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STATE AND INDIVIDUAL RESPONSIBILITY FOR TARGETED KILLINGS BY DRONES

Chantal Meloni

1. Introduction

Notwithstanding the variety of unmanned aerial vehicles (drones) and the multitude of their possible uses in daily life and civil activities - as in surveying or even for recreational purposes - drones today are mostly associated with their military use and lethal force operations. The use of armed drones in warfare, in particular as a means to execute State-sponsored targeted killings, raises serious concerns and, as we will see, undermines fundamental principles such as the right to life and ultimately the rule of law.

Although the targeted killings practice started well before the entry into use of drones, it is a fact that since this technology was made available, the recourse to targeted killing operations escalated. The number of people killed is huge: according to the most recent data up to 5.500 individuals have been killed by US drones strikes since 2004 in Pakistan, Yemen and Somalia - countries where the US are not at war - not counting the strikes in Afghanistan and Iraq - where, on the contrary, there is a declared state of war.¹

The question is whether the introduction of drones in warfare operations creates new ethical and legal issues. What I will argue is that the critical aspect is not the

¹ See the data, which are monthly adjourned, by the Bureau of Investigative Journalism, available at: <http://www.thebureauinvestigates.com>

technology as such, but rather the twist of legal principles regulating lethal operations conducted by drones. This is where States are being utterly ambiguous, blurring and expanding the limits and boundaries of concepts such as “war”, “battlefield”, “combatant”, “immediate threat” or “terrorist”. Some commentators make the argument that we would be in front of a grey zone, an unregulated space for killing between war and peace. Here I confute this argument, showing that the legal principles are there, and actually applicable, but some States are trying to shift the boundaries of what is legally permissible, invoking exceptional circumstances. However, the danger in insisting on the existence of such a grey zone is clear: once you create a state of exception you cannot control who will make use of it.

As we will further elaborate, two levels of responsibility are involved in the commission of unlawful targeted killings: the State level (at the international level) and the individual level. As to the latter one, criminal liability can come into play. Indeed, not only targeted killings are, as we will argue, mostly unlawful, thus involving the responsibility of the State, but they can also amount to war crimes and possible crimes against humanity, with the consequence that they entail the criminal responsibility of the individuals who committed them.²

Thus, the question is: under which conditions are targeted killings legal? But, most importantly, who can determine their lawfulness, given the lack of transparency by the governments and their refusal to allow any judicial oversight on “political” and “national security” issues? The current situation is particularly worrying; it can be even questioned whether it is possible at all to ascertain individual criminal responsibility of

² See *infra*, Section 5.

those who planned, ordered or conducted the kill operation, within a system that lacks any transparency and is actually designed in such a way as to condone the arbitrary deprivation of lives, when committed pursuant to a State-sponsored policy and program.

2. A major “accountability vacuum”

Drones are one of the most controversial topics in the worldwide public debate of these years. Their use in warfare, and more generally in military operations that imply the recourse to lethal force, raises a number of issues at different levels: political, moral, military, legal and philosophical. As anticipated, I will focus in particular on the legal regime applicable to the so-called targeted killing practice, both via manned and unmanned vehicles, and on the problematic issues related to this practice.

Not only this issue is currently catalysing worldwide attention and concerns,³ but also, is a crucial one to analyse the difficult interaction of the different legal regimes that regulate modern asymmetric conflicts. As noted by Philip Alston - the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions - in its 2010 report:

“In recent years, a few States have adopted policies that permit the use of targeted killings, [...] including in the territories of other States. Such policies are often justified as a necessary and legitimate response to ‘terrorism’ and ‘asymmetric warfare’, but have had the very problematic effect of blurring and expanding the boundaries of the applicable legal frameworks – human rights law, the laws of war, and the law applicable

³ Among the several works that have been published in the past years by international and criminal lawyers on this specific issue, especially in the USA, see the collective volumes by Cohn M. (ed.), 2015; Knuckey S. (ed.), 2014; Finkelstein C., Ohlin J.D., Altman A. (eds), 2012; and the fundamental, in depth study by Melzer N., 2008. For an overview of the most recent works, see the list compiled by the Bard College’s “Centre for the Study of the drone” of the best “Drone books” of 2014, available at: <http://dronecenter.bard.edu/a-winter-reading-guide-to-drones/>.

to the use of inter-state force. Even when the laws of war are clearly applicable, there has been a tendency to expand who may permissibly be a target and under what conditions. Moreover, the States concerned have often failed to specify the legal justification for their policies, to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, or to provide accountability mechanisms for violations. Most troubling, they have refused to disclose who has been killed, for what reason, and with what collateral consequences. The result has been the displacement of clear legal standards with a vaguely defined license to kill, and the creation of a major *accountability vacuum*".⁴

It is argued that the State-sponsored method of targeted killing raises serious concerns and it undermines principles as: the presumption of innocence; the right to a fair trial; the protection of the right to life; and ultimately, the rule of law.⁵ The purpose of this chapter is, in particular, to analyse the legal mechanisms aiming at assessing criminal responsibility for the commission of unlawful targeted killings.

But, before going into that analysis, let's first have a look at the general features of the targeted killings practice, in particular when committed through drones.

3. Origins and definition of the targeted killings practice

As noted by Alston in his 2010 Report, "targeted killing" is not a legal term. Despite the frequency with which it is invoked it is not defined under international law nor does it fit neatly into any particular legal framework. The term came into common usage in the year 2000, after Israel made public a policy of "targeted killings" of alleged

⁴ See Alston 2010 Report, Summary and paras 1-3 (emphasis added).

⁵ See Melzer N., 2008, p. 239.

terrorists in the Occupied Palestinian Territory during the second Intifada.⁶ Since then the term has been used in several contexts to indicate the State-sponsored practice of eliminating their “enemies” in particular in the territories of other States both in times of peace as well as during armed conflicts.

Although in most circumstances targeted killings do violate the right to life, and can also amount to war crimes, in exceptional circumstances and within a context of armed conflict they may be legal. Therefore the term “targeted killing” in general shall not be used as synonymous of “extrajudicial execution”, “summary execution” or “assassination”, which are by definition always illegal. “The means and methods of killing vary, and include sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison”⁷: Whether conducted through drones or other means, the common element of targeted killings is that lethal force is intentionally and deliberately used, with a degree of premeditation, against individuals identified in advance.⁸ In a targeted killing the specific goal of the operation is to use lethal force, which distinguishes them from unintentional, accidental or reckless killings, or killings made without conscious choice. It also distinguishes them from law enforcement operations, where the resort by the law enforcement authorities (i.e. the police) to lethal force to protect from an imminent threat can be justified, but the goal to kill the suspect/criminal cannot be the sole aim of the operation from its inception.⁹ In

⁶ Alston 2010 Report, par. 7.

⁷ Alston 2010 Report, par. 8.

⁸ However, the identification of the individuals in advance does not seem to be anymore a criteria to define the targeted killings. The signature strikes in fact are precisely conducted against non-identified people, see Heller K.J., 2013, p. 89 ss. Better then to speak of “individually selected persons”, see Melzer N., 2008, p. 3 ss.

⁹ See Alston 2010 Report.

reality, as we will see, most targeted killings do not fit either the self-defence¹⁰ or the legitimate act-of-war paradigm. They constitute premeditated deprivations of life that can only rarely be justified with the requirement of an “imminent threat” within the meaning of self-defence.¹¹

The State of Israel has the longest track on targeted killings¹² and was the first country to openly acknowledge it as a policy.¹³ Targeted killings are still extensively used by Israel, especially in Gaza, both in the context of major military operations (as during the 2014 so-called operation “Protective Edge” where drones strikes have been massively used)¹⁴ and outside of the outbreak of hostilities, to eliminate Palestinian suspects allegedly in a “surgical” way.¹⁵ Other countries are also believed to have resorted to targeted killings, in particular the United Kingdom¹⁶ and Russia, but there is less

¹⁰ As it was brilliantly noted, “the rhetoric of self-defense was one of the most frequently abused concepts of the twentieth century”, Fletcher G., Ohlin J.D., 2008, p. 3. As the authors affirm, part of the confusion around the concept stems from a basic misunderstanding about the distinct concepts of self-defence under respectively international law and (international) criminal law. One thing is in fact to legitimize the use of armed force by a State resorting to the ‘self-defence’ argument (under article 51 of the UN Charter), another is to invoke the ‘self-defence’ as an excuse for the (otherwise) criminal behaviour of individuals, for instance those in position of authority and command, with regard to the killing of criminals/enemies/terrorists. See again Fletcher G., Ohlin J.D., 2008, p. 8-11, and 30-106.

¹¹ Contra, see Kasher, in this volume. However, it shall be noted that Kasher’s argumentation seems to be based on an erroneous concept of a ‘State’s duty to self-defence’, which in fact does not exist as such under the international legal order. One thing is the *right* to self-defence, a different one is the State’s *duty* to protect its citizens from threats. Moreover, it shall not be forgotten that States also have a positive duty to protect the civilians (and not only their citizens) under their control during an armed conflict; see Rule 22 of the Customary IHL Rules by the ICRC, available at: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule22.

¹² See Alston 2010 Report, par. 13.

¹³ David S.R., 2003, p. 111-126. See also Melzer N., 2008, p. 27 ss.

¹⁴ See the Report by Dr. Atef Abu Saif, 2014.

¹⁵ On the contrary, many targeted killings conducted by Israel in Gaza are all but surgical, some of them causing dozen of innocent civilian victims. It is exemplar in this sense the case of Salah Shehadeh, who was killed on 22 July 2002 by a one tonne bomb dropped at night on his building in a highly populated area of Gaza city, causing the death of 14 innocent civilians, including eight children and injured other 150 people. See Weill S., 2009. Notably, the targeted killings practice has come under the scrutiny of the Supreme Court in Israel, but, although worried by this practice, the Court failed to declare its unlawfulness in principle, finding that the assessment must be conducted on a “case by case basis”; for a critique see Eichensehr K.E., 2007.

¹⁶ See Emmerson 2013 Report, paras 31, 49.

information available on these strikes.¹⁷ In any case, targeted killings are not solely used by the US and not exclusively against “terrorist threats” in the global “war against terror”, as confirmed by the Reports of the UN Special Rapporteurs.

Nowadays, however, the term is used in particular to indicate the US policy of eliminating suspected Al-Qaida and associated terrorists by drones. It is a fact that since 2001, and routinely since 2009, the US have carried out countless deliberate and premeditated killings of declared suspected terrorists overseas, the most famous of which is the targeted killing of Osama Bin Laden:¹⁸ many other less notorious ones have been carried out before and after that.

Numbers are not clear due to the lack of transparency by the governments, but thousands of people have been killed, including many hundreds of civilians, and the dead toll is counting while we are writing. A single strike in Yemen, on December 17, 2009, killed 41 civilians, including twenty-one children. On the 12 December 2013 another drone strike in Yemen allegedly killed a group of fifteen civilians participating in a funeral. During the month of October 2014, and despite the fact that the number of targeted killings had decisively decreased in 2014, it is reported that the CIA launched 9 strikes in Pakistan, killing between 29 and 49 people; in the same period in Yemen between 4 and 34 people (among which allegedly up to 20 civilians) were killed by at least one confirmed drone strike by the US.¹⁹

¹⁷ See Alston 2010 Report, par. 23.

¹⁸ See Ambos K. and Alkatout J., 2012, p. 341-366.

¹⁹ Bureau of Investigative Journalism, Monthly Update, October 2014, available at <http://www.thebureauinvestigates.com>

4. Targeted killings by drones as a modern warfare State-sponsored practice that requires investigation

As the number of publications on the issue in the last few years shows, targeted killings, in particular by armed drones, are in the eye of the storm. But drones are in principle not different than other targeted killings methods: a missile fired from a drone is not different from any other commonly used weapon. The basic question is the same for each weapon: whether its use complies with International Humanitarian Law (IHL) and human rights principles.²⁰ It is not the technology as such that is the problem. As it was correctly noted, in the last century there were more dramatic technological advancement with regard to weapons and warfare conduct than drones: let us think of nuclear weapons.²¹ Drones are still controlled by individuals, who are located in a chain of command, and who are responsible for the consequences of the operations: in fact these machines are not fully autonomous killer weapons.

Surely, there are clear reasons for the escalation in the use of armed drones of the last years: military speaking drones are economically advantageous and can present some advantages in terms of minimizing collateral damages.²² But most importantly they do not put at risk the life of the soldiers/pilots. As it has been noted by Gregoire Chamayou in his very interesting book on the philosophical foundations of drones, this is consistent with a sort of new principle, that of the “immunity of the combatant”, which emerged in recent times, and according to which the lives of the soldiers are more important than

²⁰ See Alston 2010 Report.

²¹ Cf. Boyle M.J., 2015, p. 106.

²² See the Emmerson 2013 Report, paras 25-28.

those of the foreign (enemy) civilians.²³ This is in contradiction with well-established principles and rules governing the conduct of hostilities.

However, this is exactly the heart of the matter: because drones make it easier to kill without risk to a State's forces, policy makers and commanders are tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively. Thus, even if in principle drones are not different than other killing techniques, the point is that drones made targeted killings more attractive for policy makers and commanders, causing an expansion in this practice.²⁴ Given these premises, some commentators also highlighted the existence of specific negative features of the drones: the risk of developing what has been called a "playstation mentality", due to the remote control through the screen and the zero risk to the forces operating the drones;²⁵ and the fact that drones are not able to conduct a capture/kill operation and can only be tasked with the killing of the target.²⁶

It is not a case that under the Obama administration, in years where the drone technology was already easily accessible, the practice to eliminate the targets have escalated and expanded. What is particularly worrying is the expansion of the targeted killings practice outside the battlefield. In fact, while some targeted killings have been carried out within armed conflicts, as in the context of the wars in Afghanistan and Iraq, many have taken place outside the context of an armed conflict. US strikes have been carried out in Yemen, Somalia, Sudan, Pakistan and the Philippines. The Obama administration has already reportedly launched eight times as many strikes as the Bush

²³ Chamayou G., 2014, p. 129 ff.

²⁴ Cf. also Boyle M.J., 2015, p. 121.

²⁵ But see Derek G., 2011, p. 197 ff.

²⁶ See also B. Koch, in this volume.

administration, in fewer years in office.²⁷ In Pakistan alone out of more than 400 strikes since 2004, 350 have been carried out under Obama, killing between 2.383 and 3.858 individuals (not to mention the injured ones).²⁸

Some scholars have noted that there was a shift in the recent counter-terrorism strategy of the US, from the capture to the direct killing of the suspects. Indeed if Bush's national security doctrine was defined by a paradigm of capture (often in the form of illegal renditions), detention and torture of enemies/suspected terrorists, Obama's aims directly at their elimination.²⁹ Yet, whilst human rights advocates were successful in building strong opposition and effective legal challenges against torture programs, such a coherent and effective opposition has still to emerge against the use of drones for targeted killing practices, leaving a massive accountability vacuum that has enabled States to pursue this practice largely unopposed.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions repeatedly asked the US to explain how they justify the use of drones to target and kill individuals. Governments "should specify the basis for decisions to kill rather than capture particular individuals [...] ensure in advance of drone killings that they comply with international law, and make [...] public the number of civilians collaterally killed as a result of drone attacks, and the measures in place to prevent such casualties".³⁰ As it was effectively summarized by Law Professor and former Defence Department advisor, Rosa Brooks, with regard to the US targeted killings program: "Right now we have the executive branch making the claim that it has the right to kill anyone, anywhere on earth

²⁷ See CCR factsheet, available at www.ccrjustice.org

²⁸ Bureau of Investigative Journalism, Monthly Update, October 2014, available at <http://www.thebureauinvestigates.com>

²⁹ See Hajjar L., 2012, available at: <http://www.merip.org/mer/mer264/anatomy-us-targeted-killing-policy>

³⁰ Alston 2010 Report, XXX.

at any time for secret reasons based on secret evidence in a secret process undertaken by unidentified officials.”³¹

Given these circumstances, growing worldwide concern is not surprising. This is testified also by the fact that, both at the national and international level, a number of Expert panels, committees’ audiences and sessions are organised specifically to address drone strikes policy, including at the European level.³² UN agencies are also intensively dealing with this issue: Beside the already mentioned Alston 2010 Report, the UN Special Rapporteur on Counter Terrorism and Human Rights, Ben Emmerson, was tasked with a wide range investigation regarding the civilian impact and human rights implications of the use of drones and other forms of targeted killings. Following an interim 2013 Report, his final report, presented to the Human Rights Council (HRC) in March 2014, examined 37 drone strikes where there are reports of civilian casualties: they included strikes committed by the US, UK and Israel in Pakistan, Afghanistan, Yemen, Somalia and Gaza (oPt).³³ According to the Special Rapporteur, these strikes require a legal duty on the relevant States to provide a public explanation of the circumstances and a justification for the use of lethal force. It is not a matter of political demand, it is a matter of accountability.³⁴ As the Special Rapporteur underscored, the States responsible for these strikes are under a present and continuing obligation to

³¹ Professor Rosa Brooks, Georgetown University Law Center, during the first public USA Senate Judiciary hearing on the use of drones, 24 April 2013.

³² See European Parliament Resolution on the Use of Armed Drones of 25 February 2014 (2014/2567 (RSP)), calling, *inter alia*, upon the High Representative for Foreign Affairs and Security Policy, the member States and the Council of the European Union to “oppose and ban the practice of extrajudicial targeted killings” and urging the Council to adopt an European Union common position on the use of armed drones.

³³ See Emmerson 2014 Report.

³⁴ See *infra*, par. 6.

disclose the results of their own fact-finding inquiries or explain why it is that no such inquiries have so far taken place.³⁵

The Report also stresses once again the “legal uncertainty” as to the principles of international law applicable to the use of deadly force in counter-terrorism operations, and the differences of State practice in this regard. These circumstances not only fail to provide adequate protection for the right to life, but also pose a threat to the international legal order and can undermine international peace and security.³⁶ In fact what the UN is aiming to achieve is a *multilateral legal framework* for drone strikes and other counter-insurgency operations. To this aim in April 2014 the UN HRC passed a resolution³⁷ pursuant to which it convened an important Panel discussion in Geneva on “the use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law”, with the participation of the relevant UN Special Rapporteurs and experts in the field.³⁸ Much is still to be done, and there are huge obstacles to win before achieving some agreement on the legal framework applicable to drones lethal operations,³⁹ but it looks like some first steps have been lately undertaken in this direction.

5. Unlawful targeted killings as violations of the right to life and possible war crimes: responsibility issues

³⁵ See Emmerson 2014 Report, par. 36.

³⁶ Ibid., par. 70 ss.

³⁷ A/HRC/Res/25/22 of 15 April 2014.

³⁸ See the summary report of the Panel, held on 22nd September 2014 at the HRC in Geneva: http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/BCE56ED914A46D40C1257D5B0038393F?OpenDocument.

³⁹ To have an idea of the difficulties, see the list of open questions in the Emmerson 2014 Report, paras. 70-71; on the issue more thoroughly *infra*, par. 6.

The issue of the permissibility under international law of the use of drones and of the targeted killing practice is an extremely complex one. What is permitted during an armed conflict (under IHL) is not always lawful outside of an armed conflict (under the law enforcement regime and human rights law). Moreover, IHL rules, regulating the conduct of hostilities, are different depending on the nature of the conflict.⁴⁰ As we will see, the clash between humanitarian law and human rights law becomes apparent precisely with regard to the targeted killings issue.

As a warfare practice, targeted killings represent a distortion, to the extent that the typical collective dimension of the ‘enemy’ is replaced by a sort of individualization and personalization of it. In this sense targeted killings do not comply with the basic logic and underlying principles regarding the conduct of hostilities, which is not to kill the enemy but to defeat him. As the ICRC stresses, the use of lethal force should be permitted only to achieve that purpose, while the focus on individualised warfare tends to distort our understanding of the inherent purpose of the conduct of the hostility.⁴¹

Moreover, there are many difficulties in applying legal categories to targeted killings in the context of contemporary asymmetric conflicts, a structural characteristic of modern-day warfare,⁴² due to the unclear boundaries of such conflicts and the related uncertainty as to the legal regimes applicable thereto. In fact, the very pillars upon which the *ius in bello* is based – such as the existence of an armed conflict; its nature, whether international or non-international; the distinction between combatants and civilians – are

⁴⁰ For a thorough analysis see Kretzmer D., 2005, p. 171-212; and again the fundamental study by Melzer N., 2008. Notably both authors, but in particular the latter, refute the position that the current legal framework had become inadequate to regulate States’ resort to lethal force; on the contrary, although extremely complex to analyse, the legal framework composed by both IHL and HR law would provide clear and unambiguous standards as to the State sponsored targeted killing operations; rather it is the State practice that, disregarding the clearly applicable legal standards, is at the heart of the problem.

⁴¹ See Melzer N., 2008, p. 241 ss; see also Koch, in this volume.

⁴² See Geiss R., 2006, p. 757 ss.

vacillating in contemporary conflicts. As a consequence, one of the basic principles of IHL, which is to avoid victims among the civilian population, is at risk because the boundary that shall distinguish the military objects from the protected civilian ones often blurs and becomes confused. Moreover, military imbalances and the non-recognition of the ‘enemy’ as ‘a legitimate party’ can push both parties to circumventing accepted rules of war: thus direct attacks against civilians, hostage taking and the use of human shields have seen a revival in recent conflicts. On the other side, military superior parties, in order to strike at their ‘amorphous enemy’, have had to recourse to indiscriminate attacks, illegal interrogation practices and renditions, as well as to targeted killings.⁴³

Let us think, for instance, of the so-called “war on terror” that the US declared after September 11, 2001 against Al-Qaeda: despite its improper name, the majority view holds that under international law the ‘war on terror’ does not actually amount to an armed conflict as a whole: thus the operations conducted by the USA and its allied forces outside the battlefield (for instance in Yemen or Pakistan) shall be governed by the more restrictive law enforcement paradigm (and not by IHL).⁴⁴

It shall be noted in this regard that the IHL regime is more tolerant than the law enforcement one (applicable outside of an armed conflict). Indeed, resort by States to targeted killings ‘outside the battlefield’⁴⁵ is permitted only in very exceptional circumstances. In particular, in order to be lawful under the normative paradigm of law enforcement, a targeted killing must: (a) have a sufficient legal basis in domestic law in accordance with the international principles on the use of lethal force; (b) be of

⁴³ Ibid.

⁴⁴ Melzer N., 2008, p. 262 ss ; see also Alston 2010 Report, par. 53.

⁴⁵ On the difficulties of defining the geographical boundaries of the ‘battlefield’ and consequently the legal regime applicable to the use of contemporary asymmetrical conflicts, see Lubell N. and Derejko N., 2013, p. 65 ss.

exclusively preventive nature (no punitive); (c) aim exclusively at protecting human life from unlawful attack; (d) be absolutely necessary for the achievement of the aim; (e) be the undesired *ultima ratio* and not the actual aim of the planned operation⁴⁶.

Differently, those targeted killings that constitute an integral part of the hostilities and are committed within an armed conflict are regulated according to IHL rules. IHL determines whether an individual can be subject to direct attack (i.e. is a legitimate military target) and provides the standards to be respected in conducting the attack (as for instance, those dictated by Art. 57(2) Add. Prot. I). If the person is a protected person under IHL (i.e. a civilian not taking part into the hostilities), then deliberate lethal force can only be used according to the very strict standards of the law enforcement paradigm. The determination of who can be a legitimate target lies of course at the heart of the problem.⁴⁷ Most problems raise with regard to non-international armed conflicts. In non-international armed conflict, contrary to the international ones, there is no such thing as a ‘combatant’.⁴⁸ States can attack only civilians who “directly participate in hostilities”. But the problem is precisely that there is no commonly accepted definition of what constitutes a direct participation in the hostilities, which has been left open to States’ (obscure) interpretation.⁴⁹

Along the same lines it is debated also whether under common Article 3 of the Geneva Conventions (dictated for non-international armed conflicts) a State is obliged to apprehend, instead of killing, suspected terrorists/enemy fighters. In fact in a non-

⁴⁶ Melzer N., 2008, p. 222-239.

⁴⁷ Alston 2010 Report, par. 57.

⁴⁸ See Sassoli M., Olson L.M., 2008, p. 599 ff.

⁴⁹ In 2009 the ICRC issued its Interpretive Guidance on ‘direct participation in the hostilities’. In non-international armed conflict, according to the ICRC, civilians who participate directly in hostilities and are members of an armed group who have a “continuous combat function” may be targeted at all times and in all places; ICRC Guidance, at 66. Whether this interpretation of the “continuous combat function” reflects in fact international customary law is still disputed: see Emmerson 2014 Report, par. 71(f).

international armed conflict non-State fighters are not protected against attack when they are taking direct or active part in the hostilities. The debate, under humanitarian law, rages over what types of activities trigger this loss of immunity and whether individuals deemed to be ‘enemy combatants’ can become legitimate targets of military operations. In other words, the application of common Article 3 standards to the above mentioned situations may not bar States from killing a suspect terrorist, even if no previous attempt was made to arrest or detain them. However, it has been suggested that reading IHL together with human rights law provisions would produce a rule that does require States to prefer the apprehension of enemies/suspected terrorists over killing them.⁵⁰ Be as it may, it is undisputable that international human rights principles do not cease to apply in time of war, as recognised since long by the International Court of Justice (ICJ); this implicates that we have to deal with a mixed system composed by IHL and human rights principles.

In fact, the most progressive doctrine considers that some fundamental human rights principles, which place to the forefront the protection of the right to life and hold the recourse to lethal force as legitimate only in the absence of less severe alternatives (*ultima ratio*), shall find application also in time of war. Thus, the following criteria have been outlined, *inter alia*, in order for a targeted killing to be lawful during an armed conflict: (a) needs to be committed as part of the hostilities; (b) be likely to contribute effectively to the achievement of a concrete and direct military advantage; (c) no there being an alternative to non-lethal force to achieve the military advantage; (d) be directed against a non-protected person; (e) not be disproportionate (in relation to the concrete and

⁵⁰ See in this sense Melzer N., 2008, p. 382 ff.

direct military advantage anticipated); (f) be planned and conducted so as to avoid erroneous targeting and minimising arming civilian objects; (g) be suspended if the targeted individual surrenders.

A thorough legal analysis would show that most of the targeted killings conducted outside the battlefield (and therefore regulated by the law enforcement paradigm) constitute premeditated deprivations of life that can only rarely be justified with unprovoked, absolute and immediate necessity within the meaning of self-defence.⁵¹ Moreover, it appears that even among those strikes conducted in the context of an armed conflict (and therefore regulated by the mixed IHL/human rights paradigm), many would be unlawful because are disproportionate. According to Article 57 of Additional Protocol I, those who plan or decide upon an attack shall:

- a. Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects [...];
- b. Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
- c. Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Moreover, “the attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may

⁵¹ Ibid. *Contra*, see Kasher, in this Volume; as previously noted, however, the author’s interpretation of the self-defence argument is based on very different premises.

be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. And, “effective advance warning shall be given of attacks, which may affect the civilian population, unless circumstances do not permit.”

The violation of the above mentioned rules and principles can give rise to the commission of war crimes, in the form of direct attacks against civilians or disproportionate attacks.⁵² Outside the context of an armed conflict, and when committed as part of a widespread or systematic attack against the civilian population, the same conducts could integrate forms of crimes against humanity.⁵³

6. The duty of States to protect the right to life and investigate its violations

It is worrisome that, in the face of hundreds of cases of alleged arbitrary deprivation of life, those States that use drone strikes have refused so far to conduct any serious investigation. Indeed the major “accountability vacuum” reported by Alston back in 2010⁵⁴ is only growing bigger in the last years. It shall be recalled that, with the only exception of operations directed against persons of undisputed combat status, States have an international obligation to conduct an independent and effective investigation into the lawfulness of each case of targeted killing attributable to them.⁵⁵ Indeed, “in any case in which there have been, or appear to have been, civilian casualties that were not anticipated when the attack was planned, the State responsible is under a obligation to

⁵² See Alston 2010 Report, par. 72. See in particular Art. 8(2)(b)(i) and Art. 8(2)(b)(iv) of the ICC Statute.

⁵³ See Art. 7(1)(a) and Art. 7(1)(g) of the ICC Statute.

⁵⁴ See *supra*, par. 2.

⁵⁵ See the European Parliament Resolution on the Use of Armed Drones of 25 February 2014.

conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation of the results.”⁵⁶ Notably this obligation is triggered whenever there is a “*plausible* indication from any *apparently reliable* source” of unintended civilian casualties, including where the “facts are *unclear* or the information is *partial or circumstantial*.”⁵⁷

In fact, contrary to military necessity, absolute necessity cannot be assessed on a collective basis, i.e. for a whole group or category of persons (for instance, the “Al Qaida terrorist groups”). There is a broad misconception and misleading rhetoric as to the fact that suspected terrorists would be always legitimate military targets within an amorphous ‘war on terrorism’ (which, as we have seen, does not amount as a whole to an armed conflict under IHL). On the contrary, according to legal standards, outside the conduct of hostilities no person can be lawfully deprived of his life based on criteria other than his conduct at the moment of the use of lethal force: definitely not based on his past behaviour (except death penalty, in those systems that still have it) or his belonging to a group or category.⁵⁸

In sum, what emerges clearly from this somehow limited analysis is that (a part from exceptional cases) the permissibility of the use of lethal force in the drones strikes/targeted killing operations can only and must be determined on a case-by-case basis.⁵⁹ States are indeed under an obligation to investigate. In fact: the human rights obligation to investigate alleged violations of the right to life promptly, thoroughly and effectively through independent and impartial bodies does not cease to apply during

⁵⁶ See Emmerson 2014 Report, par. 32, and Emmerson 2013 Report, par. 78.

⁵⁷ Ibid. (emphasis added).

⁵⁸ See the in depth analysis of Melzer N., 2008, p. 83 ss.

⁵⁹ See Israel High Court of Justice, The Public Committee Against Torture et al. v. The Government of Israel, et al. HCJ 769/02, Judgment of 14 December 2006 (Targeted Killings Decision).

armed conflicts.⁶⁰ Not surprisingly, however, States are reluctant to acknowledge their obligation to respect the legal standards as the right to life, particularly when targeting individuals outside their territorial jurisdiction, and have a correspondent counter-interest to establishing prompt, transparent and genuine investigations. Since targeted killings are normally conducted against non-citizens, i.e. foreigners not covered by the domestic constitutional right of protection of their right to life, it is very difficult to activate judicial procedures in order to establish the responsibility of the actors involved. At the same time, as we will see in the next paragraph, even when, in exceptional cases, it is possible to bring claims in front of a judicial authority, political concerns and vague national security arguments invoked by the governments have so far impeded the judges from adjudicating the issue.

7. The difficult assessment of liability for targeted killings operations before domestic courts

In order to show the difficulties related to the ascertainment of responsibility regarding the State-sanctioned targeted killings practice, it is interesting to have a look at some cases which are exemplificative of the above-mentioned dynamics. The first one is a recent case regarding the killing in 2011 of American citizens in Yemen by US drone strikes, which is particularly important because it reached - although unsuccessfully so far - the docket of a judge.

7.1 The Al-Aulaqi case

⁶⁰ See Alston 2010 Report, par. H.

The opportunity to bring a targeted killing case before the US judiciary appeared in conjunction with the targeted killing of some American citizens by US drone strikes. As the judge assigned to the case put it: “A foreign national targeted by the United States in a foreign place may not have [...] constitutional rights, a US citizen does.” On 30 September 2011 a US drone strike killed Anwar Al-Aulaqi, an American citizen who had been placed on government “kill-list” over a year before, and Samir Khan, another American citizen. Two weeks later, on 14 October, another US drone strike in Yemen killed Anwar Al-Aulaqi’s son, 16-year-old Abdulrahman Al-Aulaqi, as he was eating dinner with his teenage cousin at an open air restaurant. Several other people were also killed in the two strikes.

The case *Al-Aulaqi v. Panetta et al.* was filed on 18 July 2012; it was directed against senior CIA and military officials, arguing that the killing of three American citizens by their own government by means of drone strikes was in violation of national and international law. The killings, which took place in Yemen, a country not alleged to be at war with the US, are considered to have been carried out outside of an armed conflict; thus the law enforcement paradigm, and in the first place the US Constitution and international human rights law, shall govern the operation. Specifically the claimants denounced the violation of the Fifth Amendment to the Constitution, which provides that no person shall be deprived of life without due process of law, and the Fourth Amendment, which prohibits the excessive use of force. International human rights law similarly protects against the arbitrary deprivation of life and generally prohibits killings by States without a due legal process. In the absence of due process, according to the US an international human rights standard, the only permissible deprivation of life is in case

of an imminent threat of death or serious physical harm and the lethal force is the last resort.

The case was brought by the Centre for Constitutional Rights (CCR) and American Civil Liberties Union (ACLU) against four senior US officials responsible for authorizing and directing the killings by the CIA and the Joint Special Operations Command (JSOC).⁶¹ As lamented by the claimants, these targeted killings relied on vague legal standards, a closed executive process, and evidence never presented to any court. Indeed Anwar Al-Aulaqi was designated for death by the executive branch – in other words he was put on the infamous kill-list checked personally by President Obama – without the protection of any judicial review. It is indeed a troubling question the one that was raised (but not answered) by the District Court Judge that decided on the first petition that sought to challenge the inclusion of Al-Aulaqi in the kill-list:

“How is it that judicial approval is required when the United States decides to target a US citizen overseas for electronic surveillance, but that, according to defendants [i.e. President Obama, then Cia Director Leon Panetta and then Defense Secretary Robert Gates] judicial scrutiny is prohibited when the US decides to target a US citizen overseas for death?”⁶²

The Department of Justice, representing the defendants, has moved to dismiss the case, arguing that there is no role for the judiciary in reviewing the claims because they raise “political questions” and “national security concerns” and that the defendants

⁶¹ Notably, the four defendants are some of the highest ranking military and civilian leaders of the country: former CIA Director David Petraeus; Secretary of Defense Leon Panetta; Commander of the Special Operation Command, William McCraven; and JSOC Commander, Joseph Votel.

⁶² See CCR factsheet and transcripts of the case, available at www.ccrjustice.org.

should be immune. The Justice Department thus has continued to argue that national security concerns bar any judicial review of any government's action.

On the 4th of April 2014 the US District Judge Rosemary M. Collyer dismissed the case.⁶³ The judge, while recognizing that “the executive is not an effective check on the executive” and while rejecting the government's argument that the case presented a “political question” that prevented the judiciary from hearing the case, nevertheless dismissed the Al-Aulaqi case.

The dismissal was based on two sets of spurious arguments: on the one hand, regarding the killing of Anwar Al-Aulaqi, the judge effectively accepted the governments' allegation that he was a grave threat and it was not possible to neutralize him through non-lethal means, in a way condemning him posthumously. On the other hand, with regard to the other two victims, because Samir Khan and 16 year-old Abdulrahman Al-Aulaqi had not been (allegedly) targeted by the US government and they were only killed as collateral damages, or mistakes, the Court found that their constitutional rights were not violated. In the end, as one of the lawyers representing the victims put it: “it seems that there is no remedy if the government intended to kill you, and no remedy if it didn't”.⁶⁴

Given the closing of the case, the very hard question raised by the judge herself remains unanswered: “At what point could a President and the only couple of members in the Senate [...], at what point can they not decide that an American citizen overseas is a danger to the country and therefore, without process of law be killed?” For sure the

⁶³ District Judge for the District of Columbia, Nasser Al-Aulaqi v. Leon Panetta et al., Civil Action No 12-1192 (RMC).

⁶⁴ See CCR Press Release “Court Dismisses Lawsuit challenging U.S. Drone killings of three Americans”, 4 April 2014, available at www.ccrjustice.org.

Court's decision is deeply troubling and its effects raise serious questions of constitutionality, to the extent that violations of US citizen's right to life cannot be heard in a federal court.

7.2 Two very recent controversial cases: the first cracks in the wall?

Notably, a recent case regarding another American citizen who was on the Cia and Pentagon's kill list, and which apparently resembled very much the case of Anwar Al-Aulaqi, had a quite an opposite ending. The case involves Mohanad Mahmoud Al Farekh, a young American citizen born in Texas and raised in Canada, who is believed to have been living in Pakistan since 2007. For his alleged affiliation with terrorist organizations, the Cia and the Defence Department in 2013 requested approval to put him on the kill-list, claiming that: (i) he posed a continuing and imminent threat to the American people; (ii) there were no other governments capable of effectively addressing the threat; (iii) capture was infeasible; and (iv) there was a near-certainty that no civilians would have been killed or injured.⁶⁵ It is reported by the media that it was only thanks to the intervention of the Attorney General and other Justice Department officials that Al Farekh's inclusion in the kill-list in the end was not approved.⁶⁶

Nevertheless, a warrant of arrest was issued by the District Court of New York⁶⁷ and Al Farekh – instead of being summarily killed by a drone strike – was finally arrested by Pakistani forces and surrendered to the US, where he was indicted for criminal charges. According to the official press release by the US Department of Justice (DoJ),

⁶⁵ These were the conditions set by the "Guidelines" adopted by the White House, as acknowledged by President Obama in his Remarks at the National Defense University, Washington, on 23 May 2013.

⁶⁶ See Cole D., 2015.

⁶⁷ United States of America against Muhanad Mahmoud Al Farekh, Eastern District of New York, 2 April 2015.

Al Farekh is alleged to have conspired with others to provide material support to terrorists. He “allegedly provided material support to terrorist with every intention of becoming a martyr”.⁶⁸ If convicted the defendant faces a maximum sentence of 15 years’ imprisonment. The DoJ communicate in the end rightly explicates that “the charges in the complaint are merely allegations and the defendant is presumed innocent unless and until proven guilty”. Thus the (obvious) question: what about the presumption of innocence of all those individuals killed by targeted killings operations? Moreover, as the New Yorker journalist rightly notes: how imminent, or even just urgent, could the threat posed by Al Farekh really have been, if two years later it was possible to arrest him?⁶⁹ Would the Justice Department have raised doubts about an authorization to kill him if Al Farekh had not been a US citizen?⁷⁰ In this regard for sure the impact of the Al-Aulaqi case - which had quite an echo in the media and public opinion - even if only indirectly played a big role in the decision not to put another American citizen on the kill-list.

Another huge scandal emerged very recently, when the US administration had to admit that two civilians, the US citizen Warren Weinstein and the Italian Giovanni Lo Porto, were killed by mistake by a US drone strike in Pakistan in January 2015. Obama publicly apologized for the incident and ensured that a “thorough independent review” will be conducted. Moreover the US President publicly spoke about compensation to the victims’ families.⁷¹ Clearly, these unprecedented words can be already seen as a turning point, a positive step in the direction of ensuring accountability for the violations of fundamental human rights through the drones/targeted killings program. As the major

⁶⁸ US Department of Justice, 2015.

⁶⁹ Cf. Cole D., 2015.

⁷⁰ Ibid.

⁷¹ The video and full text of Obama’s remarks on the killing of Weinstein and Lo Porto has been published by the Washington Post on April 23, 2015 and is available on the Journal’s website.

Human Rights Organizations requested in an open letter to the US President of May 2015, it is urgent that the US administration adopts the same approach to all other US strikes where civilians have been killed or injured, regardless of their nationalities.⁷² In particular, it is necessary that the government establish a systematic and transparent mechanism for reviewing and investigating the strikes, that such investigations are made public, and that appropriate redress is provided to civilian victims.

Maybe these cases are just the first cracks in the wall, but for sure something is moving. As already happened with regard to the opposition to torture practices, it is becoming more and more evident that the counterterrorism rationale cannot justify the blatant, nor the secret, violation of fundamental human rights of the individuals.

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⁷² Cf. the open letter by ACLU, Amnesty International, CIVIC, Centre for Constitutional Rights, European Centre for Constitutional and Human Rights, Human Rights Clinic (Columbia Law School), Human Rights First, Human Rights Watch, Open Society Foundations, Reprieve, Re: Public Acknowledgment and Investigations of US “Targeted Killings” and Drone Strikes, 13 May, 2015. The letter also includes an attachment with a list of ten examples of strikes that require urgent investigations because of serious allegations of civilian casualties.

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