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**MORAL AND LEGAL ACCOUNTS ON THE USE
OF ARMED DRONES AGAINST SUSPECTED
TERRORISTS**

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ABSTRACT

Since the terrorist attacks in the US soil of September 11th, 2001, armed drones evolved from being a residual instrument of support for military operations on the ground (in particular, to conduct intelligence, monitoring and surveillance activities) to “the strategic weapon” employed to conduct counter-terrorism operations worldwide. Despite the massive use of these instruments, much of the conceptual landscape is yet to be examined by academic analysis.

This dissertation aims at investigating the moral and legal concerns related to the use of armed drones in counterterrorism operations. It will be demonstrated that such use do not meet the principles embedded in the Just War Theory (JWT), which are often mentioned as a justification in the political discourse but are frequently violated in practice. Nonetheless, the JWT remains the most appropriate theoretical framework to address the issues of justice (and injustice) in war.

Additional aspects pertaining to the philosophical inquiry are taken into consideration, in particular positive and negative arguments on drones are built, in order to provide a full spectrum of the actual debate concerning their use. The use of drones in asymmetric conflicts will be explored as well as the symmetry between armed drones and terrorist suicide attacks. From this perspective, the suicide bomber and the drone pilot stand on the two opposite sides of the spectrum of the ‘exposure to death’. The use of armed drones in war has sparked a debate with regard to the so called ‘crisis of military ethics’, while further problems materialize in relation to the their uncontrolled proliferation and the development of fully autonomous lethal drones.

The legal section of the analysis will prove that, notwithstanding the shortage of a specific drone-related legal regime, rules for regulating drone warfare already exist. They are embodied in the Laws of Armed conflict, International Human Rights Law and International Humanitarian Law. Applying the existing standards of International Law offers the best approach for regulating the use of armed drones.

In the legal section the use of armed drones will be evaluated in times of war but also outside an armed conflict. It will be demonstrated that two different legal regimes should be applied, despite too often situations that could have been handled with a law enforcement approach have been labeled as armed conflicts. The use of armed drones (both within and outside an armed conflict) amount to the definition of “use of force” as accepted in the U.N. Charter; accordingly, the acts performed by a state or by its individuals through armed drones should be held accountable under International Law.

The main concern with armed drones is not the technology itself but how they are used. Unmanned aerial vehicles offer potential benefits for counter-terrorism, law enforcement, environmental monitoring, human rights protection, and nonproliferation inspection, but their use for targeted killing of suspected terrorists is questionable ethically, legally and strategically.

Technology alone cannot be a determinant of legitimacy, but rather what matters is the ethical use of technology by human beings. A counter-terrorism policy based on the use of armed drones might result in immediate tactical gains, certainly not in an overall strategic advantage, in order to make it possible to disrupt and eventually remove for good the terrorist phenomenon as we know it today.

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METHODOLOGICAL REMARKS

Statement of the Problem.

The forms of conflicts are changing, as well as the means employed, but we are struggling to adapt the intellectual tools needed to understand and master the change.

In recent years, the world experienced the emergence of a new instrument of war, the armed drone. From the terrorist attacks of September 11th, 2001, it evolved from a residual instrument of support for military operations on the ground to a strategic weapon used to conduct anti-terrorism operations. Although these aircraft primarily provided intelligence, surveillance, and reconnaissance (ISR), armed variants are also able to provide rapid precision strike against time-sensitive targets.

The drone is indeed the ‘new weapon’ of the war on terror. For that reason it has been used massively in the ‘sacred centers of terror’, in particular in Afghanistan, Syria and Iraq, but also in Pakistan, Yemen, and Somalia. In addition, drone technology is finding a number of supporters and many countries are acquiring their own battery of drones.

The use of armed drones to conduct targeted killings of suspected terrorists has sparked a wide-ranging debate on the legality of such use (in particular, under the framework of International Humanitarian Law) and on the ethics of targeted killings of suspected terrorists perpetrated by unmanned vehicles. This debate is taking place not only amongst experts/academics but also within the media and civil society all over the world.

It is of the ultimate importance to comprehend what we are dealing with, to recognize their potential and its risks, to deepen the moral and legal aspects of their current use.

Research questions and Objectives.

This dissertation aims at assessing the legitimacy and morality of targeted killings of suspected terrorists conducted through the use of armed drones. This investigation will be made according to the applicable international legal framework and through the lenses of moral philosophy.

The first section of the examination will focus on the moral and ethical concerns surrounding the use of armed drones in counter-terrorism; the appraisal will be conducted under the privileged perspective of the Just War Theory but also drawing from traditional elaborations of military ethics.

The legal research will be carried out from the perspective of the Laws of Armed conflict (armed conflict model) and from a Human Rights perspective (law enforcement model). The double approach is required for assessing the legality of drone attacks in wartime but also in peacetime.

The research is focused on targeted killing practices carried out by states against non-state actors, in particular against suspected members of *al-Qa'ida* and related organizations. The analysis does not cover the practice of one state in particular; however, bearing in mind most of the international practice of the recent years, most of the examples will

focus on the United States and the fight against international terrorism launched in 2001.

The dissertation will address the following research questions:

- Are armed drones consistent with International Law?
- Are drone targeted killings consistent with principles of International Humanitarian Law?
- Are drone targeted killings consistent with International Human Rights Law?
- Are drones targeted killings consistent with the principles embedded in the Just War Theory?
- What are the arguments in favor and against the use of drones in the fight against international terrorism?
- Is there a difference between killing and killing by drones?
- What challenges drones pose to traditional theories of military ethics?
- Full autonomous drones and proliferation: what moral challenges do they pose?

Definition of Terms

DRONES

There is not a commonly accepted definition of “drone”. What we commonly refer to is an aircraft without a human pilot on board, and its flight is controlled either autonomously by computers in the same vehicle or under the remote control of a pilot on the ground. It can carry lethal or nonlethal payload, although it is forbidden for them to carry biological or chemical weapons, as dictated by International Law.

Several names which are currently employed to describe a drone, namely Unmanned Aerial Vehicles (UAV), Unmanned Aerial System (UAS), Remotely Piloted Vehicle (RPV) and Drones. Despite they bear different connotations, they are largely used synonymously. The term drone is also widely used in the media and popular literature.

The RPV and UAS used by the UK Armed Forces are primarily used to provide ISR or ISTAR: Intelligence, Surveillance, (Target Acquisition) and Reconnaissance. The Reaper and the Predator are the only systems that can be armed and conduct air strikes using missiles and bombs. Drones have become strategic to intervene in areas of the globe where it is difficult to employ ground troops because of the orography of the territory or due to the opponent's characteristics. The drones can gather a huge mass of information that will be stored and used for multiple purposes.

According to the definitions provided by the UK Ministry of Defence¹, an Unmanned Aircraft (sometimes abbreviated to UA) is:

“an aircraft that does not carry a human operator, is operated remotely using varying levels of automated functions, is normally recoverable, and can carry a lethal or non-lethal payload.”

Accordingly, an unmanned aircraft system is defined as:

“a system, whose components include the unmanned aircraft and all equipment, network and personnel necessary to control the unmanned aircraft. “

¹ UK Ministry of Defence, Joint Doctrine Note (JDN) 2/11, *The UK Approach to Unmanned Aircraft systems*, dated 30 March 2011. The JDN considers how Unmanned Aircraft Systems may contribute to UK's future defence and security needs between 2011 and 2030.

In the US Department of Defense (DoD) Dictionary of Military and Associated terms, they are defined as:

“powered, aerial vehicles that do not carry a human operator, use aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload.²”

Ballistic or semi-ballistic vehicles, cruise missiles, and artillery projectiles are not considered UAVs by the DOD definition.

Drones are not only employed within the context of armed conflicts. Drones with nonlethal payload are used for a variety of civilian purposes, for example, the United States of America (U.S.) uses drones for surveillance of the Mexican border, Costa Rica uses drones to study volcanoes, emergency workers in Japan used a drone to survey the damage at Fukushima, etc. Some types of drone can be used for ground surveillance, to detect environmental conditions, data, aerial photography, agricultural monitoring, applications in hostile environments such as monitoring of fires, inspections of infrastructure and equipment, supervision of road traffic. Nevertheless, in this thesis the focus will be on armed drones.

TARGETED KILLING

Despite the frequency with which the term is invoked, “targeted killing” does not have an exhaustive definition in International Law. An assessment of inter-state practice demonstrates that targeted killings

² http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf

have historically taken place both in time of peace and in time of war, although it has been defined in many ways, such as “assassination”, “execution”, “extra judicial killing”, “liquidation”. Many contemporary authors have chosen the term "targeted killing" rather than "assassination," in order to avoid the negative moral connotation that is almost inherent in the latter³.

According to the jurist Nils Melzer (2008):

“The common element in all these contexts (peace and war) is that lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator”⁴.

According to Philip Alston (2010), the Special Rapporteur on extrajudicial, summary or arbitrary executions, a targeted killing is:

“the intentional, premeditated and deliberate use of lethal force, by States or their agents, acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator”⁵.

We can therefore infer that in a targeted killing, the specific purpose of the mission is to use lethal force against one or more individuals. Such pre-meditation phase distinguishes targeted killings from unintentional or accidental killings.

³ Statman, D., (2004), “Targeted Killing”, in *Theoretical Inquiries in Law*, Vol. 5, n. 1.

⁴ Nils Melzer, Targeted Killing in International Law (2008) at 4-5.

⁵ <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>

The terms “targeted killing”, “extra judicial executions” and “assassination” have been used interchangeably by Amnesty International (2003), which defines targeted killing as:

“an unlawful and deliberate killing carried out by order of a government or with its acquiescence. Extra judicial killings are killings which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice. These killings take place outside any judicial framework”⁶.

Targeted killing as a method of warfare and counterterrorism has been used by the USA and its allies post 9/11 in the “war on terror” to target and “decapitate” the leadership and command structure of Al- Qaeda, the Taliban and their affiliates.

The Pentagon and the Central Intelligence Agency have engaged with this practice with more frequency in recent years, both as part of combat operations in Afghanistan and Iraq and in counterterrorism efforts in Pakistan, Yemen, and Somalia. Since assuming office in 2009, President Barack Obama's administration has escalated targeted killings, primarily through an increase in unmanned drone strikes on al-Qaeda and the Taliban, but also through an expansion of U.S. special operations kill/capture missions. The recent targeted killing of Osama bin Laden by US Navy SEALs is also an example of the relevance of such operations. Two years before, Israel adopted a policy of ‘targeted killings’ of Palestinians alleged to be active members of terrorist

⁶ Israel and the Occupied Territories: Israel must put an immediate end to the policy and practice of assassinations, Amnesty International, 3 July 2003, available at: <https://www.amnesty.org/en/documents/MDE15/056/2003/en/>

organizations involved in organizing, promoting or executing terrorist attacks in Israel and the Occupied Territories.

The issue is very controversial and the literature is divided on the point since perceptions differ widely: some refer to targeted killings of suspected terrorists as extra-judicial executions; others claim they are legitimate acts of war. In particular, the States involved argue that the killings are legitimate acts of war carried out as part of the state's inherent right to self-defence, to be used especially when arresting the terrorist is not a real option. It is often pointed out that the real problem with targeted killing is that, in general, targeted killing does not succeed in deterring potential terrorists who, in any event, are willing to sacrifice their lives for what they regard as a sacred cause. Some authors have claimed the need to find a realistic alternative that allows states to defend their residents against terrorist attacks without abandoning commitment to standards of human rights and humanitarian law.

The focus of this dissertation is specifically on the targeting of a suspected terrorist by armed drones.

TERRORISM

Perhaps one of the most controversial features relating to international terrorism concerns its legal definition. Defining "international terrorism" nowadays seems rather significant especially considering the measures taken in the wake of 11 September 2001 by the States and, internationally, by the United Nations Security Council, to prevent and punish the perpetrators of terrorist acts.

Agreeing on a definition accepted by the whole International Community was historically particularly difficult. The debate, which was mainly carried out within the General Assembly of the United Nations, focused primarily on which acts should be framed as ‘terrorist acts’, and more specifically, whether that concept would include only acts committed by individuals or even State terrorism.

A split followed within the international community between Western states, which wanted to limit the debate to those acts of terrorism carried out by individuals, and other States, and in particular the Arab States, which sought to extend the debate to the so called ‘state terrorism’, as a form of aggression perpetrated by that State through its organs. A further source of conflict was raised by some Asian and African States, in their attempt not to confuse terrorism with the actions of the people who legitimately were fighting for self-determination, claiming that “one’s man terrorist is another’s freedom fighter”.

The Convention on the Suppression of Financing of Terrorism, signed in New York in 1999, attempted for the first time to develop a comprehensive notion of international terrorism. Art. 2 para 1.b defined terrorism as:

“any act intended to cause death or serious body injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”.

In the aftermath of 9/11, the debate concerned with the identification of a widely-accepted definition of terrorism gained renewed attention, and

eventually, produced some significant results. The UN Security Council Resolution n. 1566, on Terrorism (2004) states that:

“Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature”.⁷

Limitations.

This dissertation is limited to data on drones and drone attacks that have been made public through the press government or otherwise available in open sources. Most of the information about the drone strikes remains classified information of the individual governments, not available for public use.

Methodology

The research is primarily based on an extensive literature review. The analysis which followed critically evaluates earlier work in the field,

⁷ <http://www.un.org/press/en/2004/sc8214.doc.htm>

paying due attention to its contributions, and to any methodological problems and limitations involved. The analysis draws on:

- Academic contributions;
- Policy documents and existing legislation (conventions, treaties, cases and commentary to the conventions)
- Statistics – from government sources publicly available and internet-based surveys;
- Research studies and publications;
- Attending conferences and drones-related events.

This methodological approach was instrumental in identifying gaps in the existing literature and highlighting areas which need further investigation. It helped in mapping out what is known, what is emerging, and any areas that remain unknown or unexplored. The effort carried out involved comparing, analyzing and/ or critically synthesizing the current literature.

INTRODUCTION

Lethal drones in the ‘war’ against international terrorism have raised the attention of a number of scholars and international observers for the massive legal, ethical and philosophical implications of such a technology. New forms of weaponry are often complemented by moral concerns if they alter the nature of armed conflict and armed drones have captured the attention of the general public because of the possibility that they might reveal themselves truly transformative weapons⁸.

Indeed, military robotics and cyber capabilities are the newest components of the so-called ‘Revolution in Military Affairs’ (RMA). The pursuit of bloodless military confrontations has led to the most worrying development in the realm of warfare of the current century, the emergence of robotic warfare. Although (for the time being) military robotics is moving towards the creation of smaller, smarter, and more lethal variants, these technologies are starting to be created with a level of decision-making capabilities that is truly unprecedented.

As far as drones are concerned, it is likely that their use for intelligence, surveillance and reconnaissance (ISR), but also for the conduct of counter-terrorism operations, will occur with growing frequency in future. It is therefore entirely relevant and timely to address the debate concerning the morality and the legality of the use of drones. New technologies force us to rethink traditional moral criteria that govern the resort and the use of force; it is therefore essential to offer some ethical assessment, or at the very least some ethical speculations, before new

⁸ Stulberg, A., (2007), *Managing the Unmanned Revolution in the US Airforce*, article published on Foreign Policy Research Institute (FPRI), <http://www.fpri.org/article/2007/04/managing-unmanned-revolution-u-s-air-force/>

technologies start being used even more broadly.

One unanticipated feature of the discussion on the ethics of killing by remote control is how much of the conceptual landscape is yet to be fully investigated by academic analysis. Although the debate on the matter is still at an early stage, many authors believe that the drone campaign against terrorism carried out in Afghanistan (2001-ongoing) Pakistan (2004-2016), Yemen (2002-ongoing), Iraq (2003-ongoing) Libya (2011-2016) and Somalia (2001-ongoing) is, at the very least, morally dubious. Nonetheless, we are witnessing an increasingly frequent and widespread use of these technologies, up to the point that many commentators consider drones to have changed for good the conduct of hostilities⁹.

The purpose of the first section of this dissertation – Moral and Ethical accounts on drones- is to fully investigate the ethical and moral concerns related to armed drones in counterterrorism operations. The Just War Theory (JWT) will serve as the theoretical foundation of such analysis. The compliance of drones use and technology with key requirements of the JWT (in particular *jus ad bellum* and *jus in bello*) will be investigated. Such assessment will be fundamental to realize whether and how drone warfare has affected (and potentially altered) Just War principles. This section will demonstrate that the principles embedded in JWT have not been satisfied with regard to counterterrorism operations carried out with armed drones. Notwithstanding that, the JWT does not prove itself to be obsolete or irrelevant, rather it is still the most complete theoretical framework to address the issues of

⁹ Bachmann, S.D., (2013), “Targeted Killings: Contemporary Challenges, Risks and Opportunities”, in *Journal of Conflict and Security Law*, Vol. 18, n.2, pp.259-288.

justice (or injustice) in war.

The philosophical section will then investigate both the positive and negative arguments on drones. Most of the authors involved in the debate (and much of the academic literature) claim that the use of UAVs in armed conflicts is ‘morally problematic’. The reasons and arguments are different, and often analyze the issue from very distant perspectives.

Some authors consider that the permissibility of such employment should be completely denied, since it is an instrument inherently unable to distinguish between the civilian population and combatants on the one side, and between acceptable and non-acceptable targets on the other (Boyle 2013; Sterio 2012; Kaag & Kreps 2015). In essence, drones do not enjoy the intrinsic characteristics to adhere to the principles of *jus in bello*.

Another significant objection to the use of drones is the fact that their employment lowers the threshold to the recourse to armed force to an extremely dangerous level (Enemark 2014; Brunstetter & Braun 2011).

Additional features that will be examined include the lack of transparency and accountability (which derive directly from the failure to disclose, by governmental sources, reliable data on the use of drones and their effects) as well as on the counterproductive effects of such use on the civilian population and on the prospects of radicalization of future generations.

Whereas there are many who argue against increasing the role of UAVs on moral grounds, there is at least an equal number who argue in favor of expanding their role in warfare. Strawser (2013) for instance, believes that drones, if employed in compliance with certain moral

criteria, have the potential to be even “more ethical” than human soldiers.

Another section will deal with the concept of asymmetry. In the specific case of counter-terrorism, some authors believe that the use of armed drones creates an insurmountable asymmetry between the parties to a conflict. Kahn (2002) claimed that the same concept of 'remote warfare' results in a higher level of asymmetry between the parties in war, as to create overwhelming moral problems¹⁰. The use of drones in asymmetric conflicts will be explored as well as the symmetry between armed drones and terrorist suicide attacks. From this perspective, the suicide bomber and the drone pilot stand on the two opposite sides of the spectrum of the ‘exposure to death’.

Another section will focus on what several authors have judged as the ‘crisis of military ethics’ stemming from the use of armed drones. The advent of UAVs, such as the Predator or the Reaper, clearly marks a significant revolution in the nature of military warfare and in combat as we are used to conceptualize it. Traditional elaborations of the military virtues (Vallor, 2013) have relied on the distinctive and peculiar moral stance of warriors, who are exposing their own lives for the sake of the wellbeing of the society. Drones, by transforming combat into a job that can be conducted safely from the office, call into question the importance and significance of those virtues.

In conclusion, an almost separate account will be made to explore the repercussions of the development of fully autonomous drones. The issue of autonomy is a highly controversial and extremely divisive. As

¹⁰ Kahn, Paul W., (2002), "The Paradox of Riskless Warfare", in *Philosophy and Public Policy Quarterly*, Vol. 22, n.3, pp. 1-8.

the technology is increasingly developed by various nations, many ethical questions arise: to what extent will the 'human factor' be taken out of the loop? Can an autonomous combat machine be held accountable for its own actions? Is it ethical for advanced nations to engage human combatants with such war machines? What are the ethical implications of such an advance in remote combat? This section will speculate on the role of artificial intelligence in future wars (the so called post-human wars), in which drones would be no longer remote controlled but would be autonomous in their decision-making and use of force.

In addition, the large-scale of drone's proliferation raises a number of security challenges. Today, over 90 nations are known to operate drones, including at least 30 countries that either operate or are developing armed drones. As this technology continues to proliferate, weaponized drones carrying explosives or chemical or biological agents will be increasingly within the reach of any state, and non-state actors, including terrorist organizations. If used in large numbers, these systems could potentially enable those actors to achieve an overmatch against a significantly more capable adversary.

In the second section of this dissertation – Legal Accounts- the use of armed drones is discussed within the international legal context. Many authors have asserted that the use of armed drones do require a new legal regime, or at least an update of the existing international regulations. This analysis claims that drones are compatible with the existing legislations; in particular, three International Law Regimes govern drone operations: the rules on sovereignty, International Humanitarian Law (IHL) and International Human Rights Law (IHRL).

The law of sovereignty, and the related area of the *jus ad bellum*, addresses the legality of crossing into another State's territory to conduct drone strikes, including theories related to self-defense. The latter two bodies of law determine who can be targeted and under what circumstances. In the statements of the US Administration, drone strikes have been framed as part of a non-international armed conflict against al-Qaida, Taliban and affiliated forces. In this section the nature and the scope of an armed conflict will be explored, as well as the limitations on the use of force imposed by International Humanitarian Law, such as the principles of discrimination, distinction, humanity, proportionality and military necessity.

This dissertation aims at exploring, simultaneously, the current use of armed drones from the point of view of moral philosophy and International Law. This choice was made since there is a great confusion between these two overlapping areas when dealing with armed drones, and it is hard to find a comprehensive analysis that takes into account both perspectives.

BRIEF HISTORICAL NOTES ON UNMANNED AIRCRAFTS AND RECENT USE.

In the history of warfare we regularly witnessed the need to increase the distance between the warring parties, especially through the use of new technical devices able, on the one side, to allow reconnaissance, intelligence and combat, while on the other limiting the exposure of the belligerents themselves to danger and death.

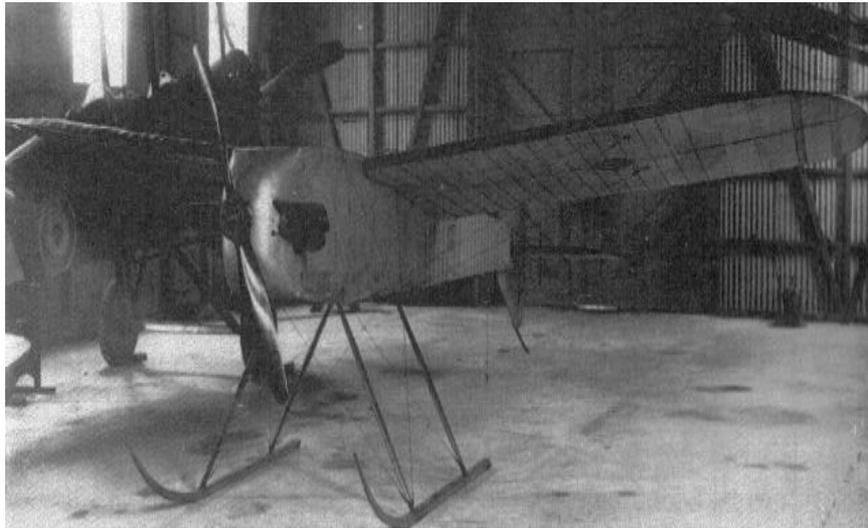
The earliest recorded use of an unmanned vehicle for combat occurred on August 22, 1849, when the Austrians attacked the Italian city of Venice with nearly 200 unmanned balloons loaded with explosives. Though some of the balloons worked and successfully managed to bomb the Republic, others were caught in a change of wind and blown back over Austrian lines¹¹. More specifically, as the wind was blowing toward the city of Venice, the balloons filled with hot air were freed. Each balloon was carrying an explosive charge and was controlled through a system of ropes. After reaching the vertical, through a long copper wire connected to batteries, the balloon was ignited in order to explode over the Venetians: this is actually the first use of remote vehicles bombing from the air¹².

The very first studies on unmanned flying vehicles, however, were carried out during the First World War, with the invention and first use of airplanes and radios. Professor Archibald Low, an engineer serving in the Royal Flying Corps, developed the "Aerial Target" project (AT): the first powered airplane, carrying a warhead, and guided through a steering system of radio pulses. In two separate events, the first of 21

¹¹ Lee Kennett, *A History of Strategic Bombing* (New York: Charles Scribner's Sons, 1982), p. 6

¹² <http://www.massacritica.eu/la-lunga-evoluzione-dei-droni-i-famigerati-uav-della-storia/6040/>

March and the second of 6 July 1917, the engineer and his team demonstrated in front of many Allied officers the validity of his theories, despite the backwardness of the technology of the time, enabling the small plane to fly, launched from a catapult of compressed air. Both flights ended with the fall of the aircraft for various technical troubles, but the concept was demonstrated¹³.



A photograph of the Aerial Target prototype in a hangar of the Royal Flying Corps¹⁴.

The opportunity to use the radio to control an airplane from distance led inventors and companies to perform a number of experiments. The American Hewitt-Sperry Company created a system of gyroscopes guided through a radio system, in order to carry bombs on the target. It was known as the Flying Bomb. The US Navy proposed to use it against the U-Boat, the fearsome German submarines. The project had many technical problems and was not concluded, but the US Navy was

¹³ <http://www.massacritica.eu/la-lunga-evoluzione-dei-droni-i-famigerati-uav-della-storia/6040/>

¹⁴ <http://warnepieces.blogspot.it/2012/07/the-predators-ancestors-uavs-in-great.html>

able to assess the quality of the idea, which was retained as the base of many other subsequent projects¹⁵.

However, before and during World War I, the balloon remained the primary method of aerial observation. Balloons provided 93 per cent of aerial observation over the trenches. The US Army operated a balloon school at Fort Omaha, Nebraska from 1908-1913. Although balloons provided a constant eye on the enemy, adverse weather conditions could limit their use; they also constituted a tempting target for enemy pursuit planes¹⁶.

On October 23rd, 1911, during the Italo-Turkish War (the "Libya Campaign" 1911-1912), the Italian pilot Captain Carlo Piazza flew over the Turkish lines with the airplane Blériot and equipped with a Baby Zeiss camera produced the first aerial shots in flight. This war is the first reconnaissance flight in history.¹⁷

The actual geneses of today's drones lie in the development of the first recoverable and reusable radio-controlled aircraft in the 1930s. The Royal Navy, looking for an aerial target for British pilots to shoot during training missions, developed a remote-controlled aircraft named "DH 82 B Queen Bee"¹⁸. Over 400 of these examples were built and used for target practice by the Royal Navy during the 1930's and

¹⁵ Singer, P.W. (2009). *Wired for War. The Robotics Revolution and Conflict in the Twenty-first Century*. The Penguin Press.

¹⁶ John David Blom, "Unmanned Aerial Systems: A Historical Perspective", Occasional Paper n. 37, Combat Studies Institute Press, US Army Combined Arms Centre, September 2010, available at: <http://usacac.army.mil/cac2/cgsc/carl/download/csipubs/OP37.pdf>.

¹⁷ Verruggio, G., e Operto F, (2015), *Roboetica: focus sulle problematiche civili e militari dei droni*.

¹⁸ Zimmer, B., "The Flight of a Drone from Bees to Planes", article published on the *Wall Street Journal* on July 26, 2013.

1940's. A total of 380 Queen Bees served as target drones in the Royal Air Force and the Royal Navy until they were retired in 1947¹⁹.

As the Second World War came to an end, remotely piloted aircrafts became the focus of aeronautics research and flight-testing. It was the demolition of a Lockheed U-2 spy plane on June 1st, 1960 and the capture of pilot Gary Powers, former USAF pilot serving for the CIA at that time, to mark a critical step. The Soviet Union had radar and anti-aircraft radar guided missile; these weapon systems were so efficient as to let insecure the use of conventional aircraft for strategic reconnaissance and real espionage. The development of a drone with these capabilities was deemed as a necessity.

The US wanted to develop a new drone for air-to-air and ground-to-air target practice. The Navy contacted the US company Teledyne-Ryan, located in San Diego, to design and built a craft suitable for simulating tactical enemy threats. The Ryan Firebee was completed in 1951. The Firebee progressed slowly through various modifications until it began to be used for reconnaissance and intelligence gathering purposes.

During the Vietnam War, Reconnaissance UAVs appeared for the first time; both the Air Force and the Navy sent in UAVs developed in the late 1950s and early 1960s. Drones were employed for nearly 3,425 reconnaissance operations, for a total of about 34,000 hours of flight which allowed to photograph Chinese and North Vietnamese positions. Depending on the model, they flew both high and low altitude, and they performed also visual and electronic signal intelligence missions²⁰.

¹⁹ http://www.pbs.org/wgbh/nova/spiesfly/uavs_05.html

²⁰ <http://usacac.army.mil/cac2/cgsc/car1/download/csipubs/OP37.pdf>

A model specifically developed for this purpose was named the *Lightening Bug*. An example that has played a key role during the Cold War and especially in Vietnam is the Ryan AQM-34 Firebee, who had tasks of strategic reconnaissance or electronic warfare. It was a drone model Firebee to take the famous photos of Soviet missile installations in Cuba. These UAVs were thrown by C-130 and were then recovered by parachute.



Ryan AQM-34 Firebee drone

The Vietnam War is essential to comprehend the development of modern drone warfare. It marked the turning point in which drones transformed from being “targets” to remote “sensor” platforms that could monitor the landscape below.

During the 1980’s, the United States lost interest in drones for intelligence gathering and surveillance purposes, choosing to employ more resources on satellites and hi-resolution imaging. Israel instead took the lead in drone development, building a number of different surveillance drones²¹.

²¹ <https://dronewars.net/2014/10/06/rise-of-the-reapers-a-brief-history-of-drones/>

The Israeli engineer Abraham Karen is considered to be ‘the man who invented the Predator drone’. In 1974 he and his family left Israel to set up his own UAV business in the United States, having no fortune in selling his ideas to the Israeli Armed Forces. In the early eighties, Karen showed a UAV built in his garage to the Defense Advanced Research Projects Agency (DARPA), which sponsored flight tests and in 1985 signed a contract with Karem’s new company, Leading Systems, to develop a larger endurance UAV, named Albatross. After a flight test during which Albatross remained aloft for 56 hours, DARPA funded Karem to scale it up into a more capable drone called Amber. While Amber flew successfully, due to budget cuts funding, the project was halted. While Karem continued working – including developing a new, simpler UAV based on Amber called the Gnat 750 – financial pressure led him and his company being bought in 1990 by General Atomics.

In 1993 the Pentagon wished to experiment a surveillance drone to support UN forces in the former Yugoslavia. The Gnat 750 was selected and by 1994 the first Gnat 750s were deployed in Albania for operations throughout the Balkans.



After the success of the Gnat, General Atomics developed a larger UAV, based on Gnat and incorporating satellite communications, named the Predator. This new drone had its first flight in June 1994 and was operationally deployed just a year later in support of the NATO air campaign against Bosnian Serb forces. The Predator is in 1995 the first example of "unmanned aerial vehicle" (UAV) although at the time was limited to carry "only" the necessary devices to video footage and communications. Digital photos were sent back via satellite and from there to a ground station located thousands of kilometers away, where the operators were able to control the course of the drone holding a joystick.

In 1999 the Predators were again deployed over Kosovo as part of 'Operation Allied Force'. While the drones were successful in locating targets, a key problem was that communicating the precise location of a target to an armed aircraft was taking time. The solution was to add a laser to the Predator thus enabling the drone operators to simply 'light up' a target with its laser that other armed aircraft could then 'see' and hit.



MQ-1 Predator Drone

Even the 1991 Gulf War saw the use of the current drone prototypes mainly used for reconnaissance and surveillance activities. Specifically, the United States acquired a special version of the aforementioned Pioneer by Israel to be used on the Kuwaiti-Iraqi desert. In February 2001, Pentagon and CIA conducted the first tests of a modified Predator that in addition to the cameras could in fact carry a laser-guided Hellfire missile.

The most modern use of armed drones for military purposes is to be traced to the "Global War on Terror (GWOT)" launched by President Bush in September 2001 and then followed by the Obama Administration. At the time, drones were believed to be the perfect machines to carry out the so-called 4D mission, which stand for dull, deep, dangerous and dirty.

Drones operational flights over Afghanistan initiated on the night of 7th October 2001, with the first Predator strike taking place in early November 2001²². The U.S.-led operation Enduring Freedom in Afghanistan was launched following the September 11th attacks, and was aimed at ousting the Taliban from Afghanistan, dismantling al-Qaeda presence in the country, and finding Osama Bin Laden. In 2003, NATO took control of the Operations through the establishment of the International Security Assistance Force (ISAF) while the Taliban and al-Qaeda retreated into Afghanistan rural areas and into the Pakistani tribal areas (FATA- Federally Administered Tribal Areas) and started a long period of armed insurgency against the Government and ISAF. On 28 December 2014, NATO formally ended combat operations in

²² <https://dronewars.net/2014/10/06/rise-of-the-reapers-a-brief-history-of-drones/>

Afghanistan and transferred full security responsibility to the Afghan government, marking the beginning of the new phase of the conflict. According to Crawford (2016), more than 31,000 civilians have been killed since the war started in Afghanistan in 2001. This amount does not refer only to the number of victims of drone attacks, rather it is an estimate of the overall number of civilian victims of the Afghan conflict. The websites and specialized think tanks initiated the death toll of drone strikes in Afghanistan only in the last few years, therefore any drone-specific aggregated data on the victims is not available.

A year later, in November 2002, the first Predator drone operation took place in Yemen with the stated aim of attacking al-Qaeda fighters. Qa'id Salim Sinan (Abu Ali) al-Harithi, allegedly one of those behind the suicide attack on the USS Cole in Port Aden in 2000, was one of the first target of a Predator drone armed with an Hellfire missile. According to Hasian (2016):

“The attack on al-Harithi in Yemen, which is the first known use of force against al-Qaeda outside Afghanistan, was viewed as a move away from the law enforcement based tactics of arrest and detention, that the Bush Administration had previously talked about in commenting on actions against terrorist suspects beyond the Afghan theatre of operations. For critics, this would be an example of mission creep and lack of executive self-restraint, but for drone advocates this was evidence of pragmatic decision making as the drones hovered over more and more territory.”²³

²³ Hasian, M. Jr., (2016), *Drone warfare and lawfare in a Post-heroic age*, University of Alabama Press, p. 59.

According to the New America Foundation (NAF), since 2002 there have been 161 drone strikes in Yemen, resulting in 1375 total killed, 93 of which are believed civilians²⁴. For the Bureau of Investigative Journalism (BIJ), in Yemen there have been nearly 160 drone strikes, resulting in 848 total killed, 100 of which are deemed civilians. The BIJ formulates further estimates of unverified attacks, which would make the death roll rise to almost 1,000²⁵. For the Long War Journal (LWJ) strikes have numbered 161 since 2002, with enemy deaths numbering 793 and civilian deaths numbering 105²⁶.

Neither the U.S. nor the Yemeni government methodically releases data on civilian deaths and injuries caused by drone strikes. In 2015, the Open Society Justice Initiative published a report on the civilian harm caused by US targeted killings in Yemen. The report raises doubt on whether the United States' "near-certainty" standard is being met on the ground, and whether the U.S. is complying with international law. The nine case studies documented in the report offer credible evidence that U.S. airstrikes have killed and injured Yemeni civilians²⁷.

On March 19, 2003, Operation Iraqi Freedom was launched, in order to rid Iraq of its weapons of mass destruction, as well as to topple Saddam Hussein's regime and replace it with a democracy. In 2002 the US started operating Predators for assault as well as surveillance in Iraq, targeting mobile air defence systems in the run up to the invasion. After the operation began, armed drones started being used to attack Iraq mobile Scud missile launchers, Iraqi air defence radars, and other

²⁴ <http://securitydata.newamerica.net/drones/yemen-analysis.html>

²⁵ <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/>

²⁶ <http://www.longwarjournal.org/multimedia/Yemen/code/Yemen-strike.php>

²⁷ <https://www.opensocietyfoundations.org/reports/death-drone>

sensitive targets in and around Baghdad²⁸. Much later, after the self-proclaimed Islamic State started gaining territory in Iraq, armed drones were used extensively for intelligence gathering purposes and for lethal attacks, particularly from the US led International Coalition. A number of media reports point out that the Islamic State had been flying drones in Iraq and Syria for surveillance, but it has equipped those drones with small explosives, essentially making them a rudimentary version of a remotely piloted bomb²⁹.

In June 2004 the first publicly known US drone strike took place in Pakistan. The program aimed at top al Qaeda leaders, al Qaeda's external operations network, and Taliban leaders and fighters. According to the BIJ, strikes in Pakistan are under the sole command of the CIA, without the involvement of the Department of Defense. These strikes began during the Bush Administration but allegedly increased substantially under President Obama. The data provided by the BIJ show that, since 2004, 434 drone strikes have taken place in Pakistan, causing nearly 4,000 deaths, of which nearly 900 are believed to be civilians.³⁰ The NAF estimates, for the same period, a total of 403 strikes, resulting in nearly 3,000 deaths among which 315 are deemed to be civilians.

Drone strikes in Somalia commenced in 2003, under the Obama Administration. The program was launched in order to fight against al-Qaeda and al-Shabaab terrorist organizations. For the NAF, 40 total strikes have been carried out in Somalia, resulting in 415 victims,

²⁸ Hasian, M., (2016), *Drone warfare and lawfare in a Post-heroic age*, University of Alabama Press, p.66

²⁹ <http://www.nytimes.com/2016/10/12/world/middleeast/iraq-drones-isis.html>

³⁰ https://docs.google.com/spreadsheets/d/1NAfjFonM-Tn7fziqiv33HIGt09wgLZDSCP-BQaux_51w/edit#gid=1000652376

among which 40 are civilians. The BIJ claims that around 36 drone strikes have taken place since 2003, with 418 total deaths and almost 40 civilian victims.

Since 2015, US armed drones have attacked Islamic State targets in Libya, following the request of the U.N. backed Libyan Government, in order to weaken the organization which has exploited the lack of governance in the country, and has led the country a regional hub for the global jihad³¹.

In conclusion, the Obama Administration attempted to disengage the United States from military operations across the globe, particularly in the Middle East. Even though the US military presence has downgraded, it has become much more dispersed geographically, with a clear preference for using drone strikes instead of full-scale military interventions, which would have included a greater loss of military personnel and would have been heavily criticized by the American citizens.

³¹ <http://www.wsj.com/articles/u-s-strikes-a-top-islamic-state-operative-in-libya-1447533324>

MORAL AND ETHICAL ACCOUNTS ON DRONES

2. JUST WAR THEORY AND DRONES

For the purpose of this dissertation, we need to scrutinize whether drones technology and use is consistent with established Just War principles, namely with *jus ad bellum* and *jus in bello* criteria. Michael Walzer (1977) refers to the Just War Tradition (JWT) as:

“A set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles and reciprocal arrangements that shape our judgments of the military conduct.”^{32,}

Even a quick survey of human history reveals that war has always been part of social reality, although its causes and motivations differ deeply. Colin Gray (2010) recognizes that States have always felt the need to provide moral justification for their acts of war and that the credibility of such claims have been a robust source of strategic advantage or disadvantage.³³

The JWT can be framed as an argument concerning the moral standing of warfare as a human activity. The main assumptions underlying such an argument are twofold: firstly, that war is sometimes justifiable or even morally necessary. The reference is far more evident when thinking about the Second World War and the struggle against Nazism. Michael Walzer used to call it ‘supreme emergency’, which, according to his own definition, exists when our deepest values and collective survival are at imminent danger. The second assumption is that the handling of hostilities is constantly subject to moral criticism and

³² Walzer, M. (2006), *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th Edition, New York Basic Books, p.44.

³³ Gray, Colin S., (2010), “Moral Advantage, Strategic Advantage?”, in *Journal of Strategic Studies*, Vol. 33, n. 3, p. 345.

appraisal.³⁴ The rationale of the theory is the exploration and pursuit of justice even under the clouds of war. Acting in accordance with ethical and moral principles is an important component of any confrontation, armed and otherwise. Walzer himself has maintained that one of the most important things in war is to act morally and, although this does not unequivocally guarantee success, the paucity of intents and unethical behaviors undermine the whole political project behind the war enterprise.³⁵ In the same fashion, Enemark (2014) deems that ‘strategy’ and ‘ethics’ are inevitably interdependent, especially from a *jus in bello* perspective: the way in which force is applied significantly affects the prospects of overall success in war and the likelihood of a peace settlement after it.³⁶

According to Johnson (1981), the term ‘just war’ is misleading, suggesting that at some point in time there has been or might be in future a conflict in which one side is ‘morally perfect’, such as the proponents of the ‘holy wars’ have attempted to do. Indeed, from the sixteenth century, when Francisco’s de Victoria argued against religion as a just cause for war, the concept of holy war has been separated from the successive elaboration of the theory.

Johnson (1981) asserted:

“If there has ever been a just war, in the absolute sense of justice, then this should serve as a reminder that human moral decisions inevitably contain something of a tragedy: for every gain there is a loss... While

³⁴ Walzer, M. (2004), *Arguing about war*, Yale University Press, Library of Congress Cataloguing.

³⁵ Walzer, M. (2006), *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th Edition, New York Basic Books, p.20.

³⁶ Enemark, C., (2014), *Armed Drones and the Ethics of War. Military Virtue in a post-heroic Age*, Routledge, p. 58.

just war is the term used by the tradition, a more exact term would be *justifiable war*, implying that the process of moral decision-making applied to war must be ongoing so long as the war in question lasts, and must be a relative one, with evidence of good and evil admitted on both sides of the conflict”³⁷.

All main civilizations and cultures have engaged in thinking about the justification of the resort to war and the proper means to wage it. This reasoning is determined by the intuitive or practical sense that the two ends of the moral spectrum - namely, pacifism (the rejection of all war) and realism - are unsupportable and that the right position is the one that falls somewhere in the middle of the spectrum³⁸.

It is assumed that JWT derives from a Catholic tradition that can be traced back to the writings of Thomas Aquinas and Augustine of Hippo. Although these figures and the traditions of thought associated with them are highly important and influential, any sectarian expropriation of JWT is historically unsupportable. Many pre-Christian thinkers, including Plato, Aristotle, Cicero, Cato the Younger, Seneca, Polybius and Sallust, to name but a few, distinguished between just and unjust grounds for waging war, and between just and unjust conduct in the course of war. *Jus ad bellum* principles resonate also in the Islamic Law tradition (Kelsay 2006): religious texts, indeed, assert that for a war to

³⁷ Johnson, James T., (1981), *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, Princeton University Press, Introduction.

³⁸ Hashmi, Sohail H., (2012), *Just Wars, Holy Wars and Jihads: Christian, Jewish, and Muslim Encounters and Exchanges*, Oxford University Press, p.4.

be just there must be a legitimate authority, a just cause, a right intention, and a reasonable hope for success³⁹.

The genesis of a specifically Christian just war conception first appeared in the thought of Saint Augustine, in his *City of God*, which envisioned the good society as one depicted by a just order and at peace both within itself and with other societies⁴⁰.

A systematic Just War Theory appeared later, beginning with Gratian's *Decretum* in the middle of the twelfth century, maturing through the work of two generations of successors, the Decretists and the Decretalists. Later in the Middle Ages, and particularly during the era of the Hundred Years War, this notion of just war was further elaborated by the assimilation of ideas, customs, and practices from the chivalric code and the Roman law, especially the *jus gentium*.

The most systematic exposition of the Western tradition and one that still attracts attention is the one outlined by Saint Thomas Aquinas in the 13th century. In the *Summa Theologicae*, Aquinas presents the general outline of what becomes the traditional just war theory, discussing not only the justification of war but also the kinds of activity that were permissible (for a Christian) in war. From this point of view, with Thomas Aquinas' work, JWT becomes more ethical and juridical and less theological than it had been. As Sebastiano Maffettone (2015) stated:

“Nowadays, a normative political theory of just war inherits much of the medieval and natural law tradition, but in a version that turns out to

³⁹ Kelsay, J. (2006), “Islamic Tradition and the Justice of War”, in Torkel Brekke, *The Ethics of War in Asian Civilizations: A comparative perspective*, London, Routledge, p.103.

⁴⁰ Augustine of Hippo, *City of God*, Penguin Classics, 2003.

be more secular. The prevailing character of the classical just war doctrine is unquestionably moral and religious, whereas in the modern and contemporary doctrine it is typically legalistic.”⁴¹

As the nature of warfare has changed over the course of history, just war theorists have repeatedly been confronted with new and challenging questions. Much of the foundation of International Law, or what is called as “international legal paradigm” is rooted in JWT. Jurists such as Grotius or Pufendorf have employed the concept of ‘legitimate authority’ and ‘just cause’ in their legal writings. The cardinal principle of state-sovereignty in international affairs is an offspring of the Just war formulation of authority. *Jus in bello* and *jus ad bellum* principles and criteria have been embedded in the Hague and Geneva Conventions, in the UN Charter and in various other international treaties. Furthermore proportionality, discrimination and military necessity are formal components of the military doctrine of many Western countries.

The moral discourse has become part of the military reasoning as to determine when, where and how wars may be fought. This has now become the way in which civil and military authorities present to the world the reasons for a war. In his provocatively titled article “The Triumph of Just War Theory (and the Dangers of Success),” Walzer (2002) wrote:

“Perhaps naively, I am inclined to say that justice has become, in all Western countries, one of the test that any proposed military strategy or tactic has to meet- only one of the tests an not the most important one-

⁴¹ Maffettone, S., (2015), “Just War and Humanitarian Intervention”, paper available at: <http://eng.globalaffairs.ru/valday/Just-War-and-Humanitarian-Intervention-17654>

but this still gives just war theory a place and standing that it never had before”.⁴²

The language of military conflict is the language of justification. Military conflicts kill people and destroy property, causing every kind of imaginable harm in immense quantities. To do these things without any reason is madness. To do these things with bad reasons is unjustifiable. To do these things with good reasons may be unjustifiable if the same goals could be accomplished by other means with much less death and destruction. Modern military conflicts have greatly magnified these harms, and, as such, the burden of justification has grown.⁴³

In the Gulf War of 1990-91, in the bombing of Serbia over the oppression of the Albanian Kosovars, in the campaign in Afghanistan aimed at al-Qaeda and the Taliban, and most recently in the recent use of armed force to remove the Saddam Hussein regime in Iraq, the United States, and to an important degree also the British, have used just war theory in order to justify their recourse to war as compliant to the actual principles of *jus in bello*.

Of course the JWT can be used instrumentally, like everything does. Such aspect remains the greatest challenge for a philosopher and for those who wish to apply standards of morality to armed conflicts, intended as tightening the constraints that justice imposes on warfare. Here remains the need to defend justice, even in situations of military necessity, and war-related decisions should be subject to constant

⁴² Walzer, M., (2002), “The triumph of Just War Theory (and the Dangers of Success), in *International Justice, War Crimes, and Terrorism: The U.S. Record*, Vol. 69, No. 4, pp. 925-944.

⁴³ Hallgarth, Matthew W., “Just War Theory and Remote Military Technology: A Primer”, in *Killing by Remote Control*, p.26.

scrutiny. The continuous critique of war-making is a central exercise in any democratic reality.

‘Moral agents’, by definition, realize the complexity and the seriousness of war; for this reason, its recourse must be justified. From this point of view, as Hallgarth (2013) argues, “the just war tradition, with its modern grounding in international law, persists as the best time-tested framework for thinking critically and morally about the justificatory burdens associated with resorting to military force”.⁴⁴

From both an historical and a moral standpoint, there is a robust assumption against the use of violence and aggression. Just war theory deals with the justification for overriding this strong presumption and waging war. Historically, the just war tradition denotes the effort of Western cultures to regulate and contain violence by establishing widely recognized rules of combat.

Some authors appreciate the theory as an attempt to civilize and humanize the inevitable recourse to war on the part of mankind. Some others criticize it earnestly, arguing that it is a series of artfully assembled excuses to justify the unjustifiable, the killing of other human beings. Tony Burke (2007), for example, condemned the theory claiming that its 'formal rigidity' actually allows to tolerate the murder of civilians, upholding that it emphasize procedures and intentions over the consequences of the hostilities themselves.⁴⁵

⁴⁴ Hallgarth, p.26.

⁴⁵ Burke, A. (2007), *Beyond Security, Ethics and Violence: War against the Other*, London, Routledge, p.163.

The JWT today comprises a set of generally accepted criteria for entering a war and how to behave in it. *Jus ad bellum* principles include:

- *Legitimate authority*;
- *Just cause*;
- *Declaration*;
- *Last resort*;
- *Reasonable chance of success*;
- *Right intention*;
- *Proportionality*;

It is essential, at this point, to assess whether drone technology and use reflect and conform to the principles of JWT, starting with *jus ad bellum* criteria.

2.1 Legitimate authority.

A central condition to the *jus ad bellum* criteria is that wars must be declared and fought between entities that are recognized as legitimate either in the international arena or by the groups that they represent.

The requirement of legitimate authority, though central to medieval and modern interpretations of the tradition, has received less attention in contemporary literature than other conditions. As understood in the modern era, the requirement of legitimate authority bestows the right to resort to war on states and coalitions of states—on sovereign political organizations with the power to enforce laws within a given territory. Similarly, in *Summa Theologiae*, Aquinas maintains that war should be waged by a legitimate authority, as a precondition for being a just war.

In a similar vein, Pufendorf (1682) insists in *On the duty of man and citizen*, that “the right of initiating war in a state lies with the sovereign”.⁴⁶

Attributing to the state the power to declare war is reasonable. Wars are generally fought in defense of communal, state interests, such as sovereignty and territorial integrity. Whether or not such interests are under threat, and thus warrant resorting to war, is a matter for public judgment on the part of the agent, which has been entrusted with the task of defending those interests. Moreover, killing is generally wrong and the possibility to declare and actually wage war should be constrained as far as possible.

However, there is considerable debate on the limitation of this right only to the states and the possible allowance of the same right to non-State actors. It is widely acknowledged that many states do not represent the best interests of their people. For Valls (2000), if we acknowledge that stateless peoples might have the right to self-determination, we should also logically consent that this right could be defended and vindicated by some non-state entity, and that this entity should be able to act as a legitimate authority and engage in violence on behalf of the people.⁴⁷

Cécile Fabre (2008) for instance, insists that non-political groups, as well as individuals themselves, can have the right to wage war on cosmopolitan grounds. Her argument maintains that a cosmopolitan

⁴⁶ Quoted in Fabre, Cécile (2012), “Cosmopolitan War”, Oxford University Press, p.143.

⁴⁷ Valls, Andrew, (2000), “Can Terrorism Be Justified?”, in *Ethics in International Affairs: Theory and Cases*, Rowman Publishers, pp. 65-80.

account of the just war must renounce the requirement that a war be declared by a legitimate authority in order to be just.⁴⁸

Many have argued that acts of terrorism are not appropriately acts of war, since terrorist groups lack legitimate authority. In Shanahan (2013) interpretation, legitimate authority and all the *jus ad bellum* conditions shall apply to both sides of the conflict. In his view, terrorist lack territorial integrity and political sovereignty, and therefore the war on terror is not actually a war.⁴⁹ Al-Qaida, for instance, although having a chain of command and political purpose, lack legitimate authority, and despite it has certainly violated US rights on 9/11, retributive acts of large scale violence made by the US are not justifiable as acts of war as AQ is simply made of a group of individuals. Some academics argue that even if terrorists can be legitimate actors, they can never have a just cause. In ‘Terrorism: A critique of excuses’, Michael Walzer (1988) takes this principle for granted: every act of terrorism is a wrongful act. He argues that since there is never a moral justification for terrorism, ‘ideological excuse and apology’ are used to try and satisfy the principle of just cause, but this is not enough.⁵⁰

In the case of the USA, the 2001 Authorization for the Use of Military Force (AUMF), proposed by the President and approved by the Congress, endorsed the country’s right to self-defence and to use all necessary and appropriate force in order to prevent future acts of terrorism against the United States. To date, the US Congress has not

⁴⁸ Fabre, C., (2008), “Cosmopolitanism, Just War Theory and Legitimate Authority”, in *International Affairs*, Vol. 84, n.5, p. 963-976.

⁴⁹ Shanahan, T., *Philosophy 9/11: Thinking about the War on Terrorism*, Open Court Publishing Company, p. 145.

⁵⁰ Walzer, M., (1988), “Terrorism: A Critique of Excuses”, in *Problems of International Justice*, ed. Steven Luper-Foy, Westview Press, pp. 237-247.

revoked or amended the AUMF, meaning that it is still applicable. However, the more time passes, it becomes more difficult for the US administration to justify its acts of war abroad as covered by this authorization. It is, in fact, more and more difficult to demonstrate the continuity between the events of 11 September and the need to attack suspected terrorists in Somalia, more than ten years later. Enemark (2014) stated:

“Recourse to violent action must only occur after every other reasonable, non violent way of achieving a political aim has proven to be (or reasonably appears to be) unavailable or ineffective..(..) The resort to airpower might be quick, but it is difficult to draw an ethical line between quick and ‘too quick’.⁵¹”

It is peaceful, in this regard, that the United States possessed a legitimate authority to wage war against the terrorist group al-Qaeda in the aftermath of 9/11, and on the basis of the right of self-defense, as embedded in art.51 of the U.N. Charter. The same legitimate authority cannot be granted to non-state groups, who do not have international legal personality.

2.2 Just Cause.

The default ethical position within the Just War tradition is that war is always wrong and if it has to be undertaken at all, it must be waged with a just cause. Art. 2.4 of the UN Charter postulates that “all States shall refrain in their international relations from the threat or the use of force”. As a consequence, a State that decides to resort to armed force

⁵¹ Enemark, C., (2014) *Armed Drones and the Ethics of War*, p. 43.

has to prove that this does not happen by mere self-interest. Self-defence (art.51 of the UN Charter) against foreign aggression, for instance, can also be invoked as a just cause for waging war.

The debate today is very dense between those who advocate a restrictive view of the principle of legitimate defense and those who prefer a more extended version, which effectively embrace the legitimate preventive defense. If the use of armed drones by the US in Afghanistan following the September 11 attacks can be seen as an appeal to self-defense, the same can not be said about the use of drones in Pakistan, Iraq, Libya, Yemen or Somalia. In these cases, the drone attacks were carried out in a logic of pre-emptive self-defense rather than in a legitimate real defense.

Still nowadays there is disagreement over what constitutes a just cause. Examples offered are self-defence, the defence of others from aggressive attack, the protection of innocent people from aggressive regimes. All involve the 'resistance of aggression', the violation of basic rights by use of armed force.

“The cause of a State seeking to wage war must also, in order for it to be just, appeal to something of greater moral importance than mere self-interest. A desire to exact revenge, greed for more territory or resources, or simple aggression can be motivating forces for going to war, but none of these qualifies as just cause”.⁵²

After the terrorist attacks of September 11th, the United States initiated the war against terror. Previously, the United States was subject to more modest attacks, typically to military targets in the Middle East, to which it reacted quite modestly. With the exception of the 1993 bombing of

⁵² Enemark, C., (2014), *Armed Drones and the Ethics of War*, p.37.

the World Trade Center in New York, the territory of the United States itself had not been targeted, and American officials pursued suspects through the realm of international criminal law. On September 11, 2001, that era ended. The attacks left caused nearly three thousand casualties and perhaps more importantly, removed the sense of geographic isolation that Americans had felt in regard to international terrorism. Just a week later, on September 18, 2001, Congress authorized the use of military force against terrorists, and the “war on terror” had begun. In satisfying the *jus ad bellum* criteria, the war on terror is certainly a just cause, and sufficiently great as to warrant warfare. Terrorists, killing indiscriminately innocent civilians and without warning seeks to overturn legitimate governments, threaten to undermine the rule of law and the safety and security of the world’s citizens. In this respect, military action against terrorism is justified and has a just cause, because of the wrong-doing of terrorists both at the level of harm inflicted on innocents and because of the climate of fear endangered by the terrorist activities designed to alter a polity structure, policies and order.⁵³

Harry van der Linden (2015) believes that the policy of targeted killing adopted and implemented by President Obama does not meet the principle of ‘just cause’. In his opinion, the targeted militants pose no immediate threat to the United States to justify the recourse to the practice of targeted killings. For the author, the level of the threat must be of such a magnitude as to make the war the only option on the ground. On the contrary, a smaller threat could not be invoked as a

⁵³ Mooney Brian T., Imre R., (2008), *Responding to Terrorism: Political, Philosophical and Legal Perspectives*, Routledge, p.228

justification for starting a war and to justify its casualties⁵⁴. Although, according to the author, the US administration has been very convincing in professing that the war would be the only suitable means to prevent future large scales harms, in reality the threat from terrorists can not amount to 'just cause' according to the theory of just war.

“Typically, terrorists lack the weaponry, the organization, and the number of participants for meeting the threshold of just cause, and in that case civilian aggressors should be approached as very dangerous criminals who should be arrested, extradited if needed, and who may only be killed or incapacitated when they use lethal force or seek to escape. The horrific events of 9/11, however, gave credibility to the idea that al-Qaeda posed a danger that went above the threshold necessary for war.⁵⁵”

The recourse to war against al Qaeda in self-defense, and the policy of targeted killing implemented by the US during the conflict, appear in accordance with the principle of just cause required by JWT. It seems rather more problematic to justify the use of such practices in other environments in which the United States has conducted its war on terrorism. In such cases, the use of legitimate preventive defense, entailing the use of armed drones and targeted killing of militants in such territories, would have to be justified on an evaluation of the imminence of the threat. According to the explanation offered by the US, the threat was real and immediate, but in the absence of reliable

⁵⁴ Van der Linden, Harry, (2015) “Drone Warfare and Just War Theory,” Chapter 9 of *Drones and Targeted Killing: Legal Moral, and Geopolitical Issues*, ed. Marjorie Cohn (Northampton, Mass: Olive Branch Press, 2015). Available from: digitalcommons.butler.edu/facsch_papers/651/ p.171-172.

⁵⁵ Van der Linden, Harry, p. 172.

data to scrutinize, it is impossible to determine with any certainty whether the criterion of just cause has been respected or not.

2.3 Last resort.

In order to wage war legitimately, it must be conducted as last resort. 'Last resort' indicates that a State must have tried every possible, non-violent alternative in advance, among which diplomacy, economic sanctions, political pressure from other nations, withdrawal of financial aid, condemnation by the United Nations, and so on. Last resort, in this sense, means that the use of force is ethical only when it is really necessary and when no reasonable alternative is left.

Drones use rises concerns in relation to the principle of last resort, which holds that the use of military force is permissible only after all other means have been attempted. President Obama and his advisers are still debating whether remote-control killing should be a measure of last resort against imminent threats to the United States, or a more flexible tool, available to help allied governments attack their enemies or to prevent militants from controlling territory.

To the extent they are successful, drones arguably raise the threshold of last resort of large-scale military deployment by providing a way to avoid deploying troops or conducting an intensive bombing campaign while still counteracting perceived threats. Paradoxically, however, the increased use of drones suggests that they may encourage countries to act with an ease that is potentially worrisome. Because drones are seen as a level of force short of war, their use may also be seen as a measure

to which the principle of last resort does not apply.⁵⁶ For Van den Linden (2015):

“The Obama administration’s drone killings violate the last resort principle. Alternatives, whether in the form of negotiations or law-enforcement measures, do not seem to have been considered. In fact, a remarkable feature of the Obama administration’s counterterrorism strategy is that no prisoners are taken, and thus the problem so central to the Bush administration of how to treat captured suspected terrorists is largely avoided.⁵⁷”

Doubts remain as to whether the drone policy has been configured as a last resort tool. Alternative solutions would have consisted in an effective track down of the international financing channels, or through a policy of increased cooperation with the authorities of law enforcement in the country of reference, which could have provided the arrest and detention of militant suspects.

“The concern is that killing may become not a last resort but the preferred option in the struggle against terrorism. The ratio of kills to arrests in recent years would suggest that there is reason to worry that the ease of resorting to drone strikes may be swaying the calculus of national leaders who are always anxious about American casualties.⁵⁸”

A serious counterterrorism policy should respect human rights, while providing educational measures aimed at avoiding the radicalization of

⁵⁶ Brunstetter, D. and Braun, M., (2011), “The Implications of Drones on the Just War Tradition”, in *Ethics & International Affairs*, Vol. 25 issue 3, pp. 337-358.

⁵⁷ Van der Linden, H.,(2015), p.175.

⁵⁸ Himes, Kenneth R., (2015), *Drones and the Ethics of Targeted Killing*, Rowman & Littlefield Publishers, p. 143.

the population. Additionally, such a policy should concentrate more on countering the illicit flow of funds and capitals that from all over the world reach the pockets of terrorist groups. Beyond the war in Afghanistan in response to September 11, the principle of last resort cannot be considered satisfied.

2.4 Proportionality

The principle of proportionality requires that a just cause must be grave enough to consent the recourse to war, with all the death, violence and destruction that it involves. In order for a war to be just, it must be a proportionate response to the suffered wrong. In the war against international terrorism, drone strikes are essentially preventive in nature, substantially no wrong has been suffered (yet). This point is especially controversial since the drone attacks on suspected terrorists are based on intelligence received on the imminence of the threat. We are not dealing, in this case, with an armed response to an attack already in place, rather with a ‘presumption of offense’ that may be realized over time.

Proportionality is a condition provided under both *jus ad bellum* and *jus in bello*. In *jus ad bellum*, proportionality has a dual role: it serves to identify the situations in which the unilateral use of force is permissible; and it serves to determine the intensity and the magnitude of military action. For example, if nation A invades a land belonging to the people of nation B, then B has just cause to take the land back. According to the principle of proportionality, B’s counter-attack must not invoke a disproportionate response: it should aim to retrieve its land and not exact further retribution or invade the aggressor’s lands, or in graphic

terms it should not retaliate with overwhelming force or nuclear weaponry to resolve a small border dispute.

The same type of consideration is to be carried out in time of war. First, a state resorting to force must prove its decision to resort to force was a result of an armed attack and necessary to respond to such attack. It is possible to argue that al-Qaeda's campaign of terrorist attacks against the United States, including 9/11, corresponded to an armed attack. Second, a state resorting to the use of force must prove its use of force was proportionate to the military campaign's objective. The US administration's reaction to the September 11 attacks involved the use of armed drones in the Afghan territory from which, presumably, the attacks were conceived and planned. The use of drones in Pakistan, Yemen and Somalia do not appear to comply with the principle of proportionality.

2.5 Reasonable chance of success.

Another requirement posed by the Just War theory is to wage war only when it is there a reasonable chance of success. The rationale behind this requirement is the following: a state's decision-makers cannot send their military if they do not have a realistic chance of winning, it is not permissible to send them to be slaughtered. Leaders may not sacrifice the lives of others for a hopeless cause. The aim of this criterion is to prevent 'futile' acts of 'mass violence'. It is very challenging to establish whether the employment of armed drones in the fight against international terrorism is likely to have or have had any "reasonable chance of success". Drone attacks have been quite effective in decapitating the senior leadership of al-Qaeda both in Afghanistan and

Pakistan. At this level of analysis targeted killing through drone attacks appear to be very successful. A great number of infrastructures have been disrupted, many senior leaders killed, and sanctuaries made unavailable. The drone policy has hampered the ability of terrorist groups to attract and train new adepts, plan and manage new terrorist attacks. Despite this, the group was not hit in a permanent and definitive way, and continued to pose a threat to the Afghan people and the whole international community.

Reasonable chance of success depends also on the purpose of the just cause for which the war was launched. According to Enemark (2014), a drone strikes campaign launched in different parts of the world for the purpose of eliminating terrorism it has minimal opportunity to achieve the aim. The drone attacks may have the effect of disrupt the leadership of a terrorist group, or temporarily reduce its operational capabilities; certainly a war based solely on targeted killings of drones can not reasonably be regarded as an effective means to eliminate the phenomenon of terrorism from the earth as we know it. The drone policy may result in immediate tactical advantages, certainly not in overall strategic advantages, in order to make it possible to disrupt and eventually eliminate the terrorist phenomenon in the dimensions in which we know it today.

Retired general Stanley McChrystal (2014), in his idea of “counterinsurgency math”, asserts:

“If you eliminate two bad guys, how many are left? The answer is, maybe more than before, because each individual has a father, a brother, a son, a friend, a fellow tribesman who now is a potential enemy. And if that was the case with killing counterinsurgents, how much more is it the case with civilian casualties? Has the administration

really weighed this calculus sufficiently in our policy? Is the tactic of drone strikes undercutting the possibility for success in the comprehensive strategy to combat terrorists?⁵⁹”

It is feasible to affirm that the war on terrorism conducted by the use of armed drones has no significant chance of success. Although useful for decapitating the chain of command of such terrorist organizations, or even certain operatives, the roots of terrorism appear much deeper, and thus only a holistic approach is required to eliminate them. As Daniel Byman (2003), asserted:

“Such a military approach generally fails to measure accurately the status of the adversary’s morale, recruitment, fundraising, organization, ability to conduct sophisticated attacks and other vital components. If al-Qaeda can still recruit new members, maintain the support for its cadres, fund its operations, sustain its organizational structure, and mount sophisticated operations, the loss of even a senior commander may have little impact on its overall strength⁶⁰.”

2.6 Right intention.

According to the principle of right intention, the aim of war must not be to pursue narrowly defined national interests, but rather to re-establish a just peace. This state of peace should be preferable to the conditions that would have prevailed had the war not occurred.

⁵⁹ Stimson Center, “Recommendations and Report on the Task Force on Drone Policy,” (Washington, DC: Stimson Center, 2014), <http://www.stimson.org>, p.11.

⁶⁰ Byman, Daniel, L., (2003), “Are we winning the War on Terrorism?”, published on Brookings, available at: <https://www.brookings.edu/research/are-we-winning-the-war-on-terrorism/>

Harry van der Linden (2015) argues that a drones-conducted war makes it easier to breach of the principle of 'right intention'⁶¹. Minimizing or almost eliminating the risk of casualties among US soldiers, the circumstances with which the American public is involved are drastically reduced. This detached attitude enables decision-makers to pursue (political and military) objectives other than those officially declared and stated. For example, beyond the declared objective, drones in Pakistan and Afghanistan could have been employed as a 'proving grounds' for these new technologies, and the continued presence of terrorists in Afghanistan and Pakistan would have justified the permanence of the United States in Afghanistan and the postponement of the US withdrawal from the theater.

With respect to the *jus in bello* criteria, the assessment will comprehend the following requirements: discrimination, proportionality and military necessity.

2.7 Discrimination.

According to the principle of discrimination, only combatants might be lawfully targeted. The discriminatory potential of drones depends on their actual use and on the intentions of those who pilot them. As such they are not inherently indiscriminate, but as any other weapon or weapon system, it highly depends on who gives instructions. The same circumstance that drone strikes often take place not precisely in war-related battlegrounds but in counterterrorism operations, beyond declared combat zones, implies that there should be special care taken that no innocent persons which will be affected.

⁶¹ Van der Linden, Harry, (2015), p. 174.

As we have already argued, terrorists wear no uniform and mingle among the civilian population. Targeting decisions are taken solely on the basis of received intelligence, coming from monitoring and surveillance. A common concern against the use of targeted killings is that they are used against individuals who are not legitimate targets or, at least, that the legitimacy of the target has not been adequately determined⁶².

“The purpose of targeted killing as part of a strategy of counterterrorism must be the defense of the innocent through interdiction of terrorist activity. Targeted killing ought not be used as punishment or retribution for past misdeeds. That would lead targeted killing into the realm of extrajudicial execution. The use of targeted killing ought to be restricted to stopping the commission of a terrorist attack upon innocent persons.⁶³”

It is a matter of fact that poor intelligence can lead to bad decisions, and the drawbacks of such decisions have often resulted in civilian casualties. In 2001, on the basis of incorrect information, the US has hit what they believed was a Taliban headquarters, although it was instead of an Afghan wedding. According to Enemark (2014) discrimination is enhanced by physical proximity, and since drones operate at high altitudes, their precision risks to be flawed. On the contrary, one may argue that drones allow more accurate visual identification, and more substantially, drone technology reverses the nexus that requires physical proximity between the attacker and the attacked. However, mistakes can still be made. A solution more consistent with the principle of

⁶² Himes, Kenneth R., (2015), *Drones and the Ethics of Targeted Killing*, Rowman & Littlefield Publishers, p. 123.

⁶³ Himes, Kenneth R., p.125.

discrimination would be to postpone and reschedule any resolution to strike until all possible doubts concerning the identity of the targets have been removed.

Unfortunately, data on targeted killings carried out by drones are unreliable at best. The data on open sources also differ much between them, so it is not easy to have a complete and reliable picture of the civilian victims of the attacks. The numbers are often manipulated, on the one hand and on the other, to achieve certain policy objectives. Probably the US administration tends to provide reduced numbers while organizations for the protection of human rights or non-governmental organization will provide opposing figures.

Enemark (2014) argues:

“Technology alone cannot be a determinant of legitimacy, but rather what matters is the ethical use of technology by humans. When it comes to the use of drone-launched precision guided munitions, precision of placement (geographically speaking) is distinct from correctness of the identity, legitimacy of the targeting and the exclusivity of the effect (namely, nobody other than the right person is hit).”⁶⁴

Using drones for monitoring, gathering *intelligence*, surveillance and reconnaissance could extremely help Armed Forces in assessing where a particular strike has to be conducted and consequently exactly locate civilians and combatants. They can prevent unnecessary destruction of lives and properties. Drones can provide fighters with crucial information to make assessments and facilitate better decisions that are more consistent with proportionality and discrimination.

⁶⁴ Enemark, C., (2014), *Armed Drones and the Ethics of War*, p. 73.

“... my presumption thus far has been that unmanned military vehicles are useful tools that the JWT can accommodate... Used correctly, they prevent a great amount of harm. Since drones are not evil in themselves, they cannot be condemned by the just war tradition. This means that moral judgments about their use in particular context will be ongoing and focused on unjustifiable uses of these tools, not on deeming them unjustifiable categorically.⁶⁵”

For many years, we have used the theory of just war to criticize American military actions, and now it has been taken over by the generals and is being used to explain and justify those actions. Obviously, we must resist. The easiest way to resist is to make noncombatant immunity into a stronger rule, until it is something like an absolute rule: all killing of civilians is (something close to) murder; therefore any war that leads to the killing of civilians is unjust⁶⁶.

The doctrine of the supreme emergency incorporates a utilitarian logic according to which the life of an innocent person must be balanced with the search for the greatest good for the greatest number. The analysis of the costs and benefits of action has become the standard form of reasoning in political life.

As Enemark (2014) argues:

“A lower rate of non-combatant casualties resulting from drone strikes would make them more ethically acceptable; demonstrating a close alignment of intended and actual outcomes. But a higher rate would

⁶⁵ Hallgarth, Matthew, p.37.

⁶⁶ Walzer, (2006), *Just and unjust Wars*, p. 13

blur the practical and ethical distinction between drone and non-drone operations.”⁶⁷

The number of civilian casualties was also increased by the use of the so-called “double tapping”: in order to minimize the possibility of errors due to unforeseen circumstances or sudden weather changes, two consecutive missiles are released by drones, even at a distance of about ten minutes from each other. In many documented cases, the locals rushed to the scene of an attack to help the wounded, only to be hit by a second strike. This practice has negatively affected the quality of life of the population, who had to change their habits, weakening the fabric of social cohesion: the residents avoid to meet and form groups for fear of being hit.

“The United States has frequently executed several missile strikes in short succession on the same target in the FATA with the result that responders to the first strike, such as rescue workers and family members, were killed. This policy violates the principle of discrimination or noncombatant immunity because it reflects lack of due care in seeking to minimize civilian casualties; worse even, it suggests the intentional killing of civilians, a war crime. Besides requiring due care, the principle of discrimination also demands that the civilian costs of individual strikes are not excessive in light of the military value of the strikes.”⁶⁸

According to Himes (2015), hundreds of civilians in Pakistan have died in follow-up attacks against those coming to the relief of victims of a first strike. As a result, families and emergency workers were reluctant

⁶⁷ Enemark, C., (2015), *Armed Drones and the Ethics of War*, p. 69.

⁶⁸ Van der Linden, Harry, (2015), p.177.

to come to the aid of those injured in drone attacks. Even some humanitarian agencies established a policy forbidding workers to approach a stricken area less than six hours after an attack⁶⁹.

Signature strikes represent the most controversial aspect of the targeted killing policy advanced by the Obama Administration. Under this label lies the policy of killing a suspect not because he is specifically identified as being on an extensively vetted and officially approved kill list, but on the ground that the individual displays such a behavior that renders him suspicious.

“Signature strikes refer to attacks premised on a person demonstrating a set of “signature” behaviors that the United States connects with militant activity. This is differentiated from “personality” strikes, which are true targeted killings in that the identity of the target is known.⁷⁰”

Outside areas of declared warfare it is hard to accept the targeted killing of an individual on the basis of a “pattern of life” analysis, given the presumption of innocence that must be accorded to the life of anyone. At the same time, targeting a man because he is living in an environment where people carry weapons on a routine basis is an erroneous approach to legitimate targeting. Presuming that all men of military age are combatants goes against the presumption of innocence; indeed a person should be considered a noncombatant unless there is strong indication of the contrary.

Due to the lack of transparency on the part of both the Bush and Obama administrations regarding their targeting policies, there are not a lot of

⁶⁹ Steven, D., (2013), “Israel’s Policy of Targeted Killing,” *Ethics in International Affairs*, vol. 17, n.1, p. 112.

⁷⁰ Himes, Kenneth R., (2015), p.125.

known specifics about signature strikes. Signature strikes are morally problematic since too often the targeting decision is made on mere assumptions, with too little firm evidence that the targets constitute a clear or imminent danger. Thus, it is uncertain that the practice of drones signature strikes could ever pass the discrimination test. As Himes (2015) argues:

“Recall that the Obama administration’s stated targeting policy has three thresholds: the individual is a member of al-Qaida or an associated force, the target is an imminent threat, and there is near certainty of no civilian casualties. The practice of signature strikes fails to pass those declared policy thresholds.⁷¹”

On a strictly theoretical level, the use of armed drones can comply with the principle of discrimination, for the excellent capacity of monitoring and precision it has. However, available data on open sources show that the number of civilian casualties has been and continues to be significant.

2.8 Proportionality.

Proportionality is probably the most challenging criteria to apply in an *jus in bello* assessment on drone use. In this case, we are called to assess proportionality in a predictive way. Incontestably, proportionality prohibits the killing of a great number of civilians as a side effect to achieving a military goal. On the one hand we have human lives whose value cannot be quantified in purely numeric calculations. On the other, the assessment of the supposed military

⁷¹ Himes, Kenneth R., (2015), p. 128.

advantage resulting from the killing of a suspected terrorist should be necessarily carried out in probabilistic terms. Appraising of the imminence of the threat posed by suspected terrorists is extremely important, and at the same time very complicated. In the absence of clear accounts given by the US administration on the ‘probability calculation’, it is only possible to make speculations on the method by which political decisions on proportionality are made. In an attempt to kill a senior leader of a terrorist organization, it is worth risking to kill 10 or 20 non-combatants present in the same area? Is the ‘careful selection of targets’ actually that selective and that cautious? In the so cherished balance between costs and opportunities, how is to be evaluated the killing of a low-level militant if, for the same reason of his killing, a large number of civilians was involved? As Vogel (2010) has claimed, the cumulative strategic costs must be added to the immediate human loss of lives. In the long term, the protracted killing of non-combatants will generate increased antagonism and hatred among the population, thereby fueling and prolonging the war⁷².

Along with distinction, humanity and necessity, proportionality is one of the fundamental principles of IHL and of Just War theory. As already described, the proportionality principle outlaws attacks “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.” Reading narrowly, the term “excessive” simply means “too great” and leaves entirely open the standard by which to determine when harm to civilians is too great in relation to anticipated military advantage.

⁷² Vogel, R., (2010), “Drone Warfare and the Law of the Armed Conflict”, in *Denver Journal of International Law and Policy*, p. 126.

Despite its importance, proportionality has always been one of the most difficult test in terms of practical application, since it is called to satisfy two apparently conflicting demands: on the one hand, preventing civilian losses, on the other ensuring a military advantage. The same formulation of the principle is vague, and we cannot expect *jus in bello* proportionality to provide clear or enforceable guidance in the vast majority of tactical situations that attacking forces confront.

Obviously, killing and injuring other human beings infringes their basic moral rights. In some cases, these others may, by their voluntary conduct, make themselves morally liable to being killed or injured. In such cases, the relevant moral rights are forfeited and not infringed. Members of terrorist organizations, for example, by perpetrating attacks against civilian and military personnel all over the globe have made themselves liable to being murdered or injured. From this perspective, killing terrorist would be the lesser evil, almost necessary to prevent the killing of a greater number of people. More precisely, killing or injuring some is morally permissible as a necessary means of preventing far greater harm to others or as a necessary side-effect of preventing substantially greater harm to others.

But how imminent must be the threat posed by a terrorist, for the targeted killing by drones to be justified and legitimate? For some authors, terrorist groups constitute an ongoing threat, since they spend their time plotting attacks and attempting to execute them. From this perspective, the targeting of those members of terrorist organizations is somehow always legitimate. Supporters of targeted killing, like Etzioni (2010) suggests the affiliation in al-Qaida or its associated forces as the

trip wire for action, since those groups have a demonstrated intent to kill others⁷³.

Such argument is unsustainable. It is impossible to accept, from a moral standpoint, that the best strategy in the fight against international terrorism is to go around the world by killing all those who sympathize with or belong to terrorist organizations. This would lead to justify the hunting and killing of thousands of men, often on the basis of mere suspicion, without considering the fact that such practices encourage a further radicalization among the population. The number of the killings could be potentially unlimited.

With regard to the attacks by drone, the secrecy of the attacks, the mode of choice of objectives and collateral victims of each strike it extremely difficult to determine with certainty whether the proportionality principle was respected. By most accounts, hundreds of dangerous militants have, indeed, been killed by drones, including some high-ranking Qaeda figures. But for six years, when the heavy cloak of secrecy has occasionally been breached, the results of some strikes have often turned out to be deeply troubling.

Every independent investigation of the strikes has found far more civilian casualties than administration officials admit. In a speech in 2013 about drones, Mr. Obama declared that no strike was taken without “near-certainty that no civilians will be killed or injured.” He added that “nevertheless, it is a hard fact that U.S. strikes have resulted

⁷³ Himes, Kenneth R., (2015), p. 130.

in civilian casualties” and said “those deaths will haunt us as long as we live.”⁷⁴

For the US, the proportionality of a drone attack lies in the significance of the combatants it executes. If those militants are leaders, the strike would be of greater value in the war effort, meaning that the strike, given its collateral damage is more likely to satisfy proportionality. According to an investigation conducted by Amnesty International, *Living Under Drones*, the amount of militant leaders who have been killed has been objectively low. “The number of high-level targets killed as a percentage of total casualties is extremely low—estimated at just 2%.”⁷⁵ According to another estimate: “Only one out of every seven drone strikes killed a militant leader.”⁷⁶ The strikes that did not kill a leader, or a key personality within the terrorist group, were possibly of limited military value, which gives at least some weight to the argument that many of the strikes, given the high number of civilian casualties, did not satisfy proportionality.

Supporters of the assertion that drone strikes fulfill *jus in bello* requirements, indicate that the quantity of civilian fatalities from the raids has dropped over time.⁷⁷ This would entail that drone strikes are

⁷⁴ Available at: http://www.nytimes.com/2015/04/24/world/asia/drone-strikes-reveal-uncomfortable-truth-us-is-often-unsure-about-who-will-die.html?_r=0

⁷⁵ International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU Law School, *Living Under Drones: Death, Injury, and Trauma to Civilians from Us Drone Practices in Pakistan*, 2012, <http://livingunderdrones.org>.

⁷⁶ Peter Bergen and Katherine Tiedemann, “The Year of the Drone,” New America Foundation, February 24, 2010.

⁷⁷ Kenneth Anderson, “Efficiency in *Bello* and *ad Bellum*: Targeted Killings Through Drone Warfare,” available at <http://ssrn.com/abstract-1212124>.

improving their performance in relation to proportionality, perhaps sufficiently to satisfy this criterion for at least some of the strikes.

It is also fair to argue that the most plausible case in the use of armed drones can be made for proportionality. In cases where the threat is truly imminent, a drone strike might be the most proportionate response to an imminent terrorist attack. Targeting an individual or group posing an imminent threat, would appear to be completely justified. The problem, however, lies in the administration's loose definition of imminence. If we simply redefine imminence to justify those we want target, without establishing that they truly constitute an imminent threat then we clearly are not meeting this condition.

2.9 Military necessity.

The “principle of military necessity” permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by international humanitarian law. In the case of an armed conflict the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict.

The government has a clear interest in arguing that capture is not feasible because drone strikes are cheaper, they don't put armed forces at risk, and though most US citizens are only dimly aware of them, a majority approve them, because nobody can object to the idea of killing terrorists.

Is there a tradeoff between military necessity and human security?

“Have we settled for managing the conflict by focusing on military necessity, while giving too little attention to the need for human security that addresses the needs of people caught in the conflict? These questions are not meant to indict but to invite reflection about whether our moral imaginations have been captured by a paradigm of efficiency, low risk, and success that drones represent in the minds of many Americans. It is a paradigm that overlooks the harms being inflicted upon us as a nation and upon the people where our drones strike.”⁷⁸

2.10 JWT and drones: concluding remarks.

Is JWT suited to address drone technology and use?

Several scholars have argued that the theory has become too old and too inadequate to deal with the conflicts of the modern world, in which the enemy (mainly international terrorism) is being dealt quite differently from traditional warfare.

But the argument that new technology demands new rules of war is unpersuasive. Existing principles of just war do accommodate the use of unmanned drones in the struggle against terrorism. Its standards, derived from the centuries-old just war tradition, could be labeled as victim-oriented rather than weapon-specific, and they apply regardless of whether force is used by land, by sea, by air, in a manned or unmanned fashion. From a cursory examination of the correspondence between the use of armed drones and the principles of JWT, it is clear that these have not been respected. In theory, however, the drones could

⁷⁸ Himes, Kenneth R., (2015), p.166.

be used in compliance with these principles, what would make a system susceptible to fully respect humanitarian law.

The problem then is not to extend, modify or alter the existing JWT categories, rather to ensure its application and compliance from decision-makers. Even if we were to change the fundamental criteria of JWT and even to modify similar rules contained in the Geneva Conventions, it is doubtful that the political decisions would be taken in accordance with new legislation. The political and military choices of a government administration have the power to give life or to permanently kill a set of rules.

In addition, the JWT has been used, in the last twenty years and especially after the Cold War, as a moral foundation for the resort to war, especially from the US administration. Such instrumental use is what worries the theorists of this school, which for centuries were concerned to find principles and criteria that could have limited the recourse to war and that could have regulated the conduct of the war by making it more human and less atrocious. Therefore, the JWT is being challenged today not only from the misuse of new technologies, which, although designed to minimize civilian casualties and destruction, have been often used in a non-discriminatory way. The real challenge for the theory is to be able to survive the instrumental and partisan use that the decision makers make of it, when they appeal precisely to those principles to justify armed interventions in disputed cases. As Freiburger (2013) argues:

“The indiscriminate use of language to legitimize our use of force will only perpetuate the cycle of violence. The problem is not that drone technology has introduced a new kind of weapon with which our traditional moral concepts cannot cope, the problem, rather, is that the

apparent ease of deploying this new technology has seduced our leaders into thinking we can ignore and evade the traditional standards that justify force because of they are “effective” in this asymmetrical war against non-state actors.”⁷⁹

It is true that drones are extraordinary precise, and that same feature would make it an advance in humanitarian warfare. In theory, in the context of armed conflict, it might targets terrorists with exquisite discrimination. But since they can only be as good as the intelligence they have, sometimes it ends up killing the wrong people.

There is little evidence that the signature strikes carried out by the United States could ever adhere to the Just War principles of discrimination, necessity, and proportionality. The burden of proof is on the government to show that it has not been engaging in unjust, unethical warfare. Lacking that information, it is nigh impossible to condone the signature strikes as just.

A separate question would be to justify the use of armed drones in the inter-war states, namely in the war between state entities. Historically, the legal conceptualization of the war was based on the principle of 'equal right to kill'. The founding principle of *jus in bello* is that there is an equal right to kill themselves between combatants. But what if in a war, the first state is in the possession of armed drones and the second is not? What happens if there is not a real possibility of reciprocation? The right to kill and be killed is no longer mutual. This aspect profoundly alters the conditions of the war, and certainly the *jus in bello*.

⁷⁹ Freiberger, E., (2013), *Just War Theory and the Ethics of Just Warfare*, article published on <http://www.e-ir.info/2013/07/18/just-war-theory-and-the-ethics-of-drone-warfare/>

“...because it transforms war from being possibly asymmetrical into a unilateral relationship of death-dealing in which the enemy is deprived of the very possibility of fighting back, it surreptitiously slips out of the normative framework initially designed for armed conflicts.⁸⁰”

⁸⁰ Chamayou, G., (2015), *A Theory of the Drone*, The New Press, p. 162.

3. ARGUMENTS AGAINST THE USE OF DRONES IN WAR

3.1 Lack of transparency and accountability.

The Obama Administration has revealed little information to the public regarding the number, the location, the mortality rate of drone strikes, or even on which government organization is responsible for such attacks. As Whetham (2015) argues:

“There is very rarely a public explanation for an attack, and without such transparency there is no way for anyone (outside the chain of US command) to know the difference between an extrajudicial execution and a legitimate act of national self-defense.”⁸¹

As a result, many organizations and non-governmental bodies, such as the Long War Journal, the Bureau of Investigative Journalism and the New America Foundation, have tried to independently record drone attacks, putting together data on location, target, on the wounded and the number of victims.

From July 2014 to December 2015, the Stimson Centre analyzed the progresses of the Obama Administration in implementing the recommendations of the Stimson Task Force on U.S. Drone Policy⁸². The task force concluded that current U.S. drone policy suffers from a lack of transparency and accountability, and the *ad hoc* way in which the United States has implemented its drone policy has negatively impacted the U.S. and the international perceptions of this technology.

⁸¹ Whetham, D., (2015), “Targeted killing: accountability and oversight via a drone accountability regime”, in *Ethics and International Affairs*, vol. 29, no.1, p. 62.

⁸² “Grading Progress on U.S. Drone Policy”, Stimson Centre, published on Feb. 23rd, 2016, available at: <http://www.stimson.org/sites/default/files/file-attachments/Grading%20Progress%20on%20U.S.%20Drone%20Policy..pdf>

In short, the lack of a clear U.S. policy risks damaging consequences for the United States, at home and abroad, and undermines efforts to support the international rule of law.

Given the rapid spread of drone technology around the world, it is important that the Obama administration — and any administration that follows — develop a transparent and accountable U.S. drone policy that is both practical and comprehensive, and that sets a constructive international precedent for future drone use worldwide.

Clearly, the public dissemination of information sensitive to national security is neither realistic nor plausible. However, it is possible for the administration to provide elements for public discussion on the chosen targets, on the nature of the threat posed to national security, and on the imminence of the threat. If this approach became the norm, probably they will have great impact on the frequency of the use of armed drones to carry out targeted killings.

Transparency, indeed, requires the disclosure of policy standards, legal justification, targeting criteria and procedures. More information should have been released on the location of the attack, on the type of weapons launched, on the decision-making process leading to the addition of a name to a kill list. The requirement is not that there must be public approval of every targeted killing, but that there should be adequate information and oversight on the principles and criteria, which represent the foundation of the policy. There should also be provision of basic information *ex post* any strikes: was the intended target killed? were there other casualties? how many? is it determined whether they were civilian or combatant? on what basis was the determination made?

The parallel drone program conducted by the CIA makes oversight by the Congress and the civil society even more difficult. The drone program operated by the CIA is kept under cover; this attitude is likely to seriously damage the US efforts in counterterrorism. Militants could exploit such attacks, as a propaganda tool, in order to recruit new members and to stimulate a widespread sense of anti-Americanism in the Muslim population. At the same time, this opacity prevents the US to express itself clearly on the program, eventually rejecting the accusations of mismanagement raised by terrorist propaganda. Such secrecy further deteriorates the image of the United States worldwide.

3.2 Overuse of the military option.

The overarching matter here is whether the availability of remotely controlled drones lowers the threshold for resorting to armed force. Many critics argue that armed drones make it easier to kill without risk to a State's forces, so policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively. As Enemark (2014) argues:

“From an ethical perspective, the challenge posed by more frequent drone use is to guard against any associated increase in the number of unjust decision to resort to force at all.⁸³”

Politicians, not having to contemplate the prospects of death, injuries and grieving families, might accordingly feel less anxious about using force to solve political problems. And citizens, if not called upon to

⁸³ Enemark, C., (2014), *Armed Drones and the Ethics of War*, p. 36.

spill their own blood for a cause, might feel less inclined to dissuade leaders from foreign intervention.

The use of the military option may become more attractive, even in circumstances in which this option would have been discarded if the administration had not been in possession of armed drones. This concern relates to the potential lowering of the threshold for resorting to war, enticing the political authority not to contemplate as valid softer options such as the imposition of sanctions, or the severance of diplomatic relations.

“Paradoxically, however, the increased use of drones suggests that they may encourage countries to act on just cause with an ease that is potentially worrisome. Because drones are seen as a level of force short of war, their use may also be seen as a measure to which the principle of last resort does not apply.”⁸⁴

In a survey experiment conducted by the *Strategic Studies Institute*⁸⁵ on whether the use of drones actually encourages war, the results showed that participants were more willing to support the use of force by their Government when it involved drone strikes.

From an ethical point of view, the challenge posed by more recurrent drone use is to assess in relation to any upsurge in the number of unjust decisions to resort to war. In 2011, a UK Ministry of Defence Joint Doctrine warned:

“... It is essential that, before unmanned systems become ubiquitous (if it is not already too late), we should ensure that, by removing some of

⁸⁴ Brunstetter, D., and Braun M., (2011), p. 339.

⁸⁵ <http://www.strategicstudiesinstitute.army.mil/pdf/PUB1289.pdf>

the horror, or at least keeping it at distance, we do not risk losing our controlling humanity and make war more likely.”⁸⁶

As an article appeared in the *New York Times* in May 2012 it is stated that:

“The US cannot be in a perpetual war on terror that allows lethal force against anyone, anywhere, for any perceived threat. That power is too great and too easily abused. A unilateral campaign of death is untenable. To provide real assurance, President Obama should publish clear guidelines for targeting to be carried out by nonpoliticians, making assassination truly a last resort, and allow an outside court to review the evidence before placing Americans on a kill list. And it should release the legal briefs upon which the targeted killing was based.”⁸⁷

A more structured public criticism towards drones policy does not take place because there are no casualties, but also because the government keeps the program under cover, enlightening its energies to shield its targeted killings program from democratic accountability. The government has a reason to keep the program away from the public eye, given the political resistance it might encounter, and the secrecy increases the lack of public interest in the program due to the minimal impact it has on the interests on the domestic audience, as in a vicious circle.

⁸⁶ United Kingdom Ministry of Defence, *The UK Approach to Unmanned Aircraft Systems*, Joint Doctrine Note, May 2011, p.5-9.

⁸⁷ Editorial, “Too Much Power for a President”, *New York Times*, 31 May 2012, available at: http://www.nytimes.com/2012/05/31/opinion/too-much-power-for-a-president.html?_r=0

If the use of drones allows handling a war at zero cost (at least human), certain aspects of this opportunity could arouse apprehension. As argued by Michael Walzer, "killing by drone is much easier than other forms of targeted killings and the easiness of the killing does make us uneasy". The use of this tool could become attractive also if the offensive action bears as a prerequisite only a faint suspicion. A war conducted in a climate of difficult evaluation and allocation of responsibilities, risks alienating citizens from the possibility to exercise their democratic right to evaluate the actions of their rulers in accordance with the Kantian principle of citizenship. In the case of 'remote' attacks public opinion is substantially removed from the possibility of a peaceful and transparent assessment process, since the life or health of citizens is not in danger. The war, one of the most serious and complex social phenomena, might be removed from the political sphere (losing all the guarantees inherent to this) and be transferred to the administrative domain, inadequate to manage the ethic repercussions and implications of such use.

Reducing the number of those who are involved and, even more, than that of those who hold the power to decide, would reduce the focus and the weight of public opinion and popular protest, which have always been an unavoidable counterpart to possible adverse drifts in the path of human history.

3.3 Counterproductive effects.

While some authors insist that drone strikes have been able to disrupt and degrade terrorist organizations, by killing its senior leadership or hitting its most influential ranks, some others argue that drone strikes

increase the sentiment of fear and anger among the population, thus inciting recruitment by terrorist organizations⁸⁸. A 2012 study, carried out by Stanford and New York universities' law schools, based on interviews with drone victims, witnesses and experts, argues that US strikes in Pakistan have fostered anti-American sentiment and undermined US credibility not only in Pakistan but throughout the region. According to the report (*Living Under Drones*⁸⁹) there is strong evidence to suggest that US drone strikes have facilitated recruitment, and motivated attacks against both US military and civilian targets. While the drone program may have inhibited militant organizing in certain areas, it may have also affected a shift in the location of militant organizing activity.

The practice of recent years has shown great difficulties in trying to eradicate international terrorism; many belonging to terrorist organizations actually welcome dying for their causes, and there are thousands of young men ready to take the place of those who have fallen. According to Coker (2001), “such operations are extensive, but they are likely to remain inconclusive. All that air power can do is contain a problem, not to solve it.”⁹⁰

The need to 'win hearts and minds' of those mostly exposed to recruitment phenomena, in order to limit the spread of an Islamist extremist narrative, is vital to prevent the United States and all Western democracies to be locked in an interminable struggle of strike and counter strike, when civil casualties rise and our domestic life is

⁸⁸ There is some empirical evidence that drone use does increase the number of insurgents. See Micah Zenko, “Reforming U.S. Drone Strike Policies,” Council on Foreign Relations Special Report #65 (January 2013), <http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736>

⁸⁹ <http://chrj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf>

⁹⁰ Coker, C., (2001), *Humane Warfare*, London, Routledge, p.59.

changed forever. The anti-Americanism fueled by the war on terror and, more specifically, by drone attacks, is not easy to reverse, and alienates the possibilities of a genuine dialogue. A failure on the part of the US and the western democracies to adopt a truly holistic multifaceted approach to disrupt terrorism worldwide could only result in increased support for terrorism, leading to an escalation in terrorist attacks and more successful recruitment activities. The most important struggle, perhaps the most strategic long-term goal, would be to shape perceptions of the non-radicalized Muslim population.

There are some key enablers that provide recruitment, funding, support and sanctuaries to terrorist organizations. There is where the fight should concentrate the most. The UAV program has had a major impact on the lives of the local population, which generally live in fear, is stressed and under psychological pressure. The population believes that, due to incorrect information, it could be the target of a drone attack. A number of studies show that local people is frightened and cannot leave the house without the tension and fear of the drones⁹¹.

“The drone strikes in the FATA might have reduced some threats posed by al-Qaeda for the United States, but at the cost of worsening the economic and political conditions in the area and so inducing new threats in the long run, especially for the Pakistani people. Generally, militarized foreign policy errs in thinking that war is the answer.⁹²”

⁹¹ Among others: “Will I be Next? U.S. Drones in Pakistan”, *Amnesty International*, 2013; “Living Under Drones: Death, Injury and Trauma From US Drone Practices in Pakistan”, *Stanford Law School*, September 2012, David Rohde, *The Drone War*”, *Reuters*, January 26, 2012.

⁹² Van der Linden, Harry, “Drone Warfare and Just War Theory,” Chapter 9 of *Drones and Targeted Killing: Legal Moral, and Geopolitical Issues*, ed. Marjorie Cohn (Northampton, Mass: Olive Branch Press, 2015). Available from digitalcommons.butler.edu/facsch_papers/651/ p. 176.

A second strategic concern is that the expansion and usage of drones by the US is counterproductive since it incites the improvement of similar military capabilities and attitudes among states and non-state actors that are opposed to US interests. As two journalists have contended: “with Russia and China watching, the United States has set an international precedent for sending drones over borders to kill enemies.⁹³” Likewise, the increasing use of drones by other states will lead to a dangerous climate of military instability. The use of drones by the US for target killings is widely perceived in the rest of the world as a breaking of international law.⁹⁴ Such a perception could lead other States to adopt the same attitude, thus resulting in a state of international lawlessness that harms the interests of everyone, harming the sense of reciprocity.

3.4 Accountability.

A serious collateral effect is the progressive civilian disengagement from the war decision-making process. The prospect of taking part and fight a 'risk-free war' keeps away people from the political realm, since the life or health of citizens or soldiers is not at risk. As Ignatieff wrote after the Kosovo intervention: “if war becomes unreal to the citizens of modern democracies, will they care enough to restrain and control the violence exercised in their name?”⁹⁵

⁹³ Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *New York Times*, May 29, 2012.

⁹⁴ Ratner, S., (2007), “Predator and Prey: Seizing and Killing Suspected Terrorists Abroad,” *Journal of Political Philosophy* 15, no. 3, pp. 251-275.

⁹⁵ Ignatieff, M., (2000), *Virtual War: Kosovo and Beyond*, New York, Picador, p.4.

Even if a state provides sufficient assurances to its citizens, the risk of an escalation of hostilities provoked by drone attacks cannot be eliminated. For Enemark, a state that wages war on behalf of its citizens, thus potentially exposing the population to risk escalation of the conflict and retaliation, must at least receive from them their explicit consent.

As Alston (2010) has acknowledged, transparency is required as far as the procedural safeguards are in place in order to ensure that the killings are lawful and justified and that the accountability measures that guarantee that wrongful killings are investigated, prosecuted and punished.⁹⁶

Although governments may have reasons related to national security to avoid disclosure of the criteria used in the selection of the drone strikes target, still an attempt at greater transparency is possible.

⁹⁶ Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, p.26, available at:

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>

4. ARGUMENTS IN FAVOUR OF THE USE OF DRONES IN WAR.

Whereas there are some who argue against increasing the role of UAVs on moral grounds, there are at least an equal number who argue in favor of expanding their role in warfare (Strawser, 2013). The latter believe that drones, if employed in compliance with certain moral criteria, have the potential to be even “more ethical” than human combatants. There are also those who argue in favor of any technology, which reduces the risk to military soldiers. A brief look at each of these arguments is in order.

4.1 No exposure for human operators.

The first, most immediate strength related to the use of armed drones in warfare is that it allows combat operations without exposing human operators to the risk of injury, death or capture. The pilot, in fact, is not physically located on board the aircraft but in a remote station, potentially at a considerable distance from the operating environment.

The use of drones for information gathering (surveillance, monitoring, and intelligence gathering) also spared agents and soldiers from the physical risks associated with such activity. This argument is particularly sensitive for government administrations, called to account before the public and the civil society for the possible loss of lives among their Armed Forces.

Public discomfort with military casualties has grown in recent years, and governments have felt pressured by public opinion to wage wars in ways that minimize the risks to soldiers, or to avoid fighting when a

high number of casualties is likely. From this perspective, drones allow wars to be conducted without risking the lives of the soldiers, and therefore reducing the risk of provoking domestic political controversy or public backlash against decision-makers.

On this point, the attitude of governments and the population has changed considerably over time. In the past, government and citizens were apparently willing to accept large number of casualties to achieve what they deemed to be a 'legitimate purpose'. Today, the preference has shifted towards what has been defined as 'post-heroic forms of warfare', characterized by a reduced, possibly eliminated, physical risk.

As far as the United States is concerned, it was during the Vietnam War that it became politically more difficult to call for 'heroic efforts' and enduring long-term sacrifice. According to Coker (2001), during the Vietnam War, "historical metaphors such as manifest destiny which had mobilized the nation in the past had begun to lose its imaginative appeal"⁹⁷. Nearly 48.000 combat deaths have been reported between 1961 and 1975 among US soldiers. The degree of aversion to casualties began to rise, and it was quite straightforward to deduce that casualties were undermining public support for policy choices that led to war, particularly when the public perceived such an extreme effort as inconclusive.⁹⁸

In the 1991 Gulf War, for example, casualty minimization⁹⁹ became from the very beginning an operational objective, in order to win public

⁹⁷ Coker, C., (2001), *Humane Warfare*, London, Routledge, p.32.

⁹⁸ Betts, Richard, K. (1995), "What will it take to deter the United States?", in *Parameters*, Winter 1995, Vol.6, p.76.

⁹⁹ Casualty aversion has been embedded within American military heritage. Democratic societies are, indeed, intrinsically sensitive to wasting human lives in combat. The Department of Defense (DOD) has

support for the war.¹⁰⁰ In a famous essay published by the historian Edward Luttwak (1995) conceptualized the notion of ‘post-heroic war’. He believed that:

“... A higher tolerance for casualties was congruent with the demography of pre-industrial and early industrial societies, whereby families had many children and losing some to disease was normal. For families to lose a child in combat, although tragic, was therefore fundamentally less unacceptable than for today’s families, with fewer children, each of whom is expected to survive into adulthood and embodies a great part of the family’s emotional economy.”¹⁰¹

For Luttwak, the readiness of the population to consent casualties depends on three main elements: on the perceived importance of the war, on the objective worth of what is at stake, or at least on the aptitude of the political leaders to defend the necessity of combat¹⁰². Since the end of the Cold War, the decline in number and the simultaneous aging of the population have led to a reduction in the number of members of the Armed Forces. Parents became more reluctant to sacrifice their male offspring, and similarly fewer young men agreed to put at risk their own lives in combat.

institutionalized the political imperative of casualty minimization in various doctrinal publications. More significantly, the desire to minimize U.S. military casualties has achieved an unprecedented significance in the formulation of military strategy in recent conflicts. These trends appear to be gaining momentum, especially within the United States Air Force.

¹⁰⁰ Enemark, C., (2014), *Armed drones and the Ethics of War: Military Virtue in a post-heroic Age*, Routledge, p.23.

¹⁰¹ Luttwak, Edward N., (1995), “Towards Post-heroic warfare”, in *Foreign Affairs*, Vol. 74, n.3, p.115.

¹⁰² Luttwak, Edward N., (1999), “Post-heroic warfare and its Implications”, Center for Strategic and International Studies, p. 136, available at: http://www.nids.go.jp/english/event/symposium/pdf/1999/sympo_e1999_5.pdf

Quite simultaneously, there has been a profound transformation in the relationship between the military personnel and the civil society it had to protect. For Ignatieff (2000):

“... because peace has become a settled expectation of the civilian population, martial sacrifice and death in combat were considered as extreme destinies, increasingly implausible to cultures raised to count on a full adult life”.¹⁰³

In times in which the degree of tolerance for civilian deaths has declined sharply, and in which the very concept of fighting has become less heroic, the development of new military technologies has become a mediating factor between the two contrasting claims. The reliance on advanced technologies to conduct war has become increasingly attractive. The goal is to avoid the so-called 'full-scale wars', thus reducing strategic risks, and sparing military personnel as much as possible.

As suggested by Mahnken (2008), since the '90s the United States has become increasingly involved in wars in which they had limited aims, marginal interests and were willing to make minimum sacrifices. The increased use of airpower since the end of the Cold war seemed particularly suited for these types of conflicts¹⁰⁴.

4.2 Cost-effectiveness.

Another particularly important aspect in the use of drones in war is related to their minor cost compared to other combat aircrafts. Although

¹⁰³ Ignatieff, M. (2000), *Virtual War: Kosovo and Beyond*, New York, Picador, p. 186.

¹⁰⁴ Mahneken, T., (2008), *Technology and the American Way of War since 1945*, New York, Columbia University Press, p.178-179.

they are unmanned, drones operation still requires a ground flight crew, maintenance crew, and extensive networks of systems and people to provide the intelligence used and legal authorization to conduct lethal strikes. Notwithstanding that, drones are slightly more cost effective to acquire and operate than conventional manned aircraft. A Predator system costs around 20mln US dollars, while a Reaper system nearly 53 mln dollars; by comparison, a F-22 fighter costs about 150 mln dollars. As Enemark (2014) states:

“A single drone system consists of four aircraft, a ground station, a satellite link and a maintenance crew at the launch site, but the system is nonetheless considerably less expensive than a single inhabited fighter jet.”¹⁰⁵

By virtue of their unmanned operation, drones can be sent into hostile areas (which would be difficult to reach by a conventional army) with no risk to the lives of pilots. They loiter for hours, unconstrained by shift schedules or human endurance; conduct more surveillance and collect more intelligence and, when required, execute a targeted strike with precision¹⁰⁶.

4.3 Precision.

Another positive account is, indeed, precision. Since drone operators can visualize and target for hours or days in advance of a strike, they can identify terrorists more accurately than ground troops or conventional pilots. For Jeff McMahan (2013):

¹⁰⁵ Enemark, C., *Armed drones and the Ethics of War: Military Virtue in a Post-heroic Age*, p. 76.

¹⁰⁶ <http://www.americansecurityproject.org/the-us-and-its-uavs-a-cost-benefit-analysis/>

“What differentiates the newer models of remotely controlled weapons from traditional long-range precision-guided munitions is that they allow their operators to monitor the target area for lengthy periods before deciding whether, when, and where to strike. These are capacities that better enable the weapons operators to make morally informed decisions about the use of their weapons.”¹⁰⁷

Ideally, drones would be able to time a strike when innocents are not nearby or could even divert a missile after firing if, allegedly, a child wanders into range. As Daniel Brunstetter (2011) argues:

“Their aerial capacity is superior to that of bomber aircraft equipped with smart bombs because their stealth, accuracy, and loitering ability enable them to better track suspected terrorists and deny them safe haven.”¹⁰⁸

Notwithstanding that, evidence gathered by journalists, researchers and think tanks shows that the number of innocent civilians killed is impressive. In this regard, it is easy to deduce that drone strikes are only as accurate as the intelligence they're based on. Like any other weapon, armed drones can be used recklessly or on the basis of flawed intelligence.

Civilian losses of targeted airstrike with drones have called into question the accuracy with which UAVs identify their targets, raising serious questions about the so-called collateral damage. An idea of the extent of collateral damage can be gleaned from a report by the Brookings Institution (July 2009) which stated that American UAVs

¹⁰⁷ McMahan, J., (2013), Killing by remote control: the ethic of an unmanned military, Introduction.

¹⁰⁸ Brunstetter Daniel and Megan Braun, “The Implication of Drones on the Just War Tradition,” in *Ethics and International Affairs* 25, no. 3 (2011), pp. 337-358, at p. 343.

attacks in Pakistan produced ten civilians deaths for every militant eliminated.¹⁰⁹ It seems that the controllers often neglected to take all possible precautions to ensure that the objectives identified by the drones are actually fighters, or simply cannot distinguish between civilian and military targets. Since terrorist and other insurgent organizations are necessarily clandestine, it is not always clear who the members or affiliates of these groups are or how to distinguish them from civilians.¹¹⁰

4.4 The avoidance of a full-scale war¹¹¹.

Another important argument, often advanced by proponents of armed drones, is that one: instead of fighting a full-scale war involving soldiers and boots on the ground, it is preferable to use drones for a particular mission in a conventional war, assuming that these are exhaustive alternatives. Michael Walzer (2006), talking about “force-short-of-war,” notes that the use of such force avoids the “unpredictable and often catastrophic consequences” of war.¹¹² If a state can circumvent the need to go to war by using drones to counter the threat it faces, it certainly is an advantage to have drone technology available for this purpose. Alternatively, one might even think about the use of

¹⁰⁹ Byman, Daniel L., (2009), “Do Targeted killings work?”, Brookings publications.

¹¹⁰ Buchanan, A. and Keohane, Robert O., (2015), “Toward a drone accountability regime”, in *Ethics and International Affairs*, Vol. 29, no. 1, p.15.

¹¹¹ Brunstetter and Braun, p. 343.

¹¹² Michael Walzer, *Just and Unjust Wars*, fourth ed. (NY: Basic Books, 2006), p. xiv.

drones as a necessary step that needs to be attempted in order that a future war might satisfy the *jus ad bellum* criterion of last resort.¹¹³

4.5 Disrupting terrorist groups.

Targeted killings by drones puts significant pressure on terrorist groups by degrading their ability to plan and undertake attacks. ‘Terrorist leadership targeting’ has become the cornerstone of American counterterrorism policy. The United States launched drone attacks in Pakistan and Afghanistan with the aim to degrade the terrorist group’s capacity to undertake political and violent actions by targeting senior al-Qaeda leaders with drones. Leon Panetta, former US CIA Director, stated on the matter: “Those operations are seriously disrupting al-Qaeda...It is pretty clear from all the intelligence we are getting that they are having a very difficult time putting together any kind of command and control alternative structure.”¹¹⁴

There is significant debate in the academic literature on the effectiveness of drone strikes to really disrupt terrorist organization. According to Jordan, organizations or groups with a ideological settings are most likely to experience an interruption of activity following the removal of their leader, while religious organizations are largely unaffected by leadership decapitation, therefore their marginal utility is negative¹¹⁵. For the author, despite the great amount of political

¹¹³ Brunstetter and Braun, “The Implication of Drones,” p. 346. The authors, however, raise doubts about such an understanding of drone use.

¹¹⁴ Joby Warrick and Peter Finn, “CIA Director says secret attacks in Pakistan have hobbled al-Qaeda”, *The Washington Post*, March 18, 2010.

¹¹⁵ Jordan, J., (2010), “When Heads Roll: Assessing the Effectiveness of Leadership Decapitation”, in *Security Studies*, Vo. 18, n. 4, p. 359-382.

optimism, there's very little evidence on whether removing terrorist leaders will result in an organization collapse.

Martha Crenshaw argues that a leader is responsible for ensuring that the group is able to provide incentives sufficient to maintain and attract members (and avoiding free-riding) and to induce them to commit acts of violence. Notwithstanding that, her data assessment demonstrates that the removal of key leaders not always results in organizational disintegration¹¹⁶.

Hafez and Hatfield assessed the impact of Israeli targeted assassinations on the level of Palestinian violence from September 2000, the beginning of *Al-Aqsa* uprising, through June 2004¹¹⁷. Their analysis assessed that targeted assassinations had no significant impact on Palestinian attacks, did not decrease rates of Palestinian violence, nor did they increase them. They resolved that targeted assassinations may be useful as a political instrument to signal a state's determination to punish terrorists and calm a furious public, but there is little evidence that they actually impact the course of an insurgency.

Patrick B. Johnston, instead, judges that 'neutralizing' terrorist leaders increases governments' chances of defeating insurgencies, reduces attacks, and diminishes overall levels of violence. For the author, there

¹¹⁶ Crenshaw, M., (1991), "How Terrorism Declines," in *Terrorism and Political Violence*, Vol. 3, no. 1., p.26.

¹¹⁷ Hafez, M, and Hatfield, Joseph M., (2006), "Do Targeted Assassinations Work? A multivariate Analysis of Israel's Controversial Tactic During the Al-Aqsa Uprising", in *Studies in Conflict and Terrorism*, Vol. 29 n.4, pp. 359-382.

is no credible evidence of a ‘martyrdom effect’¹¹⁸, whereby trying but failing to neutralize militant leaders decreases governments’ chances of defeating insurgencies or increases levels of antigovernment violence¹¹⁹.

According to Price’s analysis, two necessary conditions are to be met in order for ‘leadership decapitation’ to be successful. Terrorist leaders must be important to the success of the organization and leadership succession must be difficult¹²⁰. For Price, the covert nature of terrorist organizations make them much more reliant on upon leadership. Terrorist leaders are less likely to institutionalize their actions and functions, which further complicates succession. On the point, Price’s reasoning cannot be accepted. While it is true that terrorist organizations do not disclose any information that could menace their survival, many terrorist groups have institutionalized their operations. Public evidence have shown that Al Qaeda in Iraq and its successor organization, the Islamic State, presented itself as a ‘state’ in the form of a caliphate, developed administrative and bureaucratic traits, a formal structure, local organization and financing. This process of bureaucratization increased organizational efficiency and provided a signal of legitimation to local populations, quite regardless from the presence of its leader, Abu Bakr al-Baghdadi.

¹¹⁸ Such a dynamic takes place when a terrorist, particularly one held in high esteem by other group members, is killed by enemy security forces. This could result in an uplifting of that terrorist to nearly mythic status, thus inspiring followers to avenge the killing and thus fostering an ongoing cycle of violence.

¹¹⁹ Johnson, Patrick B., (2012), “Does Decapitation Work? Assessing the Effectiveness of Leadership Targeting in Counterinsurgency Campaigns”, in *International Security*, Vol. 36, n. 4 , pp. 47-79.

¹²⁰ Price, Bryan C., (2012), “Targeting Top Terrorists: How Leadership Decapitation Contributes to Counterterrorism”, in *International Security*, Vol. 36, n. 4, pp. 9-46.

We could argue that because terrorist organizations are values-based, it is not unconceivable for their members to replacing leaders. The religious principles from which they claim to be inspired, their own reading of *jihad*, the narrative of radical Islamic Salafi or Wahabi legal school, could be perpetuated regardless of the existence of a charismatic leader capable of holding together a group of terrorists or insurgents. Those principles are equipped with a higher ideological appeal that transcend the contingencies of the moment, and also make it more adaptable to continuous leadership changes.

4.6 Drones do not have emotions.

Some advocates the use of drones in war argue that while UAVs are able to strictly follow logically consistent principles, human operators can easily deviate from following these principles because guided by their emotions. Drone's precision and ability to carry out attacks is in no way influenced by the fear of loss, desire for revenge, intimidation. From this point of view, the decisions implemented by drones are taken in cold blood, without suffering the emotional fluctuations that typically affect the decisions of human beings in a war theatre. A study published in 2009 by Human Rights Watch, on drone attacks by the Israeli defense forces in Gaza during the period December 2008-January 2009, emphasizes this perspective. The report, while acknowledging a number of major violations of international law and international humanitarian law by Israel, recognized the accuracy of their drones, thanks to high-resolution cameras that allowed the Israeli Defence Forces (IDF) to observe for a long time before launching launch their attacks. Indeed, the use of drones for monitoring and surveillance allowed UAVs operators to "tell the difference between fighters and others directly

participating in hostilities, who were legitimate targets and civilians, who was immune from attack, and to hold fire if that determination could not be made.¹²¹” The report praised the ability of the operator, via the missile’s remote guidance system, to divert a fired missile in the event there was last-minute doubt regarding a target’s legitimacy.

Human Rights Watch’s Marc Garlasco narrated the employ of UAVs during the 2006 Lebanon war, and how remote pilots, because they were not facing risk, were able to loiter over potential targets for hours if necessary in order to determine whether or not it was appropriate to strike them¹²².

A drone does not have a last second hesitation before wiping out an enemy camp, whereas a soldier stops and thinks about what he is about to do. Guilt of fear may influence the soldier. This means that a soldier may experience a sort of psychological conflict before directing a target while a drone has no afterthoughts or emotions. This in turn leads one to believe that since a drone does not hesitate before eradicating target, it is more effective than a soldier.

¹²¹ Human Rights Watch, “Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles, June 30th, 2009, available at: <https://www.hrw.org/report/2009/06/30/precisely-wrong/gaza-civilians-killed-israeli-drone-launched-missiles>

¹²² Singer, P., (2009) *Wired for War: The Robotics Revolution and Conflict in the 21st Century*, Penguin Books, p. 395.

5. KILLING AND KILLING BY DRONES

Here a preliminary distinction is deemed as necessary: one thing is to examine the moral dimension of killing in war in general, another one is the issue of killing carried out by remotely controlled weapons. Killing by drone is constantly and quite inevitably associated with the concept of targeted killing, at least in view of the international practice of recent years. It must be recognized that, in the fight against international terrorism, drones and targeted killing have constituted a single operational case.

The association of targeted killing with drones is clearly embedded in the public consciousness. There are no many chances of survival following a direct attack by drone, nor it is contemplated the possibility to capture/hold/process the targeted in a counter-terrorism operation. The absence of detention obligations on the side of those who use drones is based on the way the fight against terrorism has been framed and presented to the public. It has been conceptualized, particularly from the United States, as an armed conflict, and not as an international police operation. In an armed conflict the killing of an enemy combatant is allowed. As demonstrated in the previous chapter, in an armed conflict the international humanitarian law standards do find application, which provide slightly more permissive rules than those governing the conduct of the police in the operations of counter-terrorism or fighting organized crime.

Are there specific problems related to targeted killing with drones? According to Garry Solis (2010), targeted killing is:

“... The intentional killing of a specific civilian or unlawful combatant who cannot be reasonably be apprehended, who is taking a direct part in

hostilities, the targeting done at the direction of the State, in the context of an international or non-international armed conflict.¹²³

The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions has added additional nuance, defining targeted killing as “the intentional, premeditated and deliberate use of lethal force, by States or their agents, acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”

Jeff McMahan (2013) has made a case in favor of the use of targeted killing in operations against terrorism and associated it to the moral necessity to protect human life from an attack considered very plausible or probable, although not temporally defined.

“Targeted killing is necessarily preventive: it is done when there is no imminent threat from the terrorist. If a terrorist posed an imminent threat, killing him would not count as targeted killing but simply as third-party defense of others, about which there is no legal controversy. But to have any plausibility, the imminence requirement must be understood as a proxy for considerations of probability or necessity. Usually threats that are not imminent are either below some threshold of probability or can likely be dealt with in some other way. But in the case of committed terrorists who are protected by the political and legal authorities where they live, targeted killing may be necessary for defense of the innocent in the same way it is in the case of a rampaging murderer.”¹²⁴

¹²³ Solis, G., (2010), *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, p. 538.

¹²⁴ McMahan, J., (2013), *Killing by remote control: the ethic of an unmanned military*, Foreword.

In general terms, it can be argued that although killing is always wrong, there are certain circumstances in which the killing of a person is justifiable.

According to Strawser (2013):

“In my view, to justifiably kill a person, that person must have done something wrong, for which he is morally responsible, which makes it permissible to kill him to accomplish some specific end that is properly related to the wrong for which he is morally responsible. That is, a person is for some specific reason liable to be killed. Usually this will be something like wrongful, unjustified violence toward another that can be prevented only by killing, that is, self-defense or third-party defense of others.¹²⁵”

A simple but significant distinction between murder and killing must be made. Killing is a homicide when it is done to a human being. Murder is assumed to be an unjust killing or homicide. All murders are killings but not all killings are murders, because some killings cannot be considered as being unjust. The killing of a terrorist or a terrorist group, who conceived, planned and carried out a terrorist attack or more attacks against innocent civilians, can be considered a legitimate target and killing them, in times of war, does not raise any particular disputes. Terrorism is the deliberate killing of innocents, and it is in our interest to deny that such practice could ever be justified.

Strawser (2010) before adopted a position somewhat extreme. He stated that killing by drones is not only militarily effective, but also ‘morally obligatory’ due to the number of civilian lives saved by such

¹²⁵ Strawser, J. Bradley, (2013), *Killing by Remote Control: the Ethics of an Unmanned Military*, Oxford University Press, p.5.

discriminating weapons, as well as the lives of U.S. and allied combat personnel spared in attacks from terrorists. He called it the “principle of unnecessary risk,” according to which military leaders have a moral obligation, when pursuing a legitimate military goal, to choose a mean, if available and just, that does not pose a risk to their combatants.¹²⁶ Strawser’s principle is a tough expansion of the principle of force protection, which suggests to reducing risk to one’s combatants to the maximum extent.

It is not clear, however, how this principle of vital life-preservation of the just combatant in war could be complemented with the increased life-risk for non-combatants. Although the moral obligation to protect only a part of the conflict remains a bit obscure in Strawser’s reasoning, it is not clear why the protection the life of a soldier has to take place at the expense of civilians, noncombatants, of individuals not engaged in the hostility. The use of drones, in this sense, could be morally justified only if two requirements are met simultaneously: on the one hand, to protect the life and integrity of the just warrior, the other the protection of civilians and unarmed. The immunity of the former would be harmoniously matched by the safety of the latter. The moral dilemma would evaporate, resolved by the miracle of technology. And that is indeed the claim being made today by drone supporters. On the contrary, if we look at the use that was made of armed drones to date, it is almost impossible to maintain that the two imperatives have been respected in the same way.

¹²⁶ Strawser, Bradley J., (2010) “Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles,” in *Journal of Military Ethics*, Vol. 9, no. 4, p. 344.

In addition, although the targeted killing of terrorists has become an established practice in the fight against terrorism, alternative options are still to be considered preferable whether actionable.

“If it were possible to arrest the individual or apprehend him in another way, clearly the attack could not qualify as “absolutely necessary”; but a terrorist leader who has directed attacks in the past and is planning to do so again has made himself liable to harm even if he has never picked up a gun himself or worn a military uniform.”¹²⁷

According to Jeff McMahan (2013):

“It can, indeed, be argued with considerable cogency that the use of remotely controlled weapons to kill Taliban fighters in their “safe havens” can be legally justified as the killing of enemy combatants in war, while their use to kill al Qaeda operatives in their havens can be legally justified as police action against dangerous criminals who cannot be arrested and tried at a reasonable cost so that the requirement of arrest must be suspended, as it sometimes must be even in domestic law enforcement.”¹²⁸

If the killing of the enemy opponent is allowed in a context of war, as fighter of the opposing faction, there are distinct moral issues in the use of armed drones for killing rather than the use of other means? Many authors have observed, on the point, that there is ‘nothing new’ about drones. Targeted killing could be carried out by any other kinds of weapon platforms or even by soldiers on the ground with any weapon. Targeted killing, *per se*, cannot be raised an objection against drones in

¹²⁷ Whetham, D., (2015), “Targeted killing: accountability and oversight via a drone accountability regime”, in *Ethics and International Affairs*, Vol. 29, no.1, p. 62.

¹²⁸ McMahan, J., (2013), *Killing by remote control: the ethic of an unmanned military*, Foreword.

principle. It is true, indeed, that the employ of lethal drones does not initiate an entirely new form of killing, rather its use exacerbates moral concerns related to when and how force might be used.

Now, *ceteris paribus*, if killing is sometimes justified, does the method of killing become morally relevant? For Strawser (2013), unjustified killing is wrong no matter how it is accomplished. But justified killing does not have a blanket justification attached that says the killing can be done in any possible way. Methods of killing that are merely more painful or cruel for no good reason are methods that can turn an *otherwise* justified killing into an unjustified one.

In his ethical reflection on drone killing, Mark Coeckelbergh (2013) advocates that this practice does not only create physical distance between combatants, but also moral distance: far removed from one's opponent, it becomes easier to kill. In this perspective, the history of military technology and the same history of killing in fighting can be interpreted as a history of 'creating distance' in order to reduce one's own vulnerability. With remote technologies, the separation between fighter and opponent is complete and it has significant moral repercussions:

“In body-to-body fighting, the fighter sees the eyes and body of his opponent, and has body contact with him. He smells him, feels him, hears him. The fighters see, smell, and feel the skin, the bodily movements, the breathing, the sweat, and perhaps the blood of their opponent. During the fight they are frequently and literally in touch. This has epistemic and moral consequences. The fighter knows that his opponent is also a person and a human being, who also struggles to win, who has feelings (e.g. hate), and who also feels pain when he is hit. The

fighter is also very aware of his own body; in a sense his body is his weapon, the fighter ‘is’ weapon and agent at the same time¹²⁹”.

By physically dividing combatants from their act of killing, the drone exaggerates the moral distance between the parties of a conflict. Without moral commitment, warfare lacks an imperative sense of sacrifice and chivalry. Moral commitment is critical to any military accomplishment; war as a moral endeavor is waged in the cause of a better peace. Without regard for moral ideals, the risk is that of an endless conflict.

As Deane Peter Baker (2015) argued in this regard:

“The drone is not the mean by which peace will be won, nor the means by which justice will be advanced. Our moral thinking must keep up. Drones must be understood and their application mastered, lest they become the concealed weapons of injustice.”¹³⁰

It could be counter-argued, at this point, that fighting closely does not necessarily prevent killing and atrocities. ‘Empathic bridging’ between combatants is not necessarily created whether they fight face to face. More generally, it can be argued that distance does not determine the way in which a war is fought.

Drones have begun to be used only from the middle of this century. Since 2000 years ago, and even before, the story is full of examples of brutal wars in which it was committed all sorts of atrocities and

¹²⁹ Coeckelbergh, M., (2013), “Drones, information technology and distance: mapping the moral epistemology of remote fighting”, in *Ethics of Information Technology*, Vol. 15, pp. 87-98.

¹³⁰ Baker, D.P., (2015), *Key Concepts in Military Ethics*, New South Publishing, University of South Wales, Australia, p. 191.

violence, with no or very little empathy from the soldiers for enemy combatants, except in some sporadic occasions, linked to the personality and emotion of a single individual rather than the actual situation. Distance or closeness has never fundamentally altered the attitude of a human being to kill.

Finally, if targeted killing in war can be considered legitimate, the same killing raises major ethical doubts if carried out in disputed cases of armed conflict, or even outside a specific area of hostilities. Here a premise must be made: if in war, conceptualized in classical terms, the cardinal element was symbolized by the fight or struggle between adversaries, in counter-terrorism it is mainly characterized by ‘hunting and killing’. Such a distinction bears a distinctive consequence: the conflict between Armed Forces takes place within the territory of one’s party or where the opposing forces collide; ‘hunting and killing’, on the contrary, progresses more dynamically according to the whereabouts of the ‘prey’.

Stephen Graham (2004) argues that classical military doctrines tend to rely on a “horizontal projection of power”, confined in a two-dimensional space represented in geographical maps¹³¹. Nowadays, instead, a more ‘vertical vision’ is preferred, branded essentially by an air-strategy against the enemy, in order to avoid as much as possible, the resort to ground troops (no boots on the ground)¹³². Two types of considerations follow: firstly, the spatial dimension of the armed conflict tends ideally to be confined to the ‘body of the enemy’; at the

¹³¹ Graham, S., (2004), “Vertical Geopolitics: Baghdad and After,” in *Antipode* 36, no. 1, pp. 12–23.

¹³² Thus in Kosovo, Afghanistan and Iraq, tremendous reliance was placed on air power either as a substitute for, or to reduce the dependence upon, the use of allied troops for difficult and dangerous ground operations.

same time, the attacker is required to deliver ‘surgical’ attacks, and therefore to widen and expand its range of action to attest itself, essentially, on a global level.

Critics of this interpretation tend to defend a more classical concept of armed conflict¹³³, emphasizing the basic idea according to which the laws of war operate in the context of a clearly defined geographical space, by definition not ‘global’.

Whetham (2015) argues:

“A terrorist leader, well protected and constantly moving from safe house to safe house in contested or hostile territory may simply be impossible to apprehend in such a way. If an opportunity presents itself for a state to prevent ongoing acts of harm from such an individual with a drone strike or other similar method, if the evidence is extremely clear, and if authorization is granted by somebody suitably high up in, or even above, the normal chain of command, that would be a case of targeted killing carried out in self-defense.”¹³⁴

The targeted killing must take place during an armed conflict; otherwise it is just a homicide that takes place in contrast with all codifications of basic human rights. The right of not to be arbitrarily deprived of life is absolute, therefore the use of lethal force against an individual can be justified if it is absolutely necessary for the defense of another person from an act of unlawful violence by that individual.

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¹³⁴ Whetham, D., (2015), “Targeted Killing: Accountability and Oversight via a Drone Accountability Regime”, in *Ethics and International Affairs*, Vol. 29, no.1, p. 62.

Self-defense requires that a threat is immediate and pressing. Without an imminent threat to trigger an act of legitimate self-defense, a government using the military means at its disposal to eliminate people it dislikes is not practicing targeted killing but rather is employing the military tools to carry out something akin to extrajudicial executions.

In 2006, the Israeli High Court was asked to provide guidance on whether targeting killing was permissible¹³⁵. Justice Aharon Barak made clear that, while there was always a duty to minimize any harm to the civilian population, specific civilians who had lost their protected status by virtue of taking a direct part in hostilities could be legitimately targeted. This group was seen to include those who used or bore arms, those who were traveling to or from an attack, those who planned such attacks, or those who enlisted, guided, or sent others to carry out such attacks.

Another concern is related to the fact that the prolonged use of drones could 'create a slippery slope' that leads to continual killing. The risk here is to expand targeted killing to a global scale, even in cases in which the presence of terrorist organizations is acknowledged, but they are focused on local regimes and could not, realistically, target the United States. The growing risk of a perpetual war against radicalized Islamists would not affect the United States, but also all their allies.

¹³⁵ *Summary of Israeli Supreme Court Ruling on Targeted Killings*, December 14, 2006. <http://www.jewishvirtuallibrary.org/jsource/Politics/sctassass.html>.

6. DRONES AND ASYMMETRIC WARFARE

The most recent doctrine (and practice) of contemporary warfare discards the conventional model based on opposing battlefronts confronting each other (in line with the definition offered by Carl von Clausewitz, according to which the classical structure of war is essentially a duel between two or more challengers)¹³⁶. Those ‘new wars’, in fact, are not fought between States, but between a State and a combination of people, mainly non-State actors.¹³⁷

According to Margolis (2005), the new types of conflict have altered two essential principles of the Just War Theory (JWT): on the one hand, the distinction between lawful combatants and civilians; on the other, the possibility to limit military attacks to those who take effective part in hostilities. Indeed, terrorist mingles and becomes indistinguishable from the civilian population¹³⁸, thus introducing *human shields* into the equation. It is a matter of fact that since modern conflicts seem to increasingly occur in close proximity to civilian population centers, the principle of distinction becomes increasingly central to the effective regulation of contemporary conflicts.¹³⁹

Those who believe that a ‘new form of warfare’ has emerged, claim that a theoretical shift has taken place both in terms of *jus ad bellum* and *jus*

¹³⁶ Carl Von Clausewitz, *On War*, Everyman Editions, 1993.

¹³⁷ Gilbert, P. (2003), *New Terror, New Wars*, Washington DC, Georgetown University Press; Arreguin-Toft, I., (2001), “How the Weak win Wars: A Theory of Asymmetric Conflict”, in *International Security*, Vol. 26, n.1, pp. 93-128.

¹³⁸ Margolis, J. (2005), “Terrorism and the New Forms of War”, in Tom Rockmore, Joseph Margolis and Armen Marsoobian, *The Philosophical challenge of September 11: Terrorism and the New Forms of War*, Blackwell Publishing.

¹³⁹ Corn, Geoffrey S., Schoettler James. A., Brenner-Beck, Hansen, Jackson, Lewis, (2015), *The War on terror and the Laws of War: a Military Perspective*, Oxford University Press, p.78.

in bello. More specifically, the new tactics of war between dissimilar and contrasting entities pose a fundamental challenge to our normative concerns on the just cause for waging war and the conduct of hostilities between belligerents. Indeed, one could claim that the recourse to insurgence violence to attain political ends is not new at all in historical terms, and therefore the resort to the expression ‘new war’ might sound, at times, inappropriate.

According to Carter (2009) such wars require some alteration to the classical framework of Just War Theory (JWT), by expanding, excluding, or creating new categories not previously contemplated. Indeed, what we observe today -in the vast majority of counter-terrorism policies- is a military strategy of preventive *manhunting*, not intended at reacting to attacks already in place, but rather at averting the proliferation of emerging threats by eliminating their potential agents¹⁴⁰. The intention seems to detect, deter, disrupt, stop or destroy the networks before they can actually harm, despite the absence of an imminent threat¹⁴¹. The main policy *rationale* behind this approach is, quite obviously, that of the ‘social defense of the national community’; preventive action is put in place with the sole purpose of preserving the society from potentially dangerous elements.

In an asymmetric conflict, in which the *manhunting* strategy against members of the terrorist groups has become the prevailing military strategy, the use of armed drones seems to have become the best option. The use of drones, in remote or hostile contexts, makes it possible to

¹⁴⁰ Carter, A. Jacoby, “Just/New War Theory: Non-State Actors in Asymmetric Conflicts”, in *Philosophy in the Contemporary World*, Vol. 16, issue 2, Fall 2009, p. 7.

¹⁴¹ Crawford, George A. (2008), *Manhunting: Reversing the Polarity of Warfare*, Publish America Press, p.12.

constantly monitor the movements of alleged terrorists and target them directly without the use of ground troops.

Some authors argue that drone killing in warfare (intended in general terms) creates a profound asymmetry between the combat capabilities of the opposing sides, such as to transform the warfare into something, in principle, inherently unjust. This is because drones are capable of altering permanently the positions of the two sides, creating an artificial advantage to the party most technologically advanced. From this perspective, the use of drones would have the effect of relegating the part that does not use them in a sort of lifelong disadvantage. The technological gap, according to certain authors, *per se* creates an insurmountable asymmetry.

For Chamayou (2015):

“What is specific about contemporary imperial violence has less to do with the asymmetry of force and the resulting unequal distribution of vulnerability—a classic feature of all the “small wars” of history—than with the type of norms that now shape the great Western “democratic” powers’ exercise of that violence. If there is anything new about the situation, it might lie in the fact that the practical quasi- invulnerability of the dominant camp was, at the end of the twentieth century, set up as the dominant ethical and political norm.¹⁴²”

On this point, Suzi Killmister (2008) believes that ‘remote weapons’ are likely to create situations where the targeted side has closed off all moral options for retaliation, forcing it to surrender or transgress civilian immunity.

¹⁴² Chamayou, G., (2015), *A Theory of the Drone*, The New Press, p.127.

“..Remote weaponry restricts the moral options for retaliation available to the part under attack. A state under attack from remote weaponry is unable to respond in the traditional, just war sanctioned, manner of targeting combatants on the battlefield — there simply are none. There are thus three options available to such a state: it can surrender; it can target enemy civilians; or it can target what I have termed civilian combatants within the aggressor state.¹⁴³”

This argument is untenable for a number of reasons. First, a perfect equality and symmetry between the technological and military capabilities of the parties in a given conflict is both highly unlikely and perhaps impossible. Second, it has never been an ethical or moral requirement that the parties in a war are 'balanced' from a military point of view.

In addition, such an argument, formulated in the context of an armed confrontation between regular States, could certainly not be accepted in a global context to contrast terrorism perpetrated by non-States actors. Offensive actions are primarily carried out in response to terrorist attacks, thus essentially in an exercise in self-defense (albeit protracted). Second, it is precisely the *modus operandi* of international terrorism to deliberately attack the civilian population to sow fear and terror. More specifically, terrorists violate the basic principles of the *jus in bello* because it is their deliberate mode of action, and not because 'forced' to pursue these tactics to oppose the technological superiority of the counterpart.

¹⁴³ Killmister, S., (2008), “Remote Weaponry: The Ethical Implications”, in *Journal of Applied Philosophy*, Vol. 25 n.2, 2008, p.122.

Margolis (2005) creates its argument based on the comparison between states and non-state actors. He believes that the use of non-conventional weapons and tactics from non-State armed groups is to be considered as a ‘necessary condition’ to achieve military parity with conventional States.

“... they (non-state actors) cannot rule out, a priori, the use of anthrax, smallpox, plague, sarin, nuclear weapons, poisoning, suicide bombing: they cannot, because they could not otherwise be a plausible match for the powers they mean to oppose or defeat”¹⁴⁴.

Such a reasoning is, arguably, quite dangerous. It suggests that by threatening and undermining the ‘paradigm of war’, namely just war principles, non-State actors seek to acquire a strategic advantage from a position of conventional military weakness¹⁴⁵. The truck bomb detonated in 1983 against a US base in Beirut, which led to the departure of US Army from Lebanon the following year, can be quoted as a model example of effective use of asymmetric force. Every asymmetric tactic hangs, for its efficacy, upon some degree of subversion of the principles of *jus in bello*, and, in particular, the principle of non-combatant immunity¹⁴⁶. On the point Rodin (2006) argues:

“...it would not be an exaggeration to say that such tactics operationalize the moral disposition of the enemy by using its reluctance to target civilians as a source of strategic advantage. In doing

¹⁴⁴ Margolis, J., (2005), “Terrorism and the New Forms of War”, in Tom Rockmore, Joseph Margolis and Armen Marsoobian, *The Philosophical Challenge of September 11: Terrorism and New Forms of War*, Blackwell Publishing, p.196.

¹⁴⁵ Rodin, D., (2006), *The Ethics of War: Shared Problems in different Traditions*, Routledge, p.154

¹⁴⁶ Rodin, D., (2006), p. 157.

so, they implicitly expose non-combatants to risk by making it difficult for the enemy to both fight effectively and respect the principle of distinction”¹⁴⁷.

This argument holds some legitimacy only in its premises. Non-State groups would not become formidable and effective opponents on the ground if they did not reject the established normative framework, more precisely Just War principles embedded in the Geneva Conventions. The argument here might be framed as follows: Non-State actors long to attain military parity with State-actors. Due to the circumstance that they lack the political, military, technological and financial assets and resources to deal on an equal basis with a state-system waging war, they violate Just War principles to let themselves become credible opponents.

This reasoning, however, would lead to improper conclusions. If non-State actors feel not tied to those principles, it would be purposeless to attempt to account for the justice or injustice of new forms of wars in terms of these principles. Ultimately, such a stance renders JWT unsuitable to those conflicts and the theory itself is rendered ineffective as a mean of determining the justice of new wars.

Carter (2009) rejects such an argument maintaining that the same fact that non-State actors violate JWT principles cannot be raised, *per se*, as a justification for the irrelevance of JWT. According to the author, there are countless of ways to reverse the military imbalance between the adversaries that do not necessarily require the killing of innocent

¹⁴⁷ Rodin, D., (2006), p. 158.

people. For him, it is more a matter of expediency than of strict military necessity.¹⁴⁸

History teaches us that in a significant number of occasions the insurgent groups have used guerrilla tactics to counter, often victoriously, a stronger opponent. The Vietcong war against the United States, and the Taliban uprising to counter the Soviet invasion, the Israeli-Palestinian conflict are just few examples. Although the phenomenon of asymmetric warfare is not new in itself, what is new is the global importance this kind of conflict has assumed in the last decade.

Despite guerrilla warfare is widely acknowledged to have a balancing effect on power imbalance between opposed factions, it does not appear appropriate to discard the applicability of JWT regulatory framework on such an argument. Accommodating such a perspective would entail consenting the moral permissibility of fighting by different rules. Such a stance would empower Skerker's (2004) vision according to which the deliberate violation of JWT principles is aimed at provoking the Nation-state into violating those norms as well, thus undermining their legitimacy and moral superiority in the eyes of their same population and, more generally, of the International Community as a whole¹⁴⁹.

Alternatively, accepting this theoretical system might imply a second order of consequences: that both parties do not feel bound to the conventional set of JWT prohibitions and regulations.

¹⁴⁸ Carter, A. Jacoby, (2009), "Just/New War Theory: Non-State Actors in Asymmetric Conflicts", in *Philosophy in the Contemporary World*, Vol. 16, n. 2, p. 7.

¹⁴⁹ Skerker, M., (2004), "Just War Criteria and the New Face of War, in *Journal of Military Ethics*, Vol. 3, n.1, p. 31.

“...so, if for example, the weaker party chooses not to wear uniforms that clearly identify them as combatants, then it cannot demand that the stronger party does so. The claim could be understood as meaning that if the weaker party violates rule R, then the stronger is not obliged to observe R, i.e., it is morally permissible for the stronger party to violate R.”¹⁵⁰

This suggestion would make each party subject to the same rules, while at the same time it would have the effect of drastically downgrade the safeguards guaranteed by the principles of JWT, enclosed in IHL Treaties. The cogency of the principles of discrimination, necessity, proportionality and humanity cannot undergo a ‘restriction process’ any time we face an alternative opponent. We would not be even morally entitled to impose to the opponent the respect of these principles if we were willing to ‘force’ our regulatory standards in the first place. The killing of an enemy combatant in the context of an armed conflict is perfectly legal and legitimate. What it is not, is causing unnecessary and disproportionate suffering among the civilian population, which must, in all circumstances and in any kind of war, remain excluded from the atrocities of war.

As Jessica Wolfendale (2011) asserts:

“..() It would be a mistake, therefore, to interpret the laws of war as inconsistent and outdated rules developed in an attempt to serve the interests of both sides in a conflict and to minimize the destruction of war. Instead, it is more plausible to interpret the laws of war as a framework of rules based on fundamental moral principles such as the

¹⁵⁰ Skerker, M., (2004), “Just War Criteria and the New Face of War, in *Journal of Military Ethics*, Vol. 3, n.1, p. 31.

prohibition against killing innocent people and the moral permissibility of self-defence, against which we can assess new features of combat”¹⁵¹.

This is the fundamental dilemma of a war against terrorism: the asymmetry of morality. Terrorists use the compliance with just war principles as an advantage for their side. Combatants distinguish themselves from the civilian population, a terrorist does not. The very definition of terrorism involves attacking civilians, thus discarding any notion of reciprocity. As Ignatieff (2001) asserts:

“It is important to understand that terrorists count on the systematic exploitation of your reluctance to cross these lines. And that, it seems to me, is the nut of the moral and political problem we have in fighting a war against terrorism: How do we keep ourselves from being drawn over the line by an enemy whose whole rationale is to cross that line? How do you identify an enemy when that enemy wears no uniform, is indistinguishable from civilians and hides amongst civilians to make your job more difficult? How do you destroy an enemy who is not fielded against you in an organized military structure, but is dispersed surreptitiously throughout sixty countries? In short, with all this to contend with, how do you avoid becoming like the enemy? How do you avoid becoming ‘the enemy’?”¹⁵²

Ethical restraints have not to be considered as a force limitation, or as a way to achieve sub-optimal military results. Ethical behavior in the field is an important force multiplier, since it enables soldiers to gain

¹⁵¹ Wolfendale, J., (2011), *New Wars and New Soldiers: Military Ethics in the Contemporary World*, Ashgate Publishing Limited, p.22.

¹⁵² Ignatieff, M., (2001), “Ethics and the new War”, available at: <http://www.michaelignatieff.ca/assets/pdfs/EthicsandtheNew%20War.2001.pdf>

the sympathies and approval of the local population. It strengthens the legitimacy of a military intervention, and set the boundary between just and unjust combatants. Similarly, the use of armed drones against an abominable enemy should not allow the forces that are fighting to derogate from the principles contained in the Geneva Conventions. The naughtiness of the enemy must not diminish the ethical standards in approach to the war, and the use of armed drones should not be considered as a way to derogate from the main principles of the *jus in bello*.

7. THE SYMMETRY BETWEEN DRONES AND SUICIDE ATTACKS.

If the same concept of ‘suicide attack’ implies the total fusion between the body of the fighter and the weapon, the use of armed drones, on the contrary, involves a radical dissociation of these elements apparently inextricably linked. The drone does not carry any human body; the suicide bomber, on the contrary, substantiates the lethal mean of the attack precisely in his physical dimension. While the latter necessarily implies the agent’s death, which is an unavoidable premise, in the first case (by using drones) the mere possibility of the death of the agent is excluded *a priori*. On the one hand we are facing the total and definitive commitment of the agent; on the other, we are witnessing the total ‘disarticulation’ of the physical element from the weapon, namely the artificial elimination of the risk of death provided by total physical disengagement. From this perspective, the suicide bomber and the drone pilot stand on the two opposite sides of the spectrum of the ‘exposure to death’.

The symmetry between suicide attacks and remote control weapons also makes us think of a purely economic side of the issue: on the one side, terrorists have nothing but their bodies with which to fight in opposition to those who possess great economic resources and technology.

Vladimir Zworykin, a Russian born American engineer, who lived during the Second World War and pioneered military technology research, fully realized the threat posed by suicide attacks. In his words:

“...the efficiency of this method, of course, remains to be proved, but if such a psychological training of the suicide bombers is possible, this weapon will be inherently the most dangerous. It’s almost impossible to

expect to introduce such a method of warfare in the western world, and we can only rely on our technical superiority to respond effectively to the challenged posed by such a threat.¹⁵³”

We can consider the drone as the element of technical superiority described by Zworkyn, which can be perceived as a sort of ‘antidote’ to suicide attacks, a practice culturally incompatible with the ethics entrenched in the western civilization.

From a philosophical point of view, the two approaches reflect two different ethical regimes: on the one hand, the ethics of ‘heroic sacrifice’, on the other, the elimination of the risk, more precisely the ethics of self-preservation.

In the western culture, the same idea of sacrificing one’s life for the ‘production of death’ cannot be regarded as anything but as repugnant and distasteful. Suicide bombing is most often considered a peculiarly monstrous, indeed inhuman aberration that cannot – or must not – be understood. Our ethical and cultural background, while dotted with ‘scars’ and fraught with contradictions, is undeniably the bearer of values such as the attachment and the protection of life. In a way, the drone can be deemed as an instrument of life-defence.

Jacqueline Rose (2004) pointed out that although the Western countries consider themselves morally and ethically superior, throwing cluster bombs from an unmanned aircraft, often hitting civilians is no less abhorrent or atrocious. In this regard she wonders if dying with the

¹⁵³ Chamayou, G., (2015), *A Theory of the Drone*, The New Press, p.85.

victims may be considered as a greater evil than saving themselves in those types of wars¹⁵⁴. In her reflections, she suggests:

“Perhaps, then, the revulsion stems partly from the unbearable intimacy shared in their final moments by the suicide bomber and her or his victims. Suicide bombing is an act of passionate identification – you take the enemy with you in a deadly embrace.¹⁵⁵”

What stated so far, however, conveys an additional concern on the distinction between the value of ‘our lives’, and those of others, on which the whole western ethics appears to stand. In a way, the psychological effect of the killing is mitigated by the fact that there’s a long tradition of conflicts against military and ethically inferior populations, during which it was implicitly accepted that ‘they’ could suffer the greatest losses.

Chamayou (2015) in this regard stated:

“Therein lies the root of the scandal: by suggesting that the lives of the enemy are completely dispensable while ours are absolutely sacrosanct, one introduces a radical inequality in the value of lives, and this breaks with the inviolable principle of the equal dignity of all human lives.¹⁵⁶”

The anthropologist Talal Asad (2007) suggests that the horror provoked in Western societies by the phenomenon of suicide attacks is that the attacker, by employing such a mode of action, impedes any exercise of

¹⁵⁴ Rose, J., (2004), *Deadly Embrace*, in London Review of Books, available at: <http://www.lrb.co.uk/v26/n21/jacqueline-rose/deadly-embrace>

¹⁵⁵ Rose, J., (2004), *Deadly Embrace*, in London Review of Books, available at: <http://www.lrb.co.uk/v26/n21/jacqueline-rose/deadly-embrace>

¹⁵⁶ Chamayou, G., (2015), *A theory of the Drone*, The New Press, p.155.

redistributive justice against him¹⁵⁷. Dying with the civilians victims of the attack, the agent links the terrorist crime and the punishment in a single action, thus ‘defusing’ in advance any possible application of criminal justice; indeed, he will never pay for what he did.

The drone instills in its pilots a significant perception of invulnerability, which, conversely, permanently alters the traditional way of making war. The enemy is not to be fought, rather to be eliminated from the comfort-zone of our households, without risking even a wound. The use of armed drones fits faultlessly in those contemporary asymmetric conflicts, which do not implicate almost anything heroic or ethical. The public account for the use of drones in conflicts often evoked those kinds of deliberations: it is not worthy to sacrifice our soldiers, our lives, to combat those who have made violence and terror their language of communication. Although the argument includes certain aspects that could be shared, certainly it would appear to the most as an unpleasant oversimplification.

From such rhetoric is, sometimes intentionally, kept separate a reflection on the living conditions of those recruited by terrorist organizations, on what motivates young people to embark on a life-path directed at self-destruction. There is too little reflection on the political reasons why certain Governments very likely benefit from the persistence of the terrorist phenomenon. Finally, too little consideration has been paid on investigating the reasons for which, despite the imposition of international sanctions and preventive measures, the phenomenon has not been cut or eliminated.

¹⁵⁷ Asad, T., (2007), *On Suicide Bombing*, Columbia University Press, p. 90; Gusterson, H. (2010), “An American Suicide Bomber?,” in *Bulletin of the Atomic Scientists*, Vol. 20, available at: www.thebulletin.org/american-suicide-bomber.

8. DRONES AND THE ‘CRISIS OF MILITARY ETHICS’

The notion of ‘honor’ differentiates the military profession from the civilian one, and it is important from an ethical perspective as a potential source of restraint and control in the conduct of war. As Helen Frowe (2011) has observed:

“Children aspire to be soldiers. Parades are held for those returning from conflicts. We honor those who die in combat and decorate those who show particular courage or skill on the battlefield.”¹⁵⁸

Virtue in military ethics has long been documented, and a rich body of existing literature describes the way in which virtues like courage, duty, integrity, honor, loyalty and service have traditionally been indivisible from the ideal of the ‘good soldier’.

Military ethics is traditionally defined as the ethics of fighting between opponents who accept and share such a standing; an assumption with which human civilization has constantly measured itself. Centuries of production and codification of International Law and International Humanitarian Law have moved along the direction of ‘regulating war’ by safeguarding human dignity and certain rights to those who hold the status of combatant.

For Ignatieff (2000):

“Wherever the art of war was practiced, warriors distinguished between combatants and non-combatants, legitimate and illegitimate targets, moral and immoral weaponry, civilized and barbarous usage in the treatment of prisoners and the wounded. Such codes may have been

¹⁵⁸ Frowe, H., (2011), *The Ethics of War and Peace: An Introduction*, Abingdon, Routledge, p.1.

honored as often in the breach as in the observance, but without them war was not war, it is no more than slaughter.¹⁵⁹”

In his *Political Writings*, Augustine argues that precisely because war encourages evil, it is essential that military officers practice the ‘virtuous dispositions of compassion and benevolence’ to complement them in combat operations, so that the ‘mutual bond of piety and justice’ that composes the common morality of all human beings has not been irreversibly demolished by the time that material conditions for peace return¹⁶⁰.

According to Shannon Vallor (2013), great attention should be placed on the importance of moral practice and skill acquisition, as a precondition for the cultivation of military virtues, which are critical to the standing of the soldiers as a professional body. The author believes that those virtues are trained and adapted rather than innate in any human being; therefore, whether a person matures a specific virtue will essentially hang on whether he/she engages repetitively in the kinds of practice that cultivates it.

“...Moral virtue thus requires more than good will and a steady desire to do the right thing – it requires the cultivation of a kind of practical wisdom that directs this right desire intelligently, perceiving and quickly adapting to the unique moral demands of each situation. In his Nicomachean Ethics, Aristotle named this practical wisdom *phronesis*;

¹⁵⁹ Ignatieff, M., (2000), *Virtual War: Kosovo and Beyond*, New York, Picador, p.188.

¹⁶⁰ Augustine, *Political Writings*, p. 221.

a sort of ‘über-virtue’ that orchestrates one’s individual qualities of moral excellence.¹⁶¹”

In her argument, Vallor (2013) shows how increasingly automated methods of warfare challenge the future of military virtue by potentially contributing to a ‘moral deskilling’ of the military profession. The employ of semi-automated weapon systems, or even completely automated ones, prevent the human operator from conducting a substantive investigation on the moral implications of specific actions, thus distancing the fighter from ground combat and physical confrontation with the enemy, from which some specific considerations could emerge, potentially different than those that could materialize by standing in front of a computer screen.

The Kosovo war fought by NATO against Serbia could be acknowledged as a significant precedent of what we are witnessing nowadays. Ensuing before the era of drones, the Kosovo War was fought entirely by manned aircraft with no troops on the ground. Due to the NATO bombing campaign, Serbia was forced to surrender its hold over its province of Kosovo. The war was fought with no NATO casualties—the planes flew too high for Serbian anti-aircraft weapons to intercept them. In this respect, the Kosovo War resembled an upcoming drone war, as an extreme asymmetric, riskless war fought by a technologically superior power with no risk to its own personnel.

Among the virtues of a soldier, physical and moral courage is unquestionably one of the key ones. Much of the physical and psychological training that the Armed Forces undertake aims at

¹⁶¹ Vallor, S., (2013), “The Future of Military Virtue: Autonomous Systems and the Moral Deskilling of the Military”, paper presented for the 5th International Conference on Cyber-conflicts, NATO Publications, available at: https://ccdcoe.org/cycon/2013/proceedings/d2r1s10_vallor.pdf

defining (if not ‘shaping’) certain personal and ethical characteristics, among which ‘courage’ is of utmost importance. Clausewitz believed that being ‘ready to die’, is one of the main requirements of a fighter, the nucleus of what constitutes ‘moral force’.

From this perspective, drone warfare does not provide opportunities for its warriors to express military virtue, revealing an un-chivalrous and dishonorable way to fight. Since drone pilots are thousands of miles away from the battle space, they have no opportunity to exercise the traditional military virtues of courage and heroism. Indeed, it may resemble playing a videogame.

For Sparrow (2013), mercy, although often not included in ‘warrior codes’, is an important virtue, and bears a ‘constitutive role’ in what represents a soldier. For him:

“...() To be merciful is to refrain, out of compassion, from killing or causing suffering when one is both able and would be justified in doing so. Those who have the power to kill, therefore also have the opportunity to show mercy. Not all warriors are merciful, but those who are play a crucial role in showing how the warrior’s code is indeed an ethical code, and not merely a tradition. In showing mercy, warriors demonstrate their respect for human life even in the midst of war.”¹⁶²

As General Cartwright stated: “To me, the weakness in the drone activity is that if there’s no one on the ground, and the person puts his hands out, he can’t surrender...What makes it worse with a Predator is that you’re actually watching it. You know when he puts his hands

¹⁶² Sparrow, R. “War without virtue?”, in *Killing by Remote Control: The Ethics of an Unmanned Military*, p. 92.

up.”¹⁶³ Allow your enemy to surrender is not just a form of chivalry; it is a obligation embedded into Protocol I of the Geneva Convention¹⁶⁴.

Drone pilots guide their aircraft from thousand of kilometers away; they operate completely out of the enemy’s reach, they do not risk to be killed or injured while taking part in hostilities. Being safe at their workplace, drone pilots do not have cause for fear or need for courage. They do not need to be physically trained to maneuver the control buttons.

Undeniably, moral courage is still needed since drone pilots will constantly have to make life-or-death decisions, including the decision to push the button and fire the missile, that from thousands of kilometers away, will kill a whole bunch of people. Notwithstanding that, Sparrow (2013) reasons that there is something disturbing in killing from such a distance:

“Something morally suspect about long-range or remote control killing arises precisely because of a concern that the geographic and psychological distance between killer and killed makes killing too easy. That is, the idea that it takes moral courage to fire a missile at—and kill—someone who one has seen as only pixels on a screen is precisely what is under dispute in debate about the morality of killing via drones.¹⁶⁵”

There have been reports of post-traumatic stress disorder among drone

¹⁶³ General James Cartwright, quoted in Steve Coll, “Kill or Capture,” *The New Yorker*, August 2, 2012.

¹⁶⁴ Murtaza Hussain, “Is Drone War Moral?” *Salon*, August 6, 2012, available at http://www.salon.com/2012/08/06/is_drone_war_moral/

¹⁶⁵ Sparrow, R., (2013), “War Without Virtue”, in *Killing by Remote Control: the Ethics of Unmanned Military*, edited by Bradley Jay Strawser and Jeff McMahan, Oxford University Press, p.99.

pilots, which indicate that the decision to kill, from any distance, is a psychologically challenging decision in any situation, and from that perspective; also drone strikes require some degree of moral courage. Conversely, there have been accounts of drone pilots developing a sort of 'playstation mentality', being excited and eager to attack targets, nearly forgetting that the target, being an unlawful combatant, a horrible terrorist, is still a human being.

There is here a growing concern that 'disassociating' physical courage from a war would have disastrous consequences in the long term. As long as courage is required to go into battle, then warriors will fight for causes only that they believe are worth fighting for. Waging war from a great distance, could potentially have the effect of removing any ethical reflection. There would be no courage required on the part of the soldiers in future wars fought with automated or remotely piloted weapon systems.

Clausewitz argued that the soldier's mission is to kill and be killed. Making war without being killed is a chimera; waging war to be killed without killing is inept. So one has to know how to kill, while being ready to die. The use of drones in order to carry out 'safe' and targeted attacks subvert what Clausewitz theorized as the fundamental and necessary elements of the war-phenomenon. The 'chimera' he refers to, the attempt to kill without risking being killed, however, carries a risk: that of a 'dehumanization' of the combat.

A drone pilot maintains no 'human' contact with the adversary, perceiving its presence and physicality solely by a screen, under the form of a graphic representation. In such a circumstance, the enemy cannot be captured, but solely eliminated. The dangers posed by the possible exacerbation of violence and the 'temptation' to resort to an

armed tool which appears so distant from reality, impose the ruling class, both civil and military, to undertake some honest reflections about the ethical implications and morality of such tools.

For the future, drones are expected to replace piloted aircrafts for the most part. The increasing reliance on drones faces resistance within the US Air Forces, both at the level of leadership, consisting mainly of former pilots, both in terms of new recruits, who probably have dreamed of in their teens can become pilots a day. The drone inventory has grown rapidly, from 167 in 2002 to nearly 7,500 in 2010. The number of drones is expected to rise by a further 35% up to 2020, and the planned spending is estimated to be around 36.9 US bln dollars over ten years.¹⁶⁶

One of the main points of contention about the use of drones, military ethics in the broader context, is the preference for the so-called risk reduction as opposed to risk elimination. Kahn (2002) believes that it is not possible to speak of ‘war’ without the imposition of a mutual risk; it should be, instead, called in a different way but war¹⁶⁷. There is, in fact, a reciprocal relationship between combatants, for which everyone can expect to be the legitimate victim of the use of force by the enemy. The license to kill would be granted in return for the preparedness to die.¹⁶⁸ This would be the indispensable condition for this license.

McMahan (2009) acknowledges the argument that:

¹⁶⁶ Enemark, C., *Armed Drones and the Ethics of War: Military virtue in a post-heroic age*, p.

ù31.

¹⁶⁷ Kahn, P., (2002), “The Paradox of Riskless Warfare”, in *Philosophy and Public Policy Quarterly*, Vol. 22, n.3, p.4.

¹⁶⁸ Enemark, C., (2014), *Armed Drones and the Ethics of War: Military virtue in a post-heroic age*, p.112.

“what makes all combatant legitimate targets for their military adversaries ..is that in one way or another they consent to be targets in exchange for the privilege of making other combatants their own targets.¹⁶⁹”

In a variety of contexts, scholars and practitioners of war have conveyed aversion for killing that involves little or no risk for the killer. In his judgment of NATO’s 1999 air campaign against Serbian forces, Ignatieff stated:

“The Kosovo campaign achieved its objectives without a single NATO combat fatality. From a military standpoint, this is an unprecedented achievement. From an ethical standpoint, it transforms the expectations that govern the morality of war. The tacit contract of combat throughout the ages has always assumed a basic equality of moral risk: kill or be killed. Accordingly, violence in war avails itself of the legitimacy of self-defence. But this contract is void when one side kills with impunity”¹⁷⁰.

There is another aspect to consider: an unhealthy use of unmanned aircraft could offer their opponents a powerful argument; the insurgents, the terrorists, they could use these reasons as a means of propaganda claiming that the West does not want to risk the lives of their soldiers, but they are happy to make targeted killings remotely, projecting an image of cowardly and disregard to the fighting and from enemy casualties.

This desire for disengagement, enabling the killing of enemy combatants while making impossible the killing of their own fighters,

¹⁶⁹ McMahan, J., (2009), *Killing in War*, Oxford, Oxford University Press, p.51.

¹⁷⁰ Ignatieff, *Virtual War*, p.161.

could instill even more desire for revenge and retaliation by terrorists. They may feel further encouraged to carry out attacks and hitting civilian targets, also claiming that their military does not want to go to war to face them directly.

A counter-argument could also be formulated: drone pilots, not fearing any attack from their adversaries, are better placed to take deliberate decisions; they are better suited to consider the pro and cons of their actions.

Some other writers believe that the fact that drones can be deployed without risk to the operator makes them unequivocally good in the hands of just combatants (namely, those who fight a just war). Jeff McMahan, for instance, considers that the elimination of risk to just combatants is not morally problematic:

“Perhaps surprisingly, there are some who argue that the elimination of risk even to just combatants is morally problematic. Michael Walzer, in an essay on the Kosovo intervention written in 1999, claims boldly, and in italics, “*You can’t kill unless you are prepared to die.*”¹⁷¹”

In his article *The Killing Machine*, Mark Bowden reports an interview he made to a drone pilot, who he renamed ‘Dan’. Narrating his experience, Dan reported to be very enthusiastic about drones. He is 38 years old, married, with two small children. In the years since he graduated from the Air Force Academy, he has deployed several times to far-off bases for months-long stretches. Now he is regularly home for dinner. He describes the downsides as well.

¹⁷¹ *Killing by Remote Control: the Ethics of Unmanned Military*, edited by Bradley Jay Strawser and Jeff Macmahan, Oxford University Press.

“Dan has been watching the people he kills for a long time before pulling the trigger. Drone pilots become familiar with their victims. They see them in the ordinary rhythms of their lives—with their wives and friends, with their children. War by remote control turns out to be intimate and disturbing. The emotions are being passed over the radio, you see the tracers and rounds being fired, and when you are called upon to either fire a missile or drop a bomb, you witness the effects of that firepower.¹⁷²”

According to Bowden, Dan experienced the death of his enemy in a far more immediate way than he used to in the past, and he disdains the notion that he and his fellow drone pilots are like video gamers, detached from the reality of their actions. If anything, they are far more attached. At the same time, he dismisses the notion that the carnage he now sees up close is emotionally crippling¹⁷³.

It is undeniable that the distance between the pilot and the battlefield has never been bigger. Notwithstanding that, the psychological proximity should not be underestimated, as it is demonstrated in many recent studies that a number of drone pilots suffer from war-related traumas like other combatants. Dismissing it as video-gaming does not convey the true nature of the experience, and does not allow the observer to understand the complexity entrenched in the issue.

Some authors argue that, in this type of experience, drone pilots should learn the art to compartmentalize, or the ability to overcome the inevitable collision between family life, and the 'war' lived during

¹⁷² <http://www.theatlantic.com/magazine/archive/2013/09/the-killing-machines-how-to-think-about-drones/309434/>

¹⁷³ <http://www.theatlantic.com/magazine/archive/2013/09/the-killing-machines-how-to-think-about-drones/309434/>

office hours. The two separate worlds overlap, and this implies a latent contradiction between the two types of normative regimes that regulates them. The military psychologist Hernando Ortega reflects on the importance of such a partitioning. He claims that already in the recruitment phase, the pilots of drones should be hired for their ability to switch on and off work, they must be able not to think, not to reflect on their own acts of violence, just as their bodies are already immunized against any possibility of being exposed to the enemy. It is setting apart oneself and the crime one commits.

9. TOWARDS AUTONOMOUS DRONES

Today's robotic weapons still have a human being in the decision-making loop, thus necessitating human intervention before the weapons take any lethal decision. For the time being, drones depend on an individual to make the final decision whether to fire on a target. Autonomous military systems do not involve the human operator. The distinctive element is its ability to function, identifying and approaching the goal completely independently. The autonomous drones, for instance, will be designed to conduct a mission to autonomy in all its phases. This means that decisions about which targets select, how and when to attack are left to the software, which in theory should be pre-programmed to handle a mass of possible situations and adapt to changing circumstances.

The US Defense Department recognizes four levels of autonomy: the first level, described as a state of non-autonomy, is commonly referred to as 'human in the loop', the fourth level might be called 'human out of the loop'.

The fully autonomous drone is described as:

“A system that receives goals from humans and translates them into tasks to be performed without human interaction. A human could still enter the loop in an emergency or change the goals, although in practice there might be significant time delays before human intervention occurs.”

For the time being, in terms of autonomy, some drones are able of automatic take off and landing, and they can follow a pre-programmed

fight path for extended periods of time¹⁷⁴. It is still very much complicated to identify a target.

Military policy papers, especially from the United States, demonstrate clear plans to reach the full autonomy of weapons systems. In its *Unmanned Systems Integrated Roadmap FY2011-2036*, the US Department of Defense stated that it “envisions unmanned systems seamlessly operating with manned systems while gradually reducing the degree of human control and decision making required for the unmanned portion of the force structure.¹⁷⁵” The US plans cover developments in ground, air, and underwater systems.

Autonomous technology is evolving rapidly. Though the timeline for that evolution is disputed, some military experts reason that the technology for fully autonomous weapons could be attained within few decades. The US Air Force predicted that by 2030 machine capabilities will have increased to the point that humans will have become the weakest component in a wide array of systems and processes.¹⁷⁶ The UK Ministry of Defence estimated in 2011 that fully autonomous swarms could be available in 2025.

The crucial questions are the following: it is fair to leave to a machine the final decision of life or death of a human being? Is it moral to take the human factor out of the loop? Do autonomous drones will ever be able to conform to the laws of war, which require compliance with the principle of distinction and proportionality?

¹⁷⁴ Gertler, *US Unmanned Aerial Systems*, p. 19.

¹⁷⁵ US Department of Defense, “Unmanned Systems Integrated Roadmap FY2011-2036,” p. 3.

¹⁷⁶ US Air Force Chief Scientist, “Report on Technology Horizons: A Vision for Air Force Science & Technology during 2010-2030,” May 15, 2010, <http://www.af.mil/shared/media/document/AFD-100727-053.pdf>, p. 106.

The historical evolution of military technology is characterized by a constant trend: as weapons gradually become more precise, the human being becomes less important in the conduct of the war. The military enterprise has a strong interest in reaching self-targeting capabilities to solve the operational problems related to the current aerial operations. For instance, the remote-piloted airplane, but also traditional ones, depend heavily on satellite communications, which can be interrupted either accidentally or due to cyber attacks. In addition, around their use revolves a huge number of operators and analysts. If, as it seems, their use will only increase in the future, the mass of intelligence collected will be difficult to manage. In an increasingly automated world, the time to analyze the information and decide accordingly will be probably too short for the human's reaction capacity.

Ronald Arkin (2007) is one of the most prominent proponents of fully autonomous drone systems. He argues that:

“Lethal autonomous unmanned systems will potentially be capable of performing more ethically on the battlefield than are human soldiers... the trends in human behavior in the battlefield regarding adhering to legal and ethical requirements are questionable at best.”¹⁷⁷

The system envisaged by Arkin is an embedded ethical governor component, by reference to which a robot warrior would be able to “conduct an evaluation of the ethical appropriateness of any lethal response that has been produced by the robot architecture before being enacted.”¹⁷⁸

¹⁷⁷ Arkin, R.C., (2007), “Governing Lethal Behavior: Embedding Ethics in a Hybrid Deliberative/Reactive Robot Architecture”, GVV Technical Report, Georgia Institute of Technology.

¹⁷⁸ Arkin, “Governing Lethal Behavior”, p. 6.

The ethical governor proposed by Arkin enacts a two-step process before firing a missile. First, it must evaluate the information it senses and determine whether an attack is prohibited under international humanitarian law and the rules of engagement. If an attack violates a constraint, it cannot go forward. If it does not violate a constraint, it can still only proceed if attacking the target is required under operational orders. Under the second step, the autonomous robot must assess the attack under the proportionality test. The ethical governor quantifies a variety of criteria, such as the likelihood of a militarily effective strike and the possibility of damage to civilians or civilian objects, based on technical data. Then it uses an algorithm that combines statistical data with “incoming perceptual information” to evaluate the proposed strike “in a utilitarian manner.”¹⁷⁹ The robot can fire only if it finds the attack “satisfies all ethical constraints and minimizes collateral damage in relation to the military necessity of the target.

For the author, autonomous robots may be able to perform better than humans for the following reasons¹⁸⁰:

1. The ability to act conservatively: i.e., they do not need to protect themselves in cases of low certainty of target identification.
2. The development and use of a broad range of robotic sensors will be better equipped for battlefield observations than humans.
3. They can be designed without emotions that cloud their judgment or result in anger and frustration with ongoing battlefield events.

¹⁷⁹ Ronald C. Arkin, *Governing Lethal Behavior in Autonomous Robots* (Boca Raton, FL: CRC Press, 2009), p. 69

¹⁸⁰ Arkin, “Governing Lethal Behavior, p. 7.

4. The avoidance of the human psychological problem of “scenario fulfillment”. This phenomena leads to distortion or neglect of contradictory information in stressful situations, where humans use new incoming information in ways that only fit their pre-existing belief patterns, a form of premature cognitive closure. Robots will not be vulnerable to such patterns of behavior.
5. They can integrate more information from more sources and faster than a human possibly could in real-time.
6. When working in a team of combined human soldiers and autonomous systems, they have the potential capability of independently and objectively monitoring ethical behavior in the battlefield by all parties and reporting infractions that might be observed. This presence alone might possibly lead to a reduction in human ethical infractions.

A common aspect of all military documents that envisage the development of military technologies, particularly towards total automation, emphasize the efforts undertaken in the field of artificial intelligence, in order to ensure that these robots will be able to respect the principles of Humanitarian Law. Even if it were to be possible to produce automated systems with similar cognitive characteristics to those of a human being, these systems will always lack humanity, particularly compassion, emotions or empathy. The aim, probably, is to reach a total dehumanization of the war, because human feelings are perceived as a limiting factor to obtaining significant military results. In such a way the war, already a terrible and heinous enterprise, risks losing any human trait.

Krishnan (2009) writes:

“...One of the greatest restraints for the cruelty in war has always been the natural inhibition of humans not to kill or hurt fellow human beings. The natural inhibition is, in fact, so strong that most people would rather die than kill somebody.... Taking away the inhibition to kill by using robots for the job could weaken the most powerful psychological and ethical restraint in war. War would be inhumanely efficient and would no longer be constrained by the natural urge of soldiers not to kill.¹⁸¹”

The use of fully automated systems may have further consequences. Further limiting human involvement in the conflict, and thus eliminating the risk of casualties among its forces, recourse to war could become even more tempting. Second, the weight and the consequences of the armed conflict could shift from soldiers to civilians. The lives of civilians may be even more at risk. Imagine a war between two powers in possession of fully automated weapon systems. Both fighters know that the greatest damage they can inflict on the enemy will not be to destroy an automated system, but to focus directly on the civilian population. Only great losses among the civilian population may induce the parties to desist or to surrender. The destruction of a fleet of robots, though it may have significant economic effects, does not significantly alter the mutual position of the warring parties. That's why it is only the civilian population that will suffer the most damage from an increased use of automated systems.

The use of fully autonomous drones raises the issue of responsibility and accountability. Since the automated drones will be able to decide for themselves where, when and who to hit, it is still not clear who

¹⁸¹ Krishnan, A., (2009), *Killer Robots: Legality and Ethicality of Autonomous Weapons*, Ashgate Publishing, p. 130.

should be held responsible for the illegal actions it commits. Since you cannot identify a responsible, violations of International Humanitarian Law would become more and more probable, and the possibility of applying any form of retributive justice to the victims of the attacks is removed.

It is unquestionable that fully autonomous weapons have the potential to increase harm to civilians during armed conflict. It is extremely complex that they would be able to meet basic principles of international humanitarian law. Before it becomes even more challenging to change course, therefore, states and scientists should take urgent steps to review and regulate the development of technology related to robot autonomy.

In particular, fully autonomous weapons should preemptively be banned, because of the threat these kinds of robots would pose to civilians during times of war. Secondly, maintaining human involvement in the decision-making loop would make it easier to identify those to hold accountable for any unlawful acts that occur from the use of a robotic weapon, thus increasing deterrence and allowing for retribution. Thirdly, national laws and policies should be adopted to prohibit the development, production, and use of fully autonomous weapons. Before an international agreement on the point is reached, national measures could act as a first step towards a more definitive regulatory process.

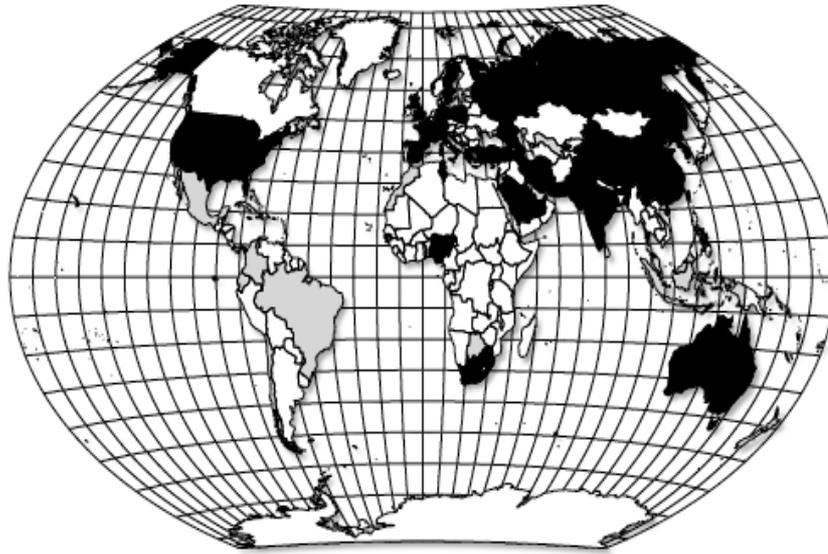
10. THE CHALLENGE OF PROLIFERATION

While the United States maintains a temporary supremacy in its use of armed drones, it does not hold a monopoly on the technology and several countries continue to seek similar programs and capabilities. Today there are more than 7,000 American drones, some 200 of which are armed¹⁸². These patterns raise a number of questions about the impact of drone proliferation on international security and stability.

In recent years, drones have proliferated precipitously around the world in both military and civilian domains. Today, over 90 nations are known to have drones (especially for surveillance and monitoring) while six countries up to now have used armed drones in combat (US, UK, Israel, Nigeria, Pakistan, Iraq). Russia, South Korea, India, Turkey, and Taiwan claim that they are indigenously developing sophisticated armed drone capabilities. According to Horowitz and Fuhrmann (2015), by the end of 2014, twenty-seven countries possessed advanced drones, defined as “UAVs that can stay in the air for at least 20 hours, operate at an altitude of at least 16,000 feet, and have a maximum takeoff weight of at least 1,320 pounds”.¹⁸³

¹⁸² <http://securitydata.newamerica.net/world-drones.html>

¹⁸³ Michael C. Horowitz and Matthew Fuhrmann, "Droning On: Explaining the Proliferation of Unmanned Aerial Vehicles," (Available at SSRN: <http://ssrn.com/abstract=2514339> or <http://dx.doi.org/10.2139/ssrn.2514339>; 2015)



Trends in Drone Proliferation at the End of 2014 Source: Horowitz and Fuhrmann (2015). Note: black = armed drone program; gray = advanced unarmed UAV capability

The size of UAVs market is large, since technology is commercially driven. The export market is led by China, Israel and the USA. In 2015 Nigeria, Pakistan and Iraq, imported their capabilities from China.

Despite the fact that over 90 countries are reported to have acquired drones, for the time being, only the US has global military infrastructure that allows it to operate them all over the world. For drone warfare to affect international peace and stability, it requires both advanced and reliable aerial platforms and extensive infrastructural and organizational support. Developing the former is far from easy while building the latter calls for significant financial resources, time, and political capital. It is also true that most countries do not have advanced

communications satellites and command and control centers, required to operate drones globally.

One particularly serious concern would arise in case of drone use in contested airspace. In such situations, the use of drones can result in a rapid escalation of hostilities and lead to a full-fledged war.

Another important issue, connected with that of proliferation, is the miniaturization of drones. It is not just that drones are becoming smaller, but they are also carrying smaller and smaller munitions. So, if you want to carry out a targeted killing, there will be no need to send a MQ-9 Reaper carrying a JDAM or a set of Hellfire missiles.

Another potential problem is related to the use of drones in domestic policy, particularly by authoritarian and repressive governments. The drones, in fact, could be used to monitor the civilian population or for some ambiguous political purposes. The use of drones thus can affect intra-state conflicts towards escalation or de-escalation.

The use of drones by the US has set a dangerous precedent on other countries. What has proliferated is the idea that a country can undertake unilateral preventive military action across the borders of other states without any formal declaration of war. Because of the secrecy that the US administration has kept around the use of drones, also local governments will exploit this secrecy when employing their drones. The behavior of the US has had is not the one that one might hope to see from other countries. As Sarah Kreps (2014) has stated:

“If other countries use drones similar to the way the United States has done in recent years, we are likely to see states carrying out cross-

border attacks less discriminately. This is highly likely in East Asia, the Middle East, the Caucasus, Africa.¹⁸⁴”

Indeed, the US has missed a great opportunity regarding the setting of precedents for the drone policy. In this regard, history demonstrates that how states use new military capabilities is influenced by the pattern of behavior other states have had in the past. Some behaviors represent precedents that will be closely looked at. In order for the US to maintain its status as the sole superpower, it should not neglect the moral and ethical dimensions of such a role. An unregulated use of drones could undermine a number of well-established principles of International Law: the ban to the recourse to war in inter-states relations, the issue of sovereignty, the ban on assassinations, the right to life embedded in numerous legal agreements.

Another very important area, connected with that of proliferation, is that of export controls. Although the US has implemented an export control system in place since 2015, some type of international regulation and agreement must be reached. There no incentive at the moment to come up with such an international regime, that could prove fundamental in prevent miscalculations in selling technology.

Presently, the transfer of armed drones is regulated by the Missile Technology Control Regime (MTCR), which is intended to regulate nuclear-capable missiles and related technologies, including armed drones. However, the MTCR is a non-binding international agreement that the 34 member states implement at their discretion. Many countries that are producing or interested in armed drones are not members of the

¹⁸⁴ <http://www.cfr.org/global/drone-proliferation-three-things-know/p33157>

MTCR, including Iran, Israel, China, India and Pakistan, offering the MTCR even more challenges in remaining relevant and pertinent.

As this technology continues to increase, weaponized drones carrying explosives or chemical or biological agents will be increasingly within the reach of virtually any state or non-state actor. According to this view, drones could represent a “game-changer” technology, that could promote instability and conflict around the world and even lead to a shift in the distribution of military power in the international system. Though these new weapons will not change the international system as fundamentally as did the proliferation of nuclear weapons and ballistic missiles, they could still be used in ways that are highly threatening and destabilizing.

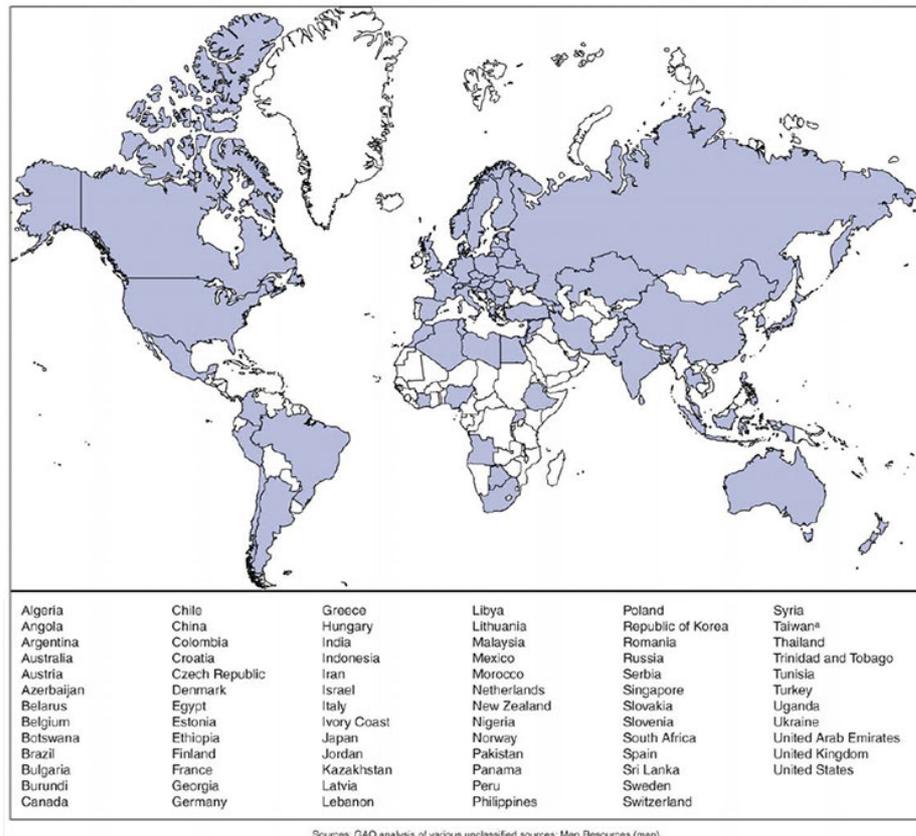
Terrorist organizations are also seeking to acquire drones that could increase their abilities to gather intelligence on and conduct attacks. So-called Islamic State has released videos showing drones being used for reconnaissance in Iraq and Syria¹⁸⁵. In an interview with the *Sunday Times*, Detective Chief Inspector Colin Smith, a security expert and adviser to the Home Office Centre for Applied Science and Technology, warned that small drones could easily be used by terrorists for attacks and propaganda purposes¹⁸⁶.

Terrorists wanting to spread chaos and fear, for instance attacking nuclear power stations, potentially could convert drones commercially

¹⁸⁵ <http://www.bbc.com/news/technology-35280402>

¹⁸⁶ http://www.thesundaytimes.co.uk/sto/news/uk_news/Crime/article1641756.ece

available into flying bombs, as the new report by the Remote Control project (hosted by the Oxford Research Group) stated¹⁸⁷.



Map of Countries (in darker blue) that acquired Drones by December 2012¹⁸⁸

¹⁸⁷ http://remotecontrolproject.org/wp-content/uploads/2016/01/Hostile-use-of-drones-report_open-briefing.pdf

¹⁸⁸ http://www.gao.gov/key_issues/unmanned_aerial_systems/issue_summary#t=0

LEGAL ACCOUNTS

11. THE USE OF ARMED DRONES IN WAR TIMES.

11.1 Legal considerations on US targeted killing policy of suspected terrorists by armed drones.

The George W. Bush and Obama Administrations have tried to publicly justify their targeted killings policy of suspected terrorists under both Domestic and International Law. The national keystone for U.S. counterterrorism strategy, including the endorsement for the targeted killing of the Taliban, al-Qaeda (AQ) and its affiliates, is the 2001 *Authorization for the Use of Military Force*¹⁸⁹ (AUMF), which was passed by the U.S. Congress just a few days after the terrorist attacks of 9/11. The Order enables the President "to use all necessary and appropriate force" in pursuit of those responsible for the above-mentioned attacks¹⁹⁰.

Since the beginning of his mandate (2008), President Obama has proclaimed that the United States remain in a state of **armed conflict of non-international character** with al-Qaeda and associated forces, and has laid out its legal justification over several policy speeches¹⁹¹. In one of his accounts, delivered at the National Defense University in Washington, on May 23rd 2013, Obama stated:

¹⁸⁹ <https://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>

¹⁹⁰ Peacetime assassinations, which are sometimes conflated with targeted killings, have been officially banned in the United States since 1976.

¹⁹¹ These include those given by: Harold Koh, Legal Adviser of the U.S. Department of State, in 2010; White House chief counterterrorism adviser, John Brennan, in 2011; Defense Department general counsel, Jeh Johnson, in 2012; Attorney General, Eric Holder in 2012, and Brennan once more, in 2012.

“..(..)America’s actions are legal. We were attacked on 9/11. Within a week, the Congress overwhelmingly authorized the use of force. Under Domestic Law and International law, the United States is at war with al-Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war, a war waged proportionally, in last resort, and in self-defense.¹⁹²”

The White House upholds that the U.S. right to self-defense, as covered by Article 51 of the U.N. Charter¹⁹³, may include the targeted killing of persons such as high-level al-Qaeda leaders who are planning attacks, both in and out declared theaters of war. In Obama’s words:

“...America does not take strikes to punish individuals; we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. Beyond the Afghan theater, we only target al-Qaeda and its associated forces. And even then, the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute. America cannot take strikes

¹⁹² <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

¹⁹³ “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.¹⁹⁴”

The US government has repeatedly claimed to be involved in an armed conflict of a non-international character with *Al Qaeda* and affiliated terrorist groups. The adoption of such an approach entails, for the United States, that their actions must be carried out in accordance with International Humanitarian Law (IHL), which regulates the conduct of hostilities during an armed conflict. Such a policy choice implies, at the international level, the negation of a counter-terrorism strategy framed in accordance with the so called ‘Law Enforcement Model’, namely a set of rules and standards that govern the conduct of the Police Forces, aimed at combating crime and restoring public order which could, with very precise limits, also involve the use of lethal force.

The Obama Administration’s definition of the armed conflict against al-Qaeda, the Taliban and associated forces should have represented a sharp departure from the Bush Administration’s early categorization of a ‘global war on terror’¹⁹⁵, thus implying the existence of a ‘global battlefield.’ In contrast to the Bush approach, the Obama Administration’s formulation limits the scope of the conflict to a war against particular entities, although there is significant ambiguity about *where* this armed conflict exists and *what armed groups are considered parties to it*.¹⁹⁶ According to Melina Sterio (2012), however, the Obama

¹⁹⁴ *ibid.*

¹⁹⁵ Full text of George Bush's address to a joint session of Congress and the American people at: <https://www.theguardian.com/world/2001/sep/21/september11.usa13>

¹⁹⁶ “Targeting operations with Drone technology: Humanitarian Law implications”, Background note for the American Society of International Law annual meeting, Human Rights Institute, Columbia Law School, March 25, 2011, p.5.

Administration, by conducting drone strikes in a multitude of locations, including Afghanistan, Pakistan, Iraq, Libya, Somalia and Yemen, has basically followed the Bush Administration view of the “global battlefield”. The Obama administration has repeatedly mentioned the AUMF as the basis for increasing the use of drone strikes in Pakistan, Yemen, Somalia and elsewhere, and maintained that its authority has no definite temporal or geographic boundary. The Obama administration has defended these strikes as legitimate attacks against al-Qaeda or the Taliban, declared enemies of the US, who as a transnational enemy must be attacked even outside the original theatre of war.

The Obama Administration believes, like the previous one, that the Laws of War do apply to the use of armed drone because the United States is engaged in an armed conflict waged in an attempt of self-defence.¹⁹⁷ In this regard, the Obama Administration has repeatedly pointed out that the armed conflict against al-Qaeda extends beyond the borders of Afghanistan; they are dealing, in fact, with a transnational terrorist organization that operates globally in a multitude of areas. According to Kelisiana Thynne (2009):

“It is essentially a policy of targeting killing of terrorists with military force in the context of an armed conflict, rather than engaging in an armed conflict involving armed forces on the ground.”¹⁹⁸

The set of norms governing the conduct of hostilities during an armed conflict (i.e. the *Laws of War*) are framed within the context of

¹⁹⁷ Sterio, M., (2012), “The United States use of Drones in the War on Terror: the (il)legality of targeted killings under International Law”, in *Case Western Reserve Journal of International Law*, vol.45, p.202.

¹⁹⁸ Thynne, K., (2009), ‘Targeting the “Terrorist Enemy”’: The Boundaries of an Armed Conflict Against Transnational Terrorists’, in *Australian International Law Journal*, n. 16, pp. 161-166.

International Humanitarian Law. Its main sources are the four Geneva Conventions¹⁹⁹ (1949), ratified by the entire International Community (IC), their two Additional Protocols (1977)²⁰⁰, the 1899 and 1907 Hague Conventions and various Treaties which intend to restricting or impeding the use of specific weapons. International Humanitarian Law (IHL) specific aim is to limit the effects of armed conflict on combatants and the civilian population for humanitarian reasons. It protects people and property that are, or might be, affected by an armed conflict and limits the rights of the Parties involved in the conflict to use methods and means of warfare of their choice. The whole framework is based on the pursuit of a balance between humanitarian concerns, on the one side, and military interests on the other, in order to prevent an all-out war and the annihilation of the opponent.

From a legal point of view, the extra-territorial targeting of a suspected terrorist (or group) by armed drones requires a double level of analysis: first of all, the lawfulness of the resort to force by one State in the territory of another ought to be investigated (under *jus ad bellum* criteria); secondly, an analysis of the international legal framework governing the way in which force is actually used should also be taken into account (under the *jus in bello* criteria i.e. IHL and under Human Rights Law). International human rights law applies at all times, including in situations of armed conflict.

¹⁹⁹ The provisions to protect victims of armed conflicts ("the Geneva law") are codified in the four Geneva Conventions that protect the following groups of people: Wounded and Sick within the Armed Forces in the field (I^o Convention); the wounded, sick and shipwrecked members of armed forces at sea (II^o Convention); prisoners of war (III^o Convention); civilians in times of war (IV^o Convention).

²⁰⁰ Additional Protocol I^o is concerned with the protection of Victims of International Armed Conflicts; additional Protocol II^o is concerned with the protection of Victims of Non-International Armed Conflicts.

Jus in bello, or International Humanitarian Law, only applies within the framework of an armed conflict. This implies that lethal force may be used against combatants, as well as against other persons taking a direct part in hostilities, including civilians when they do so. Notwithstanding that, there have been cases in which States have used lethal force extraterritorially outside an armed conflict, whether international or non-international.

11.2 Are armed drones lawful under International Law (IL)?

Selected types of weapons are expressly prohibited under Customary International Law, while others are subject to special prohibitions, enclosed in Treaties and International Agreements. There is, to date, no International treaty forbidding the use of drones. Such an international instrument would not even be useful, since armed drones are not weapons in themselves, but simply a *mean of transportation and launching pads* for weapons. The non-existence of specific treaty provisions on drones is significant because as a general rule, what International Law does not explicitly ban, it allows.²⁰¹ But such inadequacy cannot be restraining *per se*, because although Conventional

²⁰¹ ICJ, in the “Legality of the Threat or Use of Nuclear Weapons”, Advisory Opinion, 1996 (July 8, 1996), para.52: “The Court notes by way of introduction that International customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defence. Nor, however, is there any principle or rule of International Law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization. **State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.**”

or Customary International Law may not be well suited to confront new types of weapons or technologies in warfare, its principles can still be applied, albeit by analogy, to assess the effects and consequences of their use.

According to the International Court of Justice (ICJ), the so-called *Martens Clause* (used to explore and address issues not covered in existing Treaties), has proved to be an effective mean of addressing the rapid evolution of military technology. The clause, which appeared first in the 1907 Hague Convention (Hague IV), affirms:

“Until a more complete code of the Laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the Law of Nations, as they result from the usages established among civilized peoples, from the Laws of Humanity, and the dictates of the Public Conscience.”²⁰²

In his Report on Targeted Killings, Philip Alston (2010), former United Nations Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions, stated:

“a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for

²⁰² <https://www.icrc.org/eng/resources/documents/misc/57jnhy.htm>

each weapon: whether its specific use complies with International Humanitarian Law (IHL).²⁰³

Whether armed drones are to be used in warfare, the Parties (States) should always operationalize the fundamental distinction between civilians and combatants as well as between civilian objects and military objectives.²⁰⁴ In this regard, it is appropriate to mention that States do not enjoy an unlimited freedom of choice for the weapons they employ.²⁰⁵ More specifically, two kinds of armaments are expressly prohibited during an armed conflict: indiscriminate weapons and those that provoke unnecessary sufferings.

On the point, Additional Protocol I, art. 51(4) provides a tripartite definition of "indiscriminate attacks". According to the Article, they would entail: 1. Attacks not directed at a specific military objective; 2. Attacks using ways or methods of combat that cannot be directed at a military target; 3. Attacks using a method or means of combat whose effects cannot be limited to military targets.

Article 35 of Additional Protocol I sets forth the following basic rules:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

²⁰³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: a study on targeted killings. Human Rights Council, 28 May 2010. Para 79.

²⁰⁴ Art. 48 AP I.

²⁰⁵ ICJ, The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, paras. 74-87.

2. It is prohibited to employ weapons, projectiles, material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare, which are intended, or may be expected, to cause widespread, long term and severe damage to the natural environment.

Accordingly, the ICJ, in its Advisory Opinion on the *Legality of the Threat or the Use of Nuclear Weapons* (1996), argued that the Parties of a conflict might not use weapons that are “incapable of distinguishing between civilian and military targets”. Such a prescription grounds a duty on the Parties of a conflict to spare the civilian population and civilian infrastructures, and the duty to stop the armed action if the expected damage against civilians is excessive in relation to the military advantage anticipated.

The second prohibition covers those weapons that cause unnecessary sufferings or superfluous injury. The purpose of the provision lies in getting the Parties to employ alternative weapon-systems, when available, to cause the least amount of suffering, and urges the Parties to work (only) with those weapons that are sufficiently efficient to neutralize the offensive potential of the enemy. The ICJ emphasized this norm as the second of two cardinal principles of International Law; it is accordingly prohibited to use weapons causing harm or uselessly aggravating the sufferings of civilians.

For the time being, the missiles carried by drones are not banned under any international agreement and do not necessarily disrupt the requirements mentioned above, namely being indiscriminate or cause unnecessary sufferings. On the contrary, the precision which

characterizes drones is higher than that of any conventional fighter aircraft, and (at least in theory) should provide better protection for the civilian population. Supporters of the use of armed drones in war believe that they are capable of launching very accurate attacks, resulting in a lower number of casualties and destruction. According to Peter Maurer (2013) the President of the International Committee of the Red Cross:

“...() from the perspective of International Humanitarian Law, any weapon that makes it possible to carry out more precise attacks, and helps avoid or minimize incidental loss of civilian life, injury to civilians, or damage to civilian objects, should be given preference over weapons that do not. Whether the use of armed drones does indeed offer these advantages will depend on the specific circumstances. This issue is the subject of ongoing debate due, among other things, to the lack of information on the effects of most drone strikes.”²⁰⁶

Drones, therefore, are not illegal *per se*; the primary concern pertains to their use and their compliance to the Laws of War. For Michael Schmitt (2010):

“..Since drones employ precision-guided munitions such as laser-guided missiles or the JDAM, they are self-evidently not indiscriminate means of warfare. On the contrary, they are far more capable of being aimed at targets than many other weapons systems commonly employed on the

²⁰⁶ Speech available at: <https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>

battlefield. However, the indiscriminate use of a discriminate weapon is unlawful.²⁰⁷

Quite understandably, armed drones can also be used as launching pads for weapons prohibited by International Law, such as Weapons of Mass Destruction (WMD) that cause large-scale destruction, hitting indiscriminately military and civilian targets or cause unnecessary pain. Weapons subject to some form of prohibition or restriction might be divided into two categories: conventional weapons and WMD. Chemical and biological weapons are prohibited, as well as blinding laser weapons, poisons, booby-traps, landmines and “dum-dum” bullets (which expand as they come in contact with the human body). It is thus necessary to distinguish between the weapons carried by the drones and the unmanned platform itself.

Concerning the technology mounted on board of drones, it has been shown that the high level of accuracy and the ability of these vehicles to supervise, monitor and collect information before launching a strike would allow, in theory, the pilot to better distinguish between civilian and military targets, as well as to minimize collateral damage.

The mere possibility that a drone could perform an indiscriminate attack does not make it automatically illegal: in fact, every weapon could potentially be used in a non-compliant way with Humanitarian Law. The assessment should be made on a case-by-case basis, in order to

²⁰⁷ Schmitt, M., (2010), “Drone Attacks Under the *Jus ad Bellum* and *Jus in Bello*: Clearing the Fog of Law”, in *Yearbook of International Humanitarian Law*, n. 13, p. 311.

11.3 Assessing the existence of an armed conflict.

The US government has repeatedly referred to be involved in a non-international armed conflict with al-Qaeda and affiliated groups. Such a statement entails that the Laws of the Armed Conflicts can be applied in operations involving targeted killings carried out by drones. In order to establish the legality of the use of armed UAV during a conflict, it is, therefore, imperative to ascertain, if the so-called ‘War on Terror’, as conceived by the Bush and then by the Obama Administrations, can be conceived or not as an "armed conflict".

Curiously, the concept of “armed conflict” is not defined even in the Geneva Conventions of 1949, although such a definition is essential since the application of IHL depends on it. A good description is offered by the International Criminal Tribunal for the Former Yugoslavia (ICTY), which stated that:

“On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International Humanitarian Law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, International Humanitarian Law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory

under the control of a party, whether or not actual combat takes place there.”²¹⁰

The existence of an armed conflict is the essential and indispensable element to permit the implementation of Humanitarian Law standards. IHL sets out two different bodies of Law to regulate International (IAC) and Non-international (NIAC) armed conflicts. According to art. 2, para.1, common to the four Geneva Conventions, IAC are those between "High Contracting Parties", i.e. between States. IAC are to be considered as such if one or more States resort to war against another, without taking into account the reasons that led to the outbreak of the hostilities or without regard to the intensity of the clashes.

A NIAC, on the contrary, (Common art.3 and Additional Protocol II) takes place within the national boundaries of a State, between its Armed Forces and dissident armed forces or other organized armed groups. Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other similar acts are not to be considered as NIAC²¹¹.

The participants in a IAC are normally considered legitimate, since this category regards conflicts between States; in conflicts that fall under the

²¹⁰ *Prosecutor v. Dusko Tadic*, Decision of the Defence Motion on Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. N. 70, at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>

²¹¹ Momtaz, D., (1999), "War Crimes in Non- International Armed Conflicts under the Statute of the International Criminal Court", in *YIHL*, pp. 191- 192.

second category (NIAC)²¹² the Parties are typically not considered on the same level (the legitimate State and the ‘rebels’). While States that confront each other in an IAC are generally estimated as the holders of legality and legitimacy, this legitimacy is traditionally denied to non-State Parties, in particular in NIAC and above all in the fight against terrorism. That does not mean that opponents or enemies are to be pursued with extreme violence, or in violation of Humanitarian Law. Indeed, the non-state armed groups are considered to be bound by the principles of IHL as well, but they cannot derive their legitimacy from that. Often these players do not respect the IHL standards at all. The non-compliant behavior of the adversary cannot be invoked to justify practices, which are contrary to IHL. The non-compliance by Member States of obligations under IHL also contributes to further weaken the observance of these commitments by non-state actors.

Historically States have tended to negate the existence of an “armed conflict” with rebels/non-State groups. Obviously, States do not want to appear ‘weak’ by acknowledging that they are unable to halt internal large-scale violence, and/or that rebels or insurgent groups have gained control over significant parts of the State’s territory. As a consequence, States generally have refused to recognize such groups as ‘belligerents’, claiming instead that they were common criminals subject to domestic law.

Quite surprisingly, the US invoked the existence of an armed conflict against alleged terrorists. The motivation is understandable: the IHL has

²¹² The Rome Statute of the International Criminal Court (art. 8) defines non-international armed conflicts as "armed conflicts that take place in the territory of a State when there is *protracted armed conflict* between governmental authorities and organized armed groups or between such groups."

more accommodating rules for killing than International Human Rights Law (IHRL) or a State's domestic law, and generally provides immunity to State Armed Forces. Since the IHL has fewer due process safeguards than IHRL, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist. Moreover, naming a situation as 'armed conflict' might also serve to expand the executive powers of the Government both as a matter of domestic law and in terms of public support.

Let aside any political consideration, the true existence of an armed conflict is the essential element to be ascertained to allow the application of IHL standards. This condition must be assessed and evaluated in accordance with objective data and, therefore, political statements by those involved cannot be taken into account. The determination of the existence of an armed conflict within the scope of IHL lies, indeed, upon factual standards. Once those standards are met, IHL indeed finds application quite independently from any formal declaration of war, policy declaration or recognition²¹³. A number of human rights provisions can be relaxed or derogated in times of war; it is, therefore, essential to understand what characterizes an 'armed conflict' in International Law to establish which source of law can be applied.

Two main sources of Law have to be examined to order to ascertain whether we are dealing with a non-international armed conflict:

²¹³ Melzer, Nils (2013), *Human Rights implications of the usage of drones and unmanned robots in warfare*, study performed on behalf of the Directorate-General for the external policies of the European Union, requested by the European Parliament's Subcommittee on Human Rights.

common Article 3 of the 1949 Geneva Conventions and Additional Protocol II. More specifically, in order to discriminate between an armed conflict and less intense forms of violence, such as internal disturbances and tensions, riots or acts of banditry, according to common Article 3, the situation must reach ‘a certain level of confrontation’. Two main standards are usually used in this regard:

“First, hostilities have to reach a certain level of intensity. This would be the case, for example, when a Government is obliged to resort to its armed forces to confront the armed group, instead of mere policing operations;

Second, the armed group must possess armed forces. It might entail being organized under a certain structure of command and have the capacity to sustain military operations²¹⁴”

Additional Protocol II adopts, in this regard, a slightly narrower definition. According to Article 1, par. 1:

“This instrument applies to armed conflicts which take place in the territory of a High Contracting Party between its Armed Forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

Two additional requirements are then introduced: a) the territorial control exercised by the insurgents over a part of the State’s territory;

²¹⁴ ICRC (2008), How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?, opinion Paper.

b)the express application of Additional Protocol II *only* to armed conflicts between State Armed Forces and dissident armed forces or other organised armed groups. Contrary to common Article 3, the Protocol does not apply to armed conflicts occurring only between non-State armed groups.

Apparently, the intensity of violence in an armed conflict is higher than that of internal disturbances and tensions. Therefore, attacks launched by the armed group should not be isolated or sporadic, but protracted. The requisite of 'duration' is, therefore, to be assessed as well as the 'intensity' on a case-by-case basis.²¹⁵ The degree of intensity can be interpreted in different ways. It may refer to incidents on the field, to the number of victims, the damage caused or the destruction achieved. It can be evaluated by the number of actors involved in the fighting, the type of military assets employed or the duration of hostilities. According to the approach adopted by the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadic* case, the main requirement is to assess is the duration of the hostilities. The Court of Appeal added that the hostilities must be "large-scale".

In addition, the non-state groups involved in the hostilities must have an organized armed force, with a command structure and a significant military capacity. It is generally believed that the non-governmental entities involved in the hostilities must have a level of organization that permit them to fulfill the obligations imposed under common Article

²¹⁵ *Prosecutor v. Tadic*, Appeal on Jurisdiction, IT-94-I-AR72, ICTY (Oct. 2, 1995); *Prosecutor v. Akayesu*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR) (Sept. 2, 1998), pp. 619-620.

3.²¹⁶ Even the precise level of organization required is rather dull. Some commentators refer to "a minimum level of organization, or some level of organization". In the *Tadic* case the Trial Chamber stated that "the group should have a command structure, must be able to conduct military operations, demonstrate the ability to speak with one voice and to apply the relevant rules of Humanitarian Law".²¹⁷

Although difficult to translate into practice, the identification of a situation as an 'armed conflict' plays a crucial role in the selection of the legal framework that applies to a certain context. Of the utmost importance is, also, the policy adopted by the State involved, which responds, in turn, to national and political considerations of convenience.

As far as the "war on terror" is concerned, the two mentioned requisite are present with quite no uncertainty in Afghanistan and Iraq, while it remains more difficult to define as 'armed conflict' the presence of terrorist cells outside Afghanistan, namely in Yemen, Somalia and Pakistan. There is no state of armed conflict between the USA and those states, notwithstanding that armed drones for targeted killing have been used in all these three countries.

Terrorist entities with various degrees of association with al-Qaeda operate around the world (South Asia / South East Asia, Middle East and Europe), yet no State in which they operate recognized itself as part of an armed conflict. These States have opted for a the adoption of more

²¹⁶ Breau S., Aronsson M., Joyce R., (2011), Drone attacks, International Law, and the recording of civilians casualties of armed conflict, Oxford Research Group, Discussion Paper.

²¹⁷ *How is the term 'armed conflict' defined in IHL?* International Committee of the Red Cross (ICRC), opinion paper, March 2008, available at: <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>

stringent internal regulations, configurable as part of their "law enforcement" strategy.

The case is different, for example, in the case of DAESH (Islamic State), against which armed drones were deployed, which controls significant portions of the Syrian-Iraqi territory and that, at least in the organization's expansion phase (2014 to 2015), has shown to have a stable organization and a highly hierarchical command structures.

According to open sources, the US launched its first drone strike against DAESH from Incirlik Air Base in Turkey in August 2015²¹⁸, although air surveillance by drones had initiated much earlier, in 2014, from US and British Air Forces.

Some academics support the existence of a third category of armed conflict, namely that of an "internationalized" internal armed conflict, although there is no rule setting legal boundaries. Essentially, this category consists of all those conflicts that arise within a country as an internal conflict but later widened as a direct consequence of the involvement of a third State. For these conflicts it is very difficult to determine what rules do find application, namely if those are destined to be considered as international armed conflicts, or alternatively, non-international ones²¹⁹.

The use of armed drones, so far, has been one of the most used ways of fighting in asymmetric wars that involve a State on the one hand, and on the other a non-state actor, often a terrorist organization. In quantitative terms, the use of drones in international armed conflicts, ie inter-state is, today, still limited.

²¹⁸ <http://www.wsj.com/articles/turkey-says-it-is-prepared-to-join-u-s-in-comprehensive-struggle-against-islamic-state-1438777322>

²¹⁹ Verhoeven, S., (2007), *International and Non-International Armed Conflict*, Institute for International Law, Khatolieke Universitet Leuven, Faculty of Law, working paper 107, available at: <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP107e.pdf>

11.4 Extra-territorial non-international armed conflicts.

At this point, it seems appropriate to question whether the hostilities occurring between a State and a non-state armed group (a terrorist group) operating through various State-borders could still be described as an 'armed conflict' and therefore subject to IHL. The Laws of Armed Conflict are structured around the stato-centric concepts of sovereignty and territory, and is designed to regulate merely two types of conflicts, inter-state or purely internal. The ongoing conflict in Afghanistan and its ramifications in Pakistan, drone strikes in Yemen and Somalia, challenge this traditional structure of the LOAC.

Art. 3 common to the four Geneva Conventions establishes that NIACs take place "in the territory of a High Contracting Party". The literal meaning of the text and its commentary make it clear that the article was intended to be applied, at least in the intentions of its formulators, only to internal armed conflicts. In recent years this interpretation has been challenged according to international practice, in particular to the fight against international terrorism, since armed groups have acquired the capacity to act across national boundaries.

Some authors are skeptical that armed groups operating in different countries can form 'one single side of the conflict'. There is also some difficulty in accepting the idea that IHL can be applied in countries where the level of violence appears low and not persistent. In particular, the two requirements of 'organization' and 'intensity' should be applied to the global war against terrorism. What kind of relationship should exist between the different groups operating in different countries? Can the violence perpetrated by the different groups be conglomerated in order to meet the requirement of the intensity needed to determine the existence with an armed conflict?

According to some authors the approach according to which the entire globe could be considered a potential theater of war undermines the foundations of IHL, as well as the restrictions on the use of force that International Law tries to maintain. According to some commentators (also supported by the US Supreme Court in the *Hamdan case*) art. 3 common to the four Geneva Conventions and Customary International Law applicable in relation to NIAC also apply in the case of extra-territorial conflicts. Direct consequence of this interpretation is a stronger emphasis on the conflicting Parties, and a simultaneous reduction of the importance of the territory in which the confrontation takes place.

The logic of this argument is the following: if we agree that the US is in an armed conflict with AQ in Afghanistan, then we should accept that IHL is applicable to all the attacks perpetrated by AQ in different parts of the world. In other words, the combat-zone necessarily follows the movements of the combatants.

What are the implications of a broad interpretation of the geographical scope of an armed conflict? As it will be mentioned, the use of force at the international level is generally prohibited under art. 2.4 of the UN Charter. The only exceptions allowed to the general rule is the use of force in self-defense and the authorization of the Security Council. Some scholars have argued that the practice of targeted killings carried out through the use of armed drones in the territory of another State (not party to an armed conflict) amounts to an act of aggression. On the other hand, the USA has claimed to act by virtue of the right to self-defense, and after obtaining the consent of the territorial state in which certain terrorist groups do operate. In case in which the State is

unwilling or unable to capture terrorists, the US has also claimed to be able to operate according to the right to self-defense.

In conclusion, the IHL applicable to NIAC does not seem to have been formulated to allow extraterritorial application of its regulatory provisions. The issue, therefore, remains unsettled. There is the urgent necessity to make IHL more responsive to today's needs, while at the same time protecting the necessary restrictions to an indiscriminate use of force against individuals located in areas quite far from the hostilities.

11.5 IHL principles and drone strikes.

Evaluating the targeted killings of suspected terrorists through the use of armed drones within the context of a NIAC entails assessing the legality of those killings under IHL. More specifically, the legitimacy of drone killings must be assessed according to IHL core principles, which were developed both in IAC and NIAC, mainly because most of these principles have acquired the status of Customary International Law.

The use of new technologies in warfare, the continued evolution of the nature and characteristics of contemporary armed conflicts -in particular the war on terrorism and the same genesis of asymmetric conflicts - create a number of challenges with regard to the respect of IHL. The shortage of public information about the drone programs constitutes one of the main challenges of such an analysis; Governments tend to uncover little information on the chosen objectives, timing and outcome of the attacks. Nevertheless, this section scrutinizes which principles of

IHL should be imperatively respected, in order to consider legitimate a drone strike, carried out within the context of an armed conflict.

11.6 The principle of distinction.

One of the main goals of IHL is to protect and safeguard civilian innocents in times of warfare. The civilian population and individuals “shall enjoy general protection against dangers arising from military operations...and shall not be the object of the attack”.²²⁰ The principle of distinction, which can be considered one of the most fundamental IHL norms, is formulated in art. 48, Additional Protocol I (1977), in the following terms:

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

The principle of distinction between civilians and combatants is a rule of Customary International Law applicable to both international and non-international armed conflicts²²¹. Nonetheless, it is quite straightforward that its application in an IAC is far simpler than it is in

²²⁰ API, art. 51.

²²¹ The jurisprudence of the ICJ in the *Nuclear Weapons* case, of the International Criminal Tribunal for the Former Yugoslavia, in particular in the *Tadić case*, *Martić case* and *Kupreškić case*, and of the Inter-American Commission on Human Rights in the case relative to the events at *La Tablada* in Argentina, provide further evidence that the obligation to make a distinction between civilians and combatants is customary in both international and non-international armed conflicts.

an armed conflict of a non-international character.²²² As far as drone strikes are concerned, the principle tells us who can be lawfully targeted and killed. Consequently, if armed drones are to be used as a mean of warfare, their use must be capable of distinguishing between members of armed forces and organized armed groups (who may be legitimately targeted) and the peaceful civilian population (which at all times enjoys protection against direct attack).²²³

For the purposes of the principle of distinction, civilians are defined in negative terms, thus referring to those persons who enjoy immunity from direct attack unless and for such time as they take a direct part in hostilities.²²⁴

In IACs, only States' Armed Forces can be legitimate targets. According to AP I (art. 43), the Armed Forces of a Party to the conflict comprise all organized Armed Forces, groups and units, which are under a command responsible to that Party for the conduct of its subordinates. Although the Hague Regulations and the Geneva Conventions do not expressly define what Armed Forces are, the ICRC *Interpretive Guidance of the Notion Of Direct Participation in Hostilities under International Humanitarian Law* states that regular Armed Forces, recognized as such in domestic law, must fulfill four specific requirements.²²⁵

²²² Casey-Masien, S., (2012), "Pandora's box? Drone strikes under *jus ad bellum*, *jus in bello* and International Humanitarian Law, in *International Review of the Red Cross*, Vol. 94 no. 886, p. 608

²²³ Melzer, N., (2013), *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, a study requested by the European Parliament Subcommittee on Human Rights, p.23.

²²⁴ Arts 51 [3] AP I; 13 [3] AP II. Direct participation in hostilities, interpretative guidance.

²²⁵ a) Responsible command; (b) Fixed distinctive sign recognizable at a distance; (c) Carrying arms openly; and (d) Operating in accordance with the laws and customs of war.

In NIACs, the distinction between the parties of the conflict and the civilian population becomes, of course, much more complex, since the confrontation takes place between the State Armed Forces and organized armed groups (basically, the armed force of the non-State party). In this second case, civilians are defined as:

“..all persons who are not members of State Armed Forces or organized armed groups of a Party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”²²⁶

Compliance with the principle of distinction requires that the Armed Forces of the Parties to the conflict are distinguished from the civilian population and, likewise, differ civilian installations from military ones, especially in targeting stages. Its provisions require that military assets are located away from the civilian population, and it is forbidden to locate them in densely populated areas, in an effort to immunize themselves from attacks (Art. 58, API).²²⁷

In order to ensure the protection of the civilian population, it is fundamental to distinguish between those who have joined the organized armed group and those who have not, since the organized armed groups recruit their members primarily from the civilian population, but then develop a sufficient level of military organization to conduct hostilities. A second difficulty lies in the fact that members of organized armed groups usually do not wear uniforms or distinctive

²²⁶ ICRC Interpretative Guidance.

²²⁷ Art. 58 of the First Additional Protocol has become Customary Law, as confirmed by the Criminal Tribunal for the Former Yugoslavia in the cases: Kupreskic, Galic, Dragomir Milosevic.

signs and mingle among the civilian population. In fact, members of non-state groups, in this case those belonging to al-Qaeda and organizations affiliated to it, do not wear special badges that differentiate them from the civilian population. On the point, the ICRC *Interpretative Guidance* affirms that membership must be assessed “in a strictly functional sense” and “must depend on whether the continuous combat function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-state party to the conflict.”

The identification of a target on the basis of mere suspicion should be considered contrary to the entire system of guarantees proposed by the IHL and the International Law of Human Rights.²²⁸

11.6.1 The notion of continuous combat function.

The notion of “continuous combat function” is first described in the ICRC *Interpretative Guidance*. It is, therefore, a new category within the realm of IHL, which has been developed to accommodate the new exigencies of the Laws of War, namely the fight against terrorism.²²⁹ It refers exclusively to the armed wing of the non-State armed forces in a *functional sense*. According to the ICRC:

“Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-state party

²²⁸ Keller H. & Forowicz M., (2008), “A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court’s Judgment on Targeted Killing”, in *Leiden Journal of International Law*, n. 21, pp. 185-207.

²²⁹ Solis, Gary D., (2010), *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, p.205.

to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.”

Consistent with the interpretation offered by the Interpretive Guidance of the ICRC, the "stable and continuous combat function" of an individual cannot be determined in abstract but, rather, on the basis of functional criteria. A subject can be a legitimate target if there is evidence of his lasting integration within the terrorist group, thus including his active contribution and involvement in the preparation, execution and control of hostilities.

Individuals with a continuous combatant function cease to be civilians for as long as they remain members of the organized armed group. Continuous combat function does not confer to those entitled any “combatant status”, such as immunity from domestic prosecution. The term has been created only to distinguish members of the armed forces of the non-State group from civilians who directly participate in hostilities on a sporadic basis. Therefore, those who support the non-State armed group (recruiters, trainers, arms smugglers, those who are responsible for financing and propaganda) are not members of the organized armed group.

Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat functions and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group. As civilians, they benefit from protection against direct attack unless and for such time as they directly participate in hostilities, even

though their activities or location may increase their exposure to incidental death or injury.

11.6.2 The notion of direct participation in hostilities.

The notion of “direct participation in hostilities” refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. According to the ICRC *Interpretative Guidance*, it must be interpreted synonymously in situations of international and non-international armed conflict.

According to the ICTY, “taking a direct part in the hostilities” means acts of war which by their nature or purpose are likely to cause actual harm to the personnel or materiel of the enemy armed forces.²³⁰ Scholars and practitioners agree that civilians “directly participating in hostilities” lose the protection accorded by IHL and become lawful target of attacks.²³¹ It is, therefore, fundamental to ascertain the meaning of the notion. Acts amounting to “direct participation in hostilities” must meet three cumulative requirements:

1) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);

²³⁰ *Prosecutor v Galic*, (Trial Chamber) Case No IT-98-29-T (5 December 2003) [48].

²³¹ Schmitt, M., (2010), “Deconstructing Direct Participation in Hostilities: The Constitutive Elements”, in N.Y.U. J. Int’l L. & Pol. N. 42, pp. 697-699.

- 2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation);
- 3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

The three requirements of *threshold of harm*, *direct causation* and *belligerent nexus* should allow a trustworthy distinction between activities amounting to direct participation in hostilities and activities which, although occurring in the context of an armed conflict, are not part of the conduct of hostilities and, therefore, do not entail loss of protection against direct attack.²³²

The requirements mentioned above, although they provide a better clarification of the purpose and content of the notion of "direct participation in hostilities", remains at times too general and still leave open much room for interpretation. Although there is now broad agreement that the participation should be evaluated on a "case-by-case basis", there is still some confusion and uncertainty, particularly given the different ways through which civilians can take part in hostilities.²³³

²³² ICRC Interpretative Guidance.

²³³ The International Criminal Tribunal for the Former Yugoslavia, in the case *Strugar*, provides some examples of "direct participation in hostilities"; between these: [B]earing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces. Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment, ¶ 178 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 17, 2008).

A legitimate target of a drone strike is, consequently, either a combatant of the armed forces of a State, a civilian who is directly participating in hostilities, or a member of an organized armed group who has a continuous combat function. This means that civilians can lose their immunity from attack in the second and third situation. Thus, Taliban fighters are legitimately the subject of attack, whereas Taliban propagandists and politicians are not, unless and for such time as they take a direct part in hostilities.²³⁴

In current asymmetric conflicts involving terrorist organizations it has become much more difficult to determine who is a lawful target. The dividing line between civilians and civilian taking a direct part in hostilities becomes much more difficult to track, as well as the concrete application of the principle of distinction for the State's Armed Forces. Such circumstances demand a greater degree of monitoring/surveillance, intelligence sharing, compared to traditional conflicts. The assessment according to which the armed forces of a State decide to kill a suspected terrorist should be grounded on accurate and truthful information. Drones, in this regard, can provide greater accuracy in the collection of information, and therefore, put greater responsibility on those concerned with the identification of targets.

The intelligence capabilities of the drones can play a very useful role in limiting attacks that could have negative repercussions on civilians. To be noted, in this regard, the use by ISAF in Afghanistan of the so-called "pattern of life analysis", through which it is possible to analyze the daily activities of suspected militants, helping to ensure the protection

²³⁴ Millison, Rory O., Herman, David A., (2015), *Killing by drones: Legality under International Law*, Foundation for Law, Justice and Society, University of Oxford, p.3.

of the civilian population.

The difficulty in implementing the principle of distinction in these contexts may cause some over-simplifications, such as the US policy of "signature strikes" under which are considered legitimate targets those individuals who -on the basis of their behavior and personal contacts- are suspected of being terrorists or militants. The "signature strikes" are bombardments that does not target a specific individual- for instance, does not target the leader of the terrorist group, discovered thanks to a long and meticulous surveillance - but subjects that act *with reasonable evidence* as terrorists.

As an example, if there are armed men traveling in a vehicle between two hideouts of terrorists in the Tribal Areas of Pakistan, then they can fall in the category of "signature strikes" and become targets for a drone. The issue is highly controversial, because in those cases the decisions are made more quickly and with less information available and the possibility of mistakes is higher. It is precisely the large number of collateral civilian casualties caused by the UAV attacks, despite the advanced level of technology used, to arouse more criticism and controversy regarding the use of drones.

For the Obama Administration, the mere fact of belonging to an armed group, without further differentiation according to the function, makes the individual a legitimate target under international law, regarding it as a sort of "illegitimate fighter".

The Israeli Supreme Court, being asked on the matter, stated that those who participate occasionally in hostilities could be victims of direct attacks only and for the period in which they are directly involved in the

conflict. Furthermore, those who are part of a terrorist organization and perform a series of acts, although intermingled with pauses, will lose the protection intended to civilians throughout the duration of hostility, considering therefore the pauses between attacks as nothing else than the preparation of the next hostile act.²³⁵

The conclusion is that it is not possible to judge any targeted killing *a priori* as contrary to the rules of general International Law, but at the same time, it can not be determined in advance that every targeted killing is permissible. Before starting a mission involving the use of lethal force against a terrorist, it is required to verify the identity of the target, to ensure that other less harmful methods are not available, conduct an independent investigation and show that any collateral damage is proportional.²³⁶

The question has a link with another of the fundamental principles of the law of war, the equality of the belligerents. IHL must be applied by all parties in a conflict. The principle of equality of the belligerents has been codified in the preamble of the first Additional Protocol where it explicit that "the provisions of the Geneva Conventions and subsequent protocols must be fully applied in all circumstances and to all persons without any distinction based on the nature or on 'origin of the armed conflict".

Conversely, there remains the problem of determining the legal status of the operators of the drones. According to some authors, the pilots of

²³⁵ The Public Committee against Torture in Israel v. The Government of Israel, Corte Suprema Isr, 2005, HCJ 769/02 ("caso Targeted Killings") par. 39.

²³⁶ Melzen N., (2008), *Targeted killing in International Law*, Oxford University Press, pp. 32-36

the drones do not qualify as members of the Armed Forces but as "civilians directly participating in hostilities" and therefore likely to be the subject of targeted killings operations. Members of the intelligence services do not enjoy functional immunity under International Law, and are therefore liable for their conduct on the basis of state regulatory requirements for which they work, or could also be prosecuted for war crimes or crimes against humanity.

11.7 The principle of Discrimination.

Related to the principle of distinction, but considered to be a distinct one, is the principle of discrimination. In addition to direct attacks against civilians and against civilian objects, indiscriminate attacks are also prohibited, namely those which by their nature strike military and civilian objectives without distinction. In particular, according to art. 51 PA I para 4, indiscriminate attacks are:

- Those that are not directed at a specific military objective (rocket unable to discriminate the target);
- Those which employ a method or means of combat which can not be directed at a specific military objective (heavy weaponry used to attack a fighter hiding in the crowd);
- Those which employ a method or means of combat the effects of which can not be limited (for example, type of cluster munitions whose effects can not audited).

Are considered indiscriminate, among others, the following types of attacks (Art. 51 PA para. 5):

-Attacks conducted by bombardment which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area with similar concentration of civilians or civilian objects (not part of the case species of carpet bombing carried out exclusively against military targets);

-Attacks which may be expected to cause incidental deaths and injuries among the civilian population and/or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage expected (invokes the principle of proportionality).

The same rule is expressed by "art. 57 para 2 b, which calls to cancel an attack in the same circumstances.

11.8 The principle of Proportionality.

As soon as the legitimate target has been identified, by applying the principle of distinction, IHL requires the drone attack to be conducted in accordance with the principle of proportionality. Unlike the principle of distinction, which determines who can be a legitimate objective, the principle of proportionality concerns the way in which the attack must be carried out.

Proportionality is closely linked to the principle of distinction because it is based on the assumption that the armed attack must be carried out against military targets, but recognizes that there might be some civilian casualties or destruction of civilian objects justifiable only if the attack is not disproportionate to the expected benefit. In summary, there is an attempt to limit as much as possible the damage on the population and

civilian objects, balancing the principles of military necessity with that of humanity.

The respect of this principle requires the State party to make a sound evaluation before the attack, based on all the available information, aimed at considering on the one hand the likely success of the military operation and on the other, the conceivable impact on protected groups. The principle of proportionality is codified in Article 51 of Additional Protocol I and then repeated in Article 57. According to the principle, a military attack that can cause an incidental loss of civilian life, injury to civilians and damage to civilian objects that is excessive in relation to the concrete and direct military advantage anticipated is to be prohibited.

According to the ICRC, the expression “military advantage” refers to the advantage anticipated from the military attack considered as a whole and not from isolated or specific parts of that attack.²³⁷ The relevant provision in the Statute of the International Criminal Court refers to the civilian injuries, loss of life or damage deemed as excessive “in relation to the concrete and direct overall military advantage anticipated”.²³⁸

Notwithstanding that, IHL accepts the possibility that during an armed conflict there are resulting civilian casualties. The information available and the objective facts at the time of the military operations must guide the approach taken by the Armed Forces and the choices made by military commanders in order to maintain a balance between the military advantage and any civilian casualties. The principle of

²³⁷ https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14

²³⁸ ICC Statute, Article 8(2)(b)

proportionality tries to minimize the number of civilian casualties during an armed conflict and operationalizes the principle that the means and methods of attacking the enemy are not unlimited.²³⁹

On the point, Michael Schmitt (2011) states:

“Because drones provide high quality information about the target area in real-time (or near real-time), for extended periods and without risk to the operators, they [thus] permit more refined assessments of the likely collateral damage to civilians and civilian objects. The ability of armed drones to observe the target area for long periods before attacking means the operators are better able to verify the nature of a proposed target and strike only when the opportunity to minimize collateral damage is at its height.”²⁴⁰

In the planning stage of an attack, the ability of drones to carry out monitoring and surveillance tasks gives greater awareness of the targets and of the civilians in the area; it should therefore ensure a better compliance with the principle of proportionality. There is little doubt about the fact that better collection of sensitive information leads to a minimization of the number of civilian casualties. Given the advanced level of technology used on board, the incidence of attacks on civilians should be minimal.

Notwithstanding that, various reports show how many are civilians hit by missiles dropped from UAVs. Surely the impact on the civilian

²³⁹ Blank, Laurie R., (2012), “After Top Gun: how drone strikes impact the law of war”, in *University of Pennsylvania Journal of International Law*, vol. 33, available at <http://scholarship.law.upenn.edu/jil/vol33/iss3/2> P. 682

²⁴⁰ Schmitt, M., (2011), “Drone attacks under the jus ad bellum and jus in bello: clearing the fog of law”, in *Yearbook of International Humanitarian Law*, Vol. 13, pp. 311-326.

population is greater than that claimed by the military sources, and the discrepancy in the data is due to lack of information and transparency in the operations.

When the attacks by drones are conducted in densely populated areas and far from normal combat zones, a greater impact on civilians has to be expected. For example, the destruction of an entire village to render harmless a small cell of enemy combatants is unacceptable, because the collateral damage (deaths and injuries among the civilian population and the destruction of private property) is clearly excessive with respect to the military advantage anticipated.

The respect of the principle of proportionality cannot be assessed simply by counting the number of victims. In fact, the attack to a high-level target, due to its high value in terms of military advantage, will justify a larger amount of collateral civilian casualties. On the contrary, an attack made against a low-level target that is in a public place, with high risk of involving civilians, is to be considered as disproportionate and thus, unlawful. The principle tries to reach a balance between two conflicting interests. On the one hand, the military advantage resulting from the attack, and secondly, the need for humanitarian assistance that the attack did not cause casualties and / or damage excessive in relation to the concrete and direct military advantage expected.

Reaching that balance is very hard. Who undertakes the attack always gives greater weight to the military advantage, while those affected by the attack put emphasis on the humanitarian aspects.

11.9 The principle of precaution

Closely linked to the above-mentioned principles of Humanitarian Law, is the concept of precaution. It was codified primarily within Article 57 of Additional Protocol I to the Geneva Conventions but it is believed to be part of Customary Law, both in AICs and in NIACs.

The principle of precaution requires to take all feasible measures and precautions in order to minimize incidental harms to civilians and civilian objects. As well as the general obligation to target only military objectives, articles 57(2) and 57(3) API, ask for certain precautions that must be taken when planning or executing the drone attack.

One of the precautions to be taken when conducting an attack is to do everything feasible to verify that the target is a military objective subject to lawful attack. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective is to be selected among those, which are expected to cause the least danger to civilian lives and to civilian objects.

This requires an assessment of the relative quantum of collateral damage that might be caused by different attacks.

The features of UAVs make them particularly suited for this purpose. The capacity to remain in flight for extended periods enhances the opportunity of observation/monitoring of a potential target, thus collecting high fidelity information through the use of advanced sensors. Communication systems used by UAVs permit real-time dissemination of the information gathered to ground forces, imagery analyst specialists, specialist targeting officers, and military legal officers, all of who can contribute to the verification process. These

characteristics can contribute to a more accurate assessment of a target, enabling more precise information on whether the target is lawful.²⁴¹

Despite the use of the information gathered by drones, sometimes decisions have to be taken on the basis of incomplete information. Under the Additional Protocol I, it must be assumed that a subject and an object are civilians in case of doubt. In the *Interpretative Guidance on the Notion of Direct Participation in Hostilities*, the ICRC states that:

“Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal proceedings but rather must reflect the level of certainty that can reasonably be achieved in the circumstances. In practice, this determination will have to take into account, inter alia, the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision.”²⁴²

The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia expressed the required standard of certainty in the following way:

“..The Trial Chamber understands that a person (or an object that is normally used for civilian purposes) shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to

²⁴¹ Henderson, I., and Cavanagh, B., (2015), “Unmanned Aerial Vehicles: Do they pose Legal Challenges?” in *New Technologies and the Law of the Armed Conflict*, Springer, p. 204.

²⁴² *Interpretative Guidance*, p.76.

the latter, that the potential target is a combatant (or an object is being used to make an effective contribution to military action).”²⁴³

The ‘test of reasonable certainty’ has to be conducted on a case-by-case basis, and should represent the standard procedure prior to an attack by drone on a suspected terrorist. In the event that the information gathered still gives rise to doubts and uncertainties, the test of reasonableness requires the Armed Forces to postpone the attack to gain further information.

The ability to collect detailed information, thanks to the technologies installed on board of the drones and the numerous sensors, as well as the possibility of transmitting live images of the situation in progress, thus being able to see well the presence of civilians on the place of the attack programmed, make them particularly suitable to comply with all the precautionary measures in respect of distinction and proportionality.

In addition, the operations using drones are not improvised but planned to the last detail, making it possible to evaluate every possible precaution, without any risk to the safety of a pilot. This does not mean that we should however display the drone at undue risk, as it could always be shot down by enemy fire, but this condition poses UAVs in a privileged position with regard to their use in complex scenarios.

The same preparation and training of the team responsible for piloting functions, data analysis and intelligence, is in itself a form of precaution, although not expressly provided for in the art. 57. In fact,

²⁴³ ICTY, Prosecutor v. Stanislav Galic, Case No. IT-98-29-T, (Trial Chamber), 5 December, 2003, para.

the presence of military personnel trained and instructed in the principles of Humanitarian Law would reduce the possibility of erroneous or illegal conduct.

11.10 The principle of military necessity.

The principle of military necessity within a context of an armed conflict allows to use an amount of forces that is required for the achievement of a legitimate objective, namely the prompt submission of the enemy with the minimum expenditure of lives and economic resources.²⁴⁴

Military necessity has often been intended as to limit the application of the general IHL, namely inferring that Humanitarian Law is not applicable when unavoidable military necessity requires the belligerent some exemptions from the rules of IHL. This interpretation is based on the German doctrine of the *Kriegsraison*, to which many authors refer to put into question the same existence and the cogency of IHL. Such claim cannot be accepted, as the demonstrated by the same US Court of Nuremberg in case *List and others* (1950), when it stated that military necessity could not be invoked to justify the killing of innocent members of the population and destruction of villages and towns.

In art. 14 of the 1863 Lieber Code, article 14, military necessity is defined in the following terms: “*military necessity, as understood by modern civilized nations, consists in the necessity of those measures*

²⁴⁴ UK MINISTRY OF DEFENCE, The Joint Service Manual of the law of armed conflict cit., p.21 par. 2.2

*which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war”.*²⁴⁵

Military necessity in the modern LOAC should be understood in the second meaning; it is a general limit to the actions of war, or the belligerent should use only the amount of force necessary to defeat the enemy without causing unnecessary sufferings.

In any armed conflict, the military necessity is the extent of the exercise of power on the part of the belligerents. In this respect it has a dampening effect of military violence, which may be lawfully exercised and is to be complemented by the principle of humanity.²⁴⁶

Conversely, quite often military necessity has been interpreted as an authorization of infringement of certain obligations imposed by IHL, but, in this case, only to the extent that this infringement has been expressly consented by the laws of the armed conflict.²⁴⁷ This second aspect is evident, for example, in art. 23 of the Regulation annexed to IV Hague Convention (1907), when it states that it is forbidden to destroy or seize enemy property, except where such destruction is imposed by the necessities of war.

²⁴⁵ The Lieber Code is a collection of standards with which the soldiers had to comply in time of war, promulgated by US President Lincoln during the American Civil War. It represents the first attempt to codify the rules of armed conflict. It, in fact, collected the main customary laws under the current armed conflict at the time.

²⁴⁶ Green, L.C., (2008), *The Contemporary Law of Armed Conflict*, 3rd ed., Manchester University Press, p.151.

²⁴⁷ Dinstein, Y., (2010), *The Conduct of Hostilities under the International Law of Armed Conflict*, 2nd ed., Cambridge University Press, pp. 6-8.

Similarly, Article. 4 of the 1954 Hague Convention on the Protection of Cultural Property obliges the parties not to use such property for military purposes, but allows an exception in cases where military necessity imperatively requires such a waiver.

11.11 The Principle of Humanity.

The principle of humanity requires the Parties to a conflict not to impose any additional suffering to the opponent, which is not actually necessary for the pursuit of a legitimate military objective. The ICJ, in its opinion on the *Legality of the use of nuclear weapons*, stressed that this principle is of paramount importance and is at the heart of the rules applicable during armed conflict.

As a premise, it is useful to remember that the ultimate goal of each belligerent in a war is to weaken the enemy and not to destroy him. In this sense, once the military target has been reached, any further harm or suffering inflicted to the opponent is to be considered as unnecessary and unreasonable. For example, if an enemy appears injured or captured, there is no reason to continue the attack. The use of weapons that cause unnecessary suffering or aggravate the conditions of those already defenseless, are to be considered as contrary not only to the purposes of the hostilities themselves, but also to the most elementary laws of humanity.

The principle is enshrined in Article 22 of the fourth Hague Convention, which states that "the belligerents do not have an unlimited right to choose the means of injuring the enemy", then repeated in

Article. 35 of Additional Protocol I and, in fact, part of the Common Law.

It has already been pointed out that the UAVs, by their nature, do not cause excessive and unnecessary suffering when related to other systems, and for this reason are not banned outright. However, some objections about the use of drones compatibility with the principle of humanity were raised. These objections are focused on the difficulty to suspend a planned attack in the event of enemy wounded or surrendered, and to replace the lethal use of force with the capture and detention.

First of all, it should be guaranteed to the enemy the opportunity to surrender. The UAVs, according to their characteristics, are unable to capture an enemy and often operate in remote environments, without support from units on the ground, which makes it impossible in practice.

Certainly contrary to the principle of humanity (and even considered a war crime) is the case concerning the drone attacks following an earlier attack (follow-up strikes) in order to target those who are injured or *hors de combat* and medical personnel involved in the relief effort.

11.12 Conclusion.

Many scholars have raised the need for further clarification in the application and interpretation of existing Laws of the Armed conflict with regard to the current employment of new technologies and new means of warfare. As this analysis has demonstrated, there are more

than enough rules for governing drone warfare within IHL.

There is no doubt that IHL applies to new weaponry systems, as recognized, *inter alia*, in article 36 of Additional Protocol I. Nonetheless, applying pre-existing legal rules to a new technology raises the question of whether the rules are sufficiently compatible with the technology's specific characteristics, as well as with regard to the foreseeable humanitarian impact it may have.

On the one hand, armed drones help belligerents to direct their attacks more precisely against military objectives and thus reduce civilian casualties and damage to civilian objects. On the other hand, drones can also increase the opportunities of attacking an adversary and thus put the civilian population and civilian objects at greater exposure to incidental harm.

IHL oversees the legality of drone strikes. It addresses who might be targeted and under which conditions, it sets the limitation to the use of force, and protects civilians. In summary, the conditions for the legitimacy of a drone attack are as follows:

- They must be directed only against legitimate targets, such as combatants, military objectives, civilians taking direct part in the hostilities;
- They must be planned and conducted so as to avoid erroneous targeting and minimize the collateral damage. Commanders should not approve a drone strike when they know or reasonably should know that the strike will cause excessive collateral damage to civilians or civilian properties;

- It must be suspended when the expected victims fall into the category of the *hors de combat* (combatants no longer able to continue the fight) or when the collateral damage is disproportionate to any military advantage;
- They should not include the use of prohibited weapons;
- It cannot be used excess force than needed to achieve a legitimate military target, considering the circumstances prevailing at the time of the attack.

12. THE USE OF ARMED DRONES OUTSIDE AN ARMED CONFLICT.

Before 9/11, international terrorism was treated mainly as a criminal law matter, therefore highlighting the importance of prevention through intelligence or law enforcement means, the prosecution and punishment of the perpetrators. After September 11, however, the criminal justice approach was deemphasized and to a considerable extent replaced by the use of purely military means. The international practice of the latest years shows an exponential increase in the use of armed drones for targeted attacks outside the context of what can be legally defined as an “armed conflict”. The use of drones for the extra-territorial targeting of suspected terrorists has generated significant debate and criticism.

As already demonstrated, IHL requires (as a prerequisite for its application) the existence of an IAC or a NIAC. Therefore, the assessment will vary from case to case, and the perspective of an all-out ‘global war on terrorism’ cannot be accepted as such. Whether there are no adequate conditions to ascertain the existence of an armed conflict, or when clashes have not reached a certain level of intensity, the operations against terrorist groups/cells will have to be framed according to the so called *Law Enforcement Model*.

The Law Enforcement Paradigm consists of a uniform set of principles and norms resulting both from Customary and Treaty rules of Human Rights Law and Humanitarian Law, which govern the use of force outside an armed conflict. The notion of Law Enforcement encompasses all territorial and extraterritorial measures taken by a State to enforce public security, law and order or to otherwise exercise its

authority or power over individuals. The complex of these rules regulates the conduct of operations by the Police Forces and Military personnel to combat crime and restore public order and which could, with very precise limits, also involve the use of lethal force.

The distinction between Humanitarian Law and the Law Enforcement Paradigm is not so obvious, especially in the context of the fight against transnational terrorism, where the concept of territorial link between the terrorist organization and a particular country remains blurred, and since there is a clear tendency of the States to apply Humanitarian Law standards, since it is more permissive in the use of lethal force, rather than engaging in specific international police missions. Under the traditional paradigm, acts of terrorism are treated as international criminal behavior rather than acts of war.

A decision to employ the military model of counter-terrorism in place of the Law Enforcement Model, may have serious functional consequences.

12.1 The Law Enforcement model

The so-called 'Law Enforcement Model' refers to human rights standards that find application in peacetime. 'Peacetime' should not be intended plainly and in absolute terms; there can be situations in which internal tensions and disturbances are present, nonetheless, the intensity of violence is not enough to constitute an armed conflict.

The Law Enforcement Paradigm comprises imprisonment, prosecution and sentencing of the offender, and law enforcement officers can use lethal force merely once either their lives or the lives of bystanders are

in immediate danger. The *United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials* (UN Basic Principles) set out the international legal standard for the use of force by Security officers. In this regard, *the Basic Principles on the Use of Force and Firearms*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990), at art. 9, states:

“Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.²⁴⁸”

According to Blum and Heymann (2010):

“Killing an individual without trial is allowed only in very limited circumstances, such as self- defense (where the person poses an immediate threat) or the immediate necessity of saving more lives. In almost any other case, it would be clearly unlawful, tantamount to extrajudicial execution or murder.²⁴⁹”

²⁴⁸ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>

²⁴⁹ Blum, G. and Heymann P., (2010), “Law and Policy of Targeted Killing”, in *Harvard National Security Journal*, Vol. 1, p.146.

The extraterritorial targeting of a suspected terrorist beyond the framework of an armed conflict raises a number of concerns. First, it is to be evaluated whether the behavior of the attacker State is consistent with the International Law of Human Rights. Secondly, the behavior of the State should be evaluated according to the rules of International Law governing relations between States and the rules on the use of force in international relations.

International Human Rights Law provides every person with the inherent right to life. The right to life is acknowledged in a variety of widely ratified global²⁵⁰ and regional²⁵¹ treaties and other legal instruments. Human Rights Law accepts that, in cases of public emergency, States may derogate from their obligations, within specified limits.²⁵² Any deprivation of life must meet some specific requirements, “which together form the comprehensive or holistic set of requirements that should be posed by the domestic legal system. If any of these requirements is not met, the deprivation of life will be considered as arbitrary.”²⁵³

²⁵⁰ In particular, art. 6 of the *International Covenant on Civil and Political Rights* (1966) states that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Art. 3 of the *Universal Declaration of Human Rights* states that “Everyone has the right to life, liberty and security of person.”

²⁵¹ Art. 4 of the *African Charter on Human and Peoples’ Rights* (1981) recalls “the right to respect for one’s life and personal integrity “. The right to life is recognized in the *American Convention on Human Rights* (1969), while in the framework of the European Union, the *European Convention on Human Rights* (1950) guarantees the right to life at art. 2.

²⁵² *International Covenant on Civil and Political Rights*, art. 4; *American Convention on Human Rights*, art. 27; *Arab Charter on Human Rights*, art. 4; *European Convention on Human Rights*, art. 15.

²⁵³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns (2014), p.10.

A few requirements are to be met before a State resorts to lethal force according to the Law Enforcement Paradigm: Necessity, Proportionality, and Precaution.

12.2 Necessity

The *Code of Conduct for Law Enforcement Officials*, adopted by the U.N. General Assembly with Resolution 34/169 of December 17th, 1979, states that "law enforcement officials may use force only when necessary and strictly to the extent required for the performance of their duty". Therefore, it is important to emphasize the exceptional nature of these measures: every effort must be undertaken in order to exclude the use of lethal weapons during maintenance operations or restoration of public order and crime prevention.²⁵⁴

Principle No. 9 of the above mentioned *Basic Principles*, sums up, effectively, situations in which a use of lethal force by the police may be considered necessary, and therefore, lawful. It states that:

"Law enforcement officials shall not use firearms against persons except in self-defence or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve

²⁵⁴ Art. 4 Code of Conduct for Law Enforcement Officials. Similarly, the European Code of Police Ethics states that "the police may use force only when strictly necessary and only to the extent required to obtain a legitimate objective".

these objectives. ... intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”²⁵⁵

First, the use of lethal force has to be deemed as absolutely necessary in order to neutralize the threat to the life of others. Accordingly, in the fight against terrorism, the use of armed drones could be legitimate only in cases of self-defence against an imminent threat of death or serious injury. According to Nils Melzer (2008), ‘necessity’ in the context of lethal force has three components.²⁵⁶ *Qualitative necessity* means that the use of potentially lethal force (such as through a firearm) is unavoidable to achieve the legitimate purpose. *Quantitative necessity* means the amount of force used does not exceed that which is required to achieve the legitimate purpose. *Temporal necessity* means the use of force must be used against a person who presents an immediate threat.

According to the Law Enforcement Paradigm, before resorting to lethal force, non-violent means should be pursued as much as possible. Whether non-violent means are unsuccessful or do not permit to achieve the intended result, necessity obliges that the level of force used should be escalated as gradually as possible.²⁵⁷

The requirement of ‘strict necessity’ must be balanced with the specific circumstances in question, namely those linked with international terrorism. Quite often terrorists are part of “sleeping cells” located in various parts of the world, operating as non-state actors with different bases in different countries, acting through surprise attacks against

²⁵⁵ Principle n.9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

²⁵⁶ Melzer, N., (2008), *Targeted Killing in International Law*, Oxford University Press, p. 101.

²⁵⁷ Report of the Special Rapporteur, Heyns, p. 10.

civilians, international personnel (both civilian and military) and more generally against western targets and interests. The location, timing, targets of a terrorist attack is very hard to detect.

In contrast to police operations responding to an on-going crime or aiming to arrest a fugitive, the primary purpose of transnational counter-terrorism operations is to prevent unspecified attacks before they enter the phase of operational execution. Such an aspect has enormous consequences. If those operations are to have any prospect of success, the permissibility of lethal force cannot depend exclusively on the temporal imminence of an attack but, alternatively, on the temporal urgency of the use of lethal force for the prevention of further indiscriminate attacks. In other words, the question is not necessarily whether the next attack is about to take place, but whether the present moment is likely to be the last opportunity for preventing it.²⁵⁸

It is, therefore, indispensable to find a balance between the right of the State to defend its security and wellbeing, and the respect of the ‘necessity’ requirement prescribed by IHRL. The threat of a terrorist attack should be properly assessed before proceeding with any lethal attack by drone, thus considering the offensive potential of an individual and its operational relevance within the terrorist group.

The use of force will then be directed to concrete threats, and not just potential ones, and as a last chance to prevent the illegal conduct. The context of international terrorism is characterized by surprise attacks by armed groups operating clandestinely around the globe through a sophisticated network of internal connections and logistics bases.

²⁵⁸ Melzer, N., (2013), “Human Rights Implications of the usage of drones and unmanned robots in Warfare”, study requested by the European Parliament Subcommittee on Human Rights, p.31.

Although the prospect of further attacks is certain, the place and time of the next attack remain unpredictable.

So the use of lethal force would therefore remain limited to unavoidable events or if any other alternative means should be deemed ineffective to achieve the purpose of the mission (something to that effect qualitative aspect of necessity). The use of armed drones should therefore be limited only in those circumstances in which an alternative measure can not be taken with less drastic means (such as the arrest and detention of the terrorist) and only in immediate response to an absolutely necessary condition that endangers the lives of other individuals or of the same law enforcement operators.

12.3 Proportionality

As a general rule, outside the context of an armed conflict, the use of force threatening human life is always to be considered as *extrema ratio*, to be justified only in exceptional circumstances. According to the *Basic Principles*: “Whenever the lawful use of force and firearms is unavoidable, law enforcement officers shall... exercise restraint and act in proportion to the seriousness of the offence and legitimate objective to be achieved.”²⁵⁹

The amount of lethal force used must be proportionate to the threat; otherwise, it would amount to the level of arbitrariness. As Melzer (2013) argues, when there is no actual threat or when the threat is of a

²⁵⁹ Principle n.5.

political nature, any deprivation of life is illegitimate.²⁶⁰ Before launching a drone attack, it has to be demonstrated that the killing of the individual is proportionate to the harm that he/she would have posed.

12.4 Precaution

The principle of precaution prescribes that, in a Law Enforcement Operation, all the possible precautionary measures have been undertaken, in order to contain the damage as much as possible. Among the practical expressions of this principle we can include the obligation of States to equip its Police Forces with alternative kinds of weapons, which will enable a differentiated use of force, namely non-lethal means limiting the death and damage to individuals.²⁶¹

Before resorting to the use of force, Police Officers must identify themselves and provide adequate warning, unless this would result in an undue risk to the life of the same agents or other individuals²⁶². The whole operation will, therefore, be planned and designed so that the use of lethal force appears minimized. The operations involving the use of armed drones, which have as their purpose the targeted killing of a subject, are therefore, in this context, not in accordance with the precautionary principle. The mere suspicion of the involvement of an individual in the planning of a hostile act will not be enough. In addition, all the necessary medical assistance in case of injury must be

²⁶⁰ Melzer, p.101.

²⁶¹ Principle n. 2 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

²⁶² Principle n.10 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

ensured²⁶³; this is particularly difficult to guarantee in case of drone operations, since those vehicles are generally used in difficult geographic scenarios and without a suitable ground support force.

According to some authors, the United States did not comply with the conditions indicated in these paragraphs regarding the use of lethal force by drones in contexts such as Somalia and Yemen²⁶⁴.

12.5 Conclusion

The above-mentioned requirements find application with regard to the actions performed by government and security officials who exercise police powers, including the military and security forces, who operate in circumstances where there is protracted violence, but the intensity of such violence does not reach the required threshold for the existence of an armed conflict.

It has been more than 10 years since the first reported armed drone strike took place in Yemen (3rd November 2002), which is believed to be outside the scope of a traditional armed conflict.

Thousands of civilians have reportedly been killed or seriously injured by drone strikes; those figures are difficult to evaluate owing to the lack of transparency regarding the use of armed drones, which represents a

²⁶³ Principle n. 5(C) UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

²⁶⁴ O'Connell M., (2010), Lawful use of combat drones, hearing: rise of drones II: examining the legality of unmanned targeting, Congress of the United States, House of Representatives.

significant obstacle to evaluating the full extent of the civilian impact of drone strikes and contributes to the lack of accountability.

13. DRONES AND THE BAN ON INTER-STATES USE OF FORCE.

As a drone strike perpetrated within the territory of another sovereign State can clearly be labeled as “use of force”, the State responsible for the attack will need to justify its actions by reference to its inherent right of self-defence, unless it had received the consent of the territorial State in which the attacks are taking place or an expressed authorization from the UN Security Council. Outside those cases, the attacker state would be at risk of committing an act of aggression.

Indeed, article 2.4 of the UN Charter states that “all Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations”. This norm reflects customary International Law and bears a *jus cogens* nature.²⁶⁵ It basically implies that any military action by one state on another’s territory, which is not otherwise justified in international law, is unquestionably a violation of the prohibition.

13.1 Self-defence

Article 51 states:

²⁶⁵ The ICJ, in its judgment on June 27, 1986, in the case *Military and Paramilitary Activities in and against Nicaragua*, has established itself as the prohibition in Article. 2.4 of the Charter has now value norm of Customary International Law, therefore, valid for all states and not just to UN member states.

“Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a member state of the UN, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

The United States has justified its drone operations on the basis of its inherent right of self-defence. A matter of great importance is to figure it out whether the right of self-defense might include a reaction against non-state actors, ie individuals and group responsible for the attack. The wording of art. 51 of the U.N. Charter does not specify from *who* the attack should originate in order to activate the right to self-defense. In this regard, it should be underlined that for a long time the provision was interpreted as recognizing a right of self-defense with regard to a conventional attack launched by a state. To date, the positions are divided on the very possibility of conceiving a right to self-defense against a non-state actor.

Resolutions 1368 and 1373 of the Security Council of the United Nations following the attacks of September 11th condemn terrorism in all its forms and recognize the right of self-defense in response to such attacks, without any reference to a responsible state. It is not possible to deny a country the right to defend itself from terrorist attacks. In this sense, there is no doubt that self-defense requires a more precise application to some hypothesis of unconventional attacks not known at the time of preparation of the United Nations Charter. The fundamental

problem of the application of the rule of self-defense is its application as a result of a terrorist attack, which by its nature is an instantaneous act. The measures taken in self-defense must be in reaction to the attack, and not punitive or preventive.²⁶⁶

This is confirmed by the “theory of accumulation of events”, in the judgment of the International Court of Justice of November 2003 on the case concerning *Oil Platforms* (Islamic Republic of Iran v. United States of America), and in its judgment of December 2005 concerning *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v. Uganda) which ensure the right of legitimate self-defense when the State undergoes a series of unconventional individual attacks.

The legitimacy of a reaction involving the use of force could be admitted against non-state actors directly responsible for the attacks, as long as these measures are strictly defensive, are evaluated in terms of necessity and proportionality, and have the aim to end the attacks themselves.²⁶⁷

A state could use the argument of self-defense to justify the use of armed drones in a cross-border operations without the permission of the state in which the terrorist is situated only if he can demonstrate that the threat or use of force amounts to an armed attack. The threat of an isolated terrorist attack would not be sufficient.²⁶⁸

²⁶⁶ Cassese, A., (2001), “Terrorism is also Disrupting some Crucial Legal Categories of International Law”, in *European Journal of International Law*, pp.993-1001.

²⁶⁷ Focarelli, C., (2008), *Le nuove frontiere del diritto internazionale*, Morlacchi editore, pp. 47-52.

²⁶⁸ Casey-Maslen, S., (2012), “Pandora’s box? Drone strikes under *jus ad bellum*, *jus in bello* and International Human Rights Law”, in *International Review of the Red Cross*, Vol.94, n.886, p.605.

Self-defence is the central justification advanced by the Government of the United States for the extraterritorial use of deadly force in counter-terrorism operations. The ICJ has held that in the absence of an expressed consent, the use of force in self-defence by one State against a non-State armed group located on the territory of another State can be justified only where the actions of the group concerned are imputable to the host State. This may extend to situations in which a non-State armed group is being harbored by the host State. In this analysis, however, absent such a connection, the extraterritorial use of force against a non-State armed group in another State is an unlawful violation of sovereignty, and thus potentially an act of aggression, unless it takes place with the host State's consent or the prior authorization of the Security Council.

The principle of anticipatory self-defense is not universally accepted by legal scholars and it is subject of controversy. Part of the doctrine considers that a state cannot take action in self-defense until it has been the victim of an armed attack. Another part of the doctrine, instead, considers the existence of an exception to the exception: responding before the actual armed attack has taken place. According to this perspective, the key requirement of what is called anticipatory self-defense is the immediacy of the attack by another state.²⁶⁹

The Caroline incident is often considered as the precedent on which the right of anticipatory self-defense is built. Mr. Daniel Webster wrote to Lord Ashburton that an exception to the right of self-defense exists when "the necessity of that self-defense is instant, overwhelming, and

²⁶⁹ Hamid, Abdul G.,(2007), "The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Re-Appraisal", in the *Netherland International Law Review*, Vol. 54, issue n,3, p. 4.

leaving no choice of means, and no moment for deliberation”²⁷⁰. From a careful analysis of the facts of the case, it can hardly be considered so.²⁷¹

The *Caroline* was engaged in shipping recruits, supplies and arms to the rebels. It is clear that the rebels had already attacked the Canadian shore and passing British ships quite a number of times. Only after that, the British force from Canada attacked the *Caroline* and destroyed it. Although it can be argued that the act was intended to prevent further attacks from the rebels, the *Caroline* incident cannot, taking into consideration previous immediate attacks by the rebels against the British and occupation of the British territory, be said as a genuine case of anticipatory self-defense.²⁷²

In essence, the *Caroline* Case has little to do with the concept of anticipatory or preventive self-defense. Rather, it has been listed as a precedent for the “*Caroline* Test”²⁷³, which permits to distinguish between an imminent attack and the threat of an attack. Actions taken by states in anticipatory self-defense can be considered lawful and legitimate if they meet three conditions of immediacy, necessity and proportionality.²⁷⁴ The difference between a legitimate use of defensive measures and an illegitimate one is that the enemy has engaged decisively and irreversibly on a specific course of action, so that even if

²⁷⁰ The *Caroline Case*, Letter from Mr. Webster to Lord Ashburton, Yale Law School Library, available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2

²⁷¹ Brownlie, I., (1963) *International Law and the Use of Force by States*, Clarendon Press, p. 274-278.

²⁷² Hamid, Abdul G., p.19.

²⁷³ Delibasis, D., (2006), “State Use of Force in Cyberspace for Self-Defence”, in *Peace Conflict and Development Journal*, Issue 8, p. 9-12.

²⁷⁴ Dinstein, Y., (2001) *War, Aggression and Self-Defence*, Cambridge: Cambridge University Press, p.172.

the attack has not yet reached its target, it has commenced and materialized.²⁷⁵

The United States has claimed that, under specific circumstances, the right of self-defense enables States to become involved in non-consensual military operations on the territory of another State against armed groups that pose a direct and immediate threat of attack, even when there is no operational connection between the host State and the armed group.²⁷⁶ For this approach the US refers to Security Council resolutions n. 1368 (2001) and 1373 (2001), which were adopted in the wake of the attacks of 11 September 2001.

Borrowing from the law of neutrality applicable to international armed conflicts, the United States considers that if the host State has failed to counter the threat that emanates from armed groups located within its territory, either because it is unwilling or unable to do so, then the State that is threatened is entitled -under the law of self-defense- to cross the host State's borders and deploy armed force on its territory for the purpose of taking effective military action in self-defense in an attempt to repress the armed group that poses the threat.

The relevant provisions of the UN Charter do not provide a conclusive answer, but have to be interpreted. There is, still, a doctrinal division between those who favor a restrictive approach, which aims to limit the behavior of states, and those who attempt to apply the principle

²⁷⁵ Delibasis, D., (2006), *State Use of Force in Cyberspace for Self-Defence*, p. 9-12; Graham, David E., (2010), "Cyber Threats and the Law of War", in *Journal of National Security Law and Policy*, Vol. 4, n.87, p.90.

²⁷⁶ Rapport of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, 18 September 2013, p.16.

efficiently the complexity of today's reality and the threats of today. As Bethlehem (2012) has noted:

“This scholarship faces significant challenges, however, when it comes to shaping the operational thinking of those within governments and the military who are required to make decisions in the face of significant terrorist threats emanating from abroad. There is little intersection between the academic debate and the operational realities”²⁷⁷

13.2 Sovereignty and consent

The use of drones for operations that require the overflight of the territory of another State can take place only when the concerned country has expressed a valid consent, especially when the mission has consequences for the population, as in the case of targeted killings. The consent of the sovereign state constitutes a cause of exclusion of the international offense.

The consent might be expressed in different ways, from more formal written agreement to a simple oral manifestation. However to ensure that the consent can be considered valid, it must meet a number of conditions:

- It must be expressed by a truly representative organ of the State and provided with the necessary authority. It is assumed that a government

²⁷⁷ Bethlehem, D., (2012) “Principles relevant to the Scope of a State’s Right of Self-defense against an imminent or actual armed attack by non-state actors”, in *American Journal of International Law*, v. 106, p.4.

exercising actual control over territory has the authority to give or refuse consent;

- It must be a non-defective consent and expressed in accordance with the rules of domestic law of the territorial State. In particular, such consent must be specific and limited to a contextualized mission: a specific action, in a specific time period, on a specific geographical area.
- It will not be deemed to satisfy a consensus of general type;
- It must not be contrary to any mandatory rule of International Law.

Some commentators believe that a late consent will not be considered as an amnesty from illegal behavior, but will be understood as the late expression of the will of the state to give up relying on the consequences of the offense. The military presence (and the possible use of force) of a state within the borders of another state can be justified by the consent of the state itself.²⁷⁸

The consent of the territorial State is a cause of exclusion of the offense, as provided in Article 20 of the *Draft articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission in 2001. According to it, a valid consent requires the satisfaction of two elements: first, the granting authority must be legitimate (there must be no manifest lack of authority on the part of the official concerned); second, the action undertaken by the external State must fall within the scope of the expressed consent.

The consent may be expressed only with regard to activities that the state itself can legitimately put in place in its territory. It would not be

²⁷⁸ International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, UN Doc. A/56/10, November 2001, Art. 20.

considered as valid, for example, a consensus authorizing to violate core human rights or the *jus cogens*.

Finally, it should be noted that even if the State has consented to the use of its territory by another State for targeted killing operations, it is always possible to ask the operating state the reasons for which a particular subject should be hit as well as the respect of the relevant internal legislation. In the event of continuing drone attacks, and in cases in which the host State doubts that the targeted killings has been operated in a legitimate manner, the latter can initiate an investigation in order to identify any irregularity, prosecute offenders and claim damages for victims.

The main differentiation between the drone attacks in Pakistan and those in Yemen is that the Yemeni government has openly given its consent to the attacks, which are also sometimes carried out by Yemeni armed forces, whereas the Pakistani government officially condemned the attacks on its territory and has ordered the United States to stop. There are, however, some media reports that reveal that the Pakistani government indeed has tacitly approved the drone attacks conducted by the United States.

The Government of Yemen has informed the Special Rapporteur that the United States routinely seeks prior consent, on a case-by-case basis, for lethal remotely piloted aircraft operations on its territory through recognized channels. Where consent is withheld, a strike will not go ahead.

As regards to Pakistan, there is strong evidence to suggest that between June 2004 and June 2008 remotely piloted aircraft strikes in the

Federally Administered Tribal Areas were conducted with the active consent and approval of senior members of the Pakistani military and intelligence service, and with at least the acquiescence and, in some instances, the active approval of senior government figures.

14. ARMED DRONES AND THE INTERNATIONAL RESPONSIBILITY

In the previous chapters we analyzed the way in which counter-terrorism operations are conducted by drones, inside and outside the context of an armed conflict. It is now appropriate to examine the consequences that States and its individuals face as they violate the norms of International Law. Every internationally wrongful act committed by a State, any violation of Customary International Law, determines the International responsibility of the State concerned.

The international norms on the international responsibility of the State are mostly of a customary nature, although the International Law Commission has attempted to codify them within the above mentioned *Draft articles on Responsibility of States for Internationally Wrongful Acts*, which is not binding but it is largely considered as declaratory of the general law.

The project of articles affirms that the international offense is made of two elements:

- There must be a breach of an international obligation (objective element) and
- The illegal conduct must be attributable to a State (subjective element)²⁷⁹.

²⁷⁹ The qualification of the illegality of a behavior depends solely on International Law, without this qualification is affected by the fact that the national law, by contrast, consider the same act as lawful. This prediction follows from Article. 27 of the *Vienna Convention on the Law of Treaties of 1969* which affirms that a State may not invoke the provisions of its internal law as justification for the breach of an

Some wrongful acts that may result from the use of drones are related to the possible infringement of the rules on state sovereignty (if there is an overflying the airspace of a State without consent), or from the breach of humanitarian law in the conduct of the armed conflict or of the provisions on human rights, primarily the right to life. It is necessary to ensure that any illegal activity is attributable to a State.

The State will be responsible for the acts of its organs that exercise legislative, executive and judicial powers, regardless of the position they hold in the organization structure of the country and its central or peripheral nature²⁸⁰.

The activities carried out by the Armed Forces or by the Police may result in the international responsibility of the State for illegal use of UAVs. Even intelligence agencies fall under the categories of persons whose acts may be attributed to the State for which they work. Acts

international treaty. The provision is also set out in article 3 of the draft articles on international responsibility.

²⁸⁰ According to the 'organic theory of imputation', a State may act only by natural persons who are its organs or agents, whose conduct is attributable to the State (Order of March 3, 1999, rendered by the ICJ in the *LaGrand* case (Germany vs. USA), in which the Court recalls that the International Responsibility of a State derives from the action of its institutions and authorities. It is necessary that those natural or legal persons are acting within the scope of their functions and not carrying out private activities.

The absence of such "organic link" between the state and a particular individual or entity determines that the State is not liable of the conduct adopted and, therefore, determines the non-existence of an international illegal act.

However, State could still be responsible if it did not adopt the necessary measures to prevent or penalize the private behavior that does not conform to International Law. (On this point see the reconstruction made by the International Court of Justice in case the *Diplomatic and Consular Staff of the United States* in Tehran, 1980).

carried out by individuals and organizations that, although do not occupy the position of authority in respect of domestic law of a State, exercise of government powers and groups of individuals acting under the direction, control, or instructions of the State may involve the responsibility of the state.

The State may also be held responsible for acts committed by state organs or entities empowered to exercise governmental powers, which exceed the powers given to them by national law (so-called acts *ultra vires*).

More specifically, Article 3 of the Hague Convention of 1907, resumed in parallel terms art. 91 of Additional Protocol I to the Geneva Conventions, states that "the belligerent Part [...] will be responsible for all acts committed by persons forming part of its armed forces."

According to Article 16 of the *Draft Articles*, a State that "aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for such conduct". Such a form of liability will exist only where the country which assists or aids is aware of the illegal behavior and acts with the intention of facilitating its commission.

The principal State will remain responsible for its actions, while the assisting state will only have a supporting role: it will, therefore, be responsible only for the conduct that has contributed to the international commission of the offense.

In order to determine the international responsibility of the State, the conditions set out in article 16 must be met. In order to be responsible, the supporting state, despite being aware of the illegality of a particular

use of drones, provides the principal State support in terms of logistics, personnel, or information, or give their consent to carry out the illegal act.

It will not, however, be considered sufficient the mere fact of participating in a multinational military operation that see the deployment by another State of drones in ways that may contravene the rules of law international.

14.1 Circumstances which exclude the wrongful nature of the international act.

International law enlists a series of reasons whose intervention entails an exceptional removal of the wrongful nature of the acts which violate the international obligations. One of those is the State consent (art.20)²⁸¹. It should however be pointed out that no reason can justify the breach of an obligation set by a mandatory rule of International Law²⁸².

Although the territorial state in which the targeted killings through drones takes place has previously given consent to the use of force within its borders, this same act does not exclude the international responsibility of the territorial State, which it is obliged by international

²⁸¹ Among others: self-defense (Article 21), counter-measures (Article 22), force majeure (Article 23), state of danger (Article 24), state of necessity (Article 25). Article 26 institutes a general rule which forbids the invocation of the circumstances listed above whenever peremptory general international law norms (*jus cogens*) are violated.

²⁸² Leanza-Caracciolo, (2012), *Il Diritto Internazionale: Diritto per gli Stati e diritto per gli Individui*, Parte Generale, Giappichelli Editore, Torino, p. 319.

law to ensure that its territory is not being used to carry out arbitrary and extrajudicial killings. Thus the territorial State shall, from time to time, request the State which intends to conduct the operation using drones to prove the legality of the way in which the military operation will be carried out and the criteria behind any choice of targets.

It is therefore possible to identify a form of State responsibility for the authorities of Yemen, Somalia, Afghanistan and Iraq, and according to some, of Pakistan (which although publicly condemn the use of drones is deemed to grant secretly its consent) for complicity in those military operations and targeted killings that have violated some rule of IHL or Human rights.

Another form of exclusion of the illegality of the conduct is called *force majeure*. Pursuant Article 23 of the *Draft Articles*, it is defined as the "occurrence of an irresistible force or an unforeseen event, outside the control of the state, which makes it impossible, in the circumstances, to act in accordance with the requirements." This could be the case of exceptional weather events which affect the operation of a drone, forcing it to fly without permission in the airspace of another country. Since drones are characterized by a remote control, there could also malfunction or may be interfering in communications with the remote station.

14.2 Individual criminal responsibility

Some individual behaviors could trigger a form of direct penal responsibility of individuals for particularly harmful violations of

International Law, which stands distinct from the State's responsibility. The so called criminal responsibility for international crimes, generally encompasses crimes against peace (better known by the name of aggression), war crimes, and crimes against humanity and, most recently, the crime of genocide. International crimes are those in which the indictment is already contained in an international customary rule, which provides directly to incriminate a certain conduct, regardless if the same conduct is instead permitted in national legal systems. International crimes are characterized by the fact that they harm the fundamental interests of the whole International Community, in particular the interest of peace and security and that the protection of relevant humanitarian values.

After the First World War a form of individual responsibility is developed, which does not replace but is added to that of the State. World War II contributes to raise the awareness of states to the problem of punishment of individuals guilty of such crimes. On August 8, 1945 the International Military Tribunal was established, based in Nuremberg, to prosecute and bring to trial the major war crimes; on January 19, 1946, after the emperor's capitulation Hiroito, Gen. MacArthur with unilateral act established the Military Tribunal for the Far East based in Tokyo. The Nuremberg and Tokyo Trials provided a decisive impetus to the affirmation in the international law of the principle of individual criminal responsibility and the expansion of the *Crimina Juris Gentium* category.

According to art. 7 of the Statute of the International Criminal Tribunal for the former Yugoslavia, it will be held individually responsible for a crime anyone who "planned, instigated, ordered, committed it or in any

other manner aided or encouraged the planning, preparation or execution of the crime"²⁸³.

In case of drones use, the personnel appointed for the remote piloting of the aircraft will be held responsible, regardless of its spatial location, even if it is placed thousands of kilometers from of commission of the offense. According to the provisions of the Statute of the International Criminal Court (ICC), it will be held criminally responsible and liable for punishment that individual who "commits such a crime, individually or together with another person or through another person, regardless of the fact that the other person is criminally responsible."²⁸⁴ Even those individuals who order or incite the commission of the crime shall be liable.²⁸⁵

As a consequence, the attacks by drones that could constitute an international crime could be attributed to the various commanders and the according to the military hierarchy, as well as to political leaders, who planned and directed the operation and are, therefore, pursuing policies contrary to international standards. The military commanders will be held accountable also for the conduct of their subordinates, if they had to know the international crimes committed by their soldiers, and if they had not taken the necessary measures to prevent the commission of such acts.²⁸⁶

In case of international crimes, the qualification of a person as an organ of the State does not make him immune to imputation, thus invalidating

²⁸³ Art. 7 Statute of the Tribunal for the Former Yugoslavia

²⁸⁴ Art. 25 (3) (a) of the ICC Statute

²⁸⁵ Art. 25 (3) (b) of the ICC Statute

²⁸⁶ Art.28 of the ICC Statute

the functional immunity of each of these individuals.²⁸⁷ It will, also, be liable the one who provides substantial assistance to the commission of the offense²⁸⁸. Thereby the intelligence structures that assist the commanders by providing information and evaluations, could also be held accountable.

The group of persons involved in various capacities in the military operation carried out by drones, which we could qualify as an international crime, will form the so called ‘joint criminal enterprise’, a concept developed by the International Criminal Court to indicate a plurality of individuals who share a common criminal purpose and result involved the commission of the offense²⁸⁹.

An additional category of international crimes is the constituted by war crimes, corresponding to gross violations of IHL²⁹⁰. First there must be a nexus with an armed conflict. In order to qualify an attack carried out by drones as a war crime, it is essential to frame the act as committed during an armed conflict, regardless of its international or non-international nature.

A drone attack could constitute a ‘war crime’ when it provoked²⁹¹:

- The murder of an individual not involved in hostilities;
- The extensive destruction of property not justified by military necessity;

²⁸⁷ Art. 27 of the ICC Statute

²⁸⁸ Art. 25(3)(c) e (d) of the ICC Statute

²⁸⁹ De Stefani P., Sperotto, F., (2011) *Introduzione al Diritto Internazionale Umanitario e Penale*, Quaderni ricerca e documentazione interdisciplinare sui diritti umani, pp. 196-198.

²⁹⁰ Ronzitti N., (2013), *Introduzione al Diritto Internazionale*, Giappichelli Editore, Torino, pp. 328-330; Focarelli C., (2008), *Lezioni di Diritto Internazionale*, Ed. CEDAM, pp. 365-370.

²⁹¹ Art. 8 of the ICC Statute

- The intentional direction of attacks on the civilian population or to the personnel involved in humanitarian assistance operations;
- The killing of individuals hors de combat;
- The use of weapons prohibited by international law of which the drone can be equipped.

In order to qualify as a ‘war crime’, the act will have to be listed as a crime (actus reus), but also a specific intent aimed at the commission of the same crime (mens rea) is to be demonstrated.

A second category of international crimes are crimes against humanity. They consist of direct, extended and systematic attacks against the civilian population, occurring even outside the context of armed conflict.²⁹² The use of armed drones designed to strike and kill individuals not participating in hostilities, repeatedly and as part of a specific and programmed plan can, for this reason, constitute a crime against humanity.

14.3 Reparations for violations of International Law.

It is a general principle of public International Law that any wrongful act, namely any violation of an obligation under International Law, gives rise to an obligation to make reparation²⁹³. The scope of the

²⁹² Ronzitti N., *Introduzione al diritto internazionale*, pp. 330-332; Focarelli, C., *Lezioni di diritto internazionale I*, pp. 370-376; De Stefani P./ Sperotto F., (2011), pp. 225-228.

²⁹³ Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) case, (Germany v. Poland), (Merits)*, PCIJ (ser. A) No. 17, 1928, p. 29. See also Article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001: “Every internationally wrongful act of a State entails the international responsibility of that State”.

reparation is to remove, as far as possible, the effects of the illegal act and to restore the situation that would have existed if the act had not been committed. A similar requirement to pay compensation for violations of IHL is expressly reiterated in Article 91 of Additional Protocol I. It should be noted that the obligation to make reparation arises *automatically* as a consequence of the unlawful act, without the need for the obligation to be spelled out in conventions.

Before proceeding to reparations, a State that used armed drones in violation of international obligations will have to immediately cease the unlawful conduct and to ensure, with appropriate safeguards, the non-recurrence of the unlawful act²⁹⁴.

The State responsible for the offense will then have to pay the full compensation for the damage, taking into account any moral or material harm²⁹⁵.

The repair may take various forms: from *restitutio in integrum*, to compensation to satisfaction, individually or in combination. With regard to the case of drones, most of the violations are resulting from attacks causing destruction of property and killing of individuals; in this case, compensation will be a more appropriate form of restitution.

It will include the coverage of any damage susceptible to economic valuation, and therefore both the actual loss is the loss of profit, plus any interest. However, in order to determine the amount of compensation, it becomes crucial to start investigative actions based on transparency. For those violations that do not involve damage to

²⁹⁴ Art. 30 lett.b of the Project of Articles.

²⁹⁵ Art. 31

property, but only moral losses, such as the entrance of a drone in the airspace of another state without due permission, the responsible state could repair its illegal behavior through 'satisfaction', which may consist "in an acknowledgment of the violation , an expression of regret, a formal apology or another appropriate modality ", provided they are not disproportionate or humiliating against the offender State.

15. GENERAL CONCLUSION

The US international practice since 2011 suggests that drones have shaped the way policymakers think about counterterrorism operations. The operational advantages of drones, including the precision and the absence of risks for the operator, has made drones the platform of choice for the United States' counterterrorism operations despite assertions that the US has a preference for capture.

This dissertation explored the theory and practice of armed drones against suspected terrorists in counterterrorism operations. Although the academic landscape is still extremely divided between those who emphasize the most positive aspects of their use and those who call into question their moral and ethical legitimacy, much of the conceptual landscape of killing terrorists by remote control is yet to be investigated.

The principles embedded in JWT have not been satisfied with regard to counter-terrorism operations carried out with armed drones. This assessment does not entail that the JWT has become obsolete or irrelevant; rather it is still a significant and comprehensive theoretical framework to address the issues of justice in war.

The JWT is not inadequate to confront new threats to our collective security, nor should we deny our moral standards to face an asymmetric threat. New ways to combat this phenomenon should be seriously undertaken, those which could enhance the respect for the rule of law and the life of the civilian population.

Do terrorist attacks (or the existence of a terrorist threat) expand the range of acceptable options to the attacked state or one that believes it is

about to be attacked? Does terrorism itself enlarge the set of options morally and ethically available to real or potential targets? Does the nature of the threat allow policy-makers to employ armed drones at the detriment of civilians?

The same existence of a just cause for action against terrorists cannot support a regression to the standards and practices employed by terrorists. Human civilizations tempted to behave savagely in response to savagery ultimately betray and deceive themselves, while bolstering the moral symmetry advanced by relativists. The good societies should seek justice, not revenge, and just societies cannot move back and repudiate the moral standard they have built in response to past hatred.

New military technology should be introduced in order to ensure the global protection of basic human rights. The main motivation behind continuous military and technological innovations seem to be the desire to maintain military superiority and dominance while also satisfying the economic interests of the defence industries at stake in the research, development, production and sale of new weapons. In order to be considered a “humanitarian tool”, the armed drone should be employed ethically, in the service of protecting human rights.

The use of armed drones, while valuable in disrupting a certain amount of terrorist cells, has not led con a definitive solution to the problem. Conversely, it has had the side effect of causing the death of thousands of innocent civilians in war-torn areas.

As demonstrated, the large employ of armed drones bears significant repercussions on the military profession at large, more specifically with regard to the ethics of the combatants. The latters have only the option

to kill or, at maximum, to postpone an attack. The possibility to surrender is not even contemplated.

The progressive autonomization of armed drones raises even pressing questions. The gradual ‘dehumanization’ of the conflict is a clear trend, and that trend is taking place outside of any type of normative framework regulating the use of drones. The potential acquisition of those weapons by terrorists profiles scenarios of potential global instability with unimaginable repercussions.

The application of new technologies to armed conflicts cannot be halted. Nonetheless, every new introduction has to be complemented by the definition of regulatory standards for their use to ensure, first and foremost, the respect the lives of non-combatants. The rules embedded in International Humanitarian Law, which find their deepest roots in the Just War theory, have been coded at the end of the Second World War to prevent the atrocities committed during those conflicts, and prevent humanitarian tragedies of that kind. Today more than ever we are called to respect those rules, although the enemy is international terrorism.

According to the findings of the legal section, any use of armed drones, in order to be considered lawful under the rules of International Law, must fulfill a number of conditions, which vary according to the nature of the activity and the employment of lethal force.

First, each mission aimed at spying, monitoring or patrolling, flying over the territory of another State, should respect the sovereignty of the state itself; in this respect, the lack of expressed consent by the territorial State is suitable to determine the international responsibility of the previous one.

Far more complex is to establish the compliance with IL of targeted killing operations through the use of armed drones. A first study is to be conducted in order to understand the posture of the state in which the attack is taking place. It must be determined what justifications there are for allowing the use of force in interstate relations and in accordance with international standards. Has the territorial State granted the consent to the use of drones on its own territory? Can force by the first state be used in self-defense? In this case, does the use of force represent a proportionate and immediate response to an attack? Was the use of force authorized by the UN Security Council under Chapter VII of the Charter?

A second study will have to be conducted with particular reference to those who have been victims of drone attacks. It will be essential to determine, first of all, the actual existence of armed conflict, being it international or non-international, in order to assess the feasibility of the application of IHL standards. A drone attack in this context will be considered lawful only whether it is carried out without resorting to weapons prohibited by international law, and without provoking excessive damage and indiscriminate suffering. The assessment must be carried out taking into account the distinction between civilians and military targets, addressing only those individuals who directly participate in hostilities. The drone attack must be proportionate to the expected military advantage and respectful of the principle of neutrality. It will have to take all the necessary precautionary measures to minimize the impact of the attack on the civilian population. Once these conditions are met, any collateral damage will not be deemed as illegal.

Outside an armed conflict, therefore, the possibility of use of force by drones should be limited to extreme circumstances. The paradigm of

Law Enforcement should be applied, in order to safeguard, as much as possible, the right to life.

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