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Targeted Killing, Unmanned Aerial Vehicles and EU  
Policy

Nehal Bhuta, Claus Kreß, Ian Seiderman, Christof Heyns, Nils  
Melzer, Martin Scheinin, Eyal Benvenisti, Anthony Dworkin



European University Institute  
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## **Abstract**

This paper collects 7 expert memoranda prepared for the Global Governance Program's High-Level Policy Seminar on Targeted Killing, Unmanned Aerial Vehicles and EU Policy. In these memoranda, noted experts address the legality of the US policy of targeted killings under the international law of self-defence, international humanitarian law and international human rights law. Also addressed is the comparative example of Israel, and its legal framework regulating targeted killing. The concluding memorandum asks whether the time is ripe for a European policy on the use of drones and targeted killing.

## **Keywords**

International law, international humanitarian law, human rights law, targeted killing, drone strikes, unmanned aerial vehicles, United States policy, European Union policy.

## Table of Contents

Nehal Bhuta, <i>Foreword</i> .....	1
Claus Kreß, <i>Extraterritorial Targeted Killings of non-State Actors by States in Response to Transnational non-State Violence</i> .....	3
Ian Seiderman, <i>The United States Targeted Killing Policy and the Threshold of Armed Conflict under International Law</i> .....	17
Christof Heyns, <i>Taking a holistic view of the use of drones and the right to life</i> .....	25
Nils Melzer, <i>Drone Attacks and the Law of Targeting</i> .....	31
Martin Scheinin, <i>The lawful scope for targeted killings by governments, and resulting considerations about transparency and accountability</i> .....	37
Eyal Benvenisti, <i>Report on the Legal Regulation of Targeted Killing in Israel</i> .....	41
Anthony Dworkin, <i>Drones and targeted killing: Defining a European position</i> .....	47



## Foreword

Nehal Bhuta\*

On 22 February 2013, the Global Governance Programme of the European University Institute convened a High-Level Policy Seminar on “Targeted Killing, Unmanned Aerial Vehicles and EU Policy.” The seminar brought together leading experts in international human rights and humanitarian law, European legal advisers, European counter-terrorism officials, United Nations’ Special Rapporteurs, and legal advisers to non-governmental organizations, to consider the legal, ethical and policy dimensions of targeted killing using unmanned aerial vehicles. This policy paper collects extended memoranda prepared by academic participants in the seminar, and addresses in a succinct and policy-relevant way, the key questions discussed in the seminar.

Between 2008 and 2012, the United States of America significantly expanded its targeted killing program, and has continued to conduct 4-6 strikes a month in Pakistan and Yemen in 2013. The total numbers of persons killed since 2001 is conservatively estimated at over 3000 (with over 400 strikes, mostly in Pakistan, but also in Yemen and Somalia). The United States’ government claims that these strikes have resulted in almost no civilian casualties, and some non-government sources argue that between eighty and ninety percent of these deaths were indeed “militants.”<sup>1</sup> Other attempts to estimate civilian casualties from targeted killings conclude that closer to 900 civilians had been killed by late 2012,<sup>2</sup> and specific instances of civilian casualties that have been documented by journalists and human rights fact-finding missions,<sup>3</sup> suggest that the factual basis for determining whether a particular individual or group of persons can be lawfully targeted, may be highly flawed. The uncertainty over who is targeted, why they are targeted, and the aftermath of the strikes highlights one of their many controversial features: the lack of transparency and accountability in the conduct of these operations, often in places removed from a theatre of active hostilities and against individuals who cannot be immediately distinguished from the civilian population.

The practice of targeted killing poses significant challenges to the existing legal framework for the regulation of the use of force, both the *jus ad bellum* and the *jus in bello*. It’s legality within both these frameworks is contested, and certainly open to challenge, and the absence of reliable information about the legal and factual bases for the strikes makes judgements about legality even more difficult. At present, only the United States and Israel engage consistently in the practice of targeted killing, but there is an added urgency to considering the issue at the European level. European militaries have shown some interest in acquiring and weaponizing drones, and their most likely theatre of deployment in the near future will be in so-called asymmetric and unconventional conflicts which mix counter-terrorism and counter-insurgency (or pro-insurgency) objectives – in joint operations with the United States (Libya), or in Security Council authorized enforcement missions (Mali). Targeted killings are an attractive tactic for states involved in such conflicts.

Through a series of speeches by senior officials, the US government has maintained that its strikes comply with international law regulating the use of force, and the conduct of hostilities. The law and policy framework advanced by the United States, exposed in greatest detail in the so-called White Paper leaked in February 2013,<sup>4</sup> is intimately connected with the claim consistently maintained by the

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<sup>1</sup> New American Foundation, “The Year of the Drone,” <http://counterrorism.newamerica.net/drones>.

<sup>2</sup> Bureau of Investigative Journalism, <http://www.thebureauinvestigates.com/category/projects/drones/>

<sup>3</sup> Stanford International Human Rights and Conflict Resolution Clinic and NYU Law Global Justice Clinic, *Living Under Drones*, <http://livingunderdrones.org>

<sup>4</sup> [http://en.wikipedia.org/wiki/File:020413\\_DOJ\\_White\\_Paper.pdf](http://en.wikipedia.org/wiki/File:020413_DOJ_White_Paper.pdf)

government that it is in a non-international armed conflict with what it calls “Al-Qaeda and associated forces.” From this proposition, a number of other propositions are advanced:

- that a *ius ad bellum* right of self-defence in respect of these groups has been and continues to be triggered;
- that self-defence includes pre-emptive strikes against imminent threats of armed attack, but imminence does not require “clear evidence that a specific attack on US persons and interests will take place in the immediate future,” but rather an absence of confidence that none is about to occur;
- that there are no inherent geographical limitations to the conduct of strikes against these groups and their leaders;
- and that planners, leaders and members of these groups remain targetable in the territory of third states where those states are unable or unwilling to neutralize the threat posed by these individuals;
- that existing procedures for target selection and verification meet the requirements of international humanitarian law, including any requirements for transparency and accountability.

Daniel Bethlehem, former Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom, argues that while claims very much like these would not readily meet with agreement from international legal scholars, they nonetheless represent response to the “strategic and operational reality” which many states face, and that legal doctrine has lagged behind the practical judgments which states are making concerning the use of force.<sup>5</sup>

Thus, what is at stake is not only the legality of a specific practice of strikes, but whether, how, and where to redraw the lines that circumscribe the use of force by states in conflicts with non-state actors, when deploying a technology that makes such strikes relatively easy. The United States has through its statements and justifications, sought to draw those lines in a particular way – one which challenges many if not most of our accepted understandings of terms such as imminence, necessity, armed conflict, and combatancy.

The re-drawing of these lines implies significant choices of policy and law, and requires the active deliberation of all states that have an interest in such questions – and it is difficult to conceive of a state which would be indifferent to the legal regime governing the use of force and the conduct of hostilities.

In the papers collected in this policy paper, leading scholars and policy analysts consider each of these propositions, and weigh the competing arguments concerning the legality of targeted killings. A comparative perspective from Israel is also introduced, in order to consider how Israeli court cases and judicial inquiries have assessed the legality of Israel’s practice of targeted killing under international and domestic law, and the modes of transparency and accountability which are prescribed. The policy paper also addresses the question of how European governments – which have been largely silent on the American practice – should respond, and whether European member states and the EU itself should consider developing a common framework for the use of unmanned aerial vehicles in targeted killing operations.

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<sup>5</sup> Daniel Bethlehem, “Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors,” [http://www.asil.org/pdfs/ajil/Daniel\\_Bethlehem\\_Self\\_Defense\\_AJIL\\_ARTICLE.pdf](http://www.asil.org/pdfs/ajil/Daniel_Bethlehem_Self_Defense_AJIL_ARTICLE.pdf)

# Extraterritorial Targeted Killings of non-State Actors by States in Response to Transnational non-State Violence

## Self-Defence, Conflict Qualification, and the Geographical Scope of Targeting Powers in (Transnational) Non-International Armed Conflicts

### Some Elements for a Possible European Policy View With a Brief Commentary

Claus Kreß\*

#### The Elements<sup>1</sup>

##### *General*

(1) Under the *lex lata*, any targeted killing of a non-State actor by a State on foreign soil must be justified cumulatively under the *jus contra bellum*, on the one hand, and, on the other hand, under the *law of armed conflict* (to the extent applicable) as well as under *international human rights law* (to the extent not superseded or modified by the law of armed conflict). It is suggested to insist on that need for cumulative justification.

##### *Self-Defence*

(2) In the absence of consent by the territorial State, the right to self-defence is the only conceivable justification for a targeted killing of a transnationally violent non-State actor by the State suffering that transnational violence or by a State that has been requested by the victim State to come to the latter's assistance.

(3) Both under the *lex lata* and as a matter of legal policy the better, though still controversial, view is to accept the concept of a *non-State* armed attack within the meaning of Art. 51 UN Charter. Sound legal policy suggests not to dispute the resulting right to self-defence, but to insist on the spelling out of clear prerequisites and limitations of such right.

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\* Professor of Public International Law and Criminal Law, Director of the Institute of International Peace and Security Law, University of Cologne, Germany. As a brief policy paper, it is largely without precise references to pertinent State practice, jurisprudence, and scholarship. The paper essentially draws upon *Claus Kreß*, Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts, *Journal of Conflict and Security Law* 15 (2010), 245-274; *id.*, Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen in Fällen staatlicher Verwicklung in Gewaltakte Privater (Duncker & Humblot, Berlin 1995, *passim*), 388 pp., and on the *Leiden Policy Recommendations on Counter-terrorism and International Law* of 1 April 2010 (<http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf>; in particular, paras. 38-52, 59-63) to whose formulation the author of this note has contributed (the publication of the accompanying book is forthcoming). Specific reference is made to the three following scholarly pieces because of their usefulness and very recent or forthcoming nature: *Nils Melzer*, Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare, Study requested by the European Parliament's Subcommittee on Human Rights, May 2013; *Marko Milanovic/Vidan Hadzi-Vidanovic*, A taxonomy of armed conflict, in: Nigel White/Christian Henderson (eds.), *Research Handbook of International Conflict and Security Law* (a pre-print is accessible at: <http://ssrn.com/abstract=1988915>); *Noam Lubell/Nathan Derejko*, A Global Battlefield? Drones and the Geographical Scope of Armed Conflict, 11 *Journal of International Armed Conflict* (2013), 65-88.

<sup>1</sup> They may be usefully compared with *Daniel Bethlehem*, Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors, 106 *AJIL* (2012), 770 (775-77) (confined to the right to self-defence).

(4) Though controversial, the better view is to construe the concept of a *non-State* armed attack so as to require *large-scale* transnational violence by a non-State organization. It is suggested that the term ‘large-scale’ is, in this specific context, to be construed in accordance with the intensity element of the concept of non-international armed conflict. Under the *lex lata*, there is room to argue that the intensity threshold may be reached through an accumulation of lower scale acts of force. Importantly, however, the different components of a continuous non-State armed attack must emanate from the same non-State organizational source and the intervals between the several lower-scale attacks must not be too significant. If those limits are respected, it would seem fair to take the accumulation of events into account in determining whether a *non-State* armed attack has occurred.

(5) The right to self-defence against a *non-State* armed attack justifies a forcible response only on the territory of the State from whose territory the non-State armed attack occurs. The mere presence of members of the violent non-State group (including ones with a ‘continuous combat function’) on the territory of a third State and even isolated armed violence carried out by those members from within this third State do not amount to a *non-State* armed attack emanating *from that third State* and do thus not warrant self-defence action by the victim State on the territory of that third State.

(6) The *necessity* of forcible action in self-defence, including a targeted killing, requires that the territorial State of the non-State actor concerned is either unwilling or unable to effectively deal with the *non-State* armed attack.

(7) If the territorial State is not actively supporting the non-State group, at least in the form of ‘harbouring’ the latter’s infrastructure, *its responsibility for the transnational violence is weak or, in the case of inability, nominal* at best. As a matter of general legal principles, this should *influence the applicable proportionality standard to the benefit of the territorial State*. The more the overall collateral damage (including, in particular, the civilian population of the territorial State) caused by the overall self-defence action tends to exceed the overall damage to be prevented by such action, the more difficult it will be to justify the targeted killing of a non-State actor as a proportionate measure of self-defence, if that targeted killing is likely to cause collateral damage.

(8) Though controversial, the preferable view both as a matter of law and legal policy is that *anticipatory* self-defence is *admissible*. *Anticipatory* self-defence requires that the (non-State) armed attack is *imminent*; otherwise forcible action to avert a threat is *illegal*. One of the most important questions of the contemporaneous *jus contra bellum* is whether or not the temporal *rigour in terms of immediacy* implied by the diplomatic correspondence in the *Caroline* case can be *relaxed by reference to the criterion of the ‘last window of opportunity’*. This is doubtful under the *lex lata* because the concept of anticipatory self-defence in itself remains a controversial concept under the UN Charter, including the pertinent subsequent practice. In any event, the question should be approached with utmost care, both as a matter of law and legal policy and the criterion of ‘last window of opportunity’ would always have to applied with those of the immediacy and the gravity of the threat in mind.

(9) The situation changes once a non-State armed attack has occurred (*either* through one single incident of a massive use of force such as 9/11 *or* after the occurrence of that instance of a low-scale use of force in a chain of similar events which tilts the balance towards the completion of a non-State armed attack; *supra* (4)) and there is substantial reason to believe that this armed attack will continue in the future, without, however, the *precise date, location* and *modalities* of the next strike being known. Two approaches to the temporal scope of the right of self-defence are conceivable in such a situation. The first is to continue to adhere to a strike by strike-analysis, but to somewhat relax the standard of immediacy by reference to the criterion of ‘last window of opportunity’. This relaxation would appear to be justified in light of the fact that the (non-State) armed attack has already begun so that the next strike is not a new armed attack (and does not have to meet the quantitative threshold by its own). The second approach is to hold that the standard of imminence, governing anticipatory self-defence, is no longer applicable, once an armed attack has occurred and is likely to continue. Under the *lex lata*, there is room to argue for both approaches, and the question, which approach is preferable

as a matter of legal policy, is hard to answer, because it is not clear if and to which extent both approaches lead to different results in practice.

(10) Importantly, however, also a non-State armed attack composed of a series of lower-scale acts of force ends, when the chain of violent events emanating from the same source and from the territory of the same State (supra (5)) does not continue within a reasonably short interval of time. Once the non-State armed attack has ended, there must be a new (imminent) non-State armed attack to trigger the right to (anticipatory) self-defence anew.

### ***Conflict Qualification***

(11) The existence of an armed conflict and in particular of a non-international armed conflict does not only trigger the applicability of rules which provide for *humanitarian protection*. *More importantly in our context*, the existence of an armed conflict also triggers the applicability of the *broad targeting powers which exist under that body of law and which supersede the extremely stringent standards of international human rights law*. This ‘empowering legal effect’ of the existence of an armed conflict explains the increasing interest of States which face the threat of transnational non-State violence to rely on the ‘armed conflict paradigm’. In light of the ‘empowering legal effect’ of the law of armed conflict, the (formerly widespread) call for broadening the scope of application of ‘international humanitarian law’ as much as possible is not only short-sighted, but dangerous. *To the contrary, it is of imperative importance that the threshold for the existence of a non-international armed conflict remains a stringent one.*

(12) As a matter of both law and legal policy, transnational violence between a State and a non-State actor, *which meets this stringent threshold, is best qualified as a (transnational) non-international armed conflict*. The targeted killing of non-State actors, which is being carried out within the context of such transnational violence, is therefore governed (and should therefore be governed) by the law of non-international armed conflict.

### ***On the Geographical Scope of Targeting Powers in (Transnational) Non-International Armed Conflicts***

(13) A truly vexing question, both as a matter of law and as a matter of legal policy, relates to the scope of application *ratione loci* of those targeting powers which result from the existence of a (transnational) non-international armed conflict. The most permissive legal (policy) view is to open up a potentially ‘global battlefield’, on which non-State actors may be targeted to the extent that they are legitimate targets (due to a continuous combat function or direct participation in hostilities) *in this particular (transnational) non-international armed conflict*. Pursuant to the opposite view the State party to the conflict may exercise its targeting powers *only on such a territory where the non-State party holds an organized presence and where (or from where) violence occurs which is sufficiently intense in and of itself to meet the threshold of non-international armed conflict*. An intermediary position could be to allow the exercise of targeting powers outside the main ‘battlefield’ only on such locations, to which the non-international armed conflict has *significantly* spilled over, without this spill-over necessarily fulfilling by and of itself the threshold requirements for a non-international armed conflict. For example, a significant spill-over of a (transnational) non-international armed conflict to another State could be considered to have occurred if the key planners and/or directors of the non-State violence had moved to the territory of another State to plan/direct intensive violence from there. *As a matter of law*, the difficulty to specify the geographical scope of the targeting powers in question lies in the absence of clear treaty authority and State practice either way. This lack of authority does not, however, automatically lead to the most permissive legal position, as the recognition of a *transnational* non-international armed conflict already constitutes a broad construction of the concept of non-international armed conflict. *As a matter of legal policy*, the State interest in targeting non-State actors with an important continuous combat function also outside the

'hot battlefield' must be balanced against the danger of a geographical expansion of the application of the permissive targeting rules with their significant risks for the (not directly participating) civilian populations concerned. In any event, the prevailing legal uncertainty regarding the existence or not of a limitation *ratione loci* of the targeting rules under the law of non-international armed conflict make it even more imperative to insist on the territorial limitation of the right to self-defence (as set out *supra sub* (5)), whenever the State on whose soil a targeted killing of a foreign State takes place has not consented to this killing.

## A Brief Commentary

### *Introductory Observation*

According to request by the editors of this publication, the Elements deal with only some selected aspects pertaining to the question of the international legality of an extraterritorial target killing of a non-State actor by a State. The elements are essentially confined to (1) the legal and legal policy issues arising under the law of self-defence under international law, to (2) the legal and legal policy question as to how transnational violence between (at least) one State and (at least) one non-State group of persons is/should best be qualified under the law of armed conflict, if such a qualification is at all appropriate, and to (3) to the legal and legal policy question of the scope of application *ratione loci* of targeting powers under the law of (transnational) non-international armed conflict. It should be obvious that there are most important other legal components of the overall international legal framework governing the subject-matter such as the necessary precautions to be taken before any individual targeting decision and the legal consequences resulting from the principle of military necessity. Close attention must also be given to the ongoing debate on *procedural* requirements pertaining to the necessary *substantiation* of legal claims and on the need for *transparency* of any such substantiation.

The international legality of a targeted killing of a non-State actor conducted by a State on foreign soil requires legal justification on two levels, which, though intimately intertwined in its application in practice, must be kept analytically distinct under the *lex lata*: the *ius contra bellum*, on the one hand, and, on the other hand, the *law of armed conflict* (to the extent applicable) and *international human rights law* (to the extent not superseded or modified by the law of armed conflict). A number of recent informal (or leaked internal) pronouncements of representatives of the government of the USA<sup>2</sup> suffer in clarity from not clearly distinguishing between those two levels of international legal analysis. Most importantly, they occasionally create the impression as if it were sufficient that targeted killings of the kind addressed in this note can be justified *either* on the level of the *jus contra bellum* *or* on the level of armed conflict. Yet, the *lex lata* requires legal justification *on both levels cumulatively*. I am not aware of a compelling policy reason to work towards a modification of this overall analytical framework for the international legal analysis of targeted killings by States of non-State actors.

## I. Self-Defence

The elements start from the assumption that (contrary to occasional scholarly suggestions) an extraterritorial targeted killing of a non-State actor by a State organ (be the latter part of the respective State's military or not) invariably constitutes a use of force within the meaning of Art. 2 (4) of the UN

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<sup>2</sup> For the precise references to speeches delivered by *J. B. Bellinger III.*, *H.H. Koh*, *J.O. Brennan*, *J. Johnson*, *E. Holder*, and *S. Preston*, see Daniel Bethlehem, 106 AJIL (2012), 770 (fn. 1-6); the most recent Justice Department White Paper 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force', see [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf) (last visited on 19.2.2013).

Charter if the killing is carried out without the consent<sup>3</sup> of the territorial State of the targeted person. The recommendations further assume that, absent a Security Council authorization under Chapter VII<sup>4</sup>, the right to self-defence is the only conceivable legal justification within our context for the targeted killing of allegedly violent non-State actors. In particular, this note assumes (contrary to very occasional suggestions by States and somewhat less occasional suggestions by scholars) that the state of necessity is of no avail as an independent legal justification for the unilateral extraterritorial use of force.

### ***1. The Right to Self-Defence Against a non-State Armed Attack***

According to the preferable view, the right to self-defence under the UN Charter must be directed against an armed *attack*. The undisputed case of an armed attack is that *by a State*. There is no doubt about the existence of an armed attack *by a State* if this State *effectively controls* violent human beings who are neither *de iure* or *de facto* organs of that State. The *effective control*-test is now settled case law of the ICJ.

The existence of a *State* armed attack is subject to argument, as soon as a State's involvement into transnational violence by non-State organs falls below the level of effective control. There is an ongoing debate (which, though not new, has been much nurtured by recent US State practice) whether and to what extent the term *State* armed attack also covers situations of such lesser State involvement. Arguably, the best way to legally explain such a broadening of the concept of 'State armed attack' would be by accepting the existence of a *lex specialis on attribution* for the purposes of the *jus contra bellum*. In light of pre- and post 9/11 practice, there is room to argue for the existence of such a *lex specialis* in a spectrum of State involvement that reaches from *overall* State control 'down' to the 'harbouring' of the transnationally violent non-State organs on its soil (Afghanistan 2001 type of situation). It is impossible, though, to broaden the concept of *State* armed attack even further to cases of a failure of the territorial State to use the diligence due in order to prevent the transnational violence or of the territorial State's inability to do so (Somalia post 1991 type of situation). In those instances, at least, the right to self-defence under the UN Charter depends on the recognition of the concept of a *non State* armed attack.<sup>5</sup>

The idea of the right of self-defence against a *non-State* armed attack under the UN Charter remains controversial and the ICJ has yet to pronounce itself clearly on the matter. It is submitted, there are weighty considerations resulting both from a text-based analysis of Art. 51 of the UN Charter and from the analysis of State practice (not only since 2001, but) since 1945 that support the existence of an *individual* right to self-defence against a *non-State* armed attack. State practice in support of a *collective* right of self-defence in the case of a *non-State* armed conflict was long sparse, however, but the picture has changed as a consequence of the international reaction to 9/11.

*As a matter of legal policy, a right to self-defence against a non-State armed attack should be accepted.* The need for doing so is most apparent in the case of a fragile territorial State which proves unable to prevent massive transnational violence occurring from its soil. In such a case, it would

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<sup>3</sup> The requirements of a valid State consent are of significant practical importance. They do, however, fall outside the scope of the elements and this short commentary.

<sup>4</sup> Security Council endorsement should be seen as politically desirable, even in cases of self-defence and the role of the Security Council's role in respect of the use of force against transnationally violent non-State actors should be enhanced, wherever possible. This need not affect the right to self-defence.

<sup>5</sup> In the case of a 'harbouring' State, attributability is important with respect to the question of the *international responsibility of that State for an illegal use of force*. Attributability also suggests that forcible action taken in self-defence may, to the extent necessary, also be directed to organs and/or infrastructure of the harbouring State (for, example, to the Taliban in 2001/2002). Whether the right to so extend forcible action taken in self-defence *depends* on attributability, falls outside the scope of this commentary.

appear difficult to recommend to governments not to keep the option of defending their people by the use of extraterritorial force, if the necessity for doing so becomes irresistible. *As a matter of international legal policy, the emphasis should therefore be on clearly defining the prerequisites and limits of the right of self-defence against a non-State armed attack, rather than categorically denying such a right.*

## **2. A non-State Armed Attack Requires Large-Scale Transnational Violence**

Irrespective of the controversial question as to whether the ICJ is correct in holding the view that a *State* armed attack requires a (largely unspecified) intensity threshold, *there are weighty arguments in favour of requiring large-scale transnational violence in order to recognize the existence of a non-State armed attack.* First of all, State practice since 1945 in favour of a right to self-defence against isolated low-scale non-State transnational violence is sparse. Second, the heightened standard reflects the primary responsibility of the territorial State to deal with the transnational violence. Thirdly, the heightened standard can be seen as the articulation of an *abstract* proportionality requirement to the benefit of the territorial State whose territorial sovereignty is affected by force without this State itself being the attacker. For those reasons, I would be hesitant to suggest working against an intensity element of the concept of '*non-State armed attack*'.

An important question of law and legal policy is where precisely to set the intensity threshold. The preferable view is to apply the quantitative criterion that forms part of the definition of non-international armed conflict in order to emphasize the exceptional nature of forcible self-defence action against non-State actors on foreign soil. According to this view the right to self-defence against a non-State armed attack and the right to target individual non-State actors under the law of armed conflict would be triggered at the same time.

If the more permissive approach is taken to according to which the right to self-defence against a *non-State* armed attack is triggered already at a lower level of transnational non-State violence, it is crucial to bear in mind that *international human rights law* (in addition to the *jus contra bellum* requirements set out right below) would govern the targeting of individual non-State actors. This drastically reduces the practical significance forcible self-defence action below the intensity threshold of non-international armed conflict.

Under the *lex lata* there is room for the argument that, in the context of the intensity requirement of a *non-State* armed attack within the meaning of Art. 51 UN Charter, as set out above, the *accumulation of a series of lower scale acts of force* may be relevant. In the context of inter-State violence, the ICJ has (rather vaguely, though) indicated its readiness to take such an accumulation into account and States affected by series of lower-scale instances of non-State acts of force, have almost invariably taken such an approach. Importantly, however, the different components of a continuous non-State armed attack must emanate from the same non-State organizational source and the intervals between the several lower scale attacks must not be too significant. If those limits are respected, it would also seem to be fair as a matter of legal policy to take the accumulation of events into account.

## **3. The Territorial Limitation of the Right to Self-Defence Against a Non-State Armed Attack**

The right to self-defence against a non-State armed attack justifies a forcible response *only on the territory of the State from whose territory the non-State armed attack occurs.* The mere presence of members of the violent non-State group on the territory of a third State and even isolated armed violence carried out by those members from within this third State do not amount to a *non-State* armed attack *emanating from that third State and do thus not warrant self-defence action by the target State on the territory of that third State.*

This territorial distinction drawn is a necessary one in light of the fact that the exercise of the right of self-defence must be specifically justified *vis-à-vis* every State on whose territory self-defence



action is taken. The application of Art. 51 of the UN Charter to *non-State* armed attacks must not cloud the fact that this provision governs the legal relationship between States and must therefore in all cases of application retain its function to provide a justification for a use of force by a State *vis-à-vis* the State on whose territory the forcible self-defence action takes place.

It follows that where members of a non-State armed group, which has launched an armed attack, are moving between more than one State territory, it may be *factually* tempting to speak of *one* non-State armed attack that stretches over many State territories and that may eventually reach a global scope. From a legal perspective, however, such an automatic extension of the geographical scope of the right of self-defence is unwarranted. Art. 51 UN Charter justifies the exercise of forcible measures of self-defence against a non-State armed attack only on the territory of a State from which this non-State armed attack (that is, *large-scale* violence) has emanated.

It bears adding that this position does not introduce a hitherto unknown limitation into the application of the right to self-defence under international law. Quite to the contrary, a corresponding logic applies in the context of an armed attack by State A on State B with members of the armed forces of A being present on the territory of State C which is not otherwise involved in the armed attack by State A. State A may then consider extending its self-defence action onto the territory of State C. Under the existing *ius contra bellum*, such geographical extension of forcible action taken in self-defence can no longer be justified by a mere reference to the traditional law of neutrality. It rather presupposes that B's conduct carried out from within the territory of C amounts in and of itself to an armed attack against A.

The suggested geographical limitation ensures that the right to self-defence against *non-State* attacks will only exceptionally evolve into a right to use force on the territory of more than one State. To clarify that point with a view to 9/11: Assuming that the armed violence carried out by *Al Qaeda* against the *US* was *not* attributable to the State of Afghanistan, it constituted a *non-State* armed attack against the *USA* emanating from Afghanistan. This armed attack carried out by *Al Qaeda* from Afghanistan was likely to continue after September 11, 2001, as long as *Al Qaeda* preserved its quasi-military infrastructure in that country. It did not, however, extend to Yemen in November 2002 simply because of the fact that members of *Al Qaeda* may have been present on the territory of that State at this moment in time, for this presence did not amount to a non-State armed attack by *Al Qaeda* against the *USA* *emanating from Yemen*. Such a limitation of the *US* right to self-defence appears reasonable in light of Yemen's countervailing sovereignty interests.

#### ***4. The Requirement of the Necessity of Forcible Action in Self-Defence Against a non-State Armed Attack (Unwillingness or Inability of the Territorial State and Absence of a Lesser Means)***

a) The extraterritorial killing in self-defence by a State of a non-State actor involved in a non-State armed attack against that State is *not* necessary where the *territorial* State of the non-State actor is *willing and capable* to deal with the (continuing) threat. This requirement has consistently been accepted by States in their pronouncements on the matter since 1945.

b) The issue of 'capture before killing' is not just one of military necessity under the law of the conduct of hostilities in armed conflict, but it can also be raised under the *jus contra bellum* standard of necessity for self-defence action. Yet, in practice an attempt to capture will often not be as effective as an attempt to kill in light of the danger posed to the self-defence forces by an operation to capture on territory not under their control. The legal picture does not differ here from that under the law of armed conflict.

#### ***5. Proportionality***

Any extraterritorial forcible action by a State carried out in self-defence must be proportional. Importantly, this proportionality requirement under the *jus contra bellum* operates on the *strategic*

level and can therefore not be applied to an individual act of targeted killing *in isolation*. In addition, neither State practice nor legal principle supports a requirement that the intensity of the forcible self-defence action must (more or less precisely) match that of the armed attack. Those two considerations may at first sight appear to suggest that proportionality under the *jus contra bellum* will, for all practical purposes, not operate as a further legal constraint against the practice of targeted killing of transnationally violent *non-State* actors. Yet, the following should be borne in mind. If the territorial State is not actively supporting the non-State group at least in the form of ‘harbouring’ its violent infrastructure, its responsibility for the transnational violence is weak or, in the case of inability, nominal at best. As a matter of general legal principles, this should influence the applicable proportionality standard to the benefit of the territorial State.

#### **6. The Temporal Scope of the Right to Self-Defence Against a Non-State Armed Attack (Anticipatory Self-Defence and the Legal Significance of an ‘Accumulation of Events’)**

The temporal scope of the right of self-defence against a non-State attack is of *at least as great a practical importance* as the geographical scope. While the matter remains controversial due to the formulation of (at least) the English version of Art. 51 UN Charter and while the ICJ has not yet pronounced itself on the matter, the preferable view both as a matter of law and legal policy is that *anticipatory* self-defence is admissible. *Anticipatory* self-defence requires that the (non-State) armed attack is *imminent*; otherwise the forcible action to avert a threat is illegal.

One of the most important questions of the contemporaneous *jus contra bellum* is whether or not the stringency, which is implied in the *Caroline* criteria in terms of ‘immediacy’ of the future armed attack, may be relaxed by reference to the criterion of the ‘last window of opportunity’. This is doubtful under the *lex lata* because the concept of anticipatory self-defence in itself remains a controversial concept under the UN Charter, including the pertinent subsequent practice. In any event, the question should be approached with utmost care, both as a matter of law and legal policy and the criterion of ‘last window of opportunity’ would always have to be applied with those of the immediacy and the gravity of the threat in mind. . In the context of inter-State violence, a reference to the Iranian nuclear crisis should suffice to demonstrate the delicacy of the matter.

The situation changes once a non-State armed attack has occurred (*either* through one single incident of a massive use of force such as 9/11 *or* after the occurrence of that instance of a low-scale use of force in a chain of similar events which tilts the balance towards the completion of a non-State armed attack; *supra* 2. *in fine*) and there is substantial reason to believe that this armed attack will continue in the future, without, however, the *precise date*, *location* and *modalities* of the next strike being known. Arguably, such was the case of operation *Enduring Freedom*. The latter use of force was justified not to ‘punish’ *Al Qaeda* (and, at the time, the harbouring *Taliban* regime), but as a measure of self-defence *to prevent future attacks by Al Qaeda*. There was no indication, though, of the precise time, the precise location or the precise modalities of *Al Qaeda*’s next strike against the USA, so that it was open to serious question whether such next strike was imminent in the rigorous sense of ‘immediacy’ as implied by the *Caroline* criteria. Yet, the international community has endorsed the coalition’s use of force in Afghanistan on the basis of (individual and collective) self-defence.

There are two possible ways to legally explain that endorsement. The first possibility is that State continued to adhere to a strike by strike-analysis, but were prepared to somewhat relax the standard of imminence with respect to ‘immediacy’ by reference to the criterion of ‘last window of opportunity’. This relaxation could be justified in light of the fact that the armed attack by *Al Qaeda* had already begun so that the next strike would *not* be a(n entirely) *new* armed attack. The second possibility is that States believed that the standard of imminence was no longer applicable because *Al Qaeda*’s armed attack had begun and was likely to continue in future. Even though the USA has not made its legal view crystal clear in that respect, I am inclined to interpret the USA’s pronouncements on the ongoing

armed attack by *Al Qaeda* until this day in line with the second approach. Whether other States, including the United Kingdom, have taken the same approach, is not entirely clear to me.

Under the *lex lata*, there is room to argue for both approaches, and the question, which approach is preferable *as a matter of legal policy*, is hard to answer, because it is not clear if and to which extent both approaches lead to different results in practice.

Importantly, however, also a non-State armed attack composed of a series of lower-scale acts of force ends, when the chain of violent events emanating from the same source and from the territory of the same State (supra (5)) does not continue within a reasonably short interval of time. Once the non-State armed attack has ended, there need to be a new (imminent) non-State armed attack to trigger the right to (anticipatory) self-defence anew. After *Al Qaeda*'s defeat in Afghanistan in 2002 and *Al Qaeda*'s transformation into a network of terrorist cells spread into numerous countries it has become harder and harder to argue that *Al Qaeda*'s armed attack emanating from Afghanistan on the USA is continuing. To the extent that *Al Qaeda* may have re-organized itself in Pakistan to continue violent action against the USA (and other countries, such as Afghanistan), this would not support an argument of a continuing non-State armed attack. The question would rather be whether a new non-State armed attack by *Al Qaeda* has occurred, this time from Pakistan, so that there would be justification for the USA to use force in self-defence on the latter State's soil against *Al Qaeda* fighters and objects. I am not aware of any clear exposition of an argument by the USA that and how an armed attack by *Al Qaeda* against the USA emanating from Pakistan has occurred or is imminently to occur. These important legal distinctions can not be blurred by a vague reference to *Al Qaeda*'s 'associated forces' which concept the USA understands as an analogy to the concept of co-belligerent in an inter-State conflict scenario. If there is (no longer) an armed attack carried out by *Al Qaeda*, the right to self-defence cannot be maintained by reference to the unspecified activities of unspecified 'associated forces'. The USA would rather have to demonstrate that another non-State organization has begun to launch a non-State armed attack on the USA (or another country which has asked the USA for assistance) which meets all the criteria of non-State armed attack as set out above.

## **II. Conflict Qualification**

At the second level of international legal analysis referred to in the introductory observation, it makes a *fundamental difference whether the targeted killing occurs within the framework of an armed conflict or not. In the latter case, international human rights law fully applies and the right to life does not leave room for a targeted killing, except for the most exceptional circumstances.* In an armed conflict situation, however, the targeting rules of the law of armed conflict apply and, as it is submitted here, supersede the otherwise applicable international human rights standards whether the armed conflict is of an international or non-international character. The details of those targeting rules fall outside the scope of the above elements and this commentary explaining those elements. The same is true for a comprehensive definition of the concepts "international/non-international armed conflict".

One point of fundamental importance, however, bears emphasizing at the outset: The fact that the law of armed conflict provides States with the possibility to apply much more permissive targeting rules compared to a situation fully governed by international human rights law explains the interest of States such as the USA and Israel facing (transnational) non-State violence in invoking the existence of an armed conflict. The resulting danger of such an interest is that the threshold armed conflict is incrementally lowered, a danger which tends to be concealed through the use of the partially euphemistic term "international humanitarian law". This danger must be clearly kept in mind and the well-intended idea of giving "international humanitarian law" as broad a scope of application as possible is therefore to be rejected. *To the contrary, there is an imperative policy need to maintain a stringent threshold for the application of the law of (non-international) armed conflict.*

The following considerations assume a level of intensity of transnational armed violence between a(t least one) State and a(t least one) non-State organization and a level of organization of the non-State side that meets the (stringent!) threshold of the concept of non-international armed conflict. This assumption allows me to focus exclusively on issues of conflict qualification. *This assumption should not be misunderstood, however, as implying that the relevant threshold is met in any current conflict situation. Quite to the contrary, I am not aware of any official pronouncement of the USA which convincingly explains that Al Qaeda (as a transnational terrorist network) meets the required threshold at this moment in time.*

### ***1. The “Non-International Armed Conflict Model” for Transnational Violence***

a) Transnational Armed Violence as an *International* Armed Conflict Between the Victim State and another State?

Such a qualification is possible where this other State exercises *effective* control over the non-State actors and, it is submitted, also where the same State exercises *overall* control. If the respective State’s involvement is of a less intensive nature, as is most often the case in the situations of interest to this note, the conflict qualification in question is excluded. This is a sound result also as a matter of legal policy.

b) Transnational Armed Violence as an *International* Armed Conflict Between the Victim State and the Non-State Organization (under Customary International Law)?

There have been attempts in recent US and Israeli practice to qualify transnational violence accordingly. The explicit argument given by the Supreme Court of Israel was that the qualification of the conflict as *international* is appropriate where and because the violence exchanged by the parties *crosses borders*. It was difficult to identify an elaborate legal argument by the USA in support of the same position.

Such attempts have failed. Under the *lex lata*, an *international* armed conflict presupposes a(t least one) State on each side of the conflict, except for the case of Art. 1 (4) AP I. The most recent State practice suggests that there is no significant inclination to change this legal situation and to recognize a new category of (asymmetric) *international* armed conflict under customary international law. Most recent statements by the USA, such as that contained in the leaked Justice Department White Paper, would appear to acknowledge this fact.

This is sound also as a matter of legal policy as the idea of an asymmetric international armed conflict between a State and a non-State organization is fraught with conceptual and practical difficulties.

c) Transnational Armed Violence as a *Third* and *New* Form of Armed Conflict (under Customary International Law)?

There have been a few *scholarly* suggestions that there is a need to go beyond the traditional dichotomy of “international/non-international armed conflict” and to recognize a new form of armed conflict which should be tailor-made for the “new” challenge of transnational violence.

As of yet, those suggestions have not been taken up by State practice and can therefore only be discussed as a matter of *legal policy*. It is suggested that there should be *compelling* need to recognize a new form of armed conflict and there is none because, as it will be shown *infra* d), the concept of non-international armed concept is capable of covering transnational violence and, in principle, of providing for reasonable legal solutions. If adjustments are needed in the light of new questions, they

should be made within the framework of the law of non-international armed conflict and, wherever possible, informally through practice and standard-setting.

d) Transnational Armed Violence as a *Non-International* Armed Conflict between the Victim State and the Non-State Organization

The key question is whether a *non-international* armed conflict can take a *transnational* dimension. Common Article 3 of the Geneva Conventions allows for such a reading and the more recent State practice, including most notably that of the USA not clearly contradicted by other States, points in that direction. This is supported by two *systematic* considerations: first, the (partial) asymmetry characterizing the traditional and *internal* form of a non-international armed conflict also characterizes the *transnational* violence between a State and a non-State organization; *second*, the non-recognition of a transnational non-international armed conflict would result into a legal gap concerning the conduct of hostilities which would provoke the call for a new form of armed conflict (*supra* c) and therefore for a radical change of the existing law. For these considerations, there is a rapidly growing body of scholarly opinion in support of the idea that a non-international armed conflict may assume a transnational dimension. Importantly, however, the concept of transnational non-international armed conflict cannot be stretched so far as to simply add up all together any act of violence emanating from different groups with whatever kind of affiliation. It is therefore impossible to refer to an undefined concept of ‘associated non-State groups’ in order to aggregate violent incidents, which are perpetrated by separate groups with no unified and organized command and control structure, in order to demonstrate the existence of a non-international armed conflict.

*As a matter of legal policy, it is suggested that it is sensible to recognize the possibility of a transnational non-international armed conflict, again bearing the need for upholding a high threshold in mind.*

e) An Accompanying *International* Armed Conflict Between the Victim State of Transnational Non-State Violence and the Territorial State of the Non-State Organization As Soon as the Victim State Takes Action in Self-Defence on the Territorial State’s Soil?

Clearly, there will be such an accompanying international armed conflict, once the victim State *occupies* part of the territory of the host State of the non-State organization or once the armed forces of the host State become involved into the fighting.

It is an open question, however, whether an accompanying international armed conflict between the two States in question is triggered *by the mere fact* that the victim State of the transnational non-State violence acts *in self-defence against the non-State actors on the territory of the host State*. It is not clear whether the recognition of the existence of such an accompanying international armed conflict provides additional protection to the civilian population of the host State, which should be the key criterion to decide the issue.

Importantly, the recognition of an *international* armed conflict does not provide a satisfactory legal framework to govern the conduct of hostilities between the victim State and the non-State organization. The *international* armed conflict in question can therefore only be an accompanying one and cannot, by its own, provide for a satisfactory legal framework which would render the recognition of a transnational *non-international* armed conflict (*supra* d) superfluous.

### III. The Scope of Application *Ratione Loci* of the Targeting Powers under the Non-International Armed Conflict Model

Once the possibility of a *transnational* non-international armed conflict is recognized, the question arises *where precisely the State party to this armed conflict may exercise its targeting powers*.<sup>6</sup> It is suggested that *this is a legal policy issue in urgent need of debate. As a matter of law*, the issue is complicated as it is hard to disagree with the recent Justice Department White Paper in that ‘there is little judicial or other authoritative precedent that speaks directly to the geographic scope of non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operation is not within the territory of the nation that is party to the conflict’. The USA takes the view that the law of (transnational) non-international armed conflict allows the targeting of legitimate targets (due to a continuous combat function or direct participation in hostilities) in this *without any territorial limitation*. This position has recently received powerful scholarly support.<sup>7</sup>

There are two ways to formulate a geographical limitation on the application of the targeting powers, contrary to the US legal view. The first is to restrict such application to the ‘battlefield(s)’, the ‘conflict zone(s)’, the ‘zone(s) of actual armed hostilities’ or the like even in a purely internal non-international armed conflict, the other is to impose such a restriction with respect to any territory of a State other than that party to the non-international armed conflict. In an earlier piece, I have left open the first possibility and argued in support of the second. I have taken the view that in a transnational non-international armed conflict the targeting rules may be relied upon only on such a territory of a third State where the non-State party has established a (quasi-)military infrastructure of a kind that enables it to carry out intensive armed violence.<sup>8</sup> The more recent scholarly debate requires a reconsideration of this position. This leads me to accept that State boundaries, while retaining all their importance at the *jus contra bellum* level of analysis, cannot make a decisive difference in our *jus in bello* context. (I do not think that this can be successfully challenged by drawing per analogy on the law of neutrality for international armed conflicts, a point which should, however, also be explored further.) The question can therefore only be whether the applicability *ratione loci* of the targeting rules should be generally limited to certain areas in non-international armed conflict. This view has been expressed, for example, by *Mary Ellen O’Connell*.<sup>9</sup> The treaty law of non-international armed conflict does not contain an explicit rule to that effect and State practice does not present a clear picture. While the USA have made their conviction against any geographical constraint clear, the position of other States is more difficult to assess. While it cannot be disputed that the US policy of targeted killings outside Afghanistan has given rise to concern in many quarters of the world, it is unclear whether such reservations are based on the belief that the targeting rules in non-international armed conflict are geographically confined. Other possible explanations include a scepticism that there is or continues to be a non-international armed conflict between the USA and ‘Al Qaeda and its associated forces’ or a denial that the targeted persons are sufficiently connected with such a conflict through a continuous combat function or through direct participation in the hostilities at the relevant moment in time. In its recent decision on a US drone attack in Pakistan, Germany’s Federal Prosecutor has indicated its preference to limit the application of the targeting rules in a non-international armed conflict to ‘actual

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<sup>6</sup> Note that the focus is on the *targeting powers* whose geographical scope of application may differ from that, say, of the applicable *detention safeguards*. It is probably too simplistic to speak of the geographical scope of a non-international armed conflict as such.

<sup>7</sup> *Nils Melzer*, Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare, Study requested by the European Parliament’s Subcommittee on Human Rights, May 2013, sub 2.2.2; *Noam Lubell/Nathan Derejko*, A Global Battlefield? Drones and the Geographical Scope of Armed Conflict, 11 *Journal of International Armed Conflict* (2013), 65-88.

<sup>8</sup> Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts, 15 *Journal of Conflict & Security Law* (2010), pp. 245-274, at 266.

<sup>9</sup> *Combatants and the Combat Zone*, 43 *University of Richmond Law Review* (2008-2009), pp. 845-864, at 863.

war zones' (*tatsächliche Kriegsgebiete*'), but the specificity of this *obiter dictum*<sup>10</sup> is rather the exception which confirms the rule. *O'Connell* is therefore quite bold to claim, 'that State practice shows that government officials do not recognize the rights and duties of the battlefield as extending far beyond it'.<sup>11</sup> It is, however, also questionable, simply to work on the basis of a presumption against any geographical limitation as the USA does. Against such a presumption, it could be argued that any reliance of the permissive targeting rules under the law of non-international armed conflict constitutes an exception from the right to life as guaranteed under the peace time international human rights standard. Although the derogation clauses in the international human rights treaties are not technically applicable in our context, it may perhaps be seen as the expression of a general principle that a State which derogates from the peace time international human rights standard must geographically confine such derogation wherever the emergency so allows.<sup>12</sup> The *caveat* 'wherever the emergency so allows' is, of course, important, and the critics of a limitation *ratione loci* may respond that it is necessary in a non-international armed conflict to target enemy fighters with a continuous combat function and offensive civilians wherever they are. This need not be the end of the matter, though, as the UN Human Rights Committee also mentions in its General Comment on Article 4 that any derogation is subject to the principle of proportionality.<sup>13</sup> It is indeed not far-fetched to rely on that principle (in its broadest sense, as opposed to its more narrow law of armed conflict version) in support of the limitation *ratione loci* under consideration. The argument would be that it is excessive to extend the application of the permissive targeting regime under the law of non-international armed conflict beyond the 'zone(s) of actual hostilities' or the like. If one is prepared to follow this line of thought in principle, the question arises how to convincingly define the relevant geographical area. In his important recent study, *Sivakumaran* denies that such a possibility always exists. In line with modern war theorists, he points out that in some non-international armed conflicts, a traditional battlefield does not exist so that the search for a 'geographic focus essentially constitutes the drawing of arbitrary boundaries'.<sup>14</sup> To an extent, this is certainly true as it would indeed seem arbitrary to allow the leadership of a non-State party to a non-international armed conflict to immunize themselves from the application of the targeting rules by establishing their command centre far away from the scene of the actual fighting. An appropriate geographical limitation would therefore have to be formulated in different terms. Perhaps one could confine the targeting of persons and military objects to areas where the adversary has established a (quasi-) military infrastructure which significantly contributes to the fighting. The constraining force of such a criterion would admittedly be quite limited, though, and it would create new border-line issues such as the qualification as significant infrastructure or not of the location of a (or how many more?) drone pilots far away from any 'battlefield'. In light of all these considerations, I do accept that the more recent scholarship has made a powerful case against the existence of a geographical limitation of the targeting rules in non-international armed conflict. This, of course, means that the insistence on an appropriately high intensity threshold for the acceptance of the existence of an armed conflict (or at least the applicability of the armed conflict paradigm of the conduct of hostilities) becomes even more urgent. The continuous reference in the more recent US statements on 'Al Qaeda and its associated groups' must probably be seen in this context and more precisely as the attempt to aggregate the violence emanating from different groups under the undefined label of 'association' for legal purposes. This attempt is without a legal basis and must therefore be rejected.

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<sup>10</sup> Decision of the German Federal Prosecutor of 20.6.2013, *Drohneneinsatz vom 4. Oktober 2010 in Mir Ali/Pakistan* - 3 BJs 7/12-4, D II. 1.) d); unpublished and on file with the author).

<sup>11</sup> *Combatants and the Combat Zone*, 43 *University of Richmond Law Review* (2008-2009), pp. 845-864, at 862.

<sup>12</sup> See, for example, General Comment on Article 4 of the International Covenant on Civil and Political Rights, CCPR/C21/Rev.1/Add.11, 31.8.2001, paras. 4 and 17.

<sup>13</sup> *Id.*, para. 4.

<sup>14</sup> Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford, Oxford University Press, 2012), p. 251.

*As a matter of legal policy*, the key challenge is to strike the right balance between, on the one hand, the need for the victim State of massive transnational armed violence to defend itself also outside the ‘hot battlefield’ against those who are, for example, continuously planning or directing the activities of the non-State armed group from a more remote location and, on the other hand, the need to protect (not directly participating) civilian populations to become affected by the application of the permissive law of non-international armed conflict targeting regime. At this moment in time, I fear that no workable geographical standard is in sight which would mediate between the two conflicting considerations. States interested in establishing such a standard are well advised to introduce it into the international legal policy debate in light of the clear rejection by the USA of a geographical limitation of the application of the non-international armed conflict targeting rules and the weighty scholarly support that this position has recently received.

In light of this present uncertainty, one thing bears restating: *Even if a limitation ratione loci of the targeting rules under the law of non-international armed conflict does not exist, the territorial limitation of the right to self-defence (as set out supra I. 2.) remains in place, whenever the State on whose soil a targeted killing of a foreign State takes place has not consented to this killing.* The targeted killing of a non-State actor on foreign State territory from which no non-State armed attack has occurred would then still constitute an illegal State use of force under the UN Charter, while the individual State organs carrying out that use of force could avoid criminal responsibility for unlawful killing.



## The United States Targeted Killing Policy and the Threshold of Armed Conflict under International Law

Ian Seiderman\*

The United States policy of targeted killing, including by the use of unmanned aerial vehicles (drones) and the corresponding legal framework adopted in the context of the US global counter-terrorism strategy is problematic in several respects. For one thing, the practice occurs without any real geographic or temporal limitations. In addition, the United States has adopted a seemingly novel formulation of the *jus ad bellum* doctrine of self-defense and its purported applicability to non-State actors, a justification with which the United States purports to engage the use of targeted lethal force.<sup>1</sup> In carrying out the targeted killing operations, the US appears to have killed, injured and otherwise adversely affected the well being of significant number of the civilian population in certain areas.<sup>2</sup>

This note focuses particularly on the question as to the application of the appropriate legal regime that serves to protect persons from the effects of these operations. The identification of the legal regime, and its underlying legal standards, will determine both the normative rules constraining the conduct of operations and secondary rules relating to accountability and redress for victims. If the United States is using lethal force in furtherance of its aims in a genuine armed conflict, the rules of international humanitarian law (IHL) will apply, in complement with international human rights law. If, on the other hand, such force is used pursuant to counter-terrorism law enforcement operations, the rules of international human rights law, rather than IHL will place protective constraints on such operations.

To address this question, it is necessary to be consider the threshold at which the conduct of a non-state actor, including acts of terrorism and the opposing counter-terrorism operations, in this case targeted killings, involving the use of lethal force may be characterized as an armed conflict, as that term is understood under international law.

### The United States position

The United States asserts that it is engaged in a non-international armed conflict with the non-State actors identified as “al-Qa’ida and associated groups” and that, pursuant to legislative statute, the Authorization for the Use of Military Force (AUMF), the US President may use all necessary and appropriate force against those entities.<sup>3</sup> The identification of “al-Qa’ida and associated groups” as the adversary in this putative armed conflict, is, *prima facie*, problematic from a legality perspective, at least in the absence of any meaningful clarification as to the actually identity of the “associated groups.” Still, as open ended as the designation seems, it has departed significantly from US assertions of the existence of a more generalized “war on terror” announced in the immediate afternoon of 11 September, with President George W. Bush declaring: “Our war on terror begins with al Qaeda, but it

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\* Legal and Policy Director, International Commission of Jurists.

<sup>1</sup> See Harold Koh, Legal Advisor, Department of State, Address to the Annual meeting of the American Society of International Law, 25 March 2010, available at: <http://www.state.gov/s/l/releases/remarks/139119.htm>

<sup>2</sup> See the reports and casualty estimates by the Bureau of Investigative Journalism, available at: <http://www.thebureauinvestigates.com/category/projects/drones/>

<sup>3</sup> Harold Koh Address, *supra*, n. 2; see also Department of Justice White Paper, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operation Leader of al-Qa’ida or an Associated Force, Available at: [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf)

does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”<sup>4</sup>

A confusion arises from the fact that the “war” against al Qaeda and associates is not the only one in which the US is engaged, nor, critically, is it the only one in which it is deploying drones for use in targeted killing. The US has also been engaged, together with its NATO allies and the recognized government of Afghanistan, in an indisputably real armed conflict against the Taliban. The US may well also be engaged in non-international armed conflict against other armed groups in support of governments, such as in respect of armed conflicts between Pakistan and armed groups operating in the Federally Administered Tribal Areas.<sup>5</sup> The facts here are murky, obscured by the fact that Pakistan, at the official level has repeatedly condemned armed activities by the US on its territory,<sup>6</sup> including through drone attacks, despite substantial evidence that at least some organs of the State are inviting or at least cooperating in the conduct of such operations.<sup>7</sup>

Wherever the posture lies in *jus ad bellum* terms between the US and Pakistan in respect of the drone operations carried out on the territory of Pakistan, it is clear that in Afghanistan, and perhaps in Pakistan, the US is engaging multiple separate armed conflicts on the same territory, and that each of these requires a separate assessment in order to determine which legal regime must govern the conduct of operations. On the ground, the distinction no doubt is complicated by fact that membership of armed groups is difficult to determine and some may act in collusion. Amidst this confused backdrop, it is the identity of the purported adversaries, and not only the territorial State, that is consequential, indeed decisive, for making a determination as to classification of armed conflict and the designation of the appropriate regime is to govern operations involving the use of force.

The fact that the US is participating in the armed conflict between the Government of Afghanistan and the Taliban on the territory of Afghanistan does not imply that all armed operations by the US on that territory are undertaken pursuant to that same conflict; some operations may be taken against al-Qaeda and associates. The picture comes into sharper focus when considering the operations the US is alleged to have conducted in respect of the territories where it does not purport to be engaged in any hostilities aside from against al-Qaeda and associates, such as Yemen<sup>8</sup> and Somalia.<sup>9</sup> In respect of

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<sup>4</sup> According to the legal advice provided by then Deputy Assistant Attorney General John Yoo, the President could unilaterally and summarily make the determination as to nature hostilities, which did not have to be limited to “those individuals, groups, or states that participated in the attacks on the World Trade Center and Pentagon.” See Memorandum of 25 September 2001, available at: <http://www.justice.gov/olc/warpowers925.htm>

<sup>5</sup> See the study by NYU School of Law and Stanford Law School, *Living under Drones*, available at: <http://livingunderdrones.org/>

<sup>6</sup> The UN Special Rapporteur on Human Rights and Counterterrorism, Ben Emmerson, on return from a visit to Pakistan in March 2013, issued a statement reporting: “The position of Pakistan is quite clear. It does not consent to the use of drones on its territory and it considers this to be a violation of Pakistan’s sovereignty and its territorial integrity.” Statement available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13148&LangID=E>

<sup>7</sup> Accounts from leaked US embassy cables and admissions from former Pakistan President Pervez Musharraf appear to confirm substantial cooperation and authorization from the highest levels for at least some of the operations. See <http://www.guardian.co.uk/world/us-embassy-cables-documents/167125>; and <http://www.guardian.co.uk/world/2013/apr/12/musharraf-admits-permitting-drone-strikes>

<sup>8</sup> Operations in Yemen took place as early as November 2002, when a US drone strike killed six men, and resumed with a strike in May 2011. See Washington Post, *OUS drone strike is the first since 2002*, available at: [http://articles.washingtonpost.com/2011-05-05/world/35264670\\_1\\_yemen-expert-al-qaeda-target-drone-strike](http://articles.washingtonpost.com/2011-05-05/world/35264670_1_yemen-expert-al-qaeda-target-drone-strike). The Bureau of Investigative Journalism estimates that there have been between 44 and 54 US drone strikes between 2002 and early 2013. See <http://www.thebureauinvestigates.com/category/projects/drones/>

<sup>9</sup> The Bureau of Investigative Journalism estimates that there have been between three and nine drone strikes by the US in Somalia as of early 2013. See <http://www.thebureauinvestigates.com/category/projects/drones/drones-somalia/>

operations to capture detainees in the rendition and secret detention programs,<sup>10</sup> the reach of US operations has extended to a wide range of countries and drone operations may be set to expand further with revelations of the establishment of a new drone base in Niger.<sup>11</sup> Whatever the full geographic extent of the targeted killings, there are more than a few instances where they have been carried on territory where the US is not otherwise at war.

Although the Obama administration and its Department of Justice has declined to publicize any legal memoranda setting out what it considers as the legal basis for its targeting killing program, a summary of its position has been exposed in the Department of Justice White Paper on “Lawfulness of Lethal Operation against a US Citizen who is seen to be a an Operational Leader of Al-Qa’ida or An Associated Force.”<sup>12</sup> This White Paper was leaked to the US news network NBC and published on its website on 4 February 2013. The White Paper, however, does not contain a full analysis of the question as to whether engagement between the US and “al-Qa’ida or associated groups” constitutes an armed conflict, a question that the Obama administration, like the Bush administration, answers in the affirmative. The administration assumes, in the first instance, that the armed conflict arises from its exercise of the right of self-defense. In respect of the question of the threshold at which an engagement involving force rises to the level of armed conflict, the Justice Department White Paper sidesteps the core issue, but does say:

“Claiming that for purposes of international law, an armed conflict generally exists only when there is ‘protracted armed violence between governmental authorities and organized armed groups’, ...some commenters have suggested that the conflict between the United States and al-Qa’ida cannot lawfully extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself....[] The Department has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operation from a base in a new nation, on operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict, unless the hostilities become sufficiently intense and protracted in these new locations.”<sup>13</sup>

This assertion, in its framing of the question as one of geographic scope, irrespective of its merits, seems to beg the broader question: can the operation involving the use of force with al-Qaeda and associated forces constitute an armed conflict under international, notwithstanding the location of the theater of operations?

## **The Position under International Law**

While not entirely uncontested, there is substantial authority setting out the broad parameters for designating forceful engagement as a non-international armed conflict. It is generally well accepted, including by the US, that its targeted killing operations, to the extent that they involve armed conflict, occur in the context of non-international armed conflict. This is so because international armed conflict takes place only between two States.<sup>14</sup>

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<sup>10</sup> According to a recent study by the Open Society Justice Initiative, the program involved the participation in some form of some 54 States, a number of which employed their territory for operational elements of the programs. See Open Society Justice Initiative, *Globalizing Torture: CIA Secret detention and Extraordinary Rendition*, 2013, available at: <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>

<sup>11</sup> Washington Post, 21 March 2013, Craig Whitlock, *Drone Base in Niger gives US a strategic foothold in West Africa*, available at: [http://articles.washingtonpost.com/2013-03-21/world/37905284\\_1\\_drone-bases-unarmed-predator-drones-surveillance-drones](http://articles.washingtonpost.com/2013-03-21/world/37905284_1_drone-bases-unarmed-predator-drones-surveillance-drones)

<sup>12</sup> *Supra*, n. 4.

<sup>13</sup> Department of Justice White Paper, *supra* n.4, p. 4.

<sup>14</sup> Article 2, Regulations, Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land; Common Article 2 of the 1949 Geneva Conventions.

The lowest threshold of non-international armed conflict under international law is that which is governed by Common article 3 of the 1949 Geneva Conventions, applying to “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” It should be noted that there is an even higher threshold to establish the existence of non-international armed conflict that would trigger the protections contained Additional Protocol II to the Geneva Conventions, to which the US is not a party. Under terms of Article 1(1), Additional Protocol II applies to conflicts: “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

The authoritative International Committee of the Red Cross (ICRC) Commentary to the 1949 Geneva Conventions, by Jean Pictet, does not attempt to define precisely the threshold of Common article 3. It does, however, identify a number of indicators that, while not dispositive, are “useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection.”<sup>15</sup> Among these are the degree of organization of the military force; whether there is an authority responsible for the acts of that force; whether the acts occur within a determinate territory; whether the armed group has the means of ensuring respect for the Geneva Conventions; and whether it acts as a *de facto* governing entity.<sup>16</sup>

Arguably, the most authoritative exposition as to the requisite elements of an armed conflict comes from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), which has had occasion to grapple extensively with the question. In the first case decided by the ICTY, the *Tadic* case, the ICTY emphasized that a non-international armed conflict in the Common article 3 sense exists where “there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>17</sup> According to the Tribunal, “[t]he rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”<sup>18</sup> In the *Limaj* case, the ICTY developed its doctrine further, noting that the objectives of an armed group to a conflict are irrelevant to determining the existence of an armed conflict: “The determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.”<sup>19</sup> The International Criminal Tribunal for Rwanda has assessed the criteria in similar terms, albeit in the broader context of Protocol II.<sup>20</sup>

Does the conflict between the United States and al-Qaeda meet the requisite criteria as to criteria as to intensity and organization? In one sense, the question is not easy to answer, because there exists no commonly agreed factual accounting of the purported conflict, and neither “party” is at all transparent about its operations. The first prong of the threshold test, in respect of the level of organization, is that

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<sup>15</sup> ICRC, Pictet Commentary, Convention (IV) relative to the Protection of Civilian Persons in Time of War, at pp 35-36, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>

<sup>16</sup> Ibid.

<sup>17</sup> ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October 1995, para. 70.

<sup>18</sup> ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1\_T 562, para. 562.

<sup>19</sup> ICTY, *Prosecutor v. Limaj*, (Judgment), Case No IT-03-66-T, para. 170.

<sup>20</sup> ICTR, *Prosecutor v. Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, Trial Chamber 2 September 1998.

an armed conflict can only exist between clearly identifiable armed groups and/or State forces which are cohesively organized with a responsible and recognizable command structure and have the capacity to sustain military operations, including by use of military tactics.<sup>21</sup> The very existence of al-Qaeda as an actual organization, at least in recent years, has been called questioned. As Lubell notes:

“[al-Qaeda’s] description ranges from being a distinct group, to a network of groups, or even a network of networks, and in some cases an ideology rather than an entity....[U]p until 2001 it appears that it could be identified as an organized group with a clear leadership and even a fixed location, including training camps and headquarters. The US invasion of Afghanistan precipitated the physical dispersal of the group and the transition towards a decentralized network of many groups and individuals operating on the basis of a shared ideology and, in some cases, past training in the Afghan camps.[...] At best, it appears that if Al-Qaeda is to be described as a distinct entity, perhaps the most appropriate depiction that has been offered is ‘murky’ with a loosely organized but highly focused network.”<sup>22</sup>

The dominant view seems to be that al-Qaeda is not a transnational organization, but rather a loosely connected network. As one ICRC legal advisor puts it: “Basically, Al Qaeda’s way of operating probably excludes it from being defined as an armed group that could be classified as a party to a global non-international armed conflict. In accordance with the current state of intelligence, it appears, rather, to be a loosely connected, clandestine network of cells. These cells do not meet the organization criterion for the existence of a non-international armed conflict within the meaning of humanitarian law.”<sup>23</sup>

Even if al-Qaeda were to possess the requisite attributes of organizational cohesion, it is doubtful the level of engagement with them by the US would meet the intensity prong of the test, namely, that to constitute an armed conflict, a situation must consist in more than sporadic incidents of violence. There are a number of factors that serve to indicate whether engagement between adversarial forces may rise to the level of armed conflict. According to the ICTY: “The criterion of protracted armed violence has ... been interpreted in practice ... as referring more to the intensity of the armed violence than to its duration. Trial Chambers have relied on indicative factors relevant for assessing the “intensity” criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.”<sup>24</sup>

As to the actual intensity of the engagement, outside of the operations in the real armed conflicts of Afghanistan and Iraq, there appears to have been not much fighting in the “war” between the US and al-Qaeda. The US itself evidently has not been the object of a successful international terrorist attack by al-Qaeda or “associates” on its territory since September 2001. With respect to attacks around the world, such as the Madrid bombings in 2004 and the London bombings of 2005, it is unclear whether a single entity can be said to be responsible. In any event, these incidents, as serious as they are, would have to be taken as sporadic episodes and not the type sustained pattern of assault that would constitute armed conflict.

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<sup>21</sup> ICTY, *Prosecutor v. Limaj*, (Judgment), Case No. IT-03-66-T, paras. 135-170. See also *Prosecutor v. Lukic*, Case No. IT-98-32, para. 884.

<sup>22</sup> Noam Lubell, *The War ( ? ) against Al-Qaeda*, in E. Wilmschurst, ed., *International Law and the Classification of Conflicts* (2012 ), pp. 425-26 (citations omitted.)

<sup>23</sup> Sylvain Vité, *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*, 91 ICRC Review 873, at 93 (March 2009).

<sup>24</sup> ICTY, *Prosecutor v. Haradinaj*, (Judgment), Case No. IT-04-84-T Judgment, para. 49

In sum, the engagement with al-Qaeda appears to meet neither the “organization” nor the “intensity” criterion that would qualify it as an armed conflict within the meaning of Common Article 3 of the Geneva Conventions.

### **International Human Law and International Human Rights Law**

The fact that the conflict does not appear to meet the threshold of armed conflict would suggest that, in principle, the appropriate legal framework is international human rights law and not international humanitarian law. In practical terms, if the rules governing the use of force in under either legal regime were to be scrupulously observed, the result would not necessarily be dissimilar, at least in respect of the engagement of hostilities. But there are very real differences: IHL allows the lethal targeting of persons based on status, rather than simply on conduct, whereas IHRL does not. There are a number of other distinctions concerning detention and other broader and interrelated substantive and procedural protections of international human rights treaties.

Under IHL, a combatant, or a civilian taking direct part in hostilities, may be the target of lethal force. There are, of course, a number of rules and principles constraining the conduct of such operations. Most of these rules are contained in Protocol I to the Geneva Conventions, but the principal ones are also widely recognized as legally binding under customary international law, even in non-international armed conflict. These rules include, among others, the prohibition against direct attacks on civilians and civilian objects;<sup>25</sup> the prohibition against indiscriminate or disproportionate attacks;<sup>26</sup> and the requirement to take precautions to protect civilians and civilian objects.<sup>27</sup> Failure to respect certain of these rules, such as by intentionally launching direct, indiscriminate or disproportionate attacks against civilians or civilian objects, constitutes a war crime, and individual perpetrators will incur international criminal responsibility.<sup>28</sup> In principle, a State is required to provide for remedy and reparation for serious violations of IHL,<sup>29</sup> although in actual terms access to such redress is seldom realized.

Under international human rights law, no person may be lethally targeted solely on the basis of status. The right to life is protected under international human rights law, including under article 2 of the International Covenant on Civil and Political Rights, to which the US is a party. While, as under IHL, the principle of proportionality must be also applied in exercising force in law enforcement operations, in contradistinction to IHL, the use of lethal force in such situations is prohibited save in exceptional circumstances. For instance, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials prohibit the use of lethal force, except “when strictly unavoidable in order to protect life.”<sup>30</sup> In operational terms, this injunction means an objective of arrest/capture, rather than kill. When the unlawful use of force results in a death, it may constitute an extrajudicial, summary or

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<sup>25</sup> Additional Protocol I to the Geneva Conventions, Article 48,51(3) and 52; ICRC, Customary International Law, Vol. I, Rules 1, 6, 7, 8 and 9.

<sup>26</sup> Additional Protocol I, Article 51(4) and (5); ICRC, Customary International Law, Rules 11-14.

<sup>27</sup> Additional Protocol I, Article 57; ICRC Customary International Law, Rules 15-21.

<sup>28</sup> ICRC Customary International Law, Rules 168-170; Rome Statute for the International Criminal Court, article 8(2)(b).

<sup>29</sup> UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted by the UN General Assembly (Resolution 60/147 of 16 December 2005); ICRC Customary International Law, Rule 150.

<sup>30</sup> Principle 9, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990). For a fuller treatment of the standards in this respect, see the Report to the UN General Assembly of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/61/311 (5 September 2006), paras. 33-45.

arbitrary killing and incur the criminal responsibility of those carrying out.<sup>31</sup> Victims of such unlawful killings have the right to remedy and reparation.<sup>32</sup> The question as to whether the protections of the ICCPR, as a jurisdictional matter, extend extraterritorially to all of the targeted killings is not clear,<sup>33</sup> but the European Court of Human Rights has recently extended such protections in respect of a range of extrajudicial killings by United Kingdom in Iraq.<sup>34</sup>

It should be noted, while law enforcement/international human rights law must be considered the appropriate legal regime in respect of the conflict between the US and al-Qaeda, even under IHL, human rights law would not become entirely inoperative. While the question of the complimentary relationship between the two regimes remains in some respects contested and not in any respect the principal focus of this discourse, the essential protections of human rights law do not cease in time of armed conflict, as the International Court of Justice has repeatedly affirmed.<sup>35</sup> According to the UN Human Rights Committee, “[T]he [ICCPR] applies also in situations of armed conflict of which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”<sup>36</sup> Critically, a number of human rights bodies, including the Human Rights Committee and the European Court of Human Rights have found violations of right to life protections in respect of lethal operations undertaken in non-international armed conflict.<sup>37</sup>

### **Policy considerations militate against changing the legal paradigm**

The US, in its characterization of its operations against al-Qaeda and associated groups, appears to have stretched the concept of armed conflict well beyond its meaning under international law. Other States so far have not followed suit, declining to situate their counter terrorism efforts within the war paradigm. It is instructive in this respect that in the wake of various terrorism attacks around the world in aftermath of the 11 September, such as the bombings in 2004 in, in 2005 in London, and in 2005 in Bali, the governments of the UK, Spain and Indonesia respectively did not adopt the war-grounded approach United States was implementing. Nor, it would appear, has any other State.

Following the London attacks, Sir Ken MacDonald, the then UK Director of Public Prosecutions addressed the question in a statement in forceful terms: “London is not a battlefield. Those innocents who were murdered on July 7 2005 were not victims of war [...]. The fight against terrorism on the

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<sup>31</sup> UN Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para.19.

<sup>32</sup> *Ibid.*, paras.15-16; UN Basic Principles on Remedy and Reparation, *supra*, n. 28.

<sup>33</sup> UN Human Rights Committee, General Comment 31, *supra*, n. 29, para.10: “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”

<sup>34</sup> *Al-Skeini and others v. the United Kingdom*, European Court of Human Rights, Application no. 55721/07 (7 July 2011).

<sup>35</sup> International Court of Justice (ICJ), Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, para.25; ICJ, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, para.106; ICJ, Judgment of 3 February 2006, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, para. 119.

<sup>36</sup> UN Human Rights Committee, General Comment 31, *supra* n. 32 at para.11.

<sup>37</sup> See, e.g., UN Human Rights Committee, *Suarez de Guerrero v. Colombia*, Communication No. R.11/45, 31 March 1982, UN Doc. Supp. No. 40 (A37/40); European Court of Human Rights, *Isayeva v. Russia*, Application No. 57950/00, Judgment 24 February 2005.

streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement.”<sup>38</sup>

The overreaching security-oriented approaches adopted by many to confronting terrorism in the post-11 September 2001 period have already done immense damage to fabric of the rule of law around the world.<sup>39</sup> The responses have eroded the efficacy of core principles of human rights law and the administration of justice. If States were more generally to accept the elastic war paradigm conceived and adapted by the US to its counter-terrorism efforts, the harm could be exponentially greater. A great many States face challenges of some kind relating to terrorism. If these States were to shift from a law enforcement approach, and instead treat their operations to confront violent threats as global wars, the result would likely be increased international lawlessness, not to mention dire humanitarian consequences, with States arrogating to themselves the right to target those it designates as combatants or persons directly participating in hostilities, wherever they may be situated. The threat is even starker when one considers that for some States the primary sources of violence may types of organized crime other than terrorism, and in some of these instances armed groups may have effective control the streets of city areas. There would be no principled reason why the war paradigm could not be extended to these other threats of organized violence, beyond terrorism.

The invocations and application of the war paradigm has also facilitated many of the numerous abuses and lack of accountability that have hung a dark shadow on US counterterrorism efforts, particularly in the post 11-September 2001 context. According to the International Commission of Jurists’ Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights:

The US stance has caused serious damage to the protections accorded by both international human rights and humanitarian law. The war paradigm has given rise to several problems: there is *inter alia* the false implication that one of the parties to a conflict can invoke the rights and privileges of warfare without affording reciprocal rights to its enemies or accepting the corresponding legal constraints, and the mistaken claim that this can place individuals in a “legal black hole”.<sup>40</sup>

States can avoid these threats by firmly situated their counter-terrorism measures in the framework of criminal law enforcement, using police intelligence gathering and international cooperation, and subjecting their conduct to the modest and appropriate constraints of human rights law. Lethal force, in this framework, will only be available when strictly necessary to protect life. That limitation does not wholly preclude the use of drones, which are only an instrumentality, but it would likely restrict the scope and extent of their use. While this kind of limitation places greater constraints on targeting, it will no doubt greater protect “civilians” from the devastating effects of drones. Recourse to the criminal justice system will also create an incentive to arrest terrorist suspects, and bring them to justice through fair trials, which is the only means of providing genuine accountability for terrorist activities. This approach allows for more effective redress for victims of both terrorism and counter-terrorism abuses.<sup>41</sup>

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<sup>38</sup> Ken Macdonald QC, Director of Public Prosecutions, Crown Prosecution Service, Security and Rights, 23 January 2007. Available at [http://www.cps.gov.uk/news/articles/security\\_rights/index.html](http://www.cps.gov.uk/news/articles/security_rights/index.html)

<sup>39</sup> See ICJ, *Assessing Damage, Urging Action*, available at: <http://www.icj.org/report-of-the-eminant-jurists-panel-on-terrorism-counter-terrorism-and-human-rights/>

<sup>40</sup> *Ibid.*, p. 64.

<sup>41</sup> See report of the Special Rapporteur on the Promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, UN Doc A/HRC/20/14 (4 June 2012).



# Taking a holistic view of the use of drones and the right to life

Christof Heyns\*

## Introduction<sup>1</sup>

It is often said that a central preoccupation of law is to ensure that the use of force is a matter of last resort. However, this leaves open the question of what can serve as a good reason for such an eventual step, especially where the use of lethal force is at stake. International law largely proceeds from the premise, or poses the ideal, that a resort to the use of such force is justified only where there is no other way to prevent the person against whom it is directed from taking life. Deterrence, retribution, the imposition of a certain world-view; none of these reasons will suffice. The onus is on those who use force to show that it is justified.

Adherence to what is sometimes described as the protection of life principle is required by international human rights law which sets the default standards. International law recognises the realities of armed conflict, which is in itself only justifiable as a measure of necessity and last resort. Parties are allowed to engage in actions aimed at subduing each other, but this is not without limits; the protection of life remains the ideal. In some cases lower levels of protection are provided to life when an armed conflict occurs, but international law allows this only as a closely guarded and limited exception, and has developed stringent rules to contain the level and targets of the force that may be used.

Importantly, law forms just one part of a larger and interconnected set of constraints that serve, with varying degrees of success, to contain the use of force in general and to ensure that it is not targeted against innocent bystanders. When the extra-legal constraints are diminished, the legal constraints are bound to come under increased pressure, and their role in protecting life is increasingly important.

One such extra-legal constraint on the use of force is physical distance, which often serves to keep enemies apart. National and other borders can contribute towards preventing physical confrontation, at least until a certain collective limit is reached. Potential psychological constraints include the realisation that engagement in violence may place oneself or those close to one at risk, or that it may lead to the distress caused by the act of killing another human being. A further restraining influence is that political leaders may have to persuade their populations and their soldiers to cooperate and to be willing to face the hardships of war before they are willing to commit to it. Normative systems other than law, such as religion and ethics, often place a high value on life and strive to confine its deprivation, although they can also be used as a justification for the opposite.

Acting in concert, constraints such as those listed above can contribute towards diminishing and guiding violence, and a weakening of one component can undermine the ability of the system of constraints as a whole to achieve this goal.

In view of the above it seems important to approach the introduction of new weapons systems in a holistic manner when considering their impact on the right to life. Questions should be asked whether, in view of the totality of potential constraints, such systems are likely to diminish or increase the *pro rata* number of people killed, and whether or not they will contribute towards directing such violence towards the perpetrators of aggression.

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<sup>1</sup> See also the section on “Armed drones and the right to life” in the report by the Special Rapporteur on extrajudicial, summary or arbitrary executions to the General Assembly, A/68/30532, due for delivery on 25 October 2013.

It is clear that the world is moving towards an increased reliance by states on remote controlled weapon delivery systems, and in particular armed drones (here called drones). The question becomes, in a scenario in which states with varying records of adherence to humanitarian standards are able to use drones, what affect such a diverse pool of users (leaving aside the question of non-state actors acquiring drones) will have on the number of people killed, and the precision of targeting

It has been argued that the unique feature of drones is that they make the long-distance precision deployment of lethal force much easier than before. Drones, in particular, facilitate the identification of potential targets in distant locations, and reduce the period between such identification and the deployment of kinetic force against the targets.

A number of the extra-legal constraints on the use of force listed above may be affected and indeed weakened by the use of drones. The restraining influence of physical distance is obviated in the case of drones by the combination of information, navigation and aviation technology that allows someone from halfway around the world to “come close from a distance”. It is possible, at least in some cases, that this distance may diminish some of the psychological barriers to killing by the individual operators, to whom pressing a button to deploy lethal force may resemble a computer game.

Crossing international borders with a drone could be seen as less intrusive by the different parties involved, compared to doing the same with a piloted aeroplane, not least because drones also have a well-recognised reconnaissance function. Moreover, using drones does not pose the potential embarrassment to the state using it of having a captured pilot, shot down behind enemy lines or being placed on display to the world.

Because of its lower human and possibly other costs for the side that uses drones, the political and other social constraints on leaders wishing to use force in another state may as a result be weakened. Compared to mobilising the necessary support for a boots on the ground campaign, with all its potential fall-outs, deploying a drone attack or a series of such attacks is straightforward.

If some of these standard thresholds on the use of force are lowered, states may resort more easily to deploying force in other countries. This may weaken the international security system, which depends on a certain respect for the sanctity of international borders. The number of people killed in all the ensuing encounters seen cumulatively may increase, even if each individual engagement is more targeted. In short, the temptation will be to use force even if it is not in fact a matter of last resort. Meanwhile, the question as to what extent drones will indeed, in the long run, lead to better distinction between permissible and impermissible targets, if used on a global scale, has not yet been settled.

Given the fears about their security by states with access to advanced technology, including technology that makes such treats more visible than before, and the relative ease of using drones, it is understandable that there will be pressure on the legal constraints on such usage. However, lowering the legal constraints on the cross-border use of force seems to be potentially risky whatever weapons systems are being used, especially if precedents for an expanding number of states are created. To do so in order to accommodate drone attacks may pose specific additional risks. As was pointed out above, many of the extra-legal limitations on the use of force may not be in place in the case of drones, or have less force than would otherwise be the case. Giving wide latitude to states around the world to use drones, even if the immediate intention is to protect life and to pursue safety poses a real risk of making the world a more unsafe place in the long run.

It is worth considering some of the current attempts to create a more permissive legal framework for the use of drones against the backdrop of the full set of constraints that the international legal order has over the years developed to control and direct the use of lethal force.

## **Protecting territory and life: International legal constraints on the use of inter-state force**

A number of legal regimes – the law on the inter-state use of force, international human rights law and international humanitarian law, supported by international criminal law – in addition to domestic law contribute towards maintaining the international security system and supporting the protection of the right to life.

An important component of controlling the geographical spread of the use of force is the protection of state sovereignty (ironically, in other contexts often one of the barriers to the application of international human rights norms). The United Nations Charter prohibits the use of force in the territory of another state, subject to limited exceptions.

One state may use force on the territory of another state that consents to such actions. Consent by a state to the use of force on its territory cannot be presumed and must be provided by the highest authority in the state. Once consent is withdrawn, the use of further force is prohibited. States cannot consent to the violation of human rights or of humanitarian law on their territory. To claim that a state has granted consent when the criteria for consent have not been met is one way of lowering the constraints on the use of force.

Moreover, article 51 of the UN Charter allows states to use force on the territory of another state in self-defence when they are attacked. This clearly allows for self-defence where an attack has already started, but it has also been interpreted – not without controversy - to allow for anticipatory self-defence. This can however only be done where the necessity of the self-defence is “instant, overwhelming, and leaving no choice of means, no moment of deliberation”. The attack must thus be imminent. A further way of circumventing the international restrictions on the use of force is to stretch the requirement of imminence, and to conduct pre-emptive strikes, aimed not at countering an existing threat but to prevent a future threat from arising.

Moreover, the right of self-defence persists only for so long as it is necessary to halt or repel the armed attack in question. It to be questioned whether the events of 11 September 2001 still justify a claim of on-going self-defence more than a decade later.

Traditionally self-defence was considered to be possible only against an attack by another state. Nevertheless, in the wake of the events of 9/11, it is a widely held, though not universally endorsed view, that force may be used on the territory of another state if it is necessary in response to an armed attack by a non-state actor from such territory, where that state is unwilling or unable to act against the non-state actor. However, to ensure that this wider authorisation of the use of force is not invoked too readily, it makes sense to require – as some commentators argue - that the level of violence of the attack necessary to justify a resort to self-defence against a non-state actor will be higher than if the attack came from another state.

Measures adopted by states in the exercise of self-defence must, in terms of Article 51 of the UN Charter, be reported to the Security Council. The rationale of this requirement is to ensure transparency as to the basis of the claim that self-defence was necessary, and to put the issue formally on the agenda of the Security Council. As a result it seems reasonable to require a state to report afresh to the Security Council every time that the material facts change – for example, where self-defence is used as a basis for armed intervention on the territory of a new state or new parties are added to the conflict. Not to do so may weaken the international constraints on the use of force.

## **Protecting the right to life: International human rights law and international humanitarian law**

In addition to protecting the territorial integrity of states, international law also provides direct protection to the lives of individuals. Securing the right to life is widely regarded as a rule of customary international law, a general principle of international law and some see it as a rule of *jus cogens*. In addition, it enjoys wide treaty protection at the global as well as at regional levels.

International human rights law is binding on all states and provides the default protection of the right to life. The right to life proscribes the “arbitrary deprivation” of life. Under human rights law, lethal force may be used only if such force is necessary (there is no other way to stop the aggressor) and proportionate (the aggressor is killed in order to save the life of someone else).

States are bound by the right to life also when they act outside their own territory. One way to lower the constraints placed by international law on the use of force by states is to deny extraterritorial application of human rights. This position is however not tenable because of the status of the right to life as a rule of customary international law and a general principle of international law. Moreover, there are extensive precedents to the effect that treaty provisions on the right to life may also bind state parties over territory other than its own where a state exercises effective control over such territory, or has an individual in custody. In the case of drone strikes, however, the targeted persons are not in custody. Nevertheless, there is some case law supporting the proposition that targeting a particular individual with lethal force under such circumstances constitutes an act of ultimate control over that person, resulting in such action being covered by that state’s treaty obligations to respect the right to life (in addition to its obligations under custom and the general principles of international law).

Where states use force in those exceptional situations that qualify as an “armed conflicts”, international humanitarian law (IHL) applies in addition to human rights law. Drones are currently not used in international armed conflict between states, so the question whether IHL also applies in the case of a particular drone strike depends on whether it occurs in the context of a non-international (in the sense of non-interstate) armed conflict, in this case between a state and an organised armed group. The threshold requirements for a non-international armed conflict (NIAC) to exist concern the intensity of the violence and the level of organisation of the armed group.

Where these thresholds are not met, and there is no armed conflict, only human rights law applies. Where there is an armed conflict, the human rights standards continue to apply but the question on whether a particular deprivation of life is to be considered “arbitrary” is determined with reference to the norms set by IHL.

IHL rules such as humanity, pre-caution, and necessity are part of customary international law and can play an important role in protecting life. The principle of humanity provides that humanity must guide all the actions of belligerencies; pre-caution demands that parties to a conflict take utmost care when targeting and avoid arbitrary taking of lives; and the principle of necessity obliges parties to a conflict to use only such force as is necessary in achieving the military goal or advantage.

The rule of distinction provides that only belligerents may be directly targeted, not civilians who are not involved in hostilities. In the case of a NIAC, the organised armed groups involved typically do not have regular armed forces as identifiable as those of states. Civilians who directly participate in hostilities (DPH) may be targeted, as well as (according to the view of the ICRC and others) members of armed groups with a continuous combat function (CCF), defined as “individuals whose continuous combat function is to take a direct part in hostilities”. Vague or permissive interpretations of these criteria – for example to regard all military aged men in an area of hostilities as legitimate targets – can be used to legitimise uses of force that are not in conformity with the requirements of IHL, and reduce constraints on the use of force. If there is uncertainty, civilian status must be presumed.

The rule of proportionality for its part requires that any incidental death of non-belligerents or collateral damage should not be excessive in relation to the military advantage anticipated. Not only should the actual incidental deaths be brought into the calculation, but the entire process of disruption of the society must be measured against the anticipated military advantage. Especially where drone warfare is extended over a long period, such disruption of social life and the exercise of rights such as the right to education can accumulate considerable weight.

So-called “signature strikes” occur where people whose identities are not known are targeted, based for example on their location or appearance. If they meet the requirements of DPH or CCF set out above they may be targeted, but not otherwise.

If one strike is followed up by another in a short space of time in order to target those who provide assistance but are not legitimate targets, it will be a war crime. However, those who are DPH or CCF may be targeted in that way, provided the other IHL requirements, such as proportionality (previously legitimate targets who may have been rendered hors de combat by the first strike should now be counted along with the civilians), are met.

An armed conflict exists between different parties. Claims that “co-belligerents” or “associated forces” may also be targeted reflect a reliance on a concept from inter-national armed conflict that does not apply in the context of a NIAC and that could lead to an expansion of targeting authority without clear limits.

The case for a transnational armed conflict – where those with a nexus to the same organised group are found in various states, and the violence they use can be added together to meet the threshold requirement of an armed conflict – could rest on firmer theoretical ground. However, it is debatable whether such armed conflicts in fact occur in practice, and whether a case by case approach to the classification of armed conflicts should not be followed.

The principles of humanity and necessity referred to above have triggered considerable debate about the question whether there is a legal obligation to capture rather than kill an adversary where this is possible during an armed conflict. There is some state practice to support posing such a requirement, but it is too early to say which way the debate will go.

It is clear from the above that IHL places fewer constraints on the use of force than human rights law. One of the pervasive ways in which greater authority to use lethal force is legitimised, is therefore to claim that situations that do not meet the threshold requirements for such status as “armed conflict” and hence that the more permissive IHL norms apply. This is a trend that should be resisted. Many of the usages of drones outside established conflict areas should be evaluated according to the more stringent standards of human rights law.

Moreover, a conflation between the different legal regimes and the requirements they pose may make it easier to resort to the use of force. Even if the requirements for a justification of the use of force in self-defence and imminence under the principles relevant to the inter-state use of force are met, this does not answer the question whether the requirements of self-defence and imminence under human rights law have been met. These are two separate questions that should be answered consecutively and the two tests should not be collapsed. Once the question whether inter-state force may be used has been answered, the question about the right to life needs to be addressed. If there is indeed an armed conflict, imminence is not required. Recent statements that threat assessments are made before particular individuals are targeted with drones in situations of armed conflict are to be welcomed as an exercise of heightened protection of life; however, if the violence does not in fact take place in the context of armed conflict, the net result is likely to be a lower level of protection.

The right to life has two components: the prohibition of arbitrary deprivation of life, as well as accountability should it occur. In order to achieve both, transparency is a crucial requirement.

## **Conclusion**

The international legal framework does not provide a basis to hold that drones are illegal weapons, but to the extent that the use of drones is not restricted by the same extra-legal constraints as other weapons delivery systems, they should be treated with special caution – especially when the possible lowering of legal restrictions on their use is at stake. The existing international standards should be maintained and applied with rigour, to ensure the proper long-term protection of the right to life.

The notion of time plays a central role in what was said above. Lethal force should be used only as a measure of last resort. It can also be used only in defence against an imminent threat. A last dimension of time should be emphasised in conclusion. Commentators have emphasised the need for the use of armed force to be limited in duration. Every war must come to an end. War is the exception; peace is the norm.

War, thus conceived, for all its destructiveness at least holds out the promise of peace at some point in the future. The long-distance lethal targeting abilities that drones offer to an increasing number of states around the world, raise the prospect that in future cycles of war and peace will be replaced by low-intensity but drawn-out applications of the use of force that know few geographical or temporal boundaries, and offer no prospect of healing and recovery.

In order to ensure the protection of life, the legal constraints on the use of force should be maintained and protected against expansive interpretations. New law is not required to limit the use of force through drones, but the existing legal standards should not be lowered.

# Drone Attacks and the Law of Targeting

Nils Melzer\*

States resorting to drone attacks usually argue that the targeted individuals are legitimate military targets and, thereby, seek justification in international legal standards designed to govern the use of means and methods of warfare to attack legitimate military targets – the “law of targeting”. The law of targeting is derived primarily from international humanitarian law but, to a certain extent, may also be complemented by applicable human rights law. The most important prerequisite for the applicability of the law of targeting is the existence of an armed conflict. But even in armed conflict not every use of force is necessarily part of the hostilities. As far as drone attacks are concerned, the law of targeting determines whether the targeted individual is a legitimate military target and, if so, provides the legal standards governing attacks directed against that individual. If the targeted individual fails to qualify as a legitimate military target any direct attack would have to comply with law enforcement standards.

## 1. The Principle of Distinction

The law of targeting that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”, whereas “(t)he civilian population as such, as well as individual civilians, shall not be the object of attack”.<sup>1</sup> Consequently, if armed drones are to be used as a means of warfare, they must be capable of distinguishing between members of armed forces and organized armed groups (who may be legitimately targeted) and the peaceful civilian population (which enjoys protection against direct attack).

A key notion for the distinction between legitimate military targets and protected persons is the notion of “direct participation in hostilities”. While combatants of State armed forces are those individuals who “have the right to participate directly in hostilities”,<sup>2</sup> irregularly constituted organized armed groups “consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”)”.<sup>3</sup> Moreover, exceptionally, even civilians may become legitimate military targets, namely when they lose their protection “for such time as they directly participate in hostilities”.<sup>4</sup> Thus, a clear and coherent interpretation of the notion of direct participation in hostilities is of central importance to the implementation of the principle of distinction.

In essence, the notion of direct participation in hostilities comprises two basic components; that of “hostilities” and that of “direct participation” therein. While the concept of “hostilities” refers to the collective resort by parties to an armed conflict to means and methods of warfare, “participation” in hostilities refers to the individual involvement of a person in these hostilities. Depending on the quality and degree of such involvement, individual participation in hostilities may be described as “direct” or “indirect”. While direct participation refers to specific hostile acts carried out as part of the conduct of hostilities between parties to an armed conflict and leads to loss of protection against direct

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<sup>1</sup> Arts 48 and 51(2) Protocol I; ICRC, *Customary Humanitarian Law*, Rule 1.

<sup>2</sup> Art. 43 AP I.

<sup>3</sup> ICRC, *Interpretive Guidance DPH*, Section II.

<sup>4</sup> Arts 51(3) Protocol I; 13(3) Protocol II; ICRC, *Customary Humanitarian Law*, Rule 6.

attack, indirect participation may contribute to the general war effort, but does not directly harm the enemy and, therefore, does not entail loss of protection against direct attacks.

According to the ICRC's authoritative Interpretive Guidance,<sup>5</sup> the notion of direct participation in hostilities should be interpreted as referring to *specific acts, which are designed to support a belligerent party by directly harming its enemy, either by directly causing military harm or, alternatively, by directly inflicting death, injury or destruction on persons or objects protected against direct attack*. In other words, in order to qualify as direct participation in hostilities, a specific act must meet three cumulative requirements: First, the harm likely to result from the act must reach a certain threshold (*threshold of harm*). Second, there must be a direct causal relation between the act and the expected harm (*direct causation*). Third, there must be close relation between the act and the hostilities occurring between parties to an armed conflict (*belligerent nexus*).

In practice, the determination of whether a targeted person represents a legitimate military target can be extremely difficult, particularly in asymmetric confrontations with organized armed groups that are deliberately intermingling with the civilian population and show no consideration whatsoever for the resulting risk of erroneous attacks against peaceful civilians. Depending on the cultural and political context, there may be various degrees of voluntary or involuntary support or affiliation with such groups that do not necessarily amount to direct participation in hostilities and, therefore, do not entail loss of civilian protection against direct attack. Also, in many contexts, informants, collaborators, factions and gangs are likely to provide false intelligence to armed forces in the hope for an attack against a rival group or individual.

The enormous difficulties associated with implementing the principle of distinction in such contexts may provoke ill-considered simplifications, such as the reported US policy of “signature strikes”, which seems to authorize drone attacks against unidentified individuals who, based on their personal behaviour, contacts or other characteristics are suspected of being “terrorists”, “militants”, or “jihadists” – legally undefined notions which are strictly irrelevant for lawful targeting.<sup>6</sup> Such policies not only undermine the fundamental distinctions underlying the law of targeting, but also fall dramatically short of the precautions and presumptions which must be applied in situations of doubt.

## 2. The Principle of Precaution

In implementing the principle of distinction, those responsible for planning and conducting an attack must take all feasible precautions to avoid erroneous targeting and the infliction of incidental civilian harm (“collateral damage”). They must also do everything feasible to assess whether the envisaged attack may be expected to cause incidental civilian harm which would be excessive in relation to the anticipated military advantage and, if so, refrain from conducting such an attack.<sup>7</sup> In practice, the extent to which precautions in attack are “feasible” depends on factors such as the availability of intelligence on the target and its surroundings, the level of control exercised over the territory, the choice and sophistication of available weapons, the urgency of the attack and the security risks which additional precautionary measures may entail for the attacking forces or the civilian population.<sup>8</sup> When

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<sup>5</sup> Although the ICRC's “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law” has not remained uncontroversial, the basic criteria proposed by the ICRC as for the definition of direct participation in hostilities have been widely accepted by the international community. See, e.g. Special Rapporteur on extrajudicial, summary or arbitrary executions, “Study on Targeted Killings”, Human Rights Council, UN Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), §§ 62-63. For four critiques of the Interpretive Guidance and the ICRC's response, see also: New York University Journal of International Law and Policy, 42 (2010), pp. 637-916.

<sup>6</sup> On the practice of signature strikes, see, e.g.: Heller, ‘One Hell of a Killing Machine’.

<sup>7</sup> See also Arts 57(2)(a)(i)-(iii) and 57(2)(b) Protocol I; ICRC, *Customary Humanitarian Law*, Rules 16 -19.

<sup>8</sup> “Feasible” precautions are defined as “those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”. Art. 3 (4) CCW Prot.II (1980);



all feasible precautionary measures have been taken and doubt persists as to the status or activities of the targeted persons or of bystanders, they must be presumed to be protected against direct attack.<sup>9</sup>

Decisions to carry out a drone attack are not typically taken under the time pressure and personal stress of immediate combat operations, but targeted individuals are often tracked for several days or weeks before being attacked. In many circumstances, the long loiter capacity of drone may significantly extend the period at the disposal of operators to verify targets, assess the likelihood of collateral harm and clarify other factors before taking the decision to attack. As a general rule, the context of targeted killing through drone-attacks allows - and therefore also requires - a particularly high level of precaution.

Of course, the often difficult circumstances of armed conflict also require a degree of tolerance for errors made “within the limits of honest judgment on the basis of the conditions prevailing at the time”.<sup>10</sup> In no case, however, does the law of targeting permit the targeting of individuals based on the mere suspicion that they may qualify as a legitimate military target, such as appears to be the case with the current US policy of “signature strikes”. The distinctive criterion between “mere suspicion” and erroneous “honest judgment” is not only the degree of subjective conviction or doubt held by the responsible State agent, but also the objective reasonableness of that subjective conviction in view of the circumstances prevailing at the time.

### **3. The Principle of Proportionality**

The principle of proportionality in the conduct of hostilities prohibits attacks against legitimate military targets if the incidental harm expected to be inflicted on protected persons and objects (“collateral damage”) would be excessive in relation to the concrete and direct military advantage expected to result from the attack.<sup>11</sup>

Although drone attacks are often portrayed as a method of “surgical” warfare, it is probably more realistic to assume that they are neither inherently disproportionate nor inherently proportionate and that, instead, a separate assessment must be made for each operation. Various statistics show that, in practice, drone attacks regularly result in incidental civilian death, injury and destruction. In contrast, the CIA seems to be convinced that, since May 2010, drone strikes have not caused any incidental civilian harm whatsoever.<sup>12</sup>

This conclusion more likely reflects flawed assessment criteria than factual reality. More precisely, the current US administration seems to have introduced a method for counting civilian casualties which automatically presumes that all males of fighting age present in the area of a planned attack are combatants, unless intelligence collected after the attack proves otherwise.<sup>13</sup> Clearly, this deplorable approach not only employs inadmissible criteria for the distinction between civilians and combatants, but also circumvents the precautions and presumptions to be applied in situations of doubt and, thereby, effectively removes all meaningful safeguards provided by humanitarian law against the infliction of excessive incidental harm on the civilian population.

(Contd.) \_\_\_\_\_

Art. 1(5) CCW Prot.III (1980); Art. 3(10) CCW Amended Prot.II (1996). See also ICRC, *Customary Humanitarian Law*, Vol. I, Rule 15, p. 54.

<sup>9</sup> Art. 50(1) Protocol I. ICRC, *Interpretive Guidance DPH*, Section VIII.2.

<sup>10</sup> UNWCC, Wilhelm List (Hostages) case, p. 69.

<sup>11</sup> Art. 51(5)(b) Protocol I.

<sup>12</sup> Shane, Scott, "C.I.A. Is Disputed on Civilian Toll in Drone Strikes", New York Times, 11 August 2011.

<sup>13</sup> Becker / Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will", New York Times, 29 May 2012.

#### 4. The Prohibition of Denial of Quarter

The purpose of military hostilities in warfare is not to kill combatants, but to defeat the enemy, even if this requires the killing of combatants. It is therefore prohibited to order that there shall be “no survivors” or to conduct hostilities on that basis, to refuse to accept an enemy’s surrender or to attack those who are *hors de combat* due to wounds, sickness, capture, surrender or any other reason.<sup>14</sup> Whether or not the circumstances permit the capture and evacuation of adversaries who are *hors de combat* is immaterial.

It is characteristic for current drone policies that they aim specifically at the killing of the targeted persons. Unable to capture wounded or surrendering enemies, armed drones are reported to routinely carry out follow-up strikes on wounded survivors of first attacks, killing not only the intended targets, but also first responders and humanitarian personnel attempting to rescue the injured.<sup>15</sup> The law is absolutely clear in this respect: persons *hors de combat* are no longer legitimate military targets, regardless of whether or not they can be captured.<sup>16</sup> Medical personnel and others trying to collect the dead and care for the wounded must be respected and protected.<sup>17</sup> Directing attacks against persons *hors de combat*,<sup>18</sup> or against non-combatants engaged in their rescue,<sup>19</sup> constitutes a war crime in any armed conflict. As a matter of law, ordering a targeted killing without permitting the option of suspending the attack when the targeted person falls *hors de combat* is unlawful and, under the ICC-Statute, amounts to a war crime in international armed conflict.<sup>20</sup> In sum, it is always prohibited to declare that the adversary is outside the law, and to treat him as such on the battlefield.<sup>21</sup>

#### 5. The Principles of Military Necessity and Humanity

In regulating the use of force against legitimate military targets, humanitarian law neither provides an express “right to kill”, nor does it impose a general obligation to “capture rather than kill”. Instead, humanitarian law simply refrains from providing certain categories of persons with protection against attacks, that is to say, against “acts of violence against the adversary, whether in offence or in defence”.<sup>22</sup> The fact alone that a person is not protected against acts of violence, however, is not equivalent to a legal entitlement of the adversary to kill that person without any further considerations. Rather, even in attacks against legitimate military targets, elementary considerations of humanity require that no more death, injury or destruction be caused than is actually necessary to accomplish a legitimate purpose.<sup>23</sup>

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<sup>14</sup> Art. 40 Protocol I. See also Art. 23(1)(d) Hague Regulations and, for non-international armed conflict, Art. 4(1) Protocol II. On the customary nature of this rule in both international and non-international armed conflict see: ICRC, *Customary Humanitarian Law*, Rules 46 and 47.

<sup>15</sup> For the alleged US practice of double-strikes see: Stanford/NYU, “*Living under Drones*”, pp. 74-76, with references.

<sup>16</sup> Art. 23(1)(c) Hague Regulations.

<sup>17</sup> For medical personnel, see: Art. 24 Geneva Convention I, Art. 36 Geneva Convention II; Arts 12(1) and 20 Protocol I; Arts 9(1) and 11 Protocol II. ICRC, *Customary Humanitarian Law*, Rules 25, 28-30.

<sup>18</sup> Arts 8(2)(a)(i) and 8(2)(c)(i) ICC Statute.

<sup>19</sup> In the case of medical personnel, see: Arts 8(2)(b)(xxiv) and 8(2)(e)(ii) ICC Statute. For others, the general protection of civilians applies.

<sup>20</sup> Art. 8(2)(b)(xii) ICC Statute.

<sup>21</sup> Sandoz et al. (eds.), *Commentary on the Additional Protocols*, § 1600.

<sup>22</sup> Art. 41(1) Protocol I.

<sup>23</sup> This is also the official position taken by the International Committee of the Red Cross. See: ICRC, *Interpretive Guidance DPH*, Section IX, and by the Israeli High Court of Justice in its judgment on the Israeli policy of targeted killing (*The Public Committee against Torture et al. v. The Government of Israel et al.* (HCJ 769/02), Judgment of 13 December 2006, § 40). For a detailed discussion of this approach see: Melzer, *Targeted Killing or Less Harmful Means?*,

In practice, the kind and degree of force to be used against legitimate military targets obviously cannot be pre-determined for all conceivable military operations, but must be determined by the operating forces based on the totality of the circumstances prevailing at the relevant time and place. As a general rule, circumstances which would allow an attempt at capture or the issuing of a warning prior to the use of lethal force are more likely to arise in territory over which the operating forces exercise effective control. In the contexts in which armed drone attacks are currently carried out, the restrictive aspect of military necessity is unlikely to play a major role, because any attempt at capturing the targeted person would almost certainly involve significant risks for the operating forces and, therefore, would not be required. On the other hand, the fact alone that a capture operation would be impossible or fraught with unacceptable risk does not turn an otherwise protected civilian into a legitimate military target subject to lawful attack.

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pp. 87-113. For four critiques of the ICRC's position, and the organization's official response, see: NYU/JILP, Forum on "Direct Participation in Hostilities", pp. 637-916.



## The lawful scope for targeted killings by governments, and resulting considerations about transparency and accountability

Martin Scheinin\*

1. Targeted killings, i.e. the intentional killing of a human person resulting from his or her identification as a lawful target for the use of deadly force, are in principle permitted during war or non-international armed conflict. Killing members of the military force of the adversary is perhaps not war in all about but it is inherent in the conduct of any war. And when states fighting a war start to kill people, they are required to do so through proper targeting, i.e. through complying with the principle of distinction. Military objectives and military persons are to be targeted, distinguishing them from civilian objects and civilians. That said, international humanitarian law does *not* provide legal justification for the use of targeted killings, using unmanned aerial vehicles (UAVs) or otherwise, unless multiple cumulative conditions are simultaneously met. As this contribution focuses on what is permissible for states (governments), the following discussion will not address the question whether and to what extent targeted killings by non-state entities might find justification in international humanitarian law, even when treated as a crime under the laws of the country where the killing occurred or of which the victim was a national.

2. A targeted killing by a government can only be lawful under international law if that state itself is a party to an ongoing armed conflict and when all of the following cumulative conditions are met:

- a) there is an ongoing armed conflict, international or non-international in character,
- b) between identified parties, be they states or armed groups that can be distinguished from other organized or non-organized actors and meet the criteria of being capable of being party to an armed conflict;<sup>1</sup> and
- c) any person who is identified as a target is associated with such a party to an armed conflict,
- d) and personally a legitimate target (either because of being a combatant in the military force of the enemy state or because of having a continuous military-type function within the non-state actor that is a party to an armed conflict, or while temporarily participating as a ‘civilian’ in the conduct of hostilities);<sup>2</sup> and
- e) the killing takes place within a geographical space that constitutes a ‘theatre’ for the ongoing armed conflict or has a genuine nexus with the actual theatre because operations within the theatre are being carried out or directed from the outside.

3. The above cumulative conditions result in a highly demanding test, unlikely to be met in at least of a part of the current usage of UAVs by the Barack Obama administration of United States of America.<sup>3</sup> There is a wide gap between the above-listed cumulative conditions for lawfulness and what

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<sup>1</sup> For the criteria of being capable of being a party to an armed conflict, see, e.g., *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, ICTY, Trial Chamber, Judgment, Case No. IT-04-84-T, 3 April 2008, para. 60

<sup>2</sup> This typology is inspired by Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. International Committee of the Red Cross, 2009.

<sup>3</sup> Reference is made to the “disposition matrix” presumably being used and developed by the Obama administration for its policy of targeted killings. For a report and analysis by The Atlantic, see: <http://www.theatlantic.com/international/archive/2013/01/how-obama-decides-your-fate-if-he-thinks-youre-a-terrorist/266419/>. The White Paper by the Department of Justice, leaked on 15 February 2013 by NBC News, however appears to address many of the questions, at least superficially. One of the key sentences in this respect reads: “Any operation of the sort discussed here would be conducted in a foreign country against a senior operational leader of al-Qa’ida or its associated forces who poses an imminent threat of violent attack against the United States.” The notions of “associated forces” and “imminent threat” are addressed elsewhere in the White Paper, *prima facie* quite adequately to provide a framework for the assessment of the lawfulness of individual targeting. While there undoubtedly remains room

has been publicly stated as the parameters and the justification for the US policy and practice. A part of this gap relates to the relationships between the USA and other sovereign nations. While this gap may make it difficult to assess directly the lawfulness or unlawfulness of US practice or many of the individual cases of targeted killing, there certainly are conclusions that can be drawn from the gap itself, as requirements for transparency and accountability that could make a concrete assessment of lawfulness possible. The proposed conclusions for transparency and accountability are:

- a) any state that is involved in targeted killings, directly or through aiding and abetting (including through the provision of intelligence), needs to make its involvement publicly known;<sup>4</sup>
- b) this relates also, and in particular, to any territorial state that is allowing another state to conduct targeted killings within its borders;<sup>5</sup>
- c) any state that is involved in targeted killings must be able to explain in precise terms what are the entities against which it is in an ongoing armed conflict;<sup>6</sup>
- d) targeted killings not based on the identification of the parties to an armed conflict but on behavioral patterns or political like-mindedness with a party to an armed conflict, are excluded;
- e) any state that is involved in targeted killings must be able to explain in precise terms what are the criteria used to define an individual as a target;<sup>7</sup> and
- f) any state that is involved in targeted killings must specify, also for transparency and accountability reasons, what is the chain of command, and how it justifies under international humanitarian law the eventual use of plainclothes officials (e.g. members of an intelligence agency) or private contractors in its use of military force, also in relation to eventual consequences for combatant immunity and its extension by analogy to situations of non-international armed conflict.

4. Human rights law is not ignorant in relation to killings during an armed conflict. As reflected in article 6, paragraph 1, of the International Covenant on Civil and Political Rights the first and foremost dimension of the right to life is the prohibition against *arbitrary* deprivation of life. After much confused and confusing discussion on the proper relationship between international humanitarian law

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for discussion about some of the conceptual elements, the main problem of the White Paper is that the legal justification presented in it may not adequately cover the actual targeting practice by the US, in particular so-called 'signature strikes' that reportedly are based on profiling rather than the actual identification of a legitimate target. For the White Paper, see [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf)

<sup>4</sup> In the light of the White Paper mentioned in footnote 3, this item could be supplemented by an alternative requirement that the non-territorial state resorting to targeted killings in another country makes public its "determination that the host nation's government is unable or unwilling to suppress the threat". There is, however, a need for a careful distinction between *jus ad bellum* and *jus in bello* issues here, as resorting to targeted killings in another sovereign state's territory without its consent would amount *prima facie* to a breach of its territorial integrity and, hence, a violation of the United Nations Charter. Therefore, if justification for targeted killings in another country is sought under the 'unable or unwilling' construction, it will not be sufficient that the non-territorial state conducting those killings makes public its assessment. Rather, it should raise the issue of a threat to international peace and security before the UN Security Council which could then assess the situation, including the possibility of authorizing other states to use military force under Chapter VII of the Charter.

<sup>5</sup> This condition would exclude a double standard created by secret agreements by which a state allows another one to conduct targeted killings within its territory (when that other state sees them as a military necessity) but at the same time reserves the right to deny the existence of such permission and to use diplomatic channels publicly to 'condemn' the *prima facie* breach of its sovereignty. The problem of states wishing to reserve themselves sphere of plausible 'deniability' equally relates to item 3 (a) and in particular the secret provision of intelligence.

<sup>6</sup> It is recognized, however, that in exceptional cases this will be possible only *ex post facto*, when a state has been subject to a first attack and it has responded in self-defence by deadly means.

<sup>7</sup> In comparison with the White Paper mentioned in footnote 3, the main problems of current US practice appear to relate to items (d) and (e) where reality does not appear to comply with the criteria presented in the White Paper. In addition, the White Paper ignores item (f) and is in itself mistaken in relation to item (e) when it claims that the assessment of the imminence of the threat posed by an individual would include "considerations of the relevant window of opportunity" and "the possibility of reducing collateral damage to civilians".

and international human rights law during an armed conflict, including on the proper meaning and scope of the maxim of *lex specialis*, there seems to be wide consensus about the idea that what is and what is not an arbitrary deprivation of life under human rights during an armed conflict can be resolved by relying on the interpretive effect of the rules of international humanitarian law within the framework of human rights law. As formulated by the Human Rights Committee in its General Comment No. 31 on general state obligations, and building upon earlier General Comment No. 29 on states of emergency, human rights law “applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”<sup>8</sup> This line of reasoning will provide a basis for the assessment that a targeted killing that was conducted in accordance with international humanitarian law, pursuant to the cumulative conditions spelled out above in paragraph 2, did not amount to a violation of international human rights law, either. Conversely, the same line of reasoning will produce the outcome that a targeted killing that did not meet that strict test of lawfulness under international humanitarian law, is already by definition also a violation of human rights law.

5. Outside armed conflict there can never be justification for targeted killings. Therefore, also the frameworks for transparency and accountability must be geared towards disclosing and assessing any loss of human life in relation to the applicable legal framework. The loss of human life can be justified in limited situations:

- a) Genuine individual self-defence by law enforcement officials, with the use of deadly force as the method of last resort. Normally, this would entail following the protocol of oral warnings, warning shots and non-lethal force to contain the threat. There must be efficient internal and external (independent) mechanisms for the establishment of the facts, so that the genuine nature of a situation of individual self-defence can be properly addressed.
- b) A genuine imminent threat to the life of others, with the use of deadly force as the method of last resort. Again, this would normally entail following the protocol of oral warnings, warning shots and non-lethal force to contain the threat. The same internal and external mechanisms as in 5 (a) must be able to assess whether the protocol was followed.
- c) Despite of 5 (b) being the paradigmatic case, there may be some exceptional forms of terrorist attacks that justify a qualification. When dealing with a suicide bomber who all things considered is just about to detonate the suicide belt, intentionally or as a physiological response to the use of non-lethal force, then the use of deadly force may be the first measure (a bullet into the brain as the most efficient, if not only, method to prevent an intentional or non-intentional physiological response). Another similar scenario may relate to certain forms of hostage-taking where no other means are available to address an imminent threat of killing a hostage. The internal and external mechanisms referred to in 5 (a) must be able to investigate that such conduct was a response to an imminent threat, and did not result from any targeting for what the individual was expected to do in the future.
- d) Internal and external frameworks of transparency and accountability that operate *ex post facto* and assess the concrete circumstances when deadly force was used, must be complemented by the same or other mechanisms (such as the Ombudsman or a Human Rights Commission) being in a position to assess that resource allocation, training and tactical planning in relation to how violent threats are responded to, are geared towards such measures of early intervention that avoid ending up in a situation where the use of deadly force as such will be justified. Such measures include state-of-the-art training, early stopping of crimes being prepared, overmanning, the use of best technology, etc.

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<sup>8</sup> Human Rights Committee, General Comment No. 31 (2004), paragraph 11.

6. A third type of use of lethal force must be briefly mentioned: assassinations as secret operations by intelligence agencies. They could also be called targeted killings. It almost goes without saying that there is no justification for such acts in international law. This is reflected in the fact that the assassinations are kept secret and if a country is faced with an allegation about using them, they are routinely denied.<sup>9</sup> What this category of targeted killings adds to the theme is the need to secure that civilian and military intelligence agencies are under effective oversight and subject to accountability mechanisms.<sup>10</sup> The same conclusion of a need for oversight and accountability flows also from the fact that intelligence cooperation entails that the use of UAVs for targeted killings in the context of what one state (the United States) considers to be an armed conflict, relying on intelligence provided by other states (e.g., the United Kingdom). Unfortunately, as oversight mechanisms for intelligence agencies often were designed so as not to cover the sensitive practices of intelligence-sharing across borders, there may still exist accountability gaps in this area.

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<sup>9</sup> There is an analogy with torture here. Many states practice it but instead of trying to justify torture as legal, they tend to deny it on the facts. In such circumstances, practices that are in violation of international law tend to confirm the existence of *opinio juris* about their prohibition.

<sup>10</sup> See, Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, UN document A/HRC/14/46.



# Report on the Legal Regulation of Targeted Killing in Israel

Eyal Benvenisti\*

This memorandum describes the legal framework that governs the practice of “targeted killing” in Israel. The memo addresses the following questions: The legal sources of the framework (Part I), its scope of application: when and where does the legal framework concerning targeted killings apply? (Part II), the normative constraints on targeting decisions: when is targeting permitted? (Part III), the procedural constraints: how decisions on targeting should be reached and the necessary review procedures (Part IV).

## I. The legal sources of the framework

In its “Targeted Killing” judgment of December 2006,<sup>1</sup> the Israeli Supreme Court (ISC) outlined the legal framework that applies to the targeting of “civilians taking direct part in hostilities.” This general framework was subsequently endorsed in another judgment (“the Shechade judgment”) that addressed the question whether a criminal investigation should be opened to examine the killing of Salah Shechade, a senior Hamas operative, which also killed 14 civilians.<sup>2</sup> While the Shechade case was pending, the Israeli Prime Minister appointed a commission to investigate that killing and to draw general and specific conclusions. The “Special Commission to Investigate a Targeted Killing Operation – Salah Shechade” (“The Shechade Commission”) presented its report in February 2011.<sup>3</sup> Before that, in 2010, The IDF Military Advocate General put forward his interpretation of the legal framework to the “Turkel Commission” which investigated, *inter alia*, the general reporting and investigating practices of the IDF in relation to suspected violations of IHL.<sup>4</sup> The Turkel Commission’s report on this matter, which was submitted to the Israeli government in January 2013, includes general recommendations for reviewing military activities and hence is relevant also to incidents of targeted killings.<sup>5</sup>

The legal framework as expounded by the court and elaborated by the Shechade Commission and the IDF Military Advocate General is based on the law of international armed conflict (hereinafter IHL) and specifically on Articles 51(3) and 51(5)(b) of Additional Protocol I, which the ISC determined to reflect customary international law. This memo will therefore relate to the legal regime under IHL. Note that the ISC did not rely on international human rights law (IHRL) standards (which the Israeli government holds are not applicable outside Israel). But as is indicated in Parts III and IV, elements of IHRL resonate in the IHL-based regime that the ISC puts forward. Part V concludes.

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<sup>1</sup> HCJ 769/02 The Public Committee against Torture et al. v. The Government of Israel et al. (2006), available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/A34/02007690.A34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf)

<sup>2</sup> HCJ 8794/03 Haas v. The Judge Advocate General (2008) (unofficial translation available at [http://www.geneva-academy.ch/RULAC/pdf\\_state/H CJ-decision-8794-03-1-.pdf](http://www.geneva-academy.ch/RULAC/pdf_state/H CJ-decision-8794-03-1-.pdf))

<sup>3</sup> A 116-pages report is available in Hebrew only at <http://www.pm.gov.il/PMO/Archive/Spokesman/2011/02/spokeshchade270211.htm>. Excerpts are available in English at <http://www.pm.gov.il/PMOEng/Archive/Press+Releases/2011/02/spokeshchade270211.htm>

<sup>4</sup> (2010). Unofficial English translation available at [http://www.turkel-committee.com/files/wordocs/niar\\_emda\\_eng.pdf](http://www.turkel-committee.com/files/wordocs/niar_emda_eng.pdf)

<sup>5</sup> The Public Commission to Examine the Maritime Incident of 31 May 2010 Second Report (The Turkel Commission), Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law (2013) (available at <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf>)

## II. Scope: when and where does the legal framework concerning targeted killings apply?

According to the ISC, the legal regime of IHL applies to targeted killings taking place beyond the Israeli borders, regardless of the identity of the enemy: “This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state .” (HCJ 769/02, at para. 18)). In other words, according to the ISC, IHL, and the specific norms and procedures regulating targeted killings apply to military activities beyond Israeli borders even if the enemy is a non-state entity. Specifically, this law applies to operations in the West Bank and Gaza.

The Military Judge Advocate put forward a narrower understanding of the above judgment. In his view presented to the Turkel Commission, the legal framework should be less strict in the context of “extensive combat activity, that takes place in an area that is not under effective Israeli control” and when the IDF is “operating against an organized armed force that maintains effective control in a certain area.”<sup>6</sup> The Turkel Commission however did not distinguish between different types of military engagements.

## III. Normative constraints: when is targeting permitted?

The relevant norms are API Article 51(3) which prohibits the targeting of civilians, “unless and for such time as they take a direct part in hostilities,” and Article 51(5(b) which prohibits excessive harm to civilians. The ISC elaborates on the key components of the two provisions. It acknowledges that it is especially problematic to attempt to provide general tests for what amounts to “taking direct part,” “for such time,” and “excessive harm” to uninvolved civilians. Faced with this difficult task, the court adopts an ad-hoc approach which replaces the abstract definition with concrete decision-making procedures to limit unnecessary killing of both combatants and civilians. President Barak writes that “there is no escaping going case by case, while narrowing the area of disagreement” (paras. 34, 39, 40). Accordingly, he writes, “the following four things should be said:”

“[F]irst, well based information is needed before categorizing a civilian as falling into one of the discussed categories. [...] Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities [...]

Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed.[...]

Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent.[...]

In appropriate cases it is appropriate to pay compensation as a result of harm caused to an innocent civilian [...]

Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test.”<sup>7</sup>

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<sup>6</sup> Note 4, next to note 230.

<sup>7</sup> HCJ 769/02, para. 40. The application of the proportionality test is also one that according to the court must “proceed case by case” (para. 46).

#### **IV. Procedural constraints: how decisions on targeting should be reached?**

##### ***1. Ex-ante decision-making procedures:***

The Shehade Commission mentions that following the event as well as the Targeted Killing judgment the IDF and the General Security Services (GSS) adopted and followed written routines concerning the decision-making procedures related to the planning and implementation of targeting operations. According to the Commission, the GSS' written routine directed the decision-makers to accumulate, assess, document and retain for inspection all relevant information concerning the presence of uninvolved civilians. The IDF Chief of Staff was directly responsible for targeted killing operations, and the decision-making involved representatives of the army intelligence and legal advisors. Approval of operation would be given first by the Head of the GSS and the Chief of Staff, which would then be submitted to the approval of both the Minister of Defense and the Prime Minister. All correspondence would be taped or otherwise documented to facilitate retroactive review.<sup>8</sup>

The Shechade Commission found that the targeting of Shechade was based on inaccurate information and other flaws in the decision-making process and hence went further to elaborate the specific procedures that it found necessary to establish. Its lengthy recommendations are quoted in **Appendix A**.

##### ***2. Retroactive independent investigation:***

In its Shechade judgment, the ISC endorsed the Prime Minister's decision to appoint a commission of inquiry composed of a retired Military Advocate General (Chairperson), a retired Major General of the IDF and a retired commander of the General Security Services, which the court regarded a sufficiently independent commission.<sup>9</sup> The Shechade Commission thought that it was sufficiently neutral and objective and lamented the refusal of the lawyers representing the civilian victims to appear before it (pp. 19-20).

The Turkel Commission's recommendations provide a comprehensive and systemic treatment of the ex-post investigation processes in cases of suspected violations of IHL. It distinguishes between a preliminary fact finding assessment process aimed at collecting relevant information about an alleged incident that raises "a reasonable suspicion that an offense has been committed," as the basis for the MAG's decision whether an investigation is necessary. The Commission outlines a mechanism for carrying out a fact-finding assessment, conducted by a special team to be established at the IDF, with expertise in the theatres of military operations, international law and investigations. The function of the team will be to provide the MAG with as much information as possible, within a period of time stipulated in procedures, in order to enable the MAG to decide whether to begin an investigation.

If the preliminary assessments find a "credible accusation" or "reasonable suspicion" that an offense has been committed an "effective" investigation will have to commence, subject to the requirements of independence, impartiality, effectiveness and thoroughness, promptness, and transparency. Every decision of the MAG not to open an investigation should state the reasons for the decision.

The Turkel Commission also emphasizes the need, and makes certain suggestions to ensure, that the MAG is, on the one hand, independent from the IDF Chief of Staff and the Minister of Defense, and on the other hand is subordinate to the authority of the (civilian) Attorney General of the State of Israel.

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<sup>8</sup> Note 3, at pp. 93-94

<sup>9</sup> Ultimately however, when the Chairperson passed away before completing the investigation, the Prime Minister appointed a retired Supreme Court judge as Chairperson.

Note that these are general recommendations, applicable to ensure general compliance with IHL. The obligation to start a preliminary inquiry starts when there is “a reasonable suspicion that an offense has been committed.” In contrast, in cases of targeted killing, an “independent” investigation must always take part as an integral part of the process. Nevertheless, the general institutional recommendations of the Turkel Commission, if followed, could bolster the independence of that investigation and render it more accountable.

## **V. Concluding Observations**

This memorandum reported on the legal framework that governs the practice of “targeted killing” in Israel. The aim reporting, not assessing its legality. Nevertheless, because the legal framework as reported puts much faith in the robustness of the institutional and procedural constraints, one comment may be appropriate.

As may have become clear, the framework as outlined reflects much trust in institutional and procedural guarantees as key to ensure compliance with the substantive legal obligations. This assumption – which informs every effort to regulate decision-making – relies on the hope that in a deliberative process, in which participants have different opinions and engage in open and informed deliberations, the outcome eventually will be a well-balanced and lawful decision. But when all the involved parties conform to a certain vision of legality, often the mere compliance with the procedure will not prove an effective restraint. For this reason, while the institutional and procedural constraints are necessary, they should not be regarded as sufficient. External mechanisms of review, including parliamentary and judicial review, including individual sanctions, and open public debate, are also necessary to ensure that the decision-makers do not get accustomed to “follow the script” of the rules without seriously contemplating the justification for action in each case.

## **Appendix A: The “Systemic Recommendations” of the Shechade Commission<sup>10</sup>**

[Note: recommendations marked with \* appear only in the Hebrew version, hence my translations]

1. The security forces must incorporate and internalize, on an ongoing basis, the principles and norms of Israeli and international law and the ethical and moral foundations on which they are predicated, particularly in all that relates to harm to uninvolved civilians resulting from a targeted killing against a legitimate target.

2. The principle of proportionality must be carefully adhered to. A derivative of this principle is that a strike should not be carried out, even if the target is in and of itself legitimate, if the expected harm to uninvolved civilians is excessive in relation to the anticipated military advantage to be derived from the strike, and this in each case according to its circumstances. In this context, maximum caution must be exercised in the selection of the method of striking the target and the type of weapon to be used in the operation.

3.\* Written guidelines must be adopted concerning the legal, principled, normative and moral principles concerning preventive targeting<sup>11</sup> in general and the risk to uninvolved civilians in particular. These guidelines will inform those involved in planning and implementing the preventive targeting, the decision-makers and the approving authorities.

It is recommended that the guidelines be formulated by the Military Advocate General together with other relevant bodies (such as the [GSS] Legal Advisor, the IDF Chief Education Officer and the Israel Attorney General).

4. The [GSS] must expand and reinforce the system of intelligence-gathering in all that relates to the risk of harm to uninvolved civilians resulting from a targeted killing against a legitimate target.

5. The [GSS], which accompanies all stages of the operation, must ensure that there are clear procedures for the transfer on an ongoing basis of existing positive information and for highlighting information which is incomplete, to all the parties involved in the operation.

6.\* The GSS must outline procedures for the transfer of information and indicate missing information, both internally and when communicating with other actors.

7.\* When present in deliberations, the GSS representative must ensure that the participants understand both the positive information and the information that is missing.

8.\* The information circulated within the GSS and with other units, must distinguish between facts, assumption and hypotheses.

9. A transcript of every deliberation involving a decision regarding a targeted killing will be prepared in real time. The real-time records must be kept until after the operation is examined by an external committee, to the extent such a review is required by the guidelines outlined in the Supreme Court ruling.

10.\* The documentation of real time [information] must be kept until the operation is examined by an external committee, as much as such inquiry is needed according to the guidelines determined by the Supreme Court.

11. The authorized IDF bodies must examine the involvement of the Intelligence Division in targeted killing operations and determine a clear policy with regard to such involvement. This is necessary in light of claims made by high-ranking Intelligence Division officials in their testimony to the Commission, that in their view they were not properly involved in the said operation.

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<sup>10</sup> <http://www.pm.gov.il/PMOEng/Archive/Press+Releases/2011/02/spokeshchade270211.htm>

<sup>11</sup> This is the term used for targeted killing.

12. The security and political echelons must formulate a short and concise written procedure for the transfer of material and the decisions of the Director of [GSS] and the IDF Chief of General Staff to the political echelon.

13.\* The decisions of the Director of GSS and the IDF Chief of General Staff will be written and forwarded to the political echelon via the Military Secretaries. They will include the factual background that served as the basis for the decisions and the reasons for making them.

14. Differences of opinion or substantial reservations among senior officials in the mechanisms involved, which can significantly affect the decision of the political echelon, shall be made known to the latter. Special emphasis shall be placed on the risk of harm to uninvolved civilians.

15.\* The emphasis in the information forwarded to the political echelon will be put on the risk of harm to the uninvolved, while differentiating between facts, assumptions and hypotheses.

16.\* The Minister of Defense and the Prime Minister will consider in each case, according to its specific circumstances, the summoning of the IDF Chief of Staff, the Head of the GSS and anybody else they deem appropriate, to answer question and to deliberate unclear issues if such arise.

17. The legal advice accompanying deliberations by the security echelons prior to making a substantive decision regarding the carrying out of a targeted killing must be expanded and institutionalized. The security services must advise the political echelon of the position of their legal advisers, to the extent that this would have implications for the considerations which the political echelon must take into account.

18. The Commission is aware of the pressures of time, place and circumstances to which all those involved in the planning and implementation of a targeted killing are subject. Therefore, the said recommendations are set down subject to those exceptions demanded by situations of pressure and constraints which prevent full compliance with the regulations. In such instances, the procedures may be deviated from or shortened, but only on condition that the essence of Israeli and international legal principles and the instructions outlined in the Supreme Court ruling is not impacted.

## Drones and targeted killing: Defining a European position \*

Anthony Dworkin\*\*

Since the United States carried out the first lethal drone strike in Afghanistan in October 2001, drones have emerged from obscurity to become the most contentious aspect of modern warfare. Armed drones -- or unmanned aerial vehicles (UAVs) -- are now the United States' weapons platform of choice in its military campaign against the dispersed terrorist network of al-Qaeda. They offer an unprecedented ability to track and kill individuals with great precision, without any risk to the lives of the forces that use them, and at a much lower cost than traditional manned aircraft. The military attraction of remotely piloted UAVs is self-evident, but they have also attracted enormous controversy and public concern. Above all, the regular use of drones to kill people who are located far from any zone of conventional hostilities strikes many people as a disturbing development that threatens to undermine the international rule of law.

The United States, the United Kingdom and Israel are the only countries currently known to possess armed drones. The UK Ministry of Defence has confirmed their use during military operations in Afghanistan, and Israeli NGOs have documented the use of UAVs by Israel's armed forces during and after the 2008-2009 Cast Lead operation in Gaza.<sup>1</sup> The United States has also used armed drones in its wars in Afghanistan, Libya and Iraq.<sup>2</sup> However the United States' most disputed use of drones has been directed at suspected terrorists or members of armed groups in a series of troubled or lawless regions across a sweep of countries around the Middle East, encompassing Pakistan, Yemen and Somalia, which are not otherwise theatres of US military operations. (The United States has recently opened a new drone base in Niger, raising fears that armed drones might at some point be used in the Sahel or North Africa, though so far the base appears to be used only for surveillance flights.) Although no clear record of such strikes exists, one investigative group that tracks the use of drones estimates that the US has carried out 370 strikes in Pakistan, killing in the range of 2,500-3,500 people; around 50 strikes in Yemen, killing 240-349 people; and between 3 and 9 strikes in Somalia, killing from 7-27 people.<sup>3</sup> The frequency of US "out-of-theatre" drone strikes has increased significantly under Barack Obama's presidency.

The United States' use of drones for targeted killing away from any battlefield has become the focus of increasing attention and concern in Europe, as in the United States and around the world. In a recent opinion poll, people in all European countries sampled were opposed to the use of drones to kill extremists outside the battlefield and the majority of European legal scholars believe many if not all of these strikes to be unlawful.<sup>4</sup> But in contrast to the EU's reaction to President Bush's counterterrorism actions in the years after September 11, such as the detention of terrorist suspects at Guantanamo Bay, European leaders and officials have responded to President Obama's escalation of drone strikes in a

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<sup>1</sup> Louisa Brooke-Holland, "Unmanned Aerial Vehicles (drones): an introduction", House of Commons Library Standard Note SN06493, 25 April 2013, pp. 11-12, available at <http://www.parliament.uk/briefing-papers/SN06493>; the use of drones by Israeli security forces has been reported by the NGO B'Tselem, see <http://www.btselem.org/statistics>.

<sup>2</sup> Chris Woods and Alice K. Ross, "Revealed: US and Britain launched 1,200 drone strikes in recent wars", Bureau of Investigative Journalism, 4 December 2012, available at <http://www.thebureauinvestigates.com/2012/12/04/revealed-us-and-britain-launched-1200-drone-strikes-in-recent-wars/>.

<sup>3</sup> Figures from the Bureau of Investigative Journalism see <http://www.thebureauinvestigates.com/2013/06/03/may-2013-update-us-covert-actions-in-pakistan-yemen-and-somalia/>. For another set of estimates, see New America Foundation, *The Year of the Drone*, <http://counterterrorism.newamerica.net/drones>.

<sup>4</sup> Pew opinion poll at <http://www.pewglobal.org/2012/06/13/chapter-1-views-of-the-u-s-and-american-foreign-policy-4/#drones>; conversations with many EU legal scholars.

notably muted way. The EU and its member states have not challenged or worked to alter US policy, or set out an alternative vision of when drone strikes are acceptable. Nor have they made any moves in the direction of developing credible international standards for the kinds of military operations that UAVs make possible.

By far the strongest European official statement on the subject came in response to the first known drone strike by the United States outside battlefield conditions, the killing of suspected al-Qaeda member Qaed Sinan al-Harithi in Yemen in November 2002. Anna Lindh, then Swedish foreign minister, described the action as “a summary execution that violates human rights”.<sup>5</sup> There have been few if any public statements from the EU about the legal parameters for the use of lethal force since that time, even as the number of drone strikes has increased and public concern has mounted. Officials from EU member states have evidently made clear in discussions with the United States that they do not share the legal analysis on which US policy rests. In September 2011, John Brennan, then the president’s top counterterrorism advisor, acknowledged that “Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict [against al-Qaeda], limiting it only to the ‘hot’ battlefields.”<sup>6</sup> Nevertheless, beyond privately noting their differences with the US position, there is little sign that EU member states have made any concerted attempt to influence US policy, or call for the development of shared transatlantic standards that would constrain the use of this new weapons platform.

### Arguments for a European Stance

European officials may have some sympathy with President Obama’s efforts to recalibrate US counterterrorism policy in the face of domestic political opposition, and may recognise that the United States continues to face a terrorist threat from outside its borders that does not admit of simple or straightforward solutions. Nevertheless, the EU has strong reasons to define its own position on drones and targeted killing, and engage more actively with the United States on the subject. If it fails to do so, it risks neglecting its own interests and missing an opportunity to help shape global standards in an area that is vital to the international rule of law.

The EU is committed to put human rights and the rule of law at the centre of its foreign policy, and many Europeans are likely to consider the widespread use of drones outside battlefield conditions incompatible with these principles. The EU has in the past in the past condemned Israeli targeted killing of Palestinians; for instance the EU Council issued a statement in March 2004 describing the recent Israeli strike against Hamas leader Sheikh Ahmed Yassin as an “extra-judicial killing” and added, “Not only are extra-judicial killings contrary to international law, they undermine the concept of the rule of law which is a key element in the fight against terrorism”.<sup>7</sup> Although there are of course differences in the contexts of US and Israeli actions, the EU should continue to use its influence to work against the spread of a practice that it has previously opposed.

US drone strike practices also complicate intelligence cooperation between EU member states and the United States, because of the risk that information passed to the United States will be used as the basis for lethal strikes that might be considered illegal in the source countries. In December 2012 the British High Court dismissed a case brought by a young Pakistani man whose father was killed by a

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<sup>5</sup> Brian Whitaker and Oliver Burkeman, “Killing probes the frontiers of robotics and legality”, *The Guardian*, 6 November 2002, available at <http://www.guardian.co.uk/world/2002/nov/06/usa.alqaida>.

<sup>6</sup> “Strengthening our Security by Adhering to our Values and Laws”, Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, 16 September 2011, Harvard Law School, available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

<sup>7</sup> Council of the European Union, Council Conclusions on Assassination of Sheikh Ahmed Yassin, Brussels, 22 March 2004 (7383/04 Presse 80), available at [http://europa.eu/rapid/press-release\\_PRE-04-80\\_en.htm](http://europa.eu/rapid/press-release_PRE-04-80_en.htm).



drone strike, seeking to establish whether information provided by British intelligence services was used by the CIA's drone programme; the case is currently under appeal.<sup>8</sup> The German government has had a policy for the last few years of not passing information to the United States that could be used for targeted killing outside battlefield conditions, but activists argue that it is impossible to know which piece of information might form part of a mosaic used in targeting decisions.<sup>9</sup> In the meantime, a German federal prosecutor is investigating the legality of the killing of a German citizen of Turkish origin by a US drone strike in Pakistan in October 2010. In Denmark, a public controversy has blown up over claims by a Danish citizen, Morten Storm, that he acted as a Western agent inside Yemeni jihadist circles and helped the CIA track the radical cleric Anwar al-Awlaki, who was killed by a drone strike in September 2011, with the knowledge of Danish intelligence services.

European governments are increasingly interested in acquiring armed drones for their own military forces, and in some cases encountering strong public or political opposition. The German Defence Minister Thomas de Mazieres has announced his wish to purchase armed UAVs for the Bundeswehr, prompting campaigning groups to launch an appeal entitled "No Combat Drones" and provoking criticism from opposition parties. In the UK, the shift of control of British drones from the United States to an RAF base in Lincolnshire led to a demonstration of several hundred people. Italy, the Netherlands and Poland are among other EU member states that are seeking or considering the purchase of armed drones, and European defence consortia are exploring the possibility of manufacturing both surveillance and armed UAVs in Europe. To defuse the public suspicion that attaches to drones, which many defence officials regard as a vital component of contemporary armed forces, EU governments have an interest in reducing the controversy provoked by US actions and developing a clearer European line about when lethal strikes against individuals are permissible.

Beyond Europe, too, armed drones are proliferating (and developing in sophistication) rapidly. Perhaps the strongest reason for the EU to define a clearer position on drones and targeted killing is to prevent the expansive and opaque policies followed by the United States until now from setting an unchallenged global precedent. Already Chinese state media has reported that the country's Public Security Ministry had developed a plan to carry out a drone strike against a Burmese drug trafficker, implicated in the killing of several Chinese sailors, though the suggestion was apparently overruled.<sup>10</sup> It will be difficult for the EU to condemn the use of drones by other states if it fails to define its own position more clearly. Rather than allowing such a development, the EU should commit itself to clarifying and promoting its own vision, and ultimately explore the possibility of working with the United States to develop a new set of guiding principles on how fundamental principles of international law apply to this new sphere of operations.

## **Defining the Problem**

It is unnecessary to seek to ban UAVs altogether – even if there were any realistic prospect that the spread of drones could be halted. Similarly, despite the popular image of drones as "killer robots", the issues raised by remotely piloted aircraft such as drones are very different from those concerning autonomous weapons systems (in which the decision to kill is taken by the machine itself), which a

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<sup>8</sup> "Drone victim to appeal ruling over UK support for CIA strikes in Pakistan", Leigh Day, 21 December 2012, available at <http://www.leighday.co.uk/News/2012/December-2012/Drone-victim-to-appeal-ruling-over-UK-support-for->; Ravi Somaiya, "Drone Strike Prompts Suit, Raising Fears for U.S. Allies", *New York Times*, 30 January 2013.

<sup>9</sup> Author interview with official in the German Federal Foreign Office, 30 May 2012; author interview with Andreas Schüller, 17 May 2013.

<sup>10</sup> Christopher Bodeen, "China Emerging as New Force in Drone Warfare", *Associated Press*, 3 May 2013, available at <http://world.time.com/2013/05/03/china-emerging-as-new-force-in-drone-warfare/>.

number of countries are thought to be researching.<sup>11</sup> Essentially, remotely piloted drones are problematic because they facilitate the killing of targeted individuals outside battlefield conditions, extending the use of force into areas and even countries where it might not traditionally have been contemplated. The most effective way to address this problem would be to work towards a clearer international standard for the use of force under such circumstances, both through discussions within the EU and dialogue with the United States.

## The Evolution of US Policy

It would be particularly timely for the EU to clarify its views on the use of lethal force against members of non-state groups and to engage in a dialogue with the United States on the subject because of the evidence that US policy is not static but evolving. President Obama himself has spoken of the importance of “creating a legal structure, processes, with oversight checks on how we use unmanned weapons... partly because technology may evolve fairly rapidly for other countries as well.”<sup>12</sup> A number of retired US military officers have warned that an excessive reliance on drones could be counter-productive for US national security, and the administration has reduced the number of drone strikes sharply in recent months.<sup>13</sup>

Former administration officials have said the United States is at fault for not doing more to work with allies to develop global rules on drone strikes. The former State Department legal advisor, Harold Koh, said recently that the administration “should be more willing to discuss international legal standards for use of drones, so that our actions do not inadvertently empower other nations and actors who would use drones inconsistent with the law”.<sup>14</sup> The United States’ European partners are in a position to use their influence to support those groups within the administration who are pushing for improved standards and greater internationalization. As one former Obama administration official put it, the US government is subject to few domestic checks on its interpretation of international law in this area, so the reaction of allies is “the main test and constraint for the administration... if other states don’t object, the conclusion is that they are not concerned.”<sup>15</sup>

## Armed Conflict or Self-Defence?

In order to understand where the inflection points are in US policy, and the way in which EU could most usefully intervene, it is necessary to look more closely at the evolution and proclaimed legal basis for US policy. The targeted killing programme began as part of a broader campaign to “find, fix, and finish” members of the terrorist network responsible for the attacks of September 11, a covert global manhunt operated both by the CIA and Pentagon Special Forces. For several years the drone programme was not officially acknowledged, but in the last three years administration officials have gradually revealed some of the legal basis and procedures for drones strikes, and some official

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<sup>11</sup> On the subject of lethal autonomous robotics, see “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns”, UN Human Rights Council, A/HRC/23/47, 9 April 2013, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/127/76/PDF/G1312776.pdf?OpenElement>.

<sup>12</sup> Mark Bowden, *The Finish* (New York: Atlantic Monthly Press, 2002), quoted in Micah Zenko, “Reforming US Drone Strike Policies”, Council on Foreign Relations, Special Report No. 65, January 2013, p. 24, available at [http://i.cfr.org/content/publications/attachments/Drones\\_CSR65.pdf](http://i.cfr.org/content/publications/attachments/Drones_CSR65.pdf).

<sup>13</sup> Scott Shane, “Debate Aside, Number of Drone Strikes Drops Sharply”, *New York Times*, 21 May 2013, available at <http://www.nytimes.com/2013/05/22/us/debate-aside-drone-strikes-drop-sharply.html>.

<sup>14</sup> “How to End the Forever War?”, Speech by Harold Koh at the Oxford Union, Oxford, May 7 2013, p.14, available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>.

<sup>15</sup> Author interview with former US administration official, 22 February 2013.

documents have been published or leaked to the media. Nevertheless several important aspects of the legal justification and policy guidelines for US drone strikes remain unclear.

US officials have at times offered two different legal justifications for the use of lethal force without being clear about the precise boundary between them. The first and most important justification relies on the claim that the United States is engaged in an armed conflict with al-Qaeda, the Taliban and associated forces, authorized for the purpose of US domestic law by a Congressional resolution (the Authorization for Use of Military Force, or AUMF) passed on 14 September 2001.

At times, however, administration officials have added an additional or alternative justification: the United States can act in self-defence against imminent threats to its national security. For example John Brennan gave a speech in April 2012 in which he said that “the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may *also* use force consistent with our inherent right of national self-defence” (emphasis added). This justification is evidently designed to address situations where the United States feels the need to use lethal force outside the boundaries of an existing armed conflict.

Because the administration has not been clear about the precise justification for the strikes it has carried out so far, we cannot be certain whether all of them fall within the scope of the “armed conflict” justification. Some scholars who have followed the administration’s pronouncements closely believe this to be the case.<sup>16</sup> Another possible explanation for the apparent ambiguity in the US position is that there were disagreements within the administration about the scope of the alleged armed conflict, and that the formula of alternative justifications was chosen to allow flexibility between differing views.<sup>17</sup>

The significance of the distinction between the armed conflict and self-defence justifications can best be understood with reference to the different paradigms that they appeal to. The armed conflict justification is based on what could be described as a logic of collective membership: individuals can be targeted on the basis of their status as members of a group against which the United States is engaged in hostilities. The self-defence justification is based on a logic of individual threat: individuals can be killed only after a determination in their particular case that a strike is necessary to avoid an imminent threat to life that cannot be prevented in any other way. The second justification thus seems to entail a higher threshold to be met before targeted killing can be authorized – though the administration’s use of behavioural criteria to determine membership of al-Qaeda and its associated forces means the distinction is not in practice a hard-and-fast one.

Even though the United States has relied essentially on an armed conflict justification, officials have sometimes suggested that they focused primarily on those individuals who posed the greatest threat. The details that have emerged about US targeting practices in the past few years raise questions about how closely this approach has been followed in practice. An analysis published by McClatchy Newspapers in April, based on classified intelligence reports, claimed that 265 out of 482 individuals killed in Pakistan in a 12-month period up to September 2011 were not senior al-Qaeda operatives but instead were assessed as Afghan, Pakistani and unknown extremists.<sup>18</sup> It has been widely reported that in both Pakistan and Yemen the United States has at times carried out “signature strikes” or “Terrorist

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<sup>16</sup> Benjamin Wittes and Kenneth Anderson, *Speaking the Law: The Obama Administration’s Addresses on National Security Law*, (Stanford, CA: Hoover Institution Press, 2013), p. 28, available at <http://www.hoover.org/taskforces/national-security/speaking-the-law/>.

<sup>17</sup> According to reports, State Department legal advisor Harold Koh opposed extending the armed conflict model outside Afghanistan and Pakistan; see Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (New York: Houghton Mifflin, 2012), pp. 140, 219-220.

<sup>18</sup> Jonathan S. Landay, “Obama’s drone war kills ‘others’, not just al-Qaeda leaders”, McClatchy Newspapers, 9 April 2013, available at <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html#.UaTvutLVCS0>.

Attack Disruption Strikes” in which groups are targeted based not on knowledge of their identity but on a pattern of behaviour that complies with a set of indicators for militant activity. It is widely thought that these attacks have accounted for many of the civilian casualties caused by drone strikes. In both Pakistan and Yemen, there may have been times when some drone strikes – including signature strikes – could perhaps best be understood as counter-insurgency actions in support of government forces in an internal armed conflict or civil war, and in this way lawful under the laws of armed conflict. However the United States has never offered this justification for its strikes, and by presenting them as part of a global armed conflict it is helping to set an expansive precedent that is damaging to the international rule of law.

## **Obama’s New Policy on Drones**

It is against this background that Obama’s recent counterterrorism speech and the policy directive he announced at the same time should be judged. On the subject of remotely-piloted aircraft and targeted killing, there were two key aspects to his intervention. First, he suggested that the military element in US counterterrorism is likely to be scaled back further in coming months, and that he envisages a time in the not-too-distant future when the fight against the al-Qaeda network will no longer qualify as an armed conflict. He said that “the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat” and that while al-Qaeda franchises and other terrorists continued to plot against the United States, “the scale of this threat closely resembles the types of attacks we faced before 9/11”. Obama promised that he would not sign legislation that expanded the mandate of the AUMF, and proclaimed that the United States’ “systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end.”<sup>19</sup> The tone of Obama’s speech contrasted strongly with that of US military officials who testified before the Senate Armed Services Committee the week before; Michael Sheehan, the Assistant Secretary of Defence for Special Operations and Low-Intensity Conflict, said then that the end of the armed conflict was “a long way off” and appeared to say that it might continue for 10 to 20 years.<sup>20</sup>

Secondly, Obama appeared to lay out new restrictions on drone strikes in the guidance he signed the day before his speech (the guidance remains classified but a summary has been released). The guidance sets out standards and procedures for drone strikes “that are either already in place or will be transitioned into place over time”. Outside areas of active hostilities, lethal force will only be used “when capture is not feasible and no other reasonable alternatives exist to address the threat effectively”. It will only be used against a target “that poses a continuing, imminent threat to US persons”. And there must be “near-certainty that non-combatants will not be injured or killed”.<sup>21</sup>

However, the impact of the new policy will depend very much on how the concept of a continuing, imminent threat is interpreted. The administration has not given any definition of this phrase, and the leaked Department of Justice white paper contained a strikingly broad interpretation of imminence; among other points, the white paper said that it “does not require the United States to have clear evidence that a specific attack on US persons or interests will take place in the immediate future” and that it “must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on

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<sup>19</sup> Footnote Obama speech.

<sup>20</sup> Transcript, Hearing to Receive Testimony on the Law of Armed Conflict, the Use of Military Force and the 2001 Authorization for Use of Military Force, US Senate Committee on Armed Services, 16 May 2013, pp. 10, 18, available at <http://www.armed-services.senate.gov/Transcripts/2013/05%20May/13-43%20-%205-16-13.pdf>.

<sup>21</sup> All preceding quotations in this paragraph are from “Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities”, White House, 23 May 2013, available at <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

Americans”.<sup>22</sup>The presidential policy guidance captures the apparent concerns behind the administration’s policy more honestly by including the criterion of continuing threat, but this begs the question of how the notions of a “continuing” and “imminent” threat relate to each other.

It is also notable that the new standards announced by President Obama represent a policy decision by the United States, not a revised interpretation of its legal obligations. In his speech, Obama drew a distinction between legality and morality, pointing out that “to say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance”. The suggestion was that the United States was scaling back its use of drones out of practical or normative considerations, not because of any new conviction that the its previous legal claims went too far. The background assertion that the United States is engaged in an armed conflict with al-Qaeda and associated forces, and might therefore lawfully kill any member of the opposing forces wherever they were found, remains in place to serve as a precedent for other states that wish to claim it.

Looking forward, Obama’s speech strongly suggests that the time leading up to the withdrawal of most US forces from Afghanistan by the end of 2014 could be a crucial period for the evolution of US policy, and a significant window for the EU to pursue discussions with the United States. When US troops are no longer fighting on the ground in Afghanistan, there will be no conventional military operations against al-Qaeda around which a notional armed conflict can be focused, and no zone of hostilities in which status-based targeting is justified. Nor will it be possible to justify drone strikes in Pakistan as necessary to prevent attacks on US forces. Much of the language of Obama’s speech suggests that he regards the withdrawal of troops from Afghanistan both as a likely reason for further reducing drone strikes, and perhaps as a logical moment to reconsider the nature of the campaign against al-Qaeda more broadly. There is no guarantee that Obama will be ready to declare the armed conflict over at that point, or even to rethink the legal prerogatives he claims in the conflict, but he has clearly flagged these questions for consideration.

### **Defining a European Position**

If this is the US position, what about the EU? EU member states have not yet tried to formulate a common position on the use of lethal force outside battlefield conditions. Some EU member states may not have settled views on the subject, they may incline to different views on some unresolved questions of law, and they are subject to somewhat different restrictions through their domestic legal frameworks. Nevertheless it seems possible to construct a central core of agreement that would be shared across the EU. The foundation of this common vision would be the rejection of the notion of a de-territorialized global armed conflict between the United States and al-Qaeda. Across the EU there would be agreement that the confrontation between a state and a non-state group only rises to the level of an armed conflict if the non-state group meets a threshold for organization, and if there are intense hostilities between the two parties.<sup>23</sup> The consensus view within the EU would be that these conditions require that fighting be concentrated within a specific zone (or zones) of hostilities. Instead of a global war, Europeans would tend to see a series of discrete situations, each of which need to be evaluated on their own merits to decide whether they qualify as an armed conflict.

Outside an armed conflict, the default European assumption would that the threat of terrorism should be confronted within a law enforcement framework. This framework would not absolutely prohibit the deliberate killing of individuals, but it would set an extremely high threshold for its use: for example it might be permitted where strictly necessary to prevent an imminent threat to human life

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<sup>22</sup> “Lawfulness of a Lethal Operation”, p. 7.

<sup>23</sup> See Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst, ed., *International Law and the Classification of Conflicts* (Oxford University Press, 2012), pp. 51-54.

or a particularly serious crime involving a grave threat to life.<sup>24</sup> Where the threat was sufficiently serious, the state's response might legitimately include the use of military force, but every use of lethal force would have to be justified as a necessary and proportionate response to an imminent threat. Finally, EU states might perhaps agree that in the face of an armed attack or an imminent armed attack, states can use force on the territory of another state without its consent, if that state is unable or unwilling to act effectively to restrain the attack.

### **Engaging the US on Drone Strikes**

On the basis of these views, the EU already has the foundation for a stepped-up engagement with the United States on drones and targeted killing. At the heart of the EU position is the belief that the use of lethal force outside zones of active hostilities is an exceptional measure that can only be justified on the basis of a serious and imminent threat to human life. At a time when drone technology is proliferating rapidly, EU leaders should be more forthright in making this argument publicly – especially since President Obama has now essentially adopted it as an element of his policy. While Europeans may be reluctant to accuse Obama of having violated international law, they can assert their own vision and encourage Obama to follow through on his rhetoric by elevating the idea of a strict imminent threat-based approach to the use of deadly force outside the battlefield. European leaders and officials should also welcome Obama's latest moves to restrain drone strikes and his intimation that the United States' proclaimed armed conflict against al-Qaeda may be nearing its end. In this way they would reinforce the standards implicit in his speech and make clear that the United States' closest allies will be watching to see how far he matches his words with action.

At the same time, the EU and its member states should use their private communications with the US administration to press for continued clarification and transparency in US drone strike policies. They should ask US officials to explain those aspects of the drone programme that remain uncertain: the meaning that the United States attaches to the term "associated forces", the definition of a "continuing and imminent" threat, the basis for deciding what level of threat justifies targeted killing, and the criteria and processes by which the United States reviews drone strikes after the fact and assesses whether there have been civilian casualties (it is notable that Obama's speech considered various ideas for reviewing proposals for targeted strikes beforehand, but said nothing about post-strike review). EU officials should encourage the United States to interpret these terms in a strict and restrictive way, so that the constraints they embody are made as meaningful as possible. The EU should also encourage the US administration to provide more information about individual drone strikes in the future, including the threat posed by the target and, as far as possible, an accounting of those killed and injured – something that may be more likely if drone strikes are transferred progressively from the CIA to the Department of Defence, as officials have suggested will happen. Finally, the EU should test the willingness of the United States to rethink its broader armed conflict model or declare its proclaimed armed conflict against al-Qaida at an end. The EU might point out that if US targeting policies are in fact much more restrictive than allowed for under its legal paradigm, it has little to lose from rethinking that paradigm, while it stands to benefit in the future by setting a more restrained precedent for other states.

Looking further ahead, the EU and its member states could build on these exchanges and undertake a broader effort with the United States to explore the possibility of agreeing common standards for the use of drones and other methods of conducting targeted strikes. It would be enormously valuable if the EU and the United States could together agree on a set of guiding principles for the kinds of operation that technological change is making possible, rooted in a common interpretation of the applicable parts

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<sup>24</sup> These criteria are taken from the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1.

of international law. (To avoid problems arising from the different obligations that states may face under domestic law or regional instruments, such a code of conduct should be based on laws that have broad or universal adherence or are recognized as customary.) This would be the most powerful step that Europe could take toward establishing a global standard for drone strikes that does not undermine the international rule of law, before the evolving practice of other states overtakes any such effort.