
ON THE IMPLICATIONS OF THE USE OF DRONES IN INTERNATIONAL LAW

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I. INTRODUCTION

On 23 May 2013, President Obama formally acknowledged that the United States (US) had been taking “lethal, targeted action against al-Qaeda and its associated forces, including with remotely piloted aircraft commonly referred to as drones,” and that it intended to continue doing so because these actions were “effective” and “legal.”¹ When these words were pronounced, it was no secret that the US and other countries were embarked in the research, development and use of these unmanned systems.² As a matter of fact, it was not the first time that high ranking officials of the US had acknowledged this, though little more was officially disclosed.³ After Obama’s words, opacity remains the policy concerning the frequency and scope of the use of drones by either the US or any other power that possesses them.⁴ Not only has the general public lacked enough information: “Even the other two branches of federal government ... have reportedly not been fully informed of the details of the program.”⁵ Likewise, there seems to be a clear leap between what official spokespeople and apologetic scholars say on the one hand and what actually happens on the ground on the other.⁶

The purpose of this paper is to contextualize the challenges that drones imply for international law, particularly in the realm of international human rights law. It has been rightly said that drones are simply new weapons that, as any other, must be used in accordance with existing law.⁷ In this respect, what the current drone proliferation brings about is the questioning, or a reappraisal, of some very core international law principles and norms; principles and norms that are fully in force and must be respected whether

¹ Office of the Press Secretary, *Remarks of President Barack Obama* (Washington, DC: The White House, 23 May 2013), online: <<https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama>> at 3.

² See ABC News, “‘This Week’ Transcript: Panetta” (Transcript) (Washington, DC: ABC News, 2010), online: <<http://abcnews.go.com/ThisWeek/week-transcript-panetta/story?id=11025299>> (last visited 2 July 2015). See also, Harold H Koh, *Keynote Address of Harold H Koh, Legal Adviser of the Department of State, at the Annual meeting of the American Society of International Law, “The Obama Administration and International Law”* (25 March 2010), online: <<http://www.state.gov/s/l/releases/remarks/139119.htm>> (last visited 2 July 2015).

³ *Ibid.*

⁴ Eva Saiz, “Los drones, ¿una estrategia eficaz?”, (Madrid: El País, 10 August 2013), online: <http://internacional.elpais.com/internacional/2013/08/10/actualidad/1376151418_283948.html> (last visited 2 July 2015).’

⁵ Amnesty International, “*Will I be Next? US Drone Strikes in Pakistan*” (Amnesty International: London, 2013), at 50.

⁶ See, in this respect, The Bureau of Investigative Journalism, “*Covert Drone War Project*” (2015) online: <<http://www.thebureauinvestigates.com/category/projects/drones/>> (last visited 2 July 2015).

⁷ Jacqueline L Hazelton, “Drones: What are They Good For?” (2013) 42:4/43:1 *Parameters*, at 30; International Civil Aviation Organization (ICAO), *Unmanned Aircraft Systems (UAS)*, ICAO Doc. Car 328 AN/190 (2011), at 30, 33.

one uses drones or any other armament. In this article, I shall provide an overview of current drone technology and how it is used; I shall subsequently present some of the challenges that these systems bring to international law in three arenas: the means of warfare; the prohibition of the use of force and its exceptions; and international human rights and international humanitarian law (IHL), particularly when drones are used for targeted killing.

II. DRONES: WHAT THEY ARE AND WHERE THEY ARE USED

In spite of the lack of transparency that surrounds this issue most authors coincide in the description of current and prospective drone technology as well as in its current proliferation. We know plenty of things about drones and where they are being used.

1. *What are drones?*

Drones are unmanned aircraft, controlled remotely and in real time by human operators.⁸ Though they are generally referred to as “unmanned aircraft vehicles” (UAV), some prefer to call them “remotely piloted aircraft systems” (RPAS): “RPAS are under control of a remote pilot-in-command for the entire flight under normal conditions and movements on the ground”.⁹ Irrespective of this terminological issue, “drones” are robot planes flown by ground-based pilots that represent the latest development so far in war-fighting technology, separating the warfighter from the consequences of his actions by as much as several thousand miles.¹⁰ Their nickname comes from the constant buzzing noise that some of them make in flight;¹¹ they are extremely diverse: “there are currently dozens of types of drones in service, all of which differ greatly in terms of size, shape, weight, cost, range and capability.”¹² The North Atlantic Treaty Organization (NATO) classification table shows this huge variety of UAV: Class I are those aircrafts that weigh less than 150 kg., among which there are different subtypes, including so-called “micro” UAVs with less than 2 kg that cannot fly higher than 200 feet. On the opposite side of the spectrum, Class III drones (Predators, Global Hawk, etc.) weigh more than 600 kg (usually, several tones), can fly up to 65.000 feet high and have an almost

⁸ Nils Melzer, *Human Rights Implications of the usage of drones and unmanned robots in warfare*, Directorate-General for External Policies of the Union, EXPO/B/DROI/2012/12 (Brussels: European Union, May 2013), at 9.

⁹ European RPAS Steering Group, *Roadmap for the integration of Civil Remotely-Piloted Aircraft Systems into the European Aviation System*, Final Report (June 2013), online: <http://ec.europa.eu/enterprise/sectors/aerospace/uas/index_en.htm> (last visited 2 July 2015) at 5.

¹⁰ Dave Webb, Loring Wirbel, & Bill Sulzman, “From Space, No One Can Watch You Die” (2010) 22:1 Peace Review: A Journal of Social Justice at 31.

¹¹ Chris Cole, Mary Dobbing, & Amy Hailwood, *Convenient Killing: Armed Drones and the ‘Playstation’ Mentality* (London: The Fellowship of Reconciliation, 2010) at 6.

¹² Melzer, *supra* note 8.

unlimited mission radius.¹³ In total, the US alone may be flying 7,000 such devices during a natural year, with half-a-million-hour flight.¹⁴

Drones are being used in three different ways: first, when ground troops attack, or come under attack, armed drones are called in and use bombs and missiles in a similar way to other military aircraft; second, drones are on patrol in the skies of some countries (such as Afghanistan), observing the 'pattern of life' on the ground 24 hours a day; and third, they are used in pre-planned missions to conduct targeted killings of suspected militants.¹⁵ The first of these uses makes little difference with any other weapons, including traditional manned aircraft, in terms of international law: such use will or not be legal depending on general international humanitarian law parameters. In the second use (patrolling), drones need not even be armed and play only a surveillance function.¹⁶ This may not have in principle any humanitarian law implication, but does concern sovereignty and privacy issues, among others. As for the third use, it seems to have become the main use of combat drones, probably given their vulnerability (as of today) in conventional air warfare,¹⁷ and where the focus of legality has been shed upon. To be clear, killing someone is legal or illegal (usually, illegal) irrespectively of the *means* used; but the fact that armed drones make it so much easier to kill people in remote areas has established a strong linkage between drones and targeted killing; a link that concerns both international human rights and humanitarian law.¹⁸

2. *Historical overview*

The technology to fly devices without a pilot exists since the immediate post Second World War. As a matter of fact, even during World War I the US Army and US Navy experimented with a remote control system invented by Sperrey and Hewitt that allowed war planes to fly without a pilot in order to, once they were loaded with explosives, direct them against the enemy. Had the system worked (the prototypes were highly unstable) they would have been closer to cruise missiles than to current drones, but the precedent shows

¹³ Joint Air Power Competence Centre, "Strategic Concept of Employment for Unmanned Aircraft Systems in NATO" (Brussels: NATO, January 2010) at 6.

¹⁴ Cole, Dobbins, & Hailwood, *supra* note 11 at 7.

¹⁵ *Ibid.* at 6.

¹⁶ It is the case, for instance, of drones deployed by UN Peacekeepers in Congo. See Kasaija Phillip Apuuli, "The Use of Unmanned Aerial Vehicles (Drones) in United Nations Peacekeeping: The Case of the Democratic Republic of Congo (DRC)" (2014) 18:13 ASIL Insights, online: <<http://www.asil.org/insights/volume/18/issue/13/use-unmanned-aerial-vehicles-drones-united-nations-peacekeeping-case>> (last visited 2 July 2015).

¹⁷ Javier Jordán & Josep Baqués, *Guerra de Drones. Política, tecnología y cambio social en los nuevos conflictos* (Madrid: Editorial Biblioteca Nueva, 2014) at 126-128.

¹⁸ UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Philip Alston Addendum*, UNHRCOR, 14th Sess, UN Doc A/HRC/14/24 (2010) [UNHRC, "Report of the Special Rapporteur"] at para 27.

how battlefields have been robotized the moment the adequate technology existed.¹⁹ As mentioned, actual “[d]rones were first used by the United States in the 1950s as target practice for fighter pilots. In the 1960s, they were used to spy over China and Vietnam, and also for surveillance in Bosnia and Kosovo in the 1990s.”²⁰ Thus, during the Cold War drones were only used for surveillance purposes, but not only by the US; Israel, for instance, “used reconnaissance drones in Lebanon in 1982 and again in 1996 to guide piloted fighter bombers to targets.”²¹

Although the technology was developed earlier, the use of drones as weapons rather than as surveillance devices is very much linked to the US ‘War on Terror’ following the 9/11 attacks and the appearance in this scene of a non-military actor, the US Central Intelligence Agency (CIA). Even if “[i]t was during NATO’s 1999 Kosovo campaign that Armed Forces started to think about the utility of strapping a missile to the UAV which led to the [Predator drone] armed with Hellfire missiles,”²² the fact is that “[t]he first time a missile was fired from an armed drone in an attack was in Afghanistan, less than a month after 9/11.”²³ In a parallel process, during the Balkan Wars, and in order to skip the slow bureaucratic machinery of the Pentagon and its adjudicative processes, the US Government commissioned the CIA to create a surveillance drone. Even if the Gnat-750 produced by General Atomics for the CIA did not work very well, particularly in bad weather, this commission allowed the CIA to start its own relationship with the drone industry.²⁴ In fact, “[t]he CIA allegedly carried out its first targeted drone killing in February 2002 in Afghanistan, where a strike killed three men near a former *mujahedeen* base called Zhawar Kili.”²⁵ It was the beginning of a new attack vector that would become extremely popular only a few years later.

3. *A Weapon of Choice*

All authors agree that the Obama administration has produced a huge surge in the use of drones.²⁶ According to different sources, when President Bush left the White House, the US had carried out at least 45 drone strikes,²⁷

¹⁹ Jordán & Baqués, *supra* note 17 at 15-16.

²⁰ Webb, Wirbel, & Sulzman, *supra* note 10 at 31.

²¹ Cole, Dobbins, & Hailwood, *supra* note 11 at 6.

²² *Ibid.*

²³ *Ibid.* at 7.

²⁴ Jordán & Baqués, *supra* note 17, at 35.

²⁵ James Cavallaro, Stephan Sonnenberg, & Sarah Knuckey, *Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan*, (Stanford, CA and New York, NY: Stanford Law School & NYU School of Law, Global Justice Clinic, 2012) at 9-10.

²⁶ Andrew C Orr, “Electoral Justice for Aboriginal People in Canada” (2011) 44:3 *Cornell Intl LJ* 729 at 730.

²⁷ Peter Bergen & Katherine Tiedemann, “The Year of the Drone: An Analysis of US Drone Strikes in Pakistan 2004-2010” (2010) 1 *New America Foundation*, at 1.

or up to 52,²⁸ in Pakistan alone. Before the end of his first term in office, President Obama had more than quintupled any of these figures, again in Pakistan alone.²⁹

But the US is not the only actor using drones, armed or not. A recent report states that “approximately 50 States currently either possess drones or are in the process of developing or acquiring them.”³⁰ Philip Alston was mentioning “only” 40 States in 2010,³¹ among them: “Israel, Russia, Turkey, China, India, Iran, the United Kingdom, and France either have or are seeking drones that also have the capability to shoot laser-guided missiles.”³² Dave Webb *et al.* add “Belarus, Colombia, Sri Lanka, and Georgia.”³³ Curiously, there is contradiction among authors on some countries. For instance, there are allegations that Germany has already used armed drones,³⁴ while other authors state that “Germany has made a request to purchase five Reapers and four mobile ground stations for \$250 million, although they will not be armed as that step is not deemed to be acceptable in Germany.”³⁵ Also, although Spain is not mentioned in these reports, local authors state that “Spanish industry has a wide investment area and there are currently more than 50 companies developing products and innovation for drones.”³⁶ In the European Union (EU), “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.”³⁷ In this last respect other authors say, citing market analysis firm Visiongain, that “[t]he US dominates the UAV market as it integrates these systems into all its armed services and at different levels [while] Israel is both a leading exporter of UAVs and a key market.”³⁸

²⁸ Stanford Law School and NYU School of Law, “Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan” (2012), International Human Rights and Conflict Resolution Clinic at Stanford Law School & Global Justice Clinic at NYU School of Law at 40.

²⁹ *Ibid.* There were 300 attacks until the end of 2013, according to Jordán & Baqués, *supra* note 17, at 81; then, there were no attacks for months until 12 June 2014; cf. *supra* note 6, online: <<http://www.thebureauinvestigates.com/2014/06/12/drone-strikes-resume-in-pakistan-after-five-month-pause/>> (last visited on 2 July 2015).

³⁰ Melzer, *supra* note 8, at 7.

³¹ UN, “Report of the Special Rapporteur,” *supra* note 18 at para 27.

³² *Ibid.*

³³ Webb, Wirbel, & Sulzman, *supra* note 10 at 32.

³⁴ Melzer, *supra* note 8 at 10.

³⁵ Webb, Wirbel, & Sulzman, *supra* note 10 at 33. This can be due to the ‘No Combat Drones’ campaign launched by civil society groups at the announcement of German Defense Minister Thomas de Maizière of his wish to purchase UAVs for the Bundeswehr.

³⁶ Anna Escoda, “Los drones armados: una realidad en expansión” (2013) 47 Centre Delàs d’Estudis per la Pau at 12.

³⁷ Anthony Dworkin, “Drones and Targeted Killings: Defining an EU Position” (2013) ECFR/84 European Council on Foreign Relations (Policy Brief) at 3.

³⁸ Cole, Dobbing, & Hailwood, *supra* note 21 at 11.

Proliferation is not circumscribed to sovereign states. There are at least two reported cases where non-State actors have used, or tried to, armed drones. First, allegedly the private military company formerly known as Blackwater (subsequently Xe Services and Academi) was secretly hired by the CIA to target and kill Osama bin Laden and other al-Qaeda operatives in Pakistan and Afghanistan using drones.³⁹ More recently, “in 2012, Hezbollah claimed responsibility for the launch of an Iranian manufactured Shahed-129 reconnaissance and combat drone, which was shot down by Israel after flying 25 miles into its territory.”⁴⁰

The appeal of these weapons for state and non-state actors is self-evident: they imply no physical threat for its operator, who is miles away from the theater of operations; they seem to be more precise—and often more effective—than ordinary old-fashioned manned weapons.⁴¹ The first assertion cannot be put into question, although the ethical implications of such “distance” has deserved specific attention. According to some, drones would “lower the barrier to the killing of individuals,”⁴² and “there is a risk of developing a ‘PlayStation’ mentality to killing,”⁴³ though these assertions are controversial and other authors explain how drone operators suffer higher levels of conflict-zone trauma than regular pilots.⁴⁴ As for the alleged higher effectiveness of drones, in fact “the precision, accuracy, and legality of a drone strike depend on the human intelligence upon which the targeting decision is based;”⁴⁵ an intelligence that is often “faulty.”⁴⁶ Besides, accidents have been common,⁴⁷ and, as any other system that depends on network technology, drones “are vulnerable to exploitation through, for example, hacking,”⁴⁸ or “being hijacked and used as weapons against other airspace users or targets on

³⁹ Webb, Wirbel, & Sulzman, *supra* note 10 at 31. According to Apuuli, “UAVs in DRC are being operated by civilian contractors who are not UN peacekeepers, which raises issues under the customary law principle of distinction.” See Apuuli, *supra* note 16.

⁴⁰ Melzer, *supra* note 8 at 8.

⁴¹ Hazelton, *supra* note 7 at 30.

⁴² Dworkin, *supra* note 37 at 4.

⁴³ Cole, Dobbing, & Hailwood, *supra* note 11 at 4. The idea is taken from: UN, *Report of the Special Rapporteur*, *supra* note 18 at para 84.

⁴⁴ Jordán & Baqués, *supra* note 17 at 156.

⁴⁵ UN Human Rights Council, *supra* note 31 at para 82.

⁴⁶ *Ibid.* at para 83.

⁴⁷ According to Cole:

In July 2010, the *Los Angeles Times* revealed that Pentagon accident reports showed that thirty-eight Predator and Reaper drones have crashed during combat missions in Afghanistan and Iraq and nine more during training on bases in the US, with each crash costing between US\$ 3.7 million and \$5 million. Altogether, the US Air Force says there have been 79 drone accidents costing at least US\$ 1 million each.

See Cole, Dobbing, & Hailwood, *supra* note 11, at 14.

⁴⁸ *Ibid.* at 14.

the ground.”⁴⁹ Other authors advocate that “US drone attacks exacerbate the threat of terrorism, both from a regional and global perspective, and intensely strengthen militancy and insurgency in the troubled Pak-Afghan region”.⁵⁰ Still, other benefits of drone systems are their mission flexibility, endurance, and persistence.⁵¹

Thus, drones pose a number of pressing issues for scholars and practitioners in terms of law, policy and ethics, among other areas. From the legal point of view alone, we are aware that the determination of the lawfulness of the use of drones cannot have a single, straightforward answer valid for all cases. On the contrary, such appraisal is often conditioned to the actual circumstances of each use. Notwithstanding, in the next sections of this article I shall try to provide some initial general answers to the legality of the use of drones in general, with a focus on combat drones, rather than surveillance ones.

4. *Lethal autonomous weapons*

Let us finish this introduction by explaining what will not be the focus of our research: lethal autonomous weapons. According to some authors, they are the inevitable next step in weapon/drone technology,⁵² and have already merited a report by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions.⁵³ The existence of lethal autonomous weapons would imply that “targeting decisions would be taken by the robots themselves.”⁵⁴ Many processes are already automatic in the war industry, such as missile defense strikes against foreign armed attacks. The current challenge seems to be whether a robot will in the future be capable to take a human life autonomously, while at the same time respecting the limits set out by international humanitarian law, and, if so, if humanity should allow this to happen. (I believe that no automatic system will ever be able to make the fine judgments that interpretation of law, including humanitarian law, requires.⁵⁵ Hence, for ethical but also for purely legal reasons, these weapons should be

⁴⁹. European RPAS Steering Group, *supra* note 9 at 12.

⁵⁰. Sikander Ahmed Shah, “War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of US Drone Attacks in Pakistan” (2010) 9 Wash U Global Stud L Rev at 124. The ICG Report demystifies “the actual benefit to extremist groups, including in terms of recruitment” that appears to be “minimal.” See International Crisis Group (ICG), “Drones: Myths and Reality in Pakistan” (2013) Asia Report No. 247 at 23. All in all, though, ICG’s assessment is that “the best counter-terrorism in FATA” is “the rule of law” (International Crisis Group, at 31-33).

⁵¹. NATO, “Strategic Concept of Employment for Unmanned Aircraft Systems in NATO” (2010), online: <http://www.japcc.org/wp-content/uploads/UAS_CONEMP.pdf> at 2.

⁵². Kenneth Anderson & Matthew Waxman, “Law and Ethics for Robot Soldiers” (December 2012) Policy Review.

⁵³. UN, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*, UNHRCOR, UN Doc. A/HRC/23/47 (9 April 2013).

⁵⁴. *Ibid.* at para 27.

⁵⁵. Jordán & Baqués, *supra* note 17 at 139.

banned all along.⁵⁶) More generally, ICAO has excluded fully autonomous aircraft from their flying permits, at least for the time being:

All UA, whether remotely-piloted, fully autonomous or a combination thereof, are subject to the provisions of Article 8.⁵⁷ Only the remotely-piloted aircraft (RPA), however, will be able to integrate into the international civil aviation system in the foreseeable future. The functions and responsibilities of the remote pilot are essential to the safe and predictable operation of the aircraft as it interacts with other civil aircraft and the air traffic management (ATM) system. Fully autonomous aircraft operations are not being considered in this effort, nor are unmanned free balloons nor other types of aircraft which cannot be managed on a real-time basis during flight.⁵⁸

But again, this is not the topic of this article, which is focused on weapons that are under the permanent control of an, albeit distant, individual.

III. DRONE SYSTEMS AS MEANS OF WARFARE

One of the core principles in the law of war, as set out in Article 35 of Protocol I to the Geneva Conventions, is that “in any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited.”⁵⁹ Drones being a relatively new means of warfare, it seems relevant to check whether they meet the requirements of lawful weapons (under the Article 35 definition). As a matter of fact, there are few rules in customary international humanitarian law concerning weapons. Basically, as the International Committee of the Red Cross (ICRC) has established, humanitarian law says that the “use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited” (rule 70); and that the “use of weapons which are by nature indiscriminate is prohibited” (rule 71).⁶⁰ Thus, any weapon that *necessarily* causes such excessive

⁵⁶. Peter Asaro, “On banning autonomous weapon systems: human rights, automation, and the dehumanization of lethal decision-making” (2012) 94:886 *International Review of the Red Cross* 687.

⁵⁷. Article 8 of the ICAO *Convention* states: “No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization”. See *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295 at art 8.

⁵⁸. International Civil Aviation Organization, “Unmanned Aircraft Systems (UAS),” ICAO Doc. Cir 328, AN/190 (2011) at 3.

⁵⁹. International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977, online at < <https://www.icrc.org/ihl/WebART/470-750044?OpenDocument> > [Protocol I] at art 35.

⁶⁰. Jean-Marie Henckaert & Louise Doswald-Beck, *International Committee of the Red Cross: Customary International Humanitarian Law. Volume 1: Rules*, (New York, NY: Cambridge University Press, 2009) at 237-250.

injuries or suffering or *cannot* be addressed to a specific military target should be considered prohibited and never be used. It is important to note that for a weapon to be prohibited those negative effects must be inherent or co-natural rather than incidental.⁶¹

On top of these rather broad provisions, specific weapons usually meeting the above standards have been forbidden through specific treaties, most of which can currently be considered a part of international customary law. These include poisonous, biological and chemical weapons, expanding and explosive bullets, landmines, among others.⁶² Armed drones have not been the object of any such treaty, nor are there any common international standards about their design, manufacture or stockpiling, let alone about their actual use; this means that the only standards that can be put forward are those established in Rules 70 and 71 cited above.

It would seem hard to argue that drone systems are “indiscriminate in nature.” On the contrary, they are praised for their precision: “[u]nmanned drones provide a precise method for discriminating between the civilian population and the lawful target, thus decreasing the overall casualties of an attack;”⁶³ they are “claimed to do less collateral damage.”⁶⁴ The problem of such assertions comes when one analyses the immense percentage of erred hits by drones, that is, the amount of civilian casualties caused by drone strikes. According to a conservative estimate, “the 114 reported drone strikes in northwestern Pakistan from 2004 [to 2010] have killed between 830 and 1,210 individuals, of whom 550 to 850 were described as militants in reliable press accounts ... Thus, the true civilian fatality rate since 2004 ... is approximately 32 per cent.”⁶⁵ Other sources lower the “success percentage of the US Predator strikes...to not more than six per cent”⁶⁶ and affirm that “[w]ithout a pilot, who potentially has a better ability to distinguish between civilian and militant targets at the time of a strike, drones lack the capability to, on site, factor in the fact that civilians and militants reside co-terminously in the vicinity of the planned attack.”⁶⁷ According to other sources, many of those “militants” were in fact civilians that the US targeted in “signature strikes” that I shall

⁶¹ Melzer, *supra* note 8 at 27.

⁶² Henckaert & Doswald-Beck, *supra* note 60 at Part IV.

⁶³ Kenneth Anderson, *Targeted killing in US counterterrorism strategy and law*, Working Paper 8 (2009), online (SSRN): <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415070>.

⁶⁴ Hazelton, *supra* note 7 at 30.

⁶⁵ Bergen & Tiedemann, *supra* note 27 at 1, 3. Note that this is a serious, albeit very conservative estimate, of authors that claim that “Drone attacks in the tribal region seem to remain the only viable option for the United States to take on the militants based there who threaten the lives of Afghans, Pakistanis, and Westerners alike” (Bergen and Tiedemann, at 6). Thus, no ‘pacifists’ or anti-drone chums.

⁶⁶ Shah, *supra* note 50 at 126.

⁶⁷ *Ibid.* Improved data in the last few months seems to be due to a new cheating approach of the administration: “the current [US] administration seems to have introduced a method for counting civilian casualties which automatically presumes that all males of fighting age present

discuss later,⁶⁸ and, in fact, “the United States does not offer clear information on how they recognize civilians and ‘combatants’ in drone strikes.”⁶⁹ Reports by Amnesty International (on Pakistan) and Human Rights Watch (on Yemen) also show an immense ratio of civilian casualties, probably due to wrong intelligence and/or a too wide a concept of “combatant.”⁷⁰ Authors argue that drone targeting is necessarily based on intelligence obtained on the ground,⁷¹ which can sometimes be biased by political rivalries alien to the goals of the attacking power: “[r]esidents in FATA also believe that informants possibly provide false information and exploit their position to settle vendettas with local rivals.”⁷² But, this is not a problem about accuracy of the weapon, but about the precision of the necessary intelligence to use it.

Likewise, as for the prohibition of *excessively injurious weapons*, authors tend to agree that:

Where armed drone operations have inflicted excessive harm on targeted persons, the reason lay not in the excessively injurious nature of the weapon used, but in the failure of the human planners and operators to comply with the prohibition of attacks against persons hors de combat and, thus, in a failure to respect the principle of distinction rather than the prohibition of unnecessary suffering.⁷³

Thus, as with any other “bomb,” missiles launched by drones will kill, maim, and produce other injuries on individuals that are “reasonable.” But again, there would be something unique to drones and how they are used that is “extremely insidious.” According to the NYU-Stanford ‘Living Under Drones’ project:

The presence of drones and capacity of the US to strike anywhere at any time led to constant and severe fear, anxiety, and stress, especially when taken together with the inability of those on the ground to ensure their own safety. Further, those interviewed stated that the fear of strikes undermines people’s sense of safety to such an extent that it has at times affected their willingness to engage in a wide variety of activities, including social

in the area of a planned attack are combatants, unless intelligence collected *after [sic!]* the attack proves otherwise.” See Melzer, *supra* note 61, at 25; and ICG, *supra* note 50 at 10.

⁶⁸ Cavallaro, Sonnenberg, & Knuckey, *supra* note 25 at 48-52.

⁶⁹ Alcides Eduardo dos Reis Peron, “The ‘Surgical’ Legitimacy of Drone Strikes? Issues of Sovereignty and Human Rights in the Use of Unmanned Aerial Systems in Pakistan” (2014) 7:4 JSS 81 at 86.

⁷⁰ Amnesty International, *supra* note 6; Human Rights Watch, “Between a Drone and Al-Qaeda” The Civilian Costs of US Targeted Killings in Yemen” (22 October 2013), online: <<https://www.hrw.org/report/2013/10/22/between-drone-and-al-qaeda/civilian-cost-us-targeted-killings-yemen>>.

⁷¹ Hazelton, *supra* note 7 at 8.

⁷² ICG, *supra* note 50 at 11.

⁷³ Melzer, *supra* note 8 at 28.

gatherings, educational and economic opportunities, funerals, and that fear has also undermined general community trust. In addition, the US practice of striking one area multiple times, and its record of killing first responders, makes both community members and humanitarian workers afraid to assist injured victims.⁷⁴

Certainly, the excessive psychological effects of drones on civilians and militants alike is not a matter of the technology itself but rather about how it is used in that particular theater of operations (specifically Federally Administered Tribal Area (FATA) regions in Pakistan). Having said that, it could be argued that since drones are used primarily in this fashion (permanent surveillance and targeted killing),⁷⁵ they can meet the standard of customary international law as a weapon normally causing “superfluous injury or unnecessary suffering.” Although it is an interesting argument, it must be admitted that the International Court of Justice set a high standard for these considerations when it found itself incapable of determining that nuclear weapons, probably the most clear-cut example of a weapon that is indiscriminate in nature and necessarily causes superfluous injuries and unnecessary suffering, were intrinsically unlawful under international humanitarian law.⁷⁶ Thus, it is unlikely that such reasoning would succeed before any jurisdictional forum.

In order to ascertain whether drones are *per se* lawful weapons, this technology should have undergone a verification process in accordance to Article 36 of Protocol I to the Geneva Conventions:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.⁷⁷

This obligation is fairly loose. In the worst case scenario, not compliance could be considered a violation of treaty law, but the fact is that the ICRC itself has not included anything similar to this duty within its compilation of customary international humanitarian law.⁷⁸ In particular, as the US is not

⁷⁴ Cavallaro, Sonnenberg, & Knuckey, *supra* note 25 at 55. Journalist David Rohde, in his account of being held hostage by the Taliban, wrote that “the buzz of a distant propeller is a constant reminder of imminent death” (quoted by ICG, *supra* note 70 at 11).

⁷⁵ Cheri Kramer, “The Legality of Targeted Drone Attacks as US Policy” (2011) 9:2 Santa Clara J of Intl L at 380. This being so because, as mentioned earlier, current drone technology makes them very vulnerable in conventional air warfare.

⁷⁶ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (8 July 1996), ICJ Reports 1996, 226.

⁷⁷ ICRC, *Protocol I*, *supra* note 59 at art 36.

⁷⁸ *Ibid.*

a party to the Protocol, it has no direct duties in this respect. On top of that, Jean Pictet acknowledges that this internal determination of the legality of a new weapon cannot be supervised by any international body and that even if the State finds that such new weapon is illegal under the criteria set up in Article 35, it is not obliged to disclose such information.⁷⁹ In other words, the fact that there is no way to know whether the different states involved in the development of drone technology have or have not taken the features of such weapons into consideration in terms of them being necessarily indiscriminate or excessively harmful cannot be considered *per se* a violation of Article 36.

Moving a step forward however, drone technology is fit to be combined with other weapons that could be prohibited.⁸⁰ For instance, the UK Ministry of Defense is said of having considered the miniaturization of systems that would enable future “micro-drones” to be weaponized to act as “antipersonnel devices, presumably by way of poisonous injection.”⁸¹ We fully agree with Melzer when he argues that “the general prohibitions and restrictions of weapons law apply fully also to all types of weapons which may be mounted on drones.”⁸² But then again, this is nothing specific of drone technology. If a poisonous weapon, a chemical weapon, or a landmine was to be thrown from a conventional manned airplane, it would very probably be an illegal act of war, but it would not *ipso facto* make the aircraft technology illegal.

IV. THE USE OF COMBAT DRONES BEYOND NATIONAL TERRITORY: CONSENT AND SELF DEFENSE

Before moving into the specific use of drones in targeted killing, a word seems necessary about the implication of the use of drones in general international law. In principle, not much should be needed since there are little specificities in this field as compared to any other technology.

1. *The role of consent of the territorial State*

The first issue, of state consent, is raised both in the context of surveillance drones, as well as drones used for targeted killings, within or without an armed conflict, as long as they happen beyond national jurisdiction. It relates to sovereignty over airspace, an area that is globally acknowledged

⁷⁹. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977), Comments, online: <<http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=FEB84E9C01DDC926C12563CD0051DAF7>> at para 1479-1482 (last visited 2 July 2015).

⁸⁰. Melzer, *supra* note 8 at 10.

⁸¹. *Ibid.* at 9; Jordán & Baqués, *supra* note 17 at 37.

⁸². *Ibid.* at 27.

to belong exclusively to the territorial State.⁸³ In this respect, it is true that the international community has given itself a number of instruments that tend to fulfill the “freedom of the skies”, but such freedoms only apply for commercial aviation.⁸⁴ On the contrary, “aircraft used in military, customs, and police services,” are not covered by the 1944 Chicago Convention on International Civil Aviation and require special agreement for flight.⁸⁵ The non-consensual flight of any aircraft for whichever purpose over territorial airspace is a violation of State’s sovereignty, that is, the territorial State must give a “valid consent” over the flight of a drone (or any other flying device) in order for it to be lawful.⁸⁶

When we refer to combat drones using force, this alleged preclusion of wrongfulness must face the fact that Article 26 of the Draft Articles on State Responsibility limits this to acts of states which are not in violation of obligations “arising under a peremptory norm of general international law,” including the use of force.⁸⁷ Notwithstanding, in the best known cases of use of drones, armed force is not used “against a State”, but against certain armed elements “within a State” that fight against its government and thus, allegedly, have its consent. For instance, in the case of Afghanistan, it has been argued that a coalition formed by Taliban and al-Qaeda elements is at war (in a non-international armed conflict) with the Afghan Government, which is supported by NATO (ISAF).⁸⁸ Thus, there is ‘consent’ by the Afghan Government to foreign powers exerting force in its territory, including flying and using armed drones.⁸⁹ The same seems to be applicable in other theaters since, according to some sources, US “drone operations [in Yemen] are executed in coordination with the [recognized] governments of Yemen and Saudi Arabia.”⁹⁰

However, one specific case shows the difficulties in establishing the real existence of such consent: the notorious strikes in certain remote areas of Pakistan (FATA) systematically hit by US drones since 2004. According to

⁸³. Rebeca MM Wallace & Olga Martin Ortega, *International Law*, 6th ed (London: Sweet & Maxwell, 2009) at 113.

⁸⁴. Chia-Jui Cheng, *The Use of Air and Outer Space Cooperation and Competition: Proceedings of the International Conference on Air and Outer Space at the Service of World Peace and Prosperity, Held in Beijing from 21-23 August 1995* (Dordrecht: Martinus Nijhoff Publishers, 1998).

⁸⁵. ICAO Convention, *supra* note 58 at 15, art 3.

⁸⁶. *Responsibility of States for Internationally Wrongful Acts*, International Law Commission, UNGA Resolution 56/83 (12 December 2001) at art 20.

⁸⁷. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001*, (2001) Yearbook of the International Law Commission, vol II, Part 2 [*Draft Articles*] at art 26.

⁸⁸. Kramer, *supra* note 75 at 382-83.

⁸⁹. Obviously, the fact that the Security Council has authorized the deployment of ISAF may render the issue of consent by the Afghani Government irrelevant. But since the drone strikes seems to be carried out not by ISAF proper but directly by the US Government - and in fact not by its military, but by a civil agency (CIA) - the fact that the Afghani Government agrees on such strikes becomes important again.

⁹⁰. Saiz, *supra* note 4.

one source, "Pakistan initially appeared to support US strikes covertly. From 2004 through at least 2007, the Pakistani government claimed responsibility for attacks that had, in fact, been conducted by the US, thus allowing the US to deny any involvement."⁹¹ According to Amnesty International, "former President and Army Chief Pervez Musharraf acknowledged that he had given the USA qualified permission to undertake some US drone strikes in the Tribal Areas during his tenure, which ended in August 2008."⁹² As strikes have increased, however, so has the Pakistani public's opposition to them, although this has not impeded the Pakistani government to adopt a position of "tacit support" to US drone strikes.⁹³ According to a local international lawyer, "albeit unofficially, there does exist a kind of a defective 'go ahead.'"⁹⁴ Other authors disagree:

The Prime Minister of Pakistan, Yousuf Raza Gilani, has on numerous occasions officially condemned such attacks, and has termed them a violation of the sovereignty of Pakistan and a dangerous course of action that fuels militarism. He has urged the US administration to immediately bring a halt to halt such operations.⁹⁵

According to a report of the International Crisis Group, "Almost nine years after the US conducted its first drone strike in [the] FATA, Pakistan has yet to lodge a formal complaint to the UN Security Council," and "continues to clear airspace for the drones" which "the Obama administration interprets as tacit consent."⁹⁶

Even if such "tolerance" exists, "[t]he informal go ahead is not being viewed as sufficient by international lawyers to confer ... legitimacy."⁹⁷

⁹¹ Cavallaro, Sonnenberg, & Knuckey, *supra* note 25 at 15. In 2008, according to cables released by WikiLeaks, Pakistan's Prime Minister reportedly told US Embassy officials, "I don't care if they [conduct strikes] as long as they get the right people. We'll protest in the National Assembly and then ignore it." In 2009, both Pakistan's Prime Minister and its Foreign Minister publicly celebrated the drone strike that killed Baitullah Mehsud, the alleged leader of Tehreek-e-Taliban, Pakistan (TTP), an armed group that launches terrorist attacks within Pakistan (*ibid.*).

⁹² Amnesty International, *supra* note 5 at 53.

⁹³ *Ibid.*

⁹⁴ Ahmar Bilal Soofi, "A CRSS Discussion Forum Reports. The Legality of Drone Attacks" (Remarks of Mr. Ahmar Bilal Soofi at Centre for Research and Security Studies (CRSS)) (Islamabad, 30 June 2010), online: <<http://crss.pk/downloads/Events%20and%20Media/CRSS-Roundtables/Legality-of-Drone-Attacks/The%20Legality%20of%20Drone%20Attacks.pdf>>.

⁹⁵ Shah, *supra* note 50 at 114. Amnesty International describes also this official rejection of US policy. According to a spokesperson of the Pakistan government quoted in their report: "drone strikes are violative of Pakistan's sovereignty and territorial integrity, are violative of international law and are counterproductive because they do not serve their purpose but create a thirst for revenge." See Amnesty International, *supra* note 6, at 53.

⁹⁶ ICG, *supra* note 52 at 5.

⁹⁷ Soofi, *supra* note 93.

It is true that usually consent is not formalistic in international law,⁹⁸ but sometimes it is, particularly when the Chicago Convention calls for a “special agreement,” or when we are dealing with the use of armed or police force in the territory of a third country. In respect of Article 20 of the Draft Articles on State Responsibility, the International Law Commission (ILC) has said that “certain modalities need to be observed for consent to be considered valid. Consent must be freely given and *clearly established*.”⁹⁹ It is beyond doubt that the government’s consent requires an unambiguous, if not written and formal, agreement. This does not seem the case in Pakistan, where “while responding to reports claiming that Pakistan had privately backed such operations and allowed the use of its airfields, the Prime Minister categorically denied any such agreement between the two nations.”¹⁰⁰ Moreover, it should be noted that the International Court of Justice (ICJ) has been very strict in considering the scope of a presumed “consent” to use force in one’s territory against a non-state actor. In the *Congo-Uganda* case, the Court draws its attention to the fact that consent “given to Uganda to place its forces in the DRC, and to engage in military operations, was not open-ended,” and that, at a certain point, “any earlier consent by the DRC to the presence of Ugandan troops on its territory” had been withdrawn.¹⁰¹

Consent may thus be a good argument in terms of the legality of overflying someone else’s airspace and even using armed force in it, as long as it is validly and clearly expressed and covers precisely the whole range of the otherwise illegal act.¹⁰² This consent, however, does not validate whatever happens in such airspace and territory and, in fact, it may also imply the co-responsibility of the territorial State in whichever breaches of international law the US or another power may be committing in their territory.¹⁰³

2. *Self-defense*

This leads to the second argument and its implications: that the US, in countries such as Pakistan, Afghanistan, Yemen, and other theaters would be exercising its “inherent right to self-defense,” as set out in Article 51 of the UN Charter “against Al-Qaeda, a non-State actor.”¹⁰⁴ According to President Barack Obama:

⁹⁸ Wallace and Ortega, *supra* note 83 at 4 and 15.

⁹⁹ *Draft Articles*, *supra* note 87 at 73.

¹⁰⁰ Shah, *supra* note 50 at 114. Shah adds: “The legislative Parliamentary Committee on National Strategy echoed the same sentiment, calling for an immediate end to US attacks on Pakistani soil and terming them a violation of the nation’s territorial integrity” (*ibid.*).

¹⁰¹ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] ICJ Rep 168 [*Congo-Uganda*] at paras 52-53.

¹⁰² *Per Draft Articles*, *supra* note 87 at art 20.

¹⁰³ Amnesty International, *supra* note 5 at 54-55.

¹⁰⁴ Melzer, *supra* note 8 at 22; Andrew C Orr, “Unmanned, Unprecedented and Unresolved: The Status of American Drone Strikes in Pakistan under International Law” (2011) 44 *Cornell*

Under domestic law, and international law, the United States is at war with al-Qaeda, the Taliban, and their associated forces ... a war waged proportionally, in last resort, and in self-defense.¹⁰⁵

This argument would be put forward in response to the obvious perception that the use of *armed* drones in third states constitutes, in itself, an act of aggression or at least an armed attack. An armed attack that (in their understanding of reality) would be justified as a response to the 9/11 attacks or to international terrorism in general, or to terrorism directed against US interests, as part of the infamous “Global War on Terror.”¹⁰⁶ Such reasoning implies a serious misunderstanding of core norms of international law.

Bombing someplace or someone with an armed device such as drones falls fully *prima facie* in the definition of “aggression” agreed by the international community in UN General Assembly Resolution 3314 (XXIX) of 1974.¹⁰⁷ Among the different acts that constitute an “aggression,” this includes: “[b]ombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.”¹⁰⁸ More recently, an amendment to the Statute of the International Criminal Court has confirmed this wording.¹⁰⁹ Though combat drones are not explicitly mentioned (no weapon is) their strikes clearly fall within the concept of “bombardment.” The fact that they often belong to the CIA rather than to the military does not preclude it from being considered an “act of State.” There is a strong presumption that a first use of force is illegal under contemporary international law;¹¹⁰ meaning that the burden of proof that such strike was justified under self-defense belongs to the State using armed force. In this respect, Resolution 3314 (XXIX) defines that “the first use of armed force by a State in contravention of the Charter shall constitute *prima facie*

Intl LJ 729, at 738. The same has been argued for instance by Israel in relation to the Palestinian Occupied Territories, but the International Court of Justice rejected the argument in its Wall Opinion (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion), 9 July 2004, ICJ Reports, 136 at para 139):

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defense. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

¹⁰⁵ Office of the Press Secretary, *supra* note 1 at 3.

¹⁰⁶ Dworkin, *supra* note 37 at 5.

¹⁰⁷ *Definition of Aggression*, GA Res 3314 (XXIX), UNGAOR, 29th Sess, Supp 31, 142 UN Doc A/0631 (1974).

¹⁰⁸ GA Res 3314 (XXIX), *supra* note 106 at art 3(b) [Annex].

¹⁰⁹ See (the new) art 8 *bis* of the ICC Statute, inserted by resolution RC/Res.6 of 11 June 2010.

¹¹⁰ Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963) at 214.

evidence of an act of aggression."¹¹¹ If the US truly believes that its strikes in different theaters are acts of self-defense, it should notify the Security Council. According to Dinstein, following the ICJ *Nicaragua-US* case, "[t]he duty of reporting becomes a substantive condition and a limitation on the exercise of self-defense."¹¹² There is no news about the United States reporting "its carrying out drone attacks on Pakistani territory to the S.C. [*sic*] as an exercise of this right of self-defense as mandated by article 51."¹¹³

Neither the drafting history nor customary law suggests that the principle of self-defense could be applied to any actor different than sovereign states. As a matter of fact, the ICJ "has never authorized another State to intervene by the use of force against non-State groups in violation of another sovereign's space."¹¹⁴ For instance, when considering allegations of Uganda acting in self-defense against a non-State actor in the *Congo-Uganda* case, the ICJ refused it, for Uganda had "not ever claimed that it had been subjected to an armed attack by the armed forces of the DRC [or] by armed bands or irregulars sent by the DRC or on behalf of the DRC."¹¹⁵

Thus, there is no such thing in international law as "self-defense against terrorist groups," even when territorial states are not very collaborative. In this respect, could anyone imagine the United Kingdom bombing the Republic of Ireland during the IRA years (or bombing the US, by the way, where the IRA used also to obtain funding); or Spain doing the same in France in the height of ETA's power?

Self-defense is a *necessary and proportional* armed response to an *armed attack*.¹¹⁶ Even if *anticipatory* self-defense may be permissible under international law,¹¹⁷ in the sense of reacting to an attack that has already started but not yet hit, so-called *pre-emptive* self-defense, (attacking a State that may or may not carry out an attack in the future), is an act of aggression on its own.¹¹⁸ Whether they are a reprisal for the 9/11 attacks, or aimed at exterminating al-Qaeda's leadership in order to prevent future terrorist attacks, US drone attacks in Pakistan, Yemen, and other theaters are "preemptive in nature,"¹¹⁹ not acts of self-defense. If they respond to prior or potential terrorist attacks (or "a use of force of lesser gravity," in the terms used by the ICJ in the *Nicaragua-US* case),

¹¹¹ GA Res 3314 (XXIX), *supra* note 106 at art 2 [Annex].

¹¹² Yoram Dinstein, *War, Aggression and Self-Defense*, 4th ed (Cambridge: Cambridge University Press, 2005), at 216.

¹¹³ Shah, *supra* note 66 at 115.

¹¹⁴ Peron, *supra* note 68 at 88. This is acknowledged by authors like Orr, *supra* note 104 at 738.

¹¹⁵ *Congo-Uganda*, *supra* note 99 at para 146.

¹¹⁶ See *UN Charter* at art 51, as interpreted by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, 27 June 1986, ICJ Reports [*Nicaragua-US*] at para 194.

¹¹⁷ Orr, *supra* note 104 at 740.

¹¹⁸ Jaume Saura, "Legalidad de la Guerra moderna a propósito de la invasión de Irak" in Concha Roldan *et al.*, *Guerra y paz en nombre de la política* (Madrid: Calamar Ediciones, 2004) at 126-128.

¹¹⁹ Shah, *supra* note 50 at 116.

they cannot “give rise to an entitlement to take ... countermeasures involving the use of force”.¹²⁰

Terrorism is a matter of public order and law enforcement, which should be addressed by police means and due process;¹²¹ not of warfare.¹²² Transnational or international terrorism is no different, as the 13 treaties adopted under the auspices of the UN and its agencies against this phenomenon show.¹²³ It is to be addressed via international police and judicial cooperation, not by the use of armed force, notwithstanding the gravity of the terrorist attack:¹²⁴ “terrorism is best countered by rule of law both within and between countries because the global nature of terrorism requires international cooperation.”¹²⁵

International terrorism is a threat to peace and security, but terrorist attacks are not armed attacks in the appropriate sense. The fight against terrorism requires international cooperation and institutional action, not self-defense. From a global perspective, UN Security Council Resolution 1269 (1999) was meant to be the roadmap of the international community to fight international terrorism and it indeed established that terrorism “endangers the lives and well-being of individuals worldwide as well as the peace and security of all states.”¹²⁶ But this resolution is neither framed in Chapter VII of the UN Charter,¹²⁷ nor does it refer to the right to self-defense.¹²⁸ Two years later, SC Resolution 1368 (2001) condemned the 9/11 attacks “[like] any act of international terrorism, as a threat to international peace and security,” but neither this nor further Resolutions establishing international terrorism to be a “threat to international peace and security” have considered “terrorist attacks” as “armed attacks” in the sense of Article 51 of the UN Charter.¹²⁹ There is little

¹²⁰ Dinstein, *supra* note 111 at para 249.

¹²¹ Michael L Gross, “Assassination and Targeted Killing: Law Enforcement, Execution, or Self-Defense” (2006) 23:3 J of Appl Philosophy 329.

¹²² Shah, *supra* note 50 at 128.

¹²³ See their text and status online: <http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml> (last visited 2 July 2015).

¹²⁴ See a description of the international treaty framework against terrorism in: Jaume Saura, “Some Remarks on the Use of Force Against Terrorism in Contemporary International Law and the Role of the Security Council” (2003) 26:1 Loy LA Intl & Comp L Rev at 8-13.

¹²⁵ Kramer, *supra* note 75 at 391.

¹²⁶ SC Res 1269, UNSCOR, 54th Sess, 4053rd mtg, UN Doc S/RES/1269 (1999).

¹²⁷ I.e., “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” Charter of the United Nations, 26 June 1945, 1 UNTS XVI, Can TS 1945 No. 7 [UN Charter] at Ch 7.

¹²⁸ Saura, *supra* note 118 at 17.

¹²⁹ Security Council Resolution 1368 (2001) [on Threats to international peace and security caused by terrorist acts], SC Res 1368, UNSCOR, 4370th mtg, UN Doc S/RES/1368 (2001), and Security Council Resolution 1373 (2001) [on Threats to international peace and security caused by terrorist acts], SC Res 1373, UNSCOR, 4385th mtg, UN Doc S/RES/1373 (2001) are both ambiguous in this respect as they “remind” in their respective preambles about the “inherent” right of all States to self-defense.

evidence, beyond US statements and practice, of the international community accepting that a terrorist attack is to be considered an armed attack.¹³⁰

In an unbelievable twist of the self-defense argument, certain authors and officials seem to affirm that Article 51 of the Charter—on the prior, inherent, right to self-defense—allow strikes against the specific individual who is “attacking” (or more often, is *about* to attack) US interests. Thus, “...The ongoing threat from *militants* in Pakistan also justifies the use of anticipatory force against *persons* planning or working towards future attacks against the United States.”¹³¹

There is here a tremendous conflation between a norm of international law, dealing with international subjects, and national criminal law, where an individual can defend him or herself from the attack of a thug or “law enforcement officers [may use] lethal force when either their lives or the lives of bystanders and in immediate danger.”¹³² This is a confusion that, willingly,¹³³ forgets that, if we are in the realm of national criminal law, then the matter turns to be one of “enforcement,” not of “use of force”, and thus the law of human rights is fully applicable.¹³⁴ “the domestic criminal system of states should be employed to punish reprehensible behavior carried out by non-state actors.”¹³⁵ In this framework, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide very reasonable guidelines,¹³⁶ for instance that the “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”¹³⁷ This leads us irremediably to the discussion of the legal qualification of targeted killing.

¹³⁰ Note that huge terrorist attacks committed against countries different from the US (Indonesia, 2002; Spain, 2004; UK, 2005, etc.) by foreign terrorists have never taken these countries to threat or use force against the countries from which these individuals came from or where they prepared their attacks. On the contrary, they were arrested, prosecuted and convicted in a fair trial, in accordance with domestic law.

¹³¹ Orr, *supra* note 104 at 741. President’s Obama address is ambiguous in this respect as he talks about targeting “al-Qaeda and its associated forces” (thus, ‘groups’), but immediately refers to ‘individuals’ and ‘terrorists’ “who pose a continuing and imminent threat to the American people.” Office of the Press Secretary, *supra* note 1 at 3.

¹³² Gross, *supra* 121 at 324-25.

¹³³ According to Dworkin, “[a] 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.” See Dworkin, *supra* note 37 at 5.

¹³⁴ Others argue that “the fundamental flaw of this argument in its inherent conflation of *jus ad bellum* and *jus in bello*.” See Kramer, *supra* note 74 at 395.

¹³⁵ Shah, *supra* note 50 at 128.

¹³⁶ *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–7 September 1990), UN Doc A/CONF.144/28/Rev.1 (1990) Ch 2 at 112.

¹³⁷ *Ibid.*

3. Targeted killing by drones

Drone technology poses a number of challenges to a wide variety of issues in international human rights, for instance for privacy, if they are used as a method of surveillance or espionage in peaceful and democratic contexts,¹³⁸ as well as international humanitarian law for classic *jus in bello* matters, such as the compliance with the principle of distinction in specific operations. But drones have attracted media attention and become controversial for targeted killing: again, though targeted killing is neither specific nor first appeared with this technology,¹³⁹ it has known a huge surge since the inception and development of armed drones. In Pakistan, for instance, “[t]he primary purpose of the US in carrying out these drone attacks is, as seen by many, an attempt to kill members of both al-Qaeda and Afghanistan’s Taliban leadership”.¹⁴⁰ As a matter of fact, it could be argued that today’s main use of armed drones in any theater is targeted killing.¹⁴¹

4. The right to life

When discussing the willful deprivation of the life of *any* individual committed by *any* Government, the first framework that should be taken into consideration is that of human rights and, in particular, the right to life. The right to a fair trial is also relevant, since often these people are killed after being unilaterally declared guilty of heinous crimes by in non-judicial instance and without any possibility of defending themselves.¹⁴² Due process and the right to life are acknowledged in all relevant international human rights instruments since the Universal Declaration of Human Rights (UDHR), including the International Covenant on Civil and Political Rights (ICCPR),¹⁴³ to which the United States, Israel, all EU members, and most states possessing or seeking drone technology are Parties.¹⁴⁴

The right to life enunciated in Article 6 of the ICCPR “is the supreme right from which no derogation is permitted even in time of public emergency

¹³⁸ European RPAS Steering Group, *supra* note 9 at 12-13. An example of a festive, but potentially intrusive, use of drone technology is the video posted by the newspaper “La Vanguardia” of Barcelona covering the “Catalan Way” that about half a million individuals formed on Catalonia’s National Day of 2013 to claim for independence from Spain: La Vanguardia, “La Via Catalana, captada por un dron desde el aire” (12 September 2013), online: <<http://videos.lavanguardia.com/politica/20130911/54382318522/la-via-catalana-captada-por-un-dron-desde-el-aire.html>> (last visited 2 July 2015).

¹³⁹ Hazelton, *supra* note 7 at 30; UN, “Report of the Special Rapporteur” *supra* note 19 at para 79.

¹⁴⁰ Shah, *supra* note 50 at 116.

¹⁴¹ Kramer, *supra* note 74 at 380.

¹⁴² Gross, *supra* note 121 at 324.

¹⁴³ *International Covenant on Civil and Political Rights*, 16 December 1966, (no .14668) UNTS 999 [entered into force 23 March 1976] [ICCPR] at art 6, 14-15.

¹⁴⁴ The exception would be China. Status and Parties to the ICCPR can be found online: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

which threatens the life of the nation.”¹⁴⁵ Nonetheless, it is not an absolute right: in spite of its “inherent” nature and the fact that life must be protected “by the law,” Article 6 of the ICCPR does not outlaw the death penalty.¹⁴⁶ What it basically prohibits are “arbitrary deprivations” of life of individuals by state agents, that is “extrajudicial executions, summary executions or assassinations, all of which are, by definition, illegal.”¹⁴⁷ This duty to prevent arbitrary deprivation of life includes the “duty to prevent arbitrary killing by [the State’s] own security forces,” since “the deprivation of life by the authorities of the State is a matter of the utmost gravity.”¹⁴⁸

Within this scope, “this right is a peremptory norm of international law and can never be suspended or otherwise derogated from.”¹⁴⁹ Irrespective of the domestic situation that countries such as Afghanistan, Pakistan, Somalia, or Yemen may be enduring, and irrespective of the threats that jihadist terrorism may pose to the US and other Western powers, the right to life is to be respected in all circumstances. Even dealing with a terrorist threat, the European Court of Human Rights (ECHR) has affirmed that “the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill,”¹⁵⁰ and found a violation of the right to life as it was “not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary.”¹⁵¹

Additionally, Article 2.1 of the ICCPR limits the scope of the treaty to individuals “within the territory and under the jurisdiction” of State parties.¹⁵² Thus, territorial states consenting foreign action in their territory are clearly responsible for the violation of the right to life (as seen *supra* when discussing the limits of valid consent). But this cannot exclude the responsibility of the government performing the strike itself, since willfully depriving anyone’s life is an illegal action attributable to that State under Article 2 of the Draft Articles

¹⁴⁵ Human Rights Committee, “General Comment 6, article 6 (Sixteenth Session, 1982)” *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1 (1982) at para 1.

¹⁴⁶ The Protocol to the ICCPR banning the death penalty has a much lower number of State Parties than the Covenant itself. The US, Russia or Israel among others are not parties to it. But most European States are; and all members of the Council of Europe (again, except for Russia) are parties to Protocols 6 and 13 to the *European Convention of Human Rights* that abolish the death penalty in all circumstances.

¹⁴⁷ UNHRC, “Report of the Special Rapporteur” *supra* note 18 at para 10.

¹⁴⁸ Human Rights Committee, “General Comment 6” *supra* note 145 at para 3.

¹⁴⁹ Amnesty International, *supra* note 5 at 43.

¹⁵⁰ *McCann and Others v UK* (1995) 21 ECHR 97 GC at para 211.

¹⁵¹ *Ibid.* at para 213.

¹⁵² ICCPR, *supra* note 143 at art 2.1.

on State Responsibility.¹⁵³ Though some consider that it is “manifestly absurd” to stretch the ICCPR jurisdiction to include “violations of rights under the Covenant which State’s agents commit upon the territory of another State,”¹⁵⁴ other argue more rightly that under customary law and general principles of law, the obligation of states to refrain from arbitrary deprivation of life “does require that States refrain from deliberately infringing the right to life in their extraterritorial activities.”¹⁵⁵

5. *The legal framework of targeted killing*

According to Alston, “[a] targeted killing is the intentional, premeditated and deliberate use of lethal force, by states or their agents acting under colour of law ... against a specific individual who is not in the physical custody of the perpetrator.”¹⁵⁶ Gross proposes that “targeted killing consist[s] of, first, compiling lists of certain individuals who comprise specific threats and second, killing them when the opportunity presents itself.”¹⁵⁷ The appraisal on the lawfulness of this practice must distinguish between times of peace and war, and maybe between international and non-international armed conflict.

In times of peace, targeted killing is equivalent to extrajudicial execution. It is true that the use of lethal force may be justifiable to combat crime, as long as it is absolutely necessary and proportional.¹⁵⁸ As stated by Amnesty International, “[o]utside a situation of armed conflict, the US authorities must demonstrate, in each strike, that intentional lethal force was used when strictly unavoidable to protect life, no less harmful means such as capture or non-lethal incapacitation was possible, and the use of force was proportionate in the prevailing circumstances.”¹⁵⁹ Rightful as they are, these words overlook the fact that targeted killing by drones is never improvised. Attacks do not “happen” by coincidence, in the midst of a “situation” where one can stop

¹⁵³ See *Draft Articles*, *supra* note 87 at art 2. As we shall discuss later, in the case of drone strikes all relevant agents that intervene in the decision making and execution process (the CIA, Special Operations, the US president...) are undoubtedly “State agents” under Draft Article 2.

¹⁵⁴ Orr, *supra* note 131 at 746. He criticizes a decision of the Human Rights Committee in that respect.

¹⁵⁵ Melzer, *supra* note 9 at 18. Discussing the concept of “jurisdiction” under international human rights law, and different cases under the Inter-American Commission of Human Rights (*Alejandre*) and the European Court of Human Rights (*Bankovic*), Melzer argues that it would be highly controversial to consider that collective and depersonalized acts of war might give rise to “jurisdiction” over the affected persons: “Conversely, it is much more likely that individualized operations, such as the deliberate killing of selected individuals through extraterritorial drone attacks, would be considered to bring the affected persons within the jurisdiction of the operating State.”

¹⁵⁶ UNHRC, “Report of the Special Rapporteur,” *supra* note 18 at para 1.

¹⁵⁷ Gross, *supra* note 121 at 324.

¹⁵⁸ UNHRC, “Report of the Special Rapporteur,” *supra* note 18 at para 32; Gross, *supra* note 116 at 323.

¹⁵⁹ Amnesty International, *supra* note 6 at 43.

and reject a criminal act. Targeted killing implies an element of “intentional, premeditated, and deliberate killing by law enforcement officials,” that can simply never be lawful.¹⁶⁰ As mentioned above, since terrorist strikes—even international or transnational—are not *per se* ‘armed attacks,’ any targeted killing committed by drones within the framework of a police action against terrorism must be labeled as an extrajudicial killing: “[w]ithout due process, named killings are nothing but extra-judicial execution and murder.”¹⁶¹

In time of war, be it international or non-international, the answer must be more nuanced. Obviously, the corollary of the principle of distinction is that it is lawful to kill “combatants.” In international conflicts, combatants are “members of the armed forces of a party to the conflict or participants in a *levée en masse*,”¹⁶² in non-international conflicts, “members of State armed forces or organized armed groups of a party to the conflict.”¹⁶³ When combatants die or are wounded during hostilities, this is not “targeted killing,” because even if “lethal force” is used in an “intentional, premeditated, and deliberate” form, it is not addressed against a “specific individual.”

Thus one of the issues at stake is whether it is lawful in time of war to kill a *specific* member of the enemy army outside a context of open hostilities; also, whether *anyone* can be targeted. Apparently, the answer would be yes: “[in] international armed conflict, combatants may be targeted at any time and any place (subject to the other requirements of IHL).”¹⁶⁴ The last caveat (“subject to...”) is important and should be upgraded to international law in general, not just IHL. For instance, heads of State and government and foreign ministers enjoy full inviolability in all circumstances;¹⁶⁵ it would be illegal to target them even if they are the ‘commanders-in-chief’ of their military. But beyond Alston’s precautions, his opinion, though clearly shared by a majority of authors,¹⁶⁶ is far from unanimous. Other authors argue that “named killings” are prohibited in international humanitarian law as:

Soldiers are not criminals; they do not commit murder in the course of ordinary warfare nor can they be tried or incarcerated for their activities. At best, they

¹⁶⁰ UNHRC, “Report of the Special Rapporteur,” *supra* note 18 at para 33.

¹⁶¹ Gross, *supra* note 116 at 325.

¹⁶² Nils Melzer, “Interpretative Guidance on the notion of Direct Participation in Hostilities under international humanitarian law” (ICRC: Geneva, May 2009) 20.

¹⁶³ *Ibid.* at 27.

¹⁶⁴ UNHRC, “Report of the Special Rapporteur,” *supra* note 18 at para 58.

¹⁶⁵ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, [2002] ICJ Rep 22 at para 54:

The Court accordingly concludes that the functions of a Minister for Foreign Affairs [even more, therefore, a head of state] are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability.

That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

¹⁶⁶ Dworkin, *supra* note 37 at 748.

are agents of the states whose interests they fight to defend. Even in the worst of cases, when these states are blatant aggressors, soldiers retain a measure of innocence on the assumption that many may have been conscripted or, however misguided, believe in the justice of their cause.¹⁶⁷

In an intermediate position, Melzer argues that humanitarian law “neither provides an express right to kill, nor does it impose a general obligation to capture rather than kill,”¹⁶⁸ but in any case “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.”¹⁶⁹ Still in the view of others, the “right to kill” is limited to individuals having military operational roles in the armed group:

Individuals who accompany or support an organized armed group, but whose activities are unrelated to military operations, are not lawful military targets under the laws of war. Thus members of an armed group who play a political role or a non-military logistics function cannot be targeted on that basis alone.¹⁷⁰

If it is at least doubtful that targeted or named killing is an option in a context of an international war, the same prudence must apply to non-international armed conflicts. Since in that context the very notion of “combatant” does not exist, at least on the side of the “rebels,” only individuals who participate directly in hostilities and are members of an armed group who have a “continuous combat function” would be targetable at all times and in all places.¹⁷¹ Alston has criticized the concept of “continuous combat function,” as it determines a questionable status “given the specific treaty language that limits direct participation to ‘for such time’ as opposed to ‘all the time.’”¹⁷² Besides, the very notions of direct participation in hostilities and of continuous combat functions have grey areas, in spite of the notable efforts of the ICRC to define them with precision.¹⁷³

6. *A legal assessment of the use of drones for targeted killing in practice*

Let us see now how the above legal framework compares to reality. As discussed earlier, in order to justify targeted killings with drones the US claims to be at war, be it assisting a local Government in a non-international

¹⁶⁷ Gross, *supra* note 121 at 326.

¹⁶⁸ Melzer, *supra* note 8 at 28.

¹⁶⁹ *Ibid.* at 29.

¹⁷⁰ Human Rights Watch, *supra* note 69 at 86.

¹⁷¹ Melzer, *supra* note 153 at 66.

¹⁷² UNHRC, “Report of the Special Rapporteur,” *supra* note 18 at para 65.

¹⁷³ Melzer, *supra* note 155 at 43-68.

armed conflict or fighting terrorism in the War on Terror.¹⁷⁴ As far as we know, the main theaters where drones are being used for targeted killing are Pakistan, Afghanistan, Somalia, and Yemen.¹⁷⁵ None of these states participates in an international armed conflict nor does US military support or presence transform their conflicts in international ones, since the US is not at war with any of these governments. In these theaters, both a civil agency and the military of the US are gathering intelligence, defining and carrying out targeted killings with remotely-piloted aircraft systems.¹⁷⁶ Other countries are known to have performed targeted killings (Russia, Sri Lanka), but only Israel,¹⁷⁷ and the United Kingdom,¹⁷⁸ have joined the US in using drones for such purpose.

Afghanistan and Somalia should be objectively considered to be in a situation of non-international armed conflict, with the US giving explicit support to both governments, particularly the Afghan one.¹⁷⁹ Pakistan and Yemen are not, although in the first case, some fighting derived from the Afghan war may occur in its territory,¹⁸⁰ while the second case is controversial.¹⁸¹ It can be argued that fighting between the Yemeni government and al-Qaeda in the Arabian Peninsula (AQAP) has reached the level of an armed conflict,¹⁸²

¹⁷⁴ Dworkin, *supra* note 37 at 4-6.

¹⁷⁵ We have mentioned strikes in Pakistan and Afghanistan in other sections of this article. As for the acknowledgement of drone action in Somalia and Yemen, see Adam Entous, "The US Acknowledges its Drone Strikes" *The Wall Street Journal* (15 June 2012) online: <<http://online.wsj.com/article/SB10001424052702303410404577468981916011456.html>> (last visited 2 July 2015). For data on strikes in Pakistan, Yemen and Somalia see The Bureau of Investigative Journalism, *supra* note 7.

¹⁷⁶ Cavallaro, Sonnenberg, & Knuckey, *supra* 25 at 14.

¹⁷⁷ UNHRC, "Report of the Special Rapporteur," *supra* note 18 at paras 7, 14; Webb, Wirbel, & Sulzman, *supra* note 11, at 32.

¹⁷⁸ Cole, Dobbing, & Hailwood, *supra* note 47 at 13. Their report confirms that British drones have fired their weapons, though it does not indicate that it has necessarily engaged in "targeted killings" with drones.

¹⁷⁹ In Afghanistan, the fighting "between US forces (allied with Afghan government forces) and the Taliban meets de criteria for non-international armed conflict" (Amnesty International, *supra* note 5 at 45). In the case of Somalia, it is a non-international armed conflict that does not meet the demanding requirements of Art 1 of Protocol II to the Geneva Conventions.

¹⁸⁰ According to Amnesty International, "this would be the case if a drone strike targets a Taliban fighter in North Waziristan who is directly participating in the non-international armed conflict in Afghanistan (to which the USA is a party)." See *ibid.* at 44.

¹⁸¹ See The International Crisis Group acknowledging nonetheless the violent conflicts with the separatist South and with al-Qaeda in the Arabian Peninsula (AQAP): International Crisis Group, "Yemen: Enduring Conflicts, Threatened Transition" (3 July 2012), online: <<http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/yemen/125-yemen-enduring-conflicts-threatened-transition.aspx>> (last visited 2 July 2015).

¹⁸² Some authors argue that there clearly is a non-international armed conflict between the Yemeni Government, supported by the US, and AQAP; see Benjamin R. Farley, "Targeting Anwar Al-Aulaqi: A Case Study in US Drone Strikes and Targeted Killing," (2012) 2 American University National Security Law Brief 57, at 64-69.

but even then the US government “has not claimed to be a party alongside the Yemeni government to the Yemen-AQAP conflict. [President] Obama has said instead that the US does not carry out attacks against individuals in Yemen unless they pose a direct threat to the United States or its interests.”¹⁸³ Thus, in Pakistan and Yemen the US is ostensibly carrying out “police” or “enforcement” actions, not military ones.

Current practice in targeted killing with drones in the above theaters includes “signature strikes” and “follow-up strikes.”¹⁸⁴ There are also “kill lists” (or “personality strikes”) prepared by intelligence services.¹⁸⁵

Signature strikes are based on “pattern of life analysis” and it is particularly worrisome that the Obama administration has engaged for years in this policy,¹⁸⁶ especially in the two theaters that do *not* meet the threshold of an “armed conflict” situation:

It has been widely reported that in both Pakistan and Yemen the US has at times carried out ‘signature strikes’ or ‘Terrorist Attack Disruption Strikes’ in which groups are targeted based not on knowledge of their identity but on a pattern of behavior that complies with a set of indicators for militant activity.¹⁸⁷

Thus, if you are a bearded male of 18-50 years of age, living in the FATA or other areas and behaving in a “suspicious” way (whatever that means) you are the ideal candidate to suffer a drone strike.¹⁸⁸ Needless to say, in no case does international law, in time of peace or war, allow the targeting of individuals “based on the mere suspicion that they *may* qualify as a legitimate military target.”¹⁸⁹ Thus, these strikes violate the right to life,¹⁹⁰ and may constitute a war crime.¹⁹¹ Signature strikes are illegal in any imaginable framework.

The alternative to signature strikes are “personality strikes” that started during the Bush administration and focus targeted killings on named, allegedly high-value leaders of al Qaida or other groups.¹⁹² As stated earlier, most authors agree that killing specific individuals *in a war context* (international or

¹⁸³ Human Rights Watch, *supra* note 70 at 83.

¹⁸⁴ Melzer, *supra* note 8 at 34-35.

¹⁸⁵ Amnesty International, *supra* note 5 at 46 and 49.

¹⁸⁶ Cavallaro, Sonnenberg, & Knuckey, *supra* note 25 at 12.

¹⁸⁷ Dworkin, *supra* note 37 at 6.

¹⁸⁸ The Fact Sheet produced by the White House immediately after Obama’s speech in May 2013 shows a clear improvement in this situation when it states that “it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.” See Office of the Press Secretary, *US Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* (Fact Sheet) (Washington, DC: The White House, 2013), online: <<https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>>.

¹⁸⁹ Melzer, *supra* note 8 at 24.

¹⁹⁰ *Ibid.* at 36.

¹⁹¹ *Ibid.* at 34. Or, rather, a crime against humanity.

¹⁹² Cavallaro, Sonnenberg, and Knuckey, *supra* note 25 at 12.

not) is lawful. Everyone, including US officials, agrees that the United States is not at war *against* any of the countries on which territories drones are being used. But more importantly, the United States is not at “war” with al-Qaeda, because governments do not wage wars against terrorist groups, at least not in the legal sense. The idea dropped by President Obama that “in the not-too-distant future ... the fight against the al-Qaeda network will no longer qualify as an armed conflict”¹⁹³ has a crucial flaw: in the eyes of the rest of the world, it has *never* qualified as such. Thus only in situations where the US is assisting a government fighting a non-international armed conflict, it may be arguably legal for it to target “at any time” civilians who perform “continuous combat functions.” This is clearly not the case of Pakistan, where more than 80 per cent of *all* US drone strikes have taken place.¹⁹⁴

And then, even in armed conflict situations, it is arguable whether all or most of the US targeted strikes meet the IHL requirements. Apparently, the CIA and the US Special Operations Command provide their own target lists, which are obtained through independent, parallel processes, though they often overlap.¹⁹⁵ According to the media, President Obama supervises and authorizes each decision.¹⁹⁶ But then again, the fact that most targeted killing are decided by the CIA is worrisome: “unlike a State’s armed forces, its intelligence agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL, rendering violations more likely.”¹⁹⁷ In fact, personality strikes are premeditated killings that imply that no case-by-case analysis is being done of “whether those persons are taking direct part in hostilities *at the time they are targeted*.”¹⁹⁸

The CIA’s overwhelming implication in this affair leads us to another reflection, paraphrasing Gross: “only the target’s suspected *criminal* behavior justifies recourse to informers and collaborators”¹⁹⁹ (thus, intelligence, as that

¹⁹³ Paraphrased by Dworkin, *supra* note 37 at 7. In this respect, it is worrisome that the Human Rights Watch report says that “It is not evident that the US *remains* in an armed conflict with either Al-Qaeda or AQAP as defined by international humanitarian law.” See Human Rights Watch, *supra* note 174, at 91. This “remains” implicitly assumes that at some time the US was indeed in war against this terrorist organization in a legal sense, even if the organization affirms that this is not the case nowadays.

¹⁹⁴ See data at the site of The Bureau of Investigative Journalism, *supra* note 6. Estimates as at 31 August 2013 calculate up to 373 attacks in Pakistan since 2004, 64 in Yemen since 2002, and 9 in Somalia since 2007.

¹⁹⁵ Cavallaro, Sonnenberg, & Knuckey, *supra* note 25 at 14.

¹⁹⁶ See “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will” *The New York Times* (29 May 2012), online: <<http://nyti.ms/1DMdcjr>> (last visited 2 July 2015). The fact that the President has the final say on this issue tries to cover the “war framework” that the US wants to give to these strikes, since the US President is the commander-in-chief of the US armed forces according to art II, s 2 of the US Constitution.

¹⁹⁷ UNHRC, “Report of the Special Rapporteur,” *supra* note 18 at para 22.

¹⁹⁸ Amnesty International, *supra* note 5 at 46.

¹⁹⁹ Gross, *supra* note 121 at 326.

provided by the CIA); “this argument reverts to the logic of law enforcement” rather than to the paradigm of “conventional war.”²⁰⁰ And in the context of law enforcement, “individuals cannot be targeted for lethal attack merely because of past unlawful behavior, but only for imminent or other grave threats to life when arrest is not a reasonable possibility.”²⁰¹ As asserted by Amnesty International, “making the civilian population or individual civilians not taking direct part in hostilities the object of an attack is a war crime.”²⁰²

The more recent US policy on the use of lethal force outside areas of active hostilities does not dispel the concerns raised above.²⁰³ Stating that lethal force will only be used when capture is not feasible and no other reasonable alternatives exist to address the threat [against Americans] raises at least doubts on which threshold the US will establish to determine the lack of feasibility of capture, the existence or not of alternatives and the reality, gravity, and imminence of a specific threat.²⁰⁴ Immediately before and after the disclosure of this policy:

The US government interpretation appeared to allow the killing of an individual in the absence of any intelligence about the specific planned attack, or the individual’s personal involvement in planning or carrying out a specific attack. It stretched the concept of imminence well beyond its ordinary meaning and established interpretations under the existing international law on the right of states to self-defense.²⁰⁵

Needless to say, other alleged practices such as “follow-up strikes”, that is, conducting second attacks on wounded survivors of first attacks,²⁰⁶ or deliberately targeting rescuers at the scene of a previous drone strike,²⁰⁷ should constitute a war crime (if in war context, by principle of distinction) or otherwise an assassination.

^{200.} *Ibid.*

^{201.} Human Rights Watch, *supra* note 69 at 87.

^{202.} Amnesty International, *supra* note 5 at 46.

^{203.} All we know about this policy is what President Obama announced in his May 2013 speech and the “fact sheet” produced by the White House the same day; *supra* note 188. Both Amnesty International and Human Rights Watch have considered insufficient this disclosure of information. Amnesty has formally asked the Administration to publicize the whole of the Policy Standards. See Human Rights Watch, *supra* note 69 at 89; Amnesty International, *supra* note 5 at 51-52.

^{204.} Dworkin, *supra* note 37 at 6.

^{205.} Amnesty International, *supra* note 5 at 52.

^{206.} Melzer, *supra* note 8 at 35.

^{207.} The Bureau of Investigative Journalism, “Bureau investigation finds fresh evidence of CIA drone strikes on rescuers” (1 August 2013), online: <<http://www.thebureauinvestigates.com/2013/08/01/bureau-investigation-finds-fresh-evidence-of-cia-drone-strikes-on-rescuers/>> (last visited 12 June 2014).

V. FINAL REMARKS

Drones are unmanned aircraft, controlled remotely and in real time by human operators that serve multiple purposes, both peaceful and military. This article has focused its research on military drones that perform armed strikes, particularly against suspects of jihadism. As a military technology that is relatively new, their use has attracted the attention of scholars and the media on grounds of ethical, legal, and political soundness. Amnesty International has argued that the use of armed drones should be analyzed on a case-by-case basis, that it impossible to give general answers,²⁰⁸ and we agree that each and every drone strike should be scrutinized and evaluated against human rights and international humanitarian law. Unfortunately, the lack of transparency makes this scrutiny unfeasible.²⁰⁹ In the absence of a case-by-case analysis, however, some general considerations can be made.

The issue with drones is how they are used, at least in three areas: infringement of national sovereignty; respect of the laws of war; and respect of international human rights. In the first of these areas, beyond national jurisdiction, remotely-piloted aircraft (civil or military) can only fly over sovereign territories with the clear and valid consent of the State. If this consent exists, which could be the case of Afghanistan and Yemen, but not Pakistan, let alone Somalia, the local government would be co-responsible of the eventual infringements of international law attributable to the country operating the drones. On the other hand, drones can be used in self-defense, just like any other weapon, but only as long as they are used in an immediate, proportionate and necessary response to an armed attack attributable to a State, which are requirements that the 'War on Terror' does not meet.

When employed as means of warfare, the principle of distinction, the prohibition of perfidy, and other *jus in bello* norms apply to these weapons as they do to any other, but not more than to any other. Our first assessment is that, from an international legal perspective, armed drone technology is not and cannot be *per se* forbidden. However, if empirical evidence was to show that their *raison d'être* is targeted killing and that they are used more often than not in a way that *necessarily* violates basic principles of international humanitarian law, we may need to come back to and review this assertion. In the same line of thought, drones may perform military functions, but they should not be used in a way that terrorizes the civil population by flying constantly, threatening to launch an armed attack at any unexpected time.

Armed drones can be used in the midst of hostilities, but it is at least questionable that they target specific civilians that have risen against a foreign government. Clearly, armed drones cannot *premeditatedly* target and kill presumed terrorists. In international human rights law, it is always

^{208.} Amnesty International, *supra* note 5 at 44; and Orr, *supra* note 104 at 733.

^{209.} Amnesty International, *supra* note 5 at 49; and Kramer, *supra* note 62 at 378.

unlawful to target individuals based on the mere suspicion that they may have committed a crime in the past or may do so sometime in the future. Armed drones have become the weapon of choice in the fight of the US, with other powers potentially following, against international jihadist terrorism, in the form of “targeted” or “named” killing. The legal defense of these acts is based on the foul premise that there is a global ‘war’ against terrorism. Certainly, the line between terrorism and armed force may have become thinner in the last decades, but they are still distinct (il)legal activities,²¹⁰ that imply different legal consequences. If we are ready to cross the line that separates the use of force and law enforcement, then it should be with all consequences. For instance, if “self-defense” is to be admissible against terrorist groups, this should imply that these groups have launched a prior or immediate “armed attack” (since self-defense is only permitted in such cases, according to Article 51 of the UN Charter).²¹¹ Thus, for the sake of consistency, we would have to accept that they have used “armed force,”²¹² which would imply that international humanitarian law would be fully applicable to *both* parties. This finally would mean, among many other things, that captured terrorists would have to be considered prisoners of war, not just criminals. And if there is a “Global War on Terror,” the drone operators based in US territory, some of which are civilians, would become “legal targets of attack as DPH (direct participation in hostilities).”²¹³ If we support the idea that civilians performing “continuous combat functions” are targetable “at any time,” then these drone operators would also be, not only while they are “working,” but also when they commute to and from the office, for instance.

It is unlikely that any of the above consequences of a consistent interpretation of the current use of armed drones in the four main theaters where they have been employed by the United States would satisfy the powers that possess this technology. Thus, in being consistent it is in the best interest of the US and other powers to restrain their use of armed drones to frameworks of actual armed conflict and hostilities, against legitimate enemy combatants, and with due respect of the basic principles of international humanitarian law.

²¹⁰ Hans Corell, “Human Rights, Rule of Law, Under Threat After 9/11,” (2013) International Judicial Monitor 1 at 1.

²¹¹ UN Charter, *supra* note 127 at art 51.

²¹² In principle, this would be an *illegal* use of force. Obviously, they would not be authorized by the Security Council to use force. But, could they claim that *they* are the ones acting in self-defense? If one accepts the exotic argument that States can be at “war” with non-state entities, this should work both ways and accept that not only these actors can “attack” States, but that they can be the object of an “aggression” and thus have the right to defend themselves. Does this make any sense? In any case, be it lawful or not, international humanitarian law applies to all “armed conflicts.”

²¹³ Kramer, *supra* note 74 at 389.