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# The Use of Drones in Targeted Killing Operations

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## Abstract

The use of combat drones does not create particular legal problems in the context of an armed conflict. The lawfulness of drones attacks outside of an armed conflict needs instead, at least, to be assessed through a case-by-case approach, because the use of such weapon systems outside a real battlefield, is highly problematic and while it can be justified under the domestic law of the States concerned, in the majority of cases it is unlawful under international law.

**Keywords:** UAV. Drones. Terrorism. Targeted Killings. Self-defence.

## Introduction

This essay deals with the *Use of Drones in Targeted Killing Operations*. Its first part concerns drones as combat machines and the rules of international law that applies during drones operations requiring lethal force. The second part will briefly discuss the recent practice of States which have a clear policy of targeted killings and the results of the doctrinal debate on this subject. The second part aims thus at suggesting some critical aspects which are probably worthy of more extended analysis.

The topic will be discussed from the perspective of international law. However, some aspects of the use of drones and targeted killings will be treated from an internal law perspective, in particular in respect of a prominent judicial case decided in 2006 by the Supreme Court of Israel (case 769/02), which has had important repercussions also at international level.

It can be now anticipated that while the use of combat drones in the context of an armed conflict does not create particular legal problems, the lawfulness of drones attacks outside of an armed conflict needs at least to be assessed through a case-by-case approach, because the use of such weapon systems outside a recognized battlefield, for instance in Pakistan or Yemen, is highly problematic and while it can be justified under the domestic law of the State operating the strike, it can barely be lawful under international law.

## 1. The Use of Combat Drones

### 1.1 What Are Drones

Drones is a common sense term for designating those special aerial devices technically indicated as

Unmanned Aerial Vehicles (or UAV). The name of this kind of aircraft derives from the typical buzzing noise of their engines, which is similar to that produced by a male bee. Drones are also known as Remotely Piloted Air Systems (or RPAS). This work will use the terms interchangeably.

UAV are high-tech aircraft that do not carry a human operator on board, can fly in autonomy or remotely piloted, can be expendable or recoverable, and can carry a lethal or non-lethal payload. The focus here is on those planes piloted remotely and carrying a lethal payload, that is, combat (or armed) drones.

At present, only a handful of nations can fly combat drones. The US, the UK, and Israel, have recognized combat drones capabilities. Other States are developing drones programs. Among States with significant military means, Russia does not have an advanced program in UAV technology. Germany delayed the decision of purchasing new systems (due to the excessive costs of the operation), while France and Italy have not been able to produce the related technology and their unarmed versions of *Reaper* and *Predator* drones have been furnished to them by the United States. Among the States with an effective armed drone program can be enumerated China and perhaps Iran. In any case, unmanned aerial systems require sophisticated communications, access to satellites, and systems of flying and targeting that are currently beyond the reach of the generality of States.

Drones have been originally introduced to conduct intelligence, surveillance, target acquisition, and reconnaissance missions (so called ISTAR tasks) and then developed to be employed in attacks against ground objectives. They are different, in size and operational capabilities. Most of them look, some kill, other are used for logistics and communication.

*Predators* and *Reapers* cited above are part of a system, composed by the aircraft, a mobile control centre and a *cockpit*. The communication between the control station and the airplane is assured by satellite connections. Drones normally take off and land by airfields located in the theatre of operations, under the control of personnel deployed in the area. During the mission in the proper sense, the plane is instead remotely piloted by a crew of two operators, from a base located thousands of miles from the theatre of operations.

## *1.2 Legal Bases for the Use of Force in International Relations*

UAVs are, quite simply, airplanes. UAVs operating for reconnaissance, data gathering and intelligence purposes, not being weapons, involve little issues. From an international law perspective, the main problem is the right of a State to exclude violations of its own airspace and data collection in its territory. When a UAV is armed, it becomes a weapon system and its use has to abide the provisions of international law governing the resort to armed force outside national frontiers and the way in which that military force is used. In other words, the employment of armed drones outside the national air space must comply with the restrictions imposed to States by both international law regulating the resort to military force and the law governing the conduct of hostilities or, more generally, the use of lethal means and methods during armed conflicts. Such restrictions can therefore be grouped in two categories. The first includes international rules which permit States to use their military force and wage war, also known as *ius ad bellum*. The other concerns the rules which govern combat operations, also known as *ius in bello*.

The legal grounds (and restrictions) for the use of force by States in the international arena (so called *ius ad bellum*) are derived mainly from the UN Charter of 1945. Alongside the Charter, some customary rules still remain in force. The starting point is the general principle according to which all members of the United Nations are to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. This general principle,

codified in Article 2 (4) of the UN Charter, is considered as a peremptory norm of customary international law (*ius cogens*) that admits only two exceptions: i) the Right to Self-defence under Article 51 of the UN Charter; and, ii) a United Nations Security Council Authorization, under Chapter VII of the UN Charter, finalized at preserving international peace and security. In particular, while the peremptory norm issued by Article 2 (4) prohibits use of force in international relations, Article 24 confers on the Security Council primary responsibility in the maintenance of international peace and security. It is to the Council acting under Chapter VII to determine the existence of a threat to the peace and to adopt any measure – including a pre-emptive strike – to give effect to his evaluation. As a residual measure, Article 51 permits a State to act in self-defence if an armed attack occurs, until the Council has taken measures necessary to maintain international peace and security.

Self-defence, that is, measures involving the use of military force taken by a State against an armed attack includes the principle of anticipatory self-defence, derived from the so called *Caroline Case* (1837), today considered as customary law (Jennings, 1938). The criteria for this right of anticipatory self-defence were enunciated in a statement issued by Secretary of State Webster on the Caroline incident as a necessity of self-defence instant, overwhelming, leaving no choice of means and no moment for deliberation. Assuming there must be some degree of imminence, disagreement remains on what imminence is.

Anticipatory self-defence, as a recourse to military force in the international sphere against an imminent armed attack, must be distinguished from pre-emption, as an international use of force directed against a threat which is not imminent, a concept introduced in the National Security Strategy of the United States of 2002 in terms of aggressive actions against threats not fully materialized.

According to the main opinion, well expressed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Tadic case (1995), any use of force between States generates a situation of armed conflict. The Chamber said in fact that an armed conflict is a resort to armed force between States, while an armed conflict also exists whenever there is a situation of protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. Consequently, legally speaking, there are two types of armed conflicts:

1. International armed conflicts, mentioned in Article 2 Common to the 1949 Geneva Conventions, that is, inter-state conflicts and situations of belligerent occupation, plus wars of national liberation mentioned in Article 1 (4) of 1977 Additional Protocol and a *levée en masse* (that is, a situation in which inhabitants of a territory which has not been occupied, on the approach of the enemy, spontaneously take up arms to resist the invading troops).
2. Non-international armed conflicts, mentioned in Article 3 Common to the 1949 Geneva Conventions as an armed conflict not of an international character, and internal conflicts referred in Article 1 of the Second Additional Protocol as a conflict which takes place in the territory of a State between its armed forces and dissident armed forces or other organized armed groups which exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.

War is armed combat *between* organized political entities, civil war is armed combat *within* an organized political unit. The criteria for assessing the existence of an internal armed conflict are the organization of the groups involved and the intensity of the struggle. The quantification of the two criteria is not simple. According to the ICTY, the assessment must be done on a case-by-case basis. The seriousness of attacks, an increase in armed clashes, or the spread of clashes over territory and over a period of time should be considered as symptoms of the fact that the threshold of an armed

conflict has been reached. To determine the organization of the party factors such as the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms should be taken into account. Once the armed conflict erupts, hostilities are governed by a specific set of rules, the law of armed conflict (LOAC), or international humanitarian law (IHL).

### *1.3 Targeted Killings as Self-defence Measures*

Armed drones firing *Hellfire* missiles and GBU laser-guided bombs have been employed during armed conflicts, both international (Iraq) and internal (Afghanistan, after the Taliban defeat), in situations of belligerent occupation (West Bank and Gaza Strip, before and after the withdrawal of Israeli troops in 2005), and in regions characterized by a certain degree of instability not reaching the threshold of an armed conflict (tribal zones of Pakistan, Yemen, or Somalia). In those areas of instability, frequently drones strikes have been conducting against small groups of radicals without the consent of the territorial sovereign, that is, in alleged self-defence operations against non-State actors, in substitution of a territorial sovereign incapable or unwilling to police its territory, from which hostile groups operate. Despite the (indeed criticized) verdict of the International Court of Justice, according to which a military attack in a foreign territory against non-State actors can be considered as an act of self-defence under article 51 of the UN Charter only if behind non-State actors there is a State, it is affirmed (but the debate is still ongoing) that a State can lawfully act in self-defence (under Article 51), against non-State actors based on a foreign soil, even without the consent of the territorial sovereign, and that a discrete use of military force abroad does not trigger a state of war between the territorial sovereign and the State which conducts the strike on the foreign soil. In the situations mentioned above, drones have been used mainly for *targeted killings* (Paust, 2010). According to a definition of Philip Alston, former UN Special Rapporteur on extrajudicial killings, a targeted killing is lethal force intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance. Similarly, the Israeli Supreme Court intended a targeted killing as the killing of members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel (in the frame of a conflict waged in the Occupied Palestinian Territories and considered as international).

The US has been striking al Qaeda with drones since 2002, as a part of the effort to win the so called war on terror. The first documented targeted killing action has been the strike operated in November 2002 by the CIA in a remote area of Yemen against Qaid Salim Sinan al Hariti, considered the mastermind of the attack against the *USS Cole* warship, in October 2000, in which 17 sailors were killed. Since then, the US is conducting similar operations outside traditional battlefields, in the tribal areas of Pakistan along the border with Afghanistan, or in Yemen and Somalia, or in “some other distant and unforgiving places on Earth where Al Qaeda and its affiliates take refuge,” as President Obama of the US said in a speech on May 23, 2013. The UN Special Rapporteur for extra-judicial executions defined the 2002 strike in Yemen as a clear case of extra-judicial killing, and a flagrant violation of the right to life under article 6 of the International Covenant on Civil and Political Rights (ICCPR, 1966), in the form of extraterritorial use of lethal force. The episode represented a decisive step in the employment of unmanned aircraft for lethal purposes, which were experimented since the middle of 1980s, when the CIA had optioned an attack against the bin Laden safe house in the outskirts of Kandahar (Afghanistan). In the aftermath of the killing of al Hariti (and other 5 individuals who travelled on the same car), *The New York Times* commented that the missile strike represented a tougher phase of the campaign against terror and moved the Bush administration away from the law enforcement-based tactics of arrest and detention of Qaeda suspects that it had employed outside Afghanistan in the months since the fighting there ended. As the alleged terrorists were killed outside

the zone of operation (Afghanistan), there were some conditions to satisfy before deciding the employment of a lethal strike. Those conditions were a threat to human life or integrity posed by the target, no reasonable alternative to the killing, and a use of force proportionate to the threat. Those conditions at time were ignored.

#### *1.4 What Legal Framework Applies*

For any use of lethal means by State agents, the legal framework depends on the context, meaning that the legitimacy of an use of force is determined by adopting a context-specific approach. Situations of persistent armed confrontations are governed by that portion of international humanitarian law which rules the conduct of hostilities. In particular, the 1907 Hague Regulations and Articles 48 to 58 of the First 1977 Additional Protocol to the 1949 Geneva Conventions, or Articles 13 to 16 of the Second Protocol in internal conflicts. Those norms are considered as customary international humanitarian law, binding all States. In the situation described above, while IHL is the proper legal framework, human rights law does not cease to apply. As the International Court of Justice (ICJ) stated in its *Nuclear Weapons Advisory Opinion* (1996), the right not to be arbitrarily deprived of life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. While it cannot be said that, in a situation of armed conflict, IHL as the *lex specialis*, displaces human rights norms altogether, in the case of the right to life, IHL actually prevails if it conflicts with the pertinent human rights norms (for example ICCPR, Article 6). Therefore, human rights law, although remains in force, during armed conflicts has a marginal and subsidiary role. To some States, for instance the US, the relation between human rights and IHL is of mutual exclusion, meaning that the two bodies of law cannot apply simultaneously to the same operational context. Furthermore, in the US view, the rules of international armed conflict – rather than international human rights law – apply by analogy to non-international armed conflict.

In a recent meeting promoted by the ICRC (2013), experts have distinguished two different paradigms governing the use of force in armed conflicts: a *law enforcement paradigm*, typical of situations of belligerent occupation and non-international armed conflicts, made of a combination of IHL (*lex specialis*) and HR law (*lex generalis*), and a *conduct of hostilities paradigm*, referred to situation of actual combat.

The legality of drone strikes in the context of an armed conflict is based on the respect of the rules of international humanitarian law specifically governing the conduct of hostilities. Such rules aim at creating a balance between military necessities and humanitarian purposes and implement two core principles: *Distinction* and *Proportionality*. In particular, they impose belligerents to discriminate between combatants and civilians and to use force with a view to avoid or at least minimize collateral damage among civilians. *Ratione personae*, lethal operations may be conducted against combatants (international conflict), or organized insurgents or other persons who directly participate in hostilities (non-international conflict). During a belligerent occupation, the focus is on the maintenance of law and order in the occupied territory. The coercive measures are those essential to enable the occupying Power to fulfil its obligations under the 1949 Fourth Geneva Convention, that is, to maintain the orderly government of the territory. So, in principle, there should be no reason for using combat drones in such situations, unless significant hostilities erupt in the occupied territory, reigniting the armed conflict and reversing the occupied territory in a battlefield. In any other circumstances, the employment of UAV would be disproportionate. In this case, a decision respectful of the principle of proportionality is a decision that weighs between security needs and harm to fundamental human rights.

In a limited cross-border operation directed against non-State actors, such those conducted by the US in Pakistan, that is, outside of the battlefield, the use of lethal force should be limited to neutralize an imminent threat of attack against State agents or peaceable civilians, likewise happens in law enforcement, where human rights law is prominent. The law enforcement paradigm, mandatory in situations other than an armed conflict, permits the use of lethal force as a last resort and includes a duty to warn the hostile elements and to give them the opportunity to surrender, a duty incompatible with the employment of drones. In armed conflict targeting and engagement with lethal force are *status-based*, outside of an armed conflict they should be *threat-based*. Outside of an armed conflict, the use of military force is not excluded, but it is governed by a different, more demanding, set of rules, meaning that a lethal strike, even conducted by military forces, must respect more stringent requirements. The use of force outside the real battlefield is regulated by the law of human rights and thus justified only if the targeted individual is about to kill someone. In particular, the use of force must be absolutely necessary to protect human life (since a use of lethal force to protect properties should be considered intrinsically excessive and disproportionate), and the use of force is permitted only whereas other means for preventing a threat to life are not available (that is, when lethal force is necessary, as last resort, to achieve a lawful purpose). Requisites for a lawful use of lethal force are thus proportionality, absolute necessity and an imminent threat to human life. If there is no imminent risk of death or serious (bodily) harm to human beings, the use of fire is disproportionate. While, outside of an armed conflict, human rights law imposes a use of force no more than absolutely necessary in defence of any person from unlawful violence, or in actions lawfully taken for the purpose of quelling a riot or insurrection, it remains clear that in extreme situations human rights law does not prohibit shoot-to-kill measures. It must be observed that outside of an armed conflict, the use of force pertains to police or military personnel to whom the territorial sovereign conferred law enforcement tasks. It means that outside of an armed conflict, the use of force is an issue related to the exercise of internal sovereignty and jurisdiction. Furthermore, according to human rights law, it is never permissible for killing to be the sole objective of an operation.

At present, there are only two schemes for regulating the use of lethal force, an *armed conflict model* (containing the two distinct paradigm cited above, *conduct of hostilities* and *law enforcement*), for a situation of armed conflict, or a *law enforcement model*, for peacetime conditions. A major undertaking of the Obama administration is that there is a third option. In a speech delivered in 2010, Harold Koh (then Legal Adviser, US Department of State) distinguished a situation in which a State is engaged in an armed conflict from a situation of legitimate self-defence. In both situations, when acting in self-defence or during an armed conflict, the use of lawful weapon systems must be consistent with the applicable laws of war. According to this vision, there are two different situations regulated by the same body of law – the law of war – and, what is puzzling, one of the twos is governed by the law of war even if it is not a wartime situation. It means that, alongside the two *armed conflict* and *law enforcement* patterns, part of the doctrine elaborated a *self-defence paradigm*, in which the use of force is subject to the law of armed conflict even if no armed conflict is on the way. Indeed, in *Hamdan v. Rumsfeld* (2006), the US Supreme Court held that the United States is engaged in a non-international armed conflict, but with al-Qaeda. However, activities conducted in Pakistan seem to have nothing to do with al-Qaeda.

Around the issue of the alleged self-defensive strikes in Pakistan there is a sort of confusion between two different perspectives, already discussed, the one referring to legitimacy of a resort to military force abroad (*ius ad bellum*) and the other referring to legitimacy of means and method employed in resorting to force (*ius in bello*). Those who consider the US as acting in self-defence (a *ius ad bellum* issue) must admit that that defensive action requires different means and methods (derived from different sources of legitimacy), meaning that acting militarily abroad can be an intervention in an internal armed conflict alongside the local government, or independently from it, to face an insurgency,

or a sort of reinforced police mission acted in support or in substitution of the territorial sovereign, who is unable or unwilling to conduct effective counter-terrorism operations. In the first case, the foreign intervention is governed by the standards of the law of armed conflict. In the second, it is regulated by human rights law standards (and, in addition, it should be managed in accordance to protective standards granted by the territorial sovereign to its citizens and residents in accordance with the local law).

Given that level of uncertainty in the set of rules to apply, in any situation, the minimum standards should be a complete and correct application of the basic principles of the law of armed conflict cited above (distinction and proportionality), integrated by the standards issued in Article 3 Common to the Geneva Conventions. The US includes the strikes in foreign territories in the range of measures adopted to neutralize the opposing forces in the frame of the war on terror. Since these are measures adopted in self-defence, at least, the US – which does not consider human rights instruments as extra-territorially applicable – to avoid a legal vacuum in the conduct of these operations, should admit as a minimum that an action of alleged self-defence against non-State actors on a foreign soil should satisfy the IHL basic principles of distinction and proportionality. In addition, precautions which are practicable or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations, should be respected. On this point, it is worth to cite the International Court of Justice when it affirmed that fundamental law-of-war norms are applicable even where military force might be employed outside the context of an armed conflict, such as when using powerful weapons in an act of national self-defence.

### *1.5 Who Are Legitimate Targets*

The operational context determines who are legitimate targets. Air strikes against individuals are lawful if the targets are:

- regular combatants, in international armed conflicts (where *status* is the key);
- fighters or insurgents belonging to organized armed groups, in non-international armed conflicts (where *continuous combat function* is the key);
- civilians directly but occasionally participating in hostilities (where *actual participation* is the key);
- civilians who pose a continuing and imminent *threat to life* of peaceable civilians and State agents, in situations other than armed conflict and thus assimilated to law enforcement.

A legitimate target may be killed at any time. IHL permits combatants to resort to lethal force independently from the conduct of the adversary, providing that the adversaries *hors de combat* or those who manifest the genuine intention to surrender must be protected and respected. The International Committee of the Red Cross (ICRC) sustains on this point a more restrictive and thus protective vision, since in its opinion a legitimate target may be killed at any time, unless it is clear that he or she may be rendered *hors de combat* without additional risk to the operating forces. On this subject, the Israeli Supreme Court held that 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. This different viewpoint, albeit authoritative, cannot displace the reality of IHL as it currently stands. International humanitarian law indeed provides combatants with a license to kill persons who directly participate in hostilities. And indeed, the viewpoint of the Court was handed over under a domestic perspective and inspired to a principle of proportionality recurrent in the Israeli case-law when confronting with

warfare questions.

Regular combatants are those individuals entitled to prisoners of war status in accordance with Article 4 of the III 1949 Geneva Convention and Article 43 and 44 of Protocol I. During international armed conflict those who are not combatants or members of the armed forces exercising medical or religious tasks are civilians. They are protected against any form of attack or violence unless they take direct part in hostilities. During internal conflict, the notion of prisoner of war and consequently that of legitimate combatant does not exist, in the sense that governmental armed forces are entitled to use combat power against rebels and insurgents, who, in contrast, do not have the so called *privilege of combatancy*. Their active participation in hostilities is unlawful. When captured, they can legitimately be prosecuted by the State for their participation in hostilities.

Dealing with the wave of attacks carried out by civilians against regular armies and the civilian population during present armed conflicts, scholars created the concept of *Continuous Combat Function* (or CCF). The category continuous combat function is, *de facto*, a status determination. It means that a person who is considered to belong to the military wing of an organized armed group is believed a legitimate target in any circumstances and consequently he or she is assimilated to a combatant, meaning that he or she is legitimate target even when not participating in the fight and until *hors de combat*.

Recently, after a debate lasted several years, scholars and analysts, following 3 different modes of interpretation, also explained what means *Direct Participation in Hostilities* (Melzer, 2009). According to the restrictive interpretation, only participation in actual combat is direct participation. This approach gives to civilians participating in the struggle a so called 'revolving door of protection,' meaning that if a fighter detached himself from hostilities, he is not to be harmed (a situation that can be exemplified as 'fighter by night and farmer by day'). The liberal mode holds that any contribution to the conduct of hostilities is participation. Those who prefer this approach maintain it helps discourage civilians and to maintain them out of the confrontation. The third mode is the functional one, according to which who exercises a persistent combat function, that is, who exercises a proper military function, operational but also logistical or intelligence-related, is directly participating in combat, even if he or she is not involved in actual combat activities. A committee of experts in the ICRC elaborated a 3 prongs test (Melzer, 2009). A civilian is directly participating in hostilities when 3 cumulative requirements are satisfied. The 3 cumulative requirements are:

1. Threshold of Harm (that is, a harm likely to result);
2. Direct Causation (that is to say, a direct link between act and likely harm);
3. Belligerent Nexus (act designed to negatively affect a party to the benefit of another party).

Direct Participation in Hostilities (DPH) does not include combat service support functions. Drug trafficking, frequently used to financing combat activities, is normally understood as a criminal conduct, as well as other activities generating profits that might be used to fund hostile actions. Conducts traditionally excluded from direct participation are political advocacy, supplying of food or shelter, and propaganda.

Recently, an article published by Ryan Goodman ignited a *Capture versus Kill* debate. The invalidity of a '*Least Harmful Means Rule*' sustained by Goodman has been assumed in an essay written by G. S. Corn, L. R. Blank, C. Jenks, and E. T. Jensen for the *International Law Studies* of the Naval War

College (Corn, Blank, Jenks, and Jensen, 2014). The cited experts argued that the fundamental principles of LOAC that permit status-based attacks against enemy belligerents with combat power until the enemy is rendered physically incapable of participating in hostilities, coupled with the presumption-based use-of-force authority, exclude a duty to capture. Surely, there are grounds to consider desirable to allow fighters to surrender. A reasonable military commander would probably order a capture operation under international humanitarian law, rather than the targeting of the fighter, but this would be the result of policy considerations and not legal considerations. Armed forces may prefer to conduct a capture operation under international humanitarian law if there is little or no risk to the mission or to the operating forces, because of the potential intelligence value of capturing a fighter and for in many contemporary armed conflicts it becomes essential *to win hearts and minds*, an outcome reachable using the least harmful means and avoiding overreactions or hubris. Actually, it could be desirable to allow fighters on a conventional battlefield to surrender where that is realistically feasible. However, belligerents cannot reasonably be prevented from resorting to surprise attacks of instantaneous lethality, or to employ units and weapons systems which are incapable of taking prisoners, if such action is justified by military necessity and is otherwise in compliance with international humanitarian law (Melzer, 2008, at 370).

In 2006 these themes have been treated in a decision issued by the Israeli High Court of Justice – sitting as the Supreme Court. The Court delivered prominent guidelines on the legality of the alleged policy of targeted killings in the Occupied Palestinian Territories, adopted by the Israeli government in response to the so called second *Intifada* (that is, a wave of popular violence which erupted in 2000, following some provocative and disrespectful behaviours adopted in public by prominent Israeli political figures, including future Prime Minister Sharon, towards the Arab population of Jerusalem). According to the petition, filed in 2002 by a group of NGOs, the Government of Israel was employing a policy of preventative strikes, which were causing the death of presumed terrorists in Judea, Samaria, and the Gaza Strip, but also provoking significant collateral damage among peaceful civilians.

The petitioners assumed the policy was illegal, because, being Israel an occupying Power since 1967, the rules governing the use of lethal force should have been those necessary to maintain law enforcement in an occupied territory, meaning that the use of lethal force against presumed terrorists was justified only when their capture was not feasible. The Israeli Defence Forces (IDF) approached the problem of terrorism using the rules regulating the conduct of hostilities in a situation of actual combat.

The respondent government assumed that the assault of terrorism against Israel fitted the definition of an actual armed attack. The question whether the targeted killings policy were legal should have been decided in accordance to the laws of war on the conduct of active hostilities.

In its decision the Court sustained that between Israel and the various terrorist organizations a continuous situation of armed conflict had existed since the first *Intifada* (1987). Such a conflict was international in nature, since it had transnational or crossing-border consequences. Terrorists considered by the Israeli government unlawful combatants were in fact civilians who unlawfully participated in hostilities. As such, in accordance with Article 51 of the First 1977 Additional Protocol to the Geneva Conventions, they were legitimate targets for such time as they took a direct part in hostilities. However, the Court sustained that a civilian taking a direct part in hostilities could not be attacked if less harmful means could be employed. With the view to avoid the so called ‘revolving door’ effect, the Court pointed out that direct participation in hostilities could not be considered as limited to that of an individual carrying out a physical attack, in such adopting a functional perspective in respect of the concept of direct participation. In particular, the Court suggested that a civilian who had joined a terrorist organization and in the framework of his role in that organization committed a chain of hostilities, with short periods of rest between them, forfeited his immunity from attack. Finally, the Court affirmed that it could not be determined in advance that every targeted killing was prohibited

according to customary international law, and that it could not be determined in advance that every targeted killing was permissible according to customary international law, meaning that the lawfulness of a targeted killing had to be established on a case-by-case basis. However, in relation of any targeted killing decision, the Court imposed to the military the respect of 4 guidelines:

1. *Reliable information* is required before a civilian can be categorized as directly participating in hostilities;
2. A civilian taking a direct part in hostilities cannot be attacked if a *less harmful means* can be employed;
3. After an attack a thorough *ex post facto investigation* should be carried out;
4. Harms to innocent civilians caused during military attacks, that is, *collateral damage*, should be proportionate to the obtained military gain.

#### *1.6 Who May Conduct Targeted Killings*

Drones are weapon delivery machines, *remotely operated by human beings*. The use of military force in armed conflict is to be conducted by military personnel, who have the right to participate in hostilities. When drones are piloted by members of armed forces, no issue occurs. But, as renowned, also the paramilitary division of the CIA conducts drone strikes. Under international humanitarian law, civilians, including intelligence agents may be targeted and killed (for participating in hostilities), but by virtue of their not being part of the armed forces they do not have immunity from prosecution for acts considered unlawful under the domestic law of the State in which the strike occurred, since they do not have the right to participate in combat. Whether or not a State can use civilians to conduct military operations, since in doing so it violates international law, is a controversial issue. According to the US Office of the Legal Counsel, lethal activities conducted in accordance with the laws of war, and undertaken in the course of lawfully authorized hostilities, do not violate the laws of war by virtue of the fact that they are carried out in part by government actors who are not entitled to the combatant's privilege.

Intelligence operators, as well as other civilians, employees of contractor firms, for example, who fly combat drones, being not members of the regular armed forces are unprivileged combatants. They do not enjoy combatant immunity and can be criminally prosecuted for having participated in hostilities. Even sharing data that might be used for drone strikes entails a criminal liability. If US drone strikes in Pakistan, Yemen and elsewhere are unlawful because there is no justification for them under the *ius ad bellum*, then facilitating strikes by passing over data in the knowledge that it might be used for targeting is unlawful. In this case, drone strikes are not carried out in the context of an international armed conflict; therefore combatant immunity does not apply and carrying out a strike would amount to murder. A person who assists a strike by transferring information would be personally liable in criminal law as an accessory to murder.

## 2. The Use of Drones Outside of the Battlefield

### 2.1 *The US Drones Programs*

The US is believed to carry on two Drones Programs: The military version, which is publicly acknowledged, and operates in the recognized war zones of Afghanistan; The CIA program, classified as covert, aimed at terror suspects around the world.

Forces responsible for many of the raids of the DoD program are operatives under the Joint Special Operations Command (JSOC). Drones in support of combat operations in Afghanistan and to track and kill alleged terrorists in the Federally Administered Tribal Areas of Pakistan, flown from US military airfields in Afghanistan. The theatre of operations of drones managed by the CIA are mainly the remote areas of Yemen, and Somalia. The CIA (a successor to the Office of Strategic Services) has a long history of carrying out para-military activities and it is believed it must continue to be able to provide the Executive with this option.

According to the Bureau of Investigative Journalism, 383 drone strikes have been conducted by the US in Pakistan between June 2004 and the end of 2013.

As seen above, authorities to use lethal force abroad affirmed by US are consent or self-defence.

The Pakistani leadership seems to have tacitly or secretly endorsed the US drone program. In its official statements, however, it blames Americans for violating the sovereignty of Pakistan and the rights of Pakistanis involved in the strikes. In recent press statements, the Pakistani authorities claimed that besides being violations of Pakistan sovereignty the US drone strikes have a negative impact on the government's effort to bring peace and stability to the region. In other statements, they affirmed Islamabad had given the Americans express approval (at least) for the two last strikes, of 11 and 12 June 2014.

Yemen is alleged to struggle to sustain a series of ceasefires, strengthen its central authority, and provide humanitarian assistance to its population. Violence between Yemeni armed forces and various armed groups threatens to destabilize an already fragile transition. DoD operations occurring in Yemen are said to support this effort of stabilization. In Somalia, drones have been using since 2009 to dismantle the jihadist group Al-Shabab.

### 2.2 *Drones Strikes in Situations Other Than War*

Indeed, the use of drones in Pakistan and elsewhere raises serious questions under the international law governing both resort to military force (so called *ius ad bellum*), as well as under the law governing the use of military force (so called *ius in bello*). The first objection concerns the serious doubt that a State could give its consent to the killing by foreign forces of its own nationals, or citizens, or residents under its jurisdiction without violating international human rights law or its own constitutional legal system. In addition, there are several issues concerning the human right to life of both the specific target and those people who live with the target (that is, lieutenants, fellow fighters, but also family members). In the area known as FATA, the society has a tribal structure and families are enlarged. People live concentrated in hamlets and compounds. *Predators* and *Reapers* are precise weapon dealers, but the radius of an anti-tank *Hellfire* missile always includes those who are relatively close to the target, and the hit is capable of destroying an entire neighbourhood, especially where dwellings are made of mud bricks. A strike against a tribal leader normally kills his entire family. This is unacceptable under the international law of human rights, which should be the applicable legal

standard, alongside with domestic law. It is true that, normally, a warlord rests and recovers with his lieutenants. This circumstance increases the value of the target and shifts the balance towards the air strike option. However, troops are not allowed to engage individuals with lethal force on the mere suspicion of their being unlawful combatants. It is worth to note that since 2009 the US Commanders-in-chief in Afghanistan handed over tactical directives aimed at limiting the use of force like close air support (CAS) against residential compounds, authorizing the use of air-to-ground munitions and indirect fires against residential complexes only under very limited and prescribed conditions (because civilian casualties, in the long run, make mission success more difficult and turn the Afghan people against ISAF troops. Indeed, not properly a humanitarian concern). It is worth noting that, to some commentators, FATA are an area of active hostilities (a term of art, unknown to international law) included in the Afghan theatre of operations. Furthermore, US forces operating in Afghanistan under *Operation Enduring Freedom* have the right to 'hot pursuing' hostile elements across the border of Pakistan. This should be an argument in favour of considering at least the boundaries as included in the area of active hostilities represented by the Afghan theatre. According to some opinions, the fact of launching or supervising from Pakistan an attack across the border is sufficient to include the starting point into the theatre. Within Afghanistan, a theatre of war, drones strikes against insurgents, when carefully controlled and disciplined in order to exclude or at least minimize civilian casualties, are legitimate attacks. In the *ius ad bellum* realm, they are legitimate both by the consent of the Afghan government and UN mandate. In the *jus in bello* realm, as long as they abide to the principles of distinction and proportionality, they are also legitimate. In areas not interested by an actual armed conflict, but currently theatre of drones operations – Pakistan, Somalia, Yemen – the US alleges it is carrying out drone attacks as a matter of self-defence against non-State actors, who pose an immediate threat to the lives and interests of Americans. These self-defensive operations are justified by attesting they are carried out with the consent of the territorial sovereign (in Yemen), or in accordance with Article 51 of the UN Charter pursuant to an 'unable-or-unwilling' clause allowing for the use of force on another's territory even absent consent or authorization under Chapter VII of the UN Charter. The US admits there is a lot of disagreement as to whether such an attack would satisfy Article 51, but targeted killings against non-State actors that have, or are planning to, carry out attacks on US persons or property are, in its opinion, to be considered justified as acts of self-defence.

Scholars have on this subject two different positions, which can be exemplified in the vision respectively expressed by Mary Ellen O'Connell (*There is no legal right to use drone attacks against Pakistan under the law of self-defence*. See O'Connell, 2010) and J.J. Paust, (*Selective responsive force directed against a non-State actor is a form of self-defence*. See Paust, 2010).

We can start with this second opinion. According to the self-defence paradigm sustained by Professor Paust, non-State insurgent armed attacks could trigger the right of self-defence under international law. Selective responsive force directed against a non-State actor is a form of self-defence under Article 51 of the UN Charter. A response in self-defence should meet the principles of necessity and proportionality. The necessity of self-defence exists when the threat is instant, overwhelming, leaving no choice of means, and no moment for deliberation (in accordance with the Webster's doctrine of imminent attack and anticipatory self-defence enunciated in the *Caroline case* cited above). Military force can be legitimately used in self-defence when measures are reasonably necessary and proportionate. And finally, nothing in the language of Article 51 or in customary international law requires the consent of the State from which a non-State actor armed attack is emanating and on whose territory a self-defence action takes place.

Turning to the second opinion, armed cross-border incursions (by non-State actors) are not considered attacks under Article 51 giving rise to a right to self-defence. There is no need for new rules. If terrorist suspects are located in a State other than the United States, the US may offer assistance, providing

intelligence but also kinetic assets, which will be employed in accordance with the local legal system. The *ius in bello* will apply if there is an armed conflict in the State, peacetime criminal law applies if not. There is no legal right to use drone attacks against Pakistan under the law of self-defence.

The two different points of view produce different outcomes in two core issues. The first relates to the consent of territorial sovereign. Whereas a State uses force in foreign territories to specific targets, Article 2 (4) prohibition is overcome if the target State gives its consent. One could object, however, on the compliance of such course of action in respect of the purposes of the United Nations also cited in Article 2 (4), especially when the extra-territorial strike could violate internationally recognized rights of the targeted individuals.

According to the first opinion, however, consent of the territorial sovereign is not required. Consent generally would be required for ordinary law enforcement measures, but the selective use of armed force in self-defence is not law enforcement. On the other side, consent is required because a State has no right to defend itself outside its own territory. Absent a permission from foreign State from which continuing armed attacks emanate, or attribution of non-State actor attacks to the foreign State, selective self-defence would be an intervention and interference with the sovereignty of the foreign State itself.

The second aspect regards the consequences of the act of self-defence. According to a first approach, self-defence strikes do not necessarily create a state of war. A self-defence paradigm can be different than a war paradigm and both are different than a mere law enforcement paradigm. Selective responsive targeting are not attacks on the State in which targeted non-State actors are located. The other approach assumes that the strike is a violation of international law involving the international responsibility of the State.

To summarize, at one end of the spectrum, O'Connell, excluding the pertinence of self-defence to non-State actors attacks. At the other end, Paust, affirming unequivocal legality of foreign strikes directed against non-State actors. But there is also a third option in between, offered by Kimberly Trapp, a sort of synthesis based on the customary international law requirement according to which a use of defensive force must be necessary. If a host State is doing everything possible, the matter should be addressed through cooperative arrangements. If a State is complicit or unable to prevent its territory from being used for hostile purposes, the unwillingness or inability accounts for the limited and targeted violation of the host States territorial integrity (Trapp, 2014).

## **Conclusions**

Considering the growing criticism among the so called civil society concerning the fact that drones attacks are causing significant civilian casualties, in order to answer the question *Why Targeted Killings* the correct response is that benefits outweigh the costs, identified in the political and diplomatic fallout that is sure to result after a targeted killing occurred. A further utilitarian argument is that terrorists do not follow a secular logic, meaning that they have actually an attitude to martyrdom, religious or ideological. So either restraint or threat of massive retaliation proves inadequate. Therefore, preventive strikes – i.e. strikes beyond the need to tackle imminent threats – are considered as necessary. Targeted killings satisfy domestic demands for a forceful response to terrorism and actually have shattered terrorist groups, and made it difficult for them to conduct effective operations. Potential targets have to worry constantly about hiding from strikes, and leaders in hiding also face difficulties ordering their lieutenants and motivating their followers. Irregular enemies stimulate the development of a new type of regular forces to fight them.

Within battlefields, those who participate in hostilities are legitimate targets. Civilians conducting

combat operations forfeit their protected persons status. By joining in the fighting, they are legitimate targets as long as they participate in hostilities. Outside of the theatre of operations, the pattern must be different, since *ius in bello* does not apply. When operated out of the battlefield, the use of deadly force may be permissible, as a measure of last resort in accordance with international human rights standards on the use of force.

There is a tension between the inherent right of self-defence and the prerogatives of sovereignty. To solve the question it is necessary to sustain that although the sovereignty of a non-culpable State normally prevails, the right to self-defence applies in its normal fashion when the State hosting terrorist elements is unable or unwilling to deal with them and contrast their activities.

Even in the light of the tentative explanations reported above, the legitimacy of targeted killings remains a tough subject, especially outside wartime conditions. As exemplified by Adam Schiff (Schiff, 2014), “[i]n a fight against a hidden enemy who operates in lawless safe havens, drones offer many obvious advantages and have taken many dangerous adversaries off the battlefield. But the idea that warfare can be precise, distant or sterile is also dangerous. It can easily blind us to the human cost of those inadvertently killed.”

## References

- Bowett, D. W. (1972). *Self-Defence in International Law*.
- Corn, G. S., Blank, L. R., Jenks, C., and Jensen, E. T. (2013). Belligerent Targeting and the Invalidity of a Least Harmful Means Rule. *International Law Studies*, 89, 536.
- Gaggioli, G. (2013). The Use of Force in Armed Conflicts. Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms. Experts Meeting Report, ICRC, Geneva.
- Jennings, R.Y. (1938). The Caroline and McLeod Cases. *American Journal of International Law*, 32, 82-89.
- Melzer, N. (2008). *Targeted Killing in International Law*.
- Melzer, N. (2009). Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law. ICRC, Geneva.
- O’Connell, M. E. (2010). Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009. *Notre Dame Legal Studies*, 09-43.
- Paust, J. J. (2010). Self-Defense Targeting of Non-State Actors and Permissibility of US Use of Drones in Pakistan. *Journal of Transnational Law and Policy*, 19.
- Rouillard, L. (2004). The Caroline Case: Anticipatory Self-Defence in Contemporary International Law. *Miskolc Journal of International Law*, 1, 2, 104-120.
- Schiff, A. B. (2014). Let the Military Run Drone Warfare. *The New York Times*, 12 March 2014.
- Trapp, K. (2014). Can Non-State Actors Mount an Armed Attack? Weller, M. (forthcoming). *The Oxford Handbook on the Use of Force*.