

Current drone warfare in the light of the prohibition of interventions:

The use of drones in armed conflicts in Afghanistan, Iraq, Israel, Yemen, Libya, Mali, Pakistan, the Philippines, Somalia, and Syria

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A. Drone Wars - the results of 9/11

Immediately after the attacks of September 11, 2001, i.e. in the first military responses to transnational Islamist terrorism, the use of unmanned systems (generally referred to as *drones*) constituted an important cornerstone of US military



operations.¹ This new method of warfare² first adopted by Bush and subsequently by Obama postulated the moral right to fight terrorists anywhere in the world.³ This applies especially if they do not in any way follow generally recognised, established norms of warfare, or if the states that shelter terrorists are not willing or able to fight them. At its core, this US “doctrine” is based on the US arguing that international law gives them the right to defend themselves against a terrorist enemy operating globally.⁴ The USA quickly realised the significant benefits derived from the use of drones: negligible threat to the operators, the possibility of reconnoitring a target well in advance and in a sustained manner, and the use of remote-controlled precision air-to-ground missiles for the destruction of a target or the killing of an enemy.⁵ It seemed possible to conduct almost any military operation, at any time, and at almost any chosen location.

On 16 February 2001, an *AGM-114 Hellfire* air-to-ground missile was launched successfully for the first time from an *MQ-1 Predator Unmanned Combat Aerial*

¹This text addresses the worldwide use of drones exclusively from the point of view of the UN Charter. Its focus lies on examining deployments of drones by the US armed forces. Increasing the use of unmanned systems also increases the risk of governments being willing to undermine or circumvent guidelines of the UN Charter, especially considering the prohibition of interventions. However, this text does not examine possible violations of international humanitarian law during drone engagements. Consequently, reasonable suspicion regarding repeated violations of the principles of distinction, proportionality and humane treatment may be conceived. This poses another alarming development requiring extensive investigation. – compare: Markus Reisner, ‘Robotic Wars – Legitimatorische Grundlagen und Grenzen des Einsatzes von Military Unmanned Systems in modernen Konfliktszenarien’, PhD thesis, University of Vienna (2017).

²The rising number of armed drone sorties was a result of two different developments. On the one hand, technological progress allowed for the use of armed drone systems; on the other hand, these exact systems seemed to be very effective in fighting terrorism. – Hew Strachan and Sibylle Scheipers, *The Changing Character of War*, (Oxford: Oxford University Press, 2011), pp. 241-2.

³At the time of writing no valid information from official sources was available related to current plans of newly elected US president Donald Trump concerning US drone warfare. It is reasonable to assume, however, that drones will continue to be employed in large numbers in foreseeable time. – Daphne Eviatar, ‘Just Security Podcast: Daphne Eviatar on Military Targeting under Trump’ (March 12, 2018), <https://www.justsecurity.org/53658/security-podcast-daphne-eviatar-military-targeting-trump/>. – Bill Roggio and Alexandra, ‘LWJ Exclusive: US quietly continues Yemen air campaign’, *Long War Journal* (March 14, 2018), <https://www.longwarjournal.org/archives/2018/03/yemen-air-campaign.php>.

⁴Micah Zenko, *Reforming U.S. Drone Strike Policies. Council Special Report*, (New York: Council on Foreign Relations Press, 2013), pp. 23-5. – White House, Office of the Press Secretary, ‘Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities’ (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

⁵Paul Fahlstrom and Thomas Gleason, *Introduction to UAV Systems*, 4th edn, (Chichester: Wiley, 2012), pp. 10-2.

Vehicle (UCAV).⁶ At the time, the technicians and engineers of the US Air Force and of General Atomics Aeronautical Systems were not yet aware of its ground-breaking importance.⁷ However, in the wake of September 11, 2001, events started moving rapidly. The first use of an armed *MQ-1 Predator* in the airspace above Afghanistan was recorded as early as October 2001. On March 4, 2002, an *MQ-1 Predator* was used to fire a *Hellfire* to provide close air support for US ground forces. From 2001/02, the US flew over Iraq and Yemen, and, beginning in 2003, over Pakistan. The attack carried out by an *MQ-1 Predator* in Yemen in November 2002 was the first attack of a drone outside Afghanistan as part of the Global War on Terror. It eliminated the target Qaed Salim Sinan al-Harethi. He was held responsible for the 2000 attack on the US Navy guided missile cruiser *USS Cole* in Yemen. Kamel Derwish, a further suspect who also had American citizenship, died with him.⁸ This incident is therefore also regarded as the first in which a US citizen became the victim of a drone strike. In June 2004, an *MQ-1 Predator* carried out the first targeted killing on Pakistani territory.⁹ Further *MQ-1 Predator* use followed in Somalia (from 2011, against the *Al-Shabaab* terror organisation) and the Philippines (2006 and 2012 against the terror group *Abu-Sayyaf*). Beginning in 2007, the first *MQ-9 Reaper UCAVs* were used successfully. These are advanced versions of the *MQ-1 Predator* and are also capable of carrying a much higher weapon load than the *Predator*.¹⁰

These successful operations convinced the American military and political leadership that a combination of armed and unarmed drones was an effective weapon against terrorists.¹¹ The American defence industry then successfully sold or leased *RQ-1/MQ-1 Predators* and *MQ-9 Reapers* to allies (*inter alia* France, the Netherlands, Italy, Spain, Great Britain, Australia, Turkey, and Morocco). At present, the Royal

⁶ Unmanned Aerial Vehicles (*UAV*) of the *Predator* type are currently used in an unarmed reconnaissance version (*RQ-1=UAV*) as well as in an armed version (*MQ-1=UCAV*). *UAVs* and *UCAVs* of this size are also referred to as *Medium Altitude/Long Endurance (MALE)* systems.

⁷ Christopher G. Dusseault (Program Director Predator XP, General Atomics Aeronautical Systems), 'Defining the Future of Innovation - Taking a Deliberate and Integrated Approach to Unmanned Systems Acquisition and Technology Development', Panel discussion during the *Unmanned Systems Exhibition & Conference 2016 (UMEX 2016)*, Abu Dhabi, VAE, 6 March 2016.

⁸ Richard Whittle, *Predator - The Secret Origins of the Drone Revolution*, (New York: Henry Holt and Company, 2014), pp. 302-3. - The death of a further US citizen was that of Anwar al-Awlaki. He was suspected of being an Al-Qaeda recruiter and killed on 30 September 2011 in Yemen by a *UCAV*.

⁹ Whittle, *Predator*, pp. 232-5.

¹⁰ Whittle, *Predator*, pp. 299-01.

¹¹ Dusseault, 'Defining the Future of Innovation - Taking a Deliberate and Integrated Approach to Unmanned Systems Acquisition and Technology Development', 2016.

Air Force (RAF) is the only air force outside the USA to command ten American-produced *MQ-9 Reaper UCAVs*. Since 2007, these have been operated from Creech Air Force Base (AFB) in the USA, and RAF Waddington in Great Britain. Since 2014, British *MQ-9 Reapers* (equipped with *AGM-114 Hellfire* air-to-ground missiles and *GBU-12 Paveway* laser-guided bombs) have been used against *ISIS* in Iraq and Syria. The British armed forces are planning to extend their quantitative capacities.¹² Israel also can look back on a long tradition of using unmanned systems. It was one of the first states to use *UCAVs* in targeted killings. *Heron*-type armed systems (referred to as *Machatz-1* in Israel) are currently in permanent use in territories where hostile *Hamas* and *Hezbollah* elements operate.¹³ In the course of operations *Cast Lead* (2008-2009) and *Pillar of Defense* (2012), drones of the Israeli Defense Force (IDF) carried out targeted killings in the Gaza Strip.¹⁴ Drones have therefore become an integral element of modern warfare by the beginning of the 21st century, with a highly diverse array of types being employed by a multitude of nations. The question whether fielding drones undermines or circumvents the guidelines regarding the UN Charter's Use of Force is to be examined below.

B. On the modus operandi of current drone warfare

B1. The secret US drone wars

The Intercept, a whistleblowing website comparable to *Wikileaks*, which went online in 2014, published four important US military documents in October 2014, which shed light on the use of drones or *UAVs* and *UCAVs* constituting the US answer to terrorist acts.¹⁵ All documents had been classified as secret, which illustrates the

¹² Peter Felstead, 'Cameron calls for more spending on "spy planes, drones, special forces"' (2015) 52 *IHSJane's Defence Weekly*, Issue 29, p. 8.

¹³ Andrew White, 'Leading edge - Israeli UAV development' (2015) 52 *IHSJane's Defence Weekly*, Issue 29. - Turkey, India and Germany also have *HERON*-type *UAVs*.

¹⁴ Ahron Bregman, *Israel's Wars - A history since 1947*, 4th edn, (New York: Routledge, 2016), pp. 265-7, pp. 309-11. - Katja Schöberl, 'Global Battlefield - Drohnen und der geographische Anwendungsbereich des humanitären Völkerrechts', in *Moderne Waffentechnologie - Hält das Recht Schritt? Bildungswerk des deutschen Bundeswehrverbandes*, Forum Innere Führung, vol. 39, Christof Gramm and Dieter Weingärtner (eds.), (Baden-Baden: Nomos, 2015), p. 121.

¹⁵ *The Intercept*, 'The Drone Papers', <https://theintercept.com/drone-papers/>. - *The Intercept* is run by three investigative journalists: Laura Poitras, Glenn Greenwald and Jeremy Scahill. - Former President of the US Barack Obama stressed near the end of his term that he took action to ensure that the deployment of drones would be subject to close federal supervision. Furthermore, he confirmed that fielding drones might lead to a 'comfortable' form of warfare, forewarning about '... institutional comfort and inertia with what looks like a pretty antiseptic way of disposing of enemies.' - Ryan Devereaux and Alex Emmons, 'Obama worries future Presidents will wage perpetual, covert

explosive potential of the information they contain. One document gives a detailed description of *Operation HAYMAKER* in Afghanistan. In just over a year, two Afghan provinces witnessed a total of sixty individual operations against *Taliban* fighters. In 56 cases, a *Kinetic Strike* was carried out, i.e. weapons were used. These strikes were almost exclusively executed by armed *MQ-1 Predator* und *MQ-9 Reaper UCAVs*. In these attacks, a total of 219 persons were classified as *Enemy Killed in Action*. Four additional *Direct Action* operations led to the capture of four more persons.¹⁶ In an interrogation, one of them, a mid-level Taliban commander captured by US special forces during *Operation BRANDYWINE*, stated the following on the use of US drone strikes against his fighters (translation):

*[...] the scariest/most intimidating message for the Taliban, at any level, from fighter to senior leadership, is anything to do with drones or aerial bombing. The Taliban has no way to defend against them and they are certain to end in absolute destruction of whatever their target is.*¹⁷

In the light of these statements, which found their way into the published documents (which, as stated above, were actually classified as secret), the clear conclusion can be drawn that the political leadership of the USA is convinced that the strategy of targeted killings is a highly effective tool. Two further sources published by *The Intercept* deal with US operations in the Horn of Africa.¹⁸ The US documents state that the operations were highly successful there and need to be expanded further. The operations are executed *Outside a Defined Theater of Active Armed Conflict*, which severely limits the activities of US ground troops on foreign territory. All that is required for striking a *High Value Target* or a *High Value Individual* is a *Positive Identification* to the extent of *near certainty*. So, identification of the target individual

drone war' (October 3, 2016), <https://theintercept.com/2016/10/03/obama-worries-future-presidents-will-wage-perpetual-covert-drone-war/>.

¹⁶ The Intercept, 'Operation HAYMAKER' (October 15, 2015), <https://theintercept.com/document/2015/10/15/operation-haymaker/>. – These captures were carried out by special forces. Drones had reconnoitred the target/target area beforehand. During the actual operation, drones were circling the target area in order to send information to the forces employed concerning possible movements on the ground. The sources give no information on whether the persons killed were really enemy combatants.

¹⁷ The Intercept, 'Operation HAYMAKER'; this is also confirmed by former Taliban hostages. cf: David Rohde, 'My Guards Absolutely Feared Drones: Reflections on Being Held Captive for Seven Months by the Taliban', in '*Drone Wars, Transforming Conflict, Law and Policy*' Peter L. Bergen and Daniel Rothenberg (eds.), (New York: 2015), pp. 9-11.

¹⁸ The Intercept, 'ISR Support to Small Footprint CT Operations – Somalia/Yemen' (October 15, 2015), <https://theintercept.com/document/2015/10/15/small-footprint-operations-2-13/>. – The Intercept, 'ISR Support to Small Footprint CT Operations – Somalia/Yemen – May 2013', <https://theintercept.com/document/2015/10/15/small-footprint-operations-5-13/>.

does not require 100% certainty. Pursuant to the *Authorization to Use Military Force (AUMF)* procedure, the ultimate responsibility for this rests with the President of the United States.¹⁹

During the Bush Administration, from the end of 2001 (marking the date of the beginning of armed drone operations) until the end of 2008, a total of 48 targeted killings by means of drones are known to have been carried out. During the Obama Administration, between 2009 and 2013 alone, 307 such attacks were documented. Of these, 122 were carried out in 2010 alone. This represents a massive increase.²⁰ *AUMF* is the American legal basis for the fight against terrorism and the use of drones, as authorized by both Houses of Congress a week after September 11, 2001. *AUMF* authorises the President

*[...] to use necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on 11 September 2001, or harbored such organizations or persons.*²¹

This represents an authorisation which President Obama inherited from his predecessor and interpreted and applied liberally. The alleged success of targeted killing via drones made the US expand their attacks. At first drones were used exclusively by the military (and here especially by the US Air Force and the US Joint Special Operations Command, JSOC) in defined areas of operation (i.e. Afghanistan and Iraq), but the CIA increasingly became interested. This resulted in military operators using the drones they piloted to carry out missions for the CIA, i.e. a civilian intelligence service.²²

In the space of only a few years, further US bases for drones were set up in the Middle East and in Africa. In the meantime, attacks by means of *UCAVs* had been extended to countries such as Pakistan, Yemen, and Somalia. Terror organisations such as the Somali *Al-Shabaab* Militia now also found themselves in the crosshairs. Whether or not a target individual had actually been identified became less important, and there

¹⁹ The Intercept, 'ISR Support to Small Footprint CT Operations'.

²⁰ Peter Rudolf, 'Präsident Obamas Drohnenkrieg', in *Stiftung, Wissenschaft und Politik (SWP)*, SWP-Aktuell, vol. 37, Deutsches Institut für internationale Politik und Sicherheit, (Berlin, 2013) p. 5. Rudolf quotes figures compiled by the *New American Foundation*, a US think tank.

²¹ International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law, 'Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan', (September 2012) <http://chrgi.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf>.

²² Jeremy Scahill, *Dirty Wars: The World is a Battlefield*, (New York: Notion Books, 2013), pp. 45-8.

was a deliberate decision to tolerate potential civilian casualties, i.e. *collateral damage*. Consequently, civilian casualties, highly questionable from a moral point of view, became acceptable in the conduct of operations. From this point onwards, the term *signature strike* was used.²³ In 2012, President Obama authorised the *CIA* and the *JSOC*, i.e. his two spearheads in the Global War on Terror, to fight targets on the basis of their *signatures*. This referred to a target individual's behaviour pattern, which was collated on the basis of wiretapped telephone conversations, accessible human sources of information, and targeted air reconnaissance. The information thus gathered formed the basis for the assumption that a certain individual would be in a certain place at a certain time. This was a crucial difference to previous attacks, which had, almost exclusively, been directed against targets catalogued on target lists defined by the *CIA* and *JSOC*.²⁴ Until today, the most spectacular successes against the leading *cadre* of *ISIS* were achieved by the continuous use of armed US drones. In spring 2016 alone, American *UCAVs* are said to have killed Abdul Rahman Mustafa al-Kaduli (until his death, number 2 and financial head of *ISIS*), Abu al-Hija (a high-ranking IS commander, held responsible, *inter alia*, for an attack on US forces in northern Iraq), and Abu Omar al-Schischani (a member of the *ISIS* top echelon). Finally, in August 2016, the USA reported the death of Abu Muhammad al-Adnani, a high-ranking *ISIS* founding member and its head of communications. He, too, is said to have been killed by a US drone strike.²⁵

For the first time, in summer 2016, the US government published (previously secret) extracts from the *Presidential Policy Guidance (PPG): Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*. It lists certain conditions which must be met before a targeted killing by drone can be carried out.

[...]

1. near certainty that the terrorist target is present
2. near certainty that noncombatants will not be injured or killed
3. assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons

²³ European Parliament, Directorate-General for External Policies - Policy Department (ed.), 'Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare', (Brussels, 2013), p. 34.

²⁴ Greg Miller, 'US citizen in CIA's cross hairs', (January 31, 2010), <http://articles.latimes.com/2010/jan/31/world/la-fg-cia-awlaki31-2010jan31>.

²⁵ Merieme Arif, Holly Yan and Jim Sciutto, 'US doubts Russia's claim it killed ISIS spokesman', (August 31, 2016), <http://edition.cnn.com/2016/08/31/middleeast/isis-leader-killed/>. - Both the USA and Russia claimed to have carried out the successful elimination of al-Adnani in the Syrian province of Aleppo in August 2016.

4. *assessment that capture is not feasible at the time of the operation*
5. *assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons*²⁶

This publication makes clear that the US government must have, by degrees, become aware that it is acting in a grey area as far as international law is concerned. The publication of the *PPG* could thus be understood as a first step of the USA towards greater transparency in drone warfare.

B2. Worldwide drone proliferation and technology distribution

The USA, Israel, and Great Britain are certainly the most advanced states as regards the use of *UAVs* (or, if carrying weapons, *UCAVs*). Other states, however, are catching up in development and procurement. France, but also Italy and Morocco, are already using American-produced *UAVs/UCAVs*. The Italian 32^o Stormo Armando Boetto stationed in Amendola has operated *RQ-1/MQ-1 Predator UAVs* or *UCAVs* since 2002. Since 2015, the Italian Air Force has been using their *MQ-1 Predator* against *ISIS*.²⁷ France uses, *inter alia*, *EADS Harfang MALE UAVs*. It has also procured *MQ-9 Reaper*, which it has successfully used in Mali, and especially over Mali's inaccessible northern desert region.²⁸ In Afghanistan, Germany relies on leased *Heron MALE UAVs*. Other countries are catching up with western industrial nations. The Turkish armed forces' *TAI Anka MALE UAV* was both developed and produced domestically. Russia and China also boast their own systems or development programs. China's armed forces, for example, are currently successfully using *CH-4 MALE UAVs* and *Soar Dragon HALE UAVs*. Ukrainian forces in the

²⁶ White House, Office of the Press Secretary, 'Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities', - White House, 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities', (May 22, 2013), https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf. - This was the first official confirmation by the US government (little commented on by the general public) that a target person need not be identified with 100% certainty, but only with '*near certainty*'.

²⁷ Darren Boyle, 'La dolce obliteration: Italian air force release detailed surveillance footage showing Predator drone attacks on ISIS terrorists in Iraq', (December 11, 2015) <http://www.dailymail.co.uk/news/article-3355747/La-dolce-obliteration-Italian-air-force-release-detailed-surveillance-footage-showing-Predator-drone-attacks-ISIS-terrorists-Iraq.html>.

²⁸ Christopher S. Chivvis, *The French War on Al Qaeda in Africa*, (New York: Cambridge University Press, 2016), pp. 12-3. - Colonel Christoph Fontaine (Direction du Renseignement Militaire, Ministère des la Défense, République Française), 'Defining the Future of Innovation - Taking a Deliberate and Integrated Approach to Unmanned Systems Acquisition and Technology Development', *panel discussion as part of the Unmanned Systems Exhibition & Conference 2016 (UMEX 2016)*, Abu Dhabi, VAE, 6 March 2016.

Donbass captured drones produced in Russia (e.g. *Forpost* and *Orlan-10*).²⁹ Since 2015, Ukraine has also procured and used various drone systems. On 7 September 2015, the Pakistani armed Forces announced the first successful launch of *Barq* air-to-ground missiles from a *Burraq UAV*. The missiles are said to have killed three *Taliban* fighters in the border area between Pakistan and Afghanistan.³⁰

Iran is also likely to have capable *UAVs*. The Iranian *Shahed 129 UAV* was first presented to the public in 2012. Only one year later, a video was published that supposedly showed a *Shahed 129* launching an air-to-ground missile. In 2015, Iraq successfully used armed Chinese *CH-4B UAVs* against *ISIS*. Apart from Iraq, Egypt and Nigeria also possess this Chinese *UAV* type. This is another striking example of the increasing export market for drone systems of various types and sizes.³¹ It is therefore only a matter of time until insurgent or terrorist movements come to own potent, unmanned systems. Since 2012, drones of various types have already been used - verifiably and repeatedly - by, for example, *Hamas* and *Hezbollah* over Israel, by *ISIS* over Iraq and Syria, and by pro-Russian separatists in eastern Ukraine.³² In 2012, *Hezbollah* successfully launched an Iranian *Shahed-129 MALE UAV* in Lebanon and flew it over Israeli territory. Only there was it possible for Israeli fighter jets to shoot it down. The use of such a system by *Hezbollah* came as a nasty surprise to the Israeli Defense Forces (IDF).³³ Two years later, during the IDF operation *Protective Edge* in the Gaza Strip, *Hamas* successfully launched a number of

²⁹ Askold Krushelnycky, 'Ukrainian Forces recover downed Russian Drone', (February 17, 2015) <https://theintercept.com/2015/02/17/russian-drone-shot-ukraine/>. One of the first drone systems identified in Ukraine was an *Eniks 08 UAV*. Originally designed as a target drone, it had obviously been adapted for reconnaissance operations. The *Forpost UAV* is a licence-based product from Israel produced by Russia.

³⁰ Farhan Bokhari, 'Pakistan claims first airstrike with indigenous UAV', (2015) 52 *IHS Jane's Defence Weekly*, Issue 37, p. 5. - The development of the *Burraq UAV* by the Pakistani armed forces was probably supported by China, as the system is very similar to the Chinese *CH-3* and *CH-4 UAVs*. Apart from this, Pakistan also possesses the *Shahpar UAV*, which, according to the armed forces, can also be armed.

³¹ Jeremy Binnie, 'Iranian Shahed-129 UAV crashes', (2015) 52 *IHS Jane's Defence Weekly*, Issue 34, p. 18.

³² David Zucchini, ' Hamas drone injects new element into Arab-Israeli conflict', (November 13, 2015), <http://www.latimes.com/world/middleeast/la-fg-hamas-drone-20140715-story.html>.

³³ An *RQ-1 Predator* had already been downed by an Iraqi MiG-25 in 2002 - the first time a US drone had been shot down. In November 2012, two Iranian Su-25 intercepted a US drone over the Persian Gulf. On 17 March 2015, an *MQ-1 Predator*, used as part of *Operation Inherent Resolve* was shot down by a Syrian SAM-air defence battery over the Syrian province of Latakia; cf. Missy RYAN, 'U.S. drone believed shot down in Syria ventured into new area, official says', (March 19, 2015). https://www.washingtonpost.com/world/national-security/us-drone-believed-shot-down-in-syria-ventured-into-new-area-official-says/2015/03/19/891a3d08-ce5d-11e4-a2a7-9517a3a70506_story.html.

drones.³⁴ In the autumn of 2016, the first reports about drones used by the *ISIS* and the Taliban appeared.³⁵ Given these developments, it must be assumed that in future, an increasing number of states and non-state actors will use drones for their purposes.

C. Current drone operations in the light of the prohibition of interventions

C1. Use of force and the principle of sovereignty

The Charter of the United Nations (UN Charter) of June 1945 is the most important legal document in international law. Of central importance to what is often referred to as the Constitution of the United Nations is the so-called Use of Force (or Prohibition of Force), codified in Article 2 (4) of the UN Charter. The Use of Force is a cornerstone of international law (= *ius cogens*)³⁶ and also recognised in customary international law.³⁷ Article 2 (4) of the UN Charter states:

Article 2 (4) Use of Force

*All Members 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 other manner inconsistent with the Purposes of the United Nations.*³⁸

If a state uses an armed drone in combat operations inside the territory of another state, this constitutes the use of military force. The use of armed drones could

³⁴ Bregman, 'Israel's Wars', p. 326. This was the first time a drone was brought down by a *Patriot* air defence system.

³⁵ Michael S. Schmidt and Eric Schmitt, 'Pentagon Confronts a New Threat From ISIS: Exploding Drones', (October 11, 2016), http://www.nytimes.com/2016/10/12/world/middleeast/iraq-drones-isis.html?_r=2. – It should be noted that there is international effort to regulate the usage of lethal autonomous weapons systems (LAWS); United Nations Office of Geneva (UNOG), United Nations Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), [https://www.unog.ch/80256EE600585943/\(httpPages\)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument](https://www.unog.ch/80256EE600585943/(httpPages)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument).

³⁶ International Court of Justice (ICJ), 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)', Merits, judgment of 27 JUN 1986, ICJ Reports 1986, 94, clause 190-1, <http://www.icj-cij.org/docket/files/70/6503.pdf>; Yoram Dinstein, *War, Aggression and Self-Defence*, (Cambridge: Cambridge University Press, 2011), p. 87.

³⁷ International Court of Justice (ICJ): 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)', Merits, judgment of 27 JUN 1986, ICJ Reports 1986, 94, clause 188-9, <http://www.icj-cij.org/docket/files/70/6503.pdf>.

³⁸ Art. 2 of the Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, 1 UNTS XVI.

therefore be a violation of Article 2 (4) UN Charter. This view is supported by recognised state practice (*subsequent practice*) concerning the use of military force. Thus, the Use of Force article is supposed to be interpreted broadly, every use of military force inside another state's territory is to be regarded as a violation of Article 2 (4).³⁹ Therefore, a drone entering another state's airspace and launching an air-to-ground missile to kill, in a targeted manner, persons on the ground (among them, conceivably, uninvolved civilians) constitutes a possible violation of Article 2 (4), UN Charter.⁴⁰

A drone attack that is a violation of the Use of Force also violates the Principle of Sovereignty and the Prohibition of Intervention. The UN member states enjoy the same rights and privileges (irrespective of size and influence), and individual states must not indiscriminately interfere in the internal affairs of another state.⁴¹ The Principle of Sovereignty is derived from Article 2 (1) of the UN Charter and is recognised in customary international law. It states:

Article 2 (1) Principle of Sovereignty

*The Organization is based on the principle of the sovereign equality of all its members*⁴²

Using an armed drone inside another state's territory may thus be a violation of the Principle of Sovereignty.⁴³

³⁹ Some authors argue that targeted air strikes (or drone attacks) are to be regarded as *measures short of war* or *surgical strikes* and thus do not violate the affected state's territorial integrity or its political independence. Israel used this argument after its air force carried out a targeted strike against the Iraqi nuclear programme on 7 June 1981 (*Operation Opera*). - cf.: Anthony D'Amato, 'Israel's Air Strike upon the Iraqi Nuclear Reactor', (1983) *American Journal of International Law* 1983, 585.

⁴⁰ When drafting the UN Charter, the intention of the UN was to prevent any acts of aggression or other breaches of the peace. This includes any use of military force; cf.: Dieter Dörr and Peter Reifenberg, *Gezielte Tötung erlaubt? Der Fall Osama bin Laden*, (Mainz: Bischöfliches Ordinariat Mainz, 2011), p. 9-10.

⁴¹ Bardo Fassbender, 'Die souveräne Gleichheit der Staaten - ein unangefochtenes Grundprinzip des Völkerrechts', (2004) 43/2004 *Aus Politik und Zeitgeschichte*, p. 13-4.

⁴² Art 2 of the UN Charter.- also cf. Art. 2 (7) of the UN Charter, '*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state [...]*' This is connected to the Principle of Sovereignty, Art. 2 (1) of the UN Charter.

⁴³ Bernhard Kempen and Christian Hillgruber, *Völkerrecht*, 2nd edn, (Munich: C.H.Beck, 2012), p. 167-8.

C2. Exceptions to the UN Charter's Use of Force

However, the use of an armed drone above another state's territory may also be justified. There are two exceptions to the UN Charter's Use of Force, of which the first is Article 51. It affirms the Right to Self-Defence for a state or a subject of international law and means that states may defend themselves in the event of an armed attack.

Article 51: Right to Self-Defence

*Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the 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.*⁴⁴

The second exception to the Use of Force is a Security Council Resolution concerning military sanctions pursuant to Chapter VII. Since the creation of the UN Charter, specifically Article 2, any war (or armed conflict according to the definition set out in the Geneva Conventions between states, by definition), violates international law. The right to wage war (*ius ad bellum*) only applies in exceptional cases, all set out in the UN Charter. In 1974, UN General Assembly Resolution 3314 defined pertinent terms in further detail. It is, for the most part, an interpretation of Article 39 of the UN Charter. A war of aggression is thus a crime against peace, and the state responsible can be held to account according to international law. Furthermore, direct as well as indirect force, and the threat of force, are illegal. Even the subjects of international law may use military force only pursuant to Chapter VII or Article 39, UN Charter, respectively.⁴⁵

If the peace is threatened or breached, or acts of aggression are carried out, the United Nations can take measures – even without the affected state's agreement – to restore international peace. To this end, a suitable mandate is granted. Article 39 UN Charter defines the issue, while Article 41 (measures not involving the use of armed force) and Article 42 (military measures) set out the benchmarks of possible

⁴⁴ Art. 51 of the UN Charter.

⁴⁵ Art. 39 of the UN Charter.

approaches.⁴⁶ Apart from measures of self-defence pursuant to Article 51 or the authorisation of military force pursuant to Chapter VII, the following can also be the case: (1) a state expressly requests an intervention inside its territory to be carried out by another state, (2) a state requests the support of another state with counterinsurgency measures to be carried out on its territory, and (3) a state requests the support of another state in carrying out domestic police tasks on its territory.⁴⁷

Article 2 and Article 51 of the UN Charter are therefore highly relevant as regards the use of drones. A closer look shows that it is, above all, the exceptions to the Use of Force which are highly important for an assessment of current warfare by means of unmanned reconnaissance and weapon systems; especially if subjects of international law use such weapons as *means of warfare* above the territory of other states.⁴⁸ However, the essential point is that it is not the use of armed or unarmed drone systems that is relevant, but the manner in which these are used by states *vis-à-vis* other states or above their territory.⁴⁹ In this, an unmanned drone differs in no way from a manned bomber or reconnaissance aircraft.

C3. Current arguments and justifications of drone operations

The US government argues that its current global war against terrorists (relying to a high extent on the deployment of armed drones) is legally justified pursuant to Article 51 UN Charter, i.e. the right to self-defence. All state and non-state actors with hostile intentions towards the USA are legitimate targets.⁵⁰ Many experts in international law agree that applying Article 51 to Afghanistan was and is legal. To this end, the UN Security Council passed *Resolutions 1368* and *1373*. These gave the USA the

⁴⁶ Art. 39, Art. 40, Art. 41 of the UN Charter.

⁴⁷ Chatham House (ed.), 'International Law and the Use of Drones. Summary of the International Law Discussion Group meeting held at Chatham House on 21 October 2010', http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/il211010drones.pdf.

⁴⁸ Robert Frau, 'Unbemannte Luftfahrzeuge im international bewaffneten Konflikt', (2011) 24 *Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht: Humanitäres Völkerrecht - Informationsschriften, Journal of International Law of Peace and Armed Conflict*, special edition 'Nicht-bemannte Waffensysteme und Humanitäres Völkerrecht', no. 2, p. 60-1.

⁴⁹ Chatham House, 'International Law and the Use of Drones. Summary of the International Law Discussion Group meeting held at Chatham House on 21 October 2010', p. 2.

⁵⁰ Christian Schaller, 'Gezielte Tötungen und der Einsatz von Drohnen - Zum Rechtfertigungsansatz der Obama Administration', (2011) 24 *Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht: Humanitäres Völkerrecht - Informationsschriften, Journal of International Law of Peace and Armed Conflict*, special edition 'Nicht-bemannte Waffensysteme und Humanitäres Völkerrecht', no. 2, pp. 91-3. - William M. Arkin, *Unmanned - Drones, Data and the Illusion of perfect Warfare*, (New York: Little, Brown and Company, 2015), pp. 23-5. - Medea Benjamin, *Drohnenkrieg - Tod aus heiterem Himmel - Morden per Fernbedienung*, (Hamburg: LAIKA, 2013), p. 3-4.

legitimization to defend itself against a non-state actor, in this case *Al Qaeda*.⁵¹ The operation was thus legitimate from 2001 to 2002, whereupon the Afghan government requested support.⁵² What is the case, however, with the attacks carried out in Iraq, Pakistan, Yemen, Syria, or Somalia? Also Iraq, or rather its legitimate government, elected after the fall of Saddam Hussein, asked the USA for support in its fight against insurgent groups and *ISIS*. As was the case with Afghanistan's request for help, the Prohibition of Force did not apply here.⁵³

It can be assumed that in the case of Pakistan the attacks have been carried out (at least sometimes) with the approval of the local government. There is a reasonable certainty that the Pakistani government took a duplicitous approach *vis-à-vis* its population, denouncing US drone attacks publicly while tolerating them unofficially. How else could there be credible reports that there were, or still are, US drone bases on Pakistani territory? From 2001 to 2011, for example, US *MQ-1 Predator* drones were repeatedly spotted at Shamsi airport, in Beluchistan, 200 km to the south of Quetta (seat of the Taliban's so-called *Quetta Shura*). They seem to have been operated by the CIA and the US Air Force. Only after an incident in which 24 Pakistani soldiers were killed by US combat aircraft in the border region between Afghanistan and Pakistan did Pakistan ban the USA from using the base, whereupon the USA vacated the site. If the USA really have pulled out of Pakistan, and if there really is no agreement between Pakistan and the USA regarding drone strikes on Pakistani territory, any attack would contravene the Prohibition of Force set out in the UN Charter and, therefore, also violate international law. In a similar case - *Congo vs. Uganda* - the *International Court of Justice (ICJ)* found as follows: the fact that the Congolese military was unable to put an end to attacks on Uganda emanating from Congolese territory does not give Uganda the right to advance its own forces into Congolese territory.⁵⁴

⁵¹ Chatham House, 'International Law and the Use of Drones. Summary of the International Law Discussion Group meeting held at Chatham House on 21 October 2010', p. 5.

⁵² The example of Afghanistan requires some elaboration. In 2001 and 2002 the USA operated in Afghanistan on the basis of Art. 51 of the UN Charter. In 2002, a legitimate Afghan government was formed under President Hamid Karzai. From this point on, the USA, its armed forces, as well as the international armed forces of the *International Security Assistance Force (ISAF)* operated on Afghan territory at the invitation of the state of Afghanistan. The current situation in Syria is similar. Russian troops are in the country at the invitation of the Assad government, and are thus legitimised by international law. Western governments, however, reject the legitimacy of the Assad government and thus question the international legitimacy of Russia's intervention.

⁵³ Katja Schöberl, 'Global Battlefield - Drohnen und der geographische Anwendungsbereich des humanitären Völkerrechts', p. 126.

⁵⁴ Chatham House (ed.), 'International Law and the Use of Drones'. Summary of the International Law Discussion Group meeting held at Chatham House on 21 October 2010', p. 4. - Insurgent groups

The situation is similar in Yemen. It must be assumed that there have been instances when the Yemeni government requested US help against *Al Qaeda*. In contrast to Pakistan, there are no credible reports on US bases in Yemen, but there are indications of such a base in neighbouring Saudi Arabia.⁵⁵ It therefore can be assumed that US drone operations in Yemen are carried out not only from the known base in Djibouti, but also from Saudi Arabia. Indications pointing in this direction have also been made public by the documents published by *The Intercept* (and already quoted here).⁵⁶ The advantage of a US drone base near the Yemeni border lies in the substantially reduced flight distance, which is, of course, shorter from Saudi Arabia than from Djibouti in Africa. This results in a much higher *loiter time* of the *UAVs* or *UCAVs* above their targets. The distance to the targets is one of the biggest challenges, according to the ISR Taskforce, Requirements and Analysis Division in its report *ISR Support to Small Footprint CT Operations - Somalia/Yemen*. A base's proximity to the targets to be reconnoitred makes a much longer observation period possible.⁵⁷ In Somalia, which can be classified as a *failed state*, rule of law or governmental authority is doubtful. What, if any, recognised and legitimate national authority is there to request an intervention from a third party? The situation in Iraq and Syria is also problematic. In these cases, there is also no mandate for military operations against *ISIS*. As far as Iraq is concerned, at least the Iraqi government requested the support already mentioned. In Syria, however, some states (*inter alia* France) carrying out air strikes with their manned and unmanned weapon systems invoke Article 51 of the UN Charter. It is still contested if the terror attacks in Paris really were an armed attack of high intensity (along the lines of 9/11),

regularly enter Afghanistan from Pakistani territory without being effectively hindered in this by the Pakistani military. It must be added, however, that the *Congo vs. Uganda* decision was met with controversy and criticism by experts in international law. This case, however, should serve as an example.

⁵⁵ Noah Schachtmann, 'Is this the secret US-Drone Base in Saudi Arabia?', (July 2, 2013), <http://www.wired.com/2013/02/secret-drone-base-2/>. – The author analyses aerial photographs from the Saudi-Arabian desert, close to the Yemeni border. They show a base which boasts a structure similar to US bases in Afghanistan and Pakistan. For example, the same type of hangar is used (*Clamshell* hangar) as on the US base in Kandahar, Afghanistan.

⁵⁶ Jeremy Scahill, 'Find, Fix, Finish, The Drone Papers', (October 15, 2015), <https://theintercept.com/drone-papers/find-fix-finish/>. Looking at the situation in Iraq, Pakistan, or Yemen, suggests that - despite the requests or the concessions of states such as Iraq, Pakistan, or Yemen to use drones above their territory - not all missions have been agreed on bilaterally.

⁵⁷ The Intercept, 'The Drone Papers, ISR Support to Small Footprint CT Operations - Somalia/Yemen - February 2013'; The Intercept, 'ISR Support to Small Footprint CT Operations - Somalia/Yemen - May 2013'.

and if states can invoke Article 51 in dealing with terrorist organisations (and therefore non-states) such as *ISIS*.⁵⁸

As a result, the USA, but also Great Britain and France are acting in their attacks in Pakistan, Yemen, Syria, Somalia or broader Africa without a clear mandate under international law. On the other side, Russia might argue it is acting on the request of the Syrian state, but it is clearly violating the international law in Ukraine. All of the them do not strike against clearly defined, enemy armed forces, but direct their attacks, on the basis of reconnaissance data they have generated, against groups and individuals, subsumed under the vague and politically highly problematic term *terrorists*. The examples cited reveal a grey area in international law that the USA and other actors occupy *nolens volens*. It seems clear that these actors attempt, as part of warfare by means of drones, to interpret Article 2 (1) and (4) (*Principle of Sovereignty, Use of Force*), as well as Article 51 (*Right to Self-Defence*) of the UN Charter to their own ends. The fact that drones are unmanned means that their loss produces little cause for concern. The USA is fully aware of this grey area. The government therefore attempts to depict its approach coherently *vis-à-vis* public interventions. The Obama Administration, for example, argued that, as opposed to the *Global War on Terror Doctrine* of the Bush years, it was engaged in an *Armed Conflict against Al-Qaida, the Taliban and associated Forces*.⁵⁹

C4. Drone warfare and international humanitarian law

In the event of an armed conflict, it must be the highest priority of the participating parties to limit or to contain its effects as much as possible. In armed conflicts, international humanitarian law applies (*ius in bello*, law of armed conflict).⁶⁰ Relevant criteria are to be found in the Hague Conventions and the Geneva Conventions. International humanitarian law basically applies to two types of armed conflicts. These are:

⁵⁸ Ralph Janik, 'Der Kampf gegen den „Islamischen Staat“ - Die großen Probleme liegen nicht im Völkerrecht', (December 9, 2015), <https://www.juwiss.de/88-2015/>. - Janik discusses the problem that arises when subjects of international law take action against terrorist organisations with an unclear link to a certain territory. In case of *ISIS*, however, it can be argued that it represents a *quasi-de-facto-regime*, which makes citing the right to self-defence legitimate. This is supported by the fact that *ISIS* holds sway over a huge area and acts openly. It must be added at this point that it was already the attacks of September 11, 2001 which led to reconsiderations. The UN Security Council Mandate for the US military operations was also the result of the large number of civilian victims. The USA was granted the right to self-defence pursuant to Article 51 (at least for the time immediately after 9/11).

⁵⁹ Roland Otto, *Targeted Killings and International Law: With Special Regard to Human Rights and International Humanitarian Law*, (Heidelberg: Springer, 2012), pp. 22-4.

⁶⁰ Knut Ipsen, *Völkerrecht*, 6th edn, (Munich: C.H.Beck, 2014), pp. 1175-6.

1. international armed conflicts
2. non-international armed conflicts⁶¹

This distinction is relevant insofar as fundamentally different conventions can be applied in the two situations. The following apply in international armed conflicts: the Hague Conventions of 1899/1907, the four Geneva Conventions of 1949 (with the exception of Common Article 3), and Protocol I of 1977 (relating to the Protection of Victims of International Armed Conflicts). Common Article 3 of the Geneva Conventions of 1949 and Protocol II of 1977 relate to non-international conflicts.⁶²

Dieter Fleck, a well-recognized expert of international humanitarian law, states in his *Handbook of International Humanitarian Law* concerning the application of the different conventions in international armed conflicts:

An international armed conflict exists if one state uses force of arms against another state. This shall also apply to all cases of total or partial military occupation, even if this occupation meets with no armed resistance (Article 2, para. 2 common to the Geneva Conventions). The use of military force by individual persons or groups of persons will not suffice. It is irrelevant whether the parties to the conflict consider themselves to be at war with each other and how they describe this conflict.⁶³

Further on, he refers to the application of the different conventions in non-international armed conflicts:

In a non-international armed conflict each party shall be bound to apply, as a minimum, fundamental humanitarian provisions of

⁶¹ Dieter Fleck, *The Handbook of International Humanitarian Law*, 3rd edn, (New York: Oxford University Press, 2013), pp. 43-4. International Humanitarian Law defines elementary guidelines for the employment of weapon systems. These are, in essence, as follows: 1. Prohibition of attacks without distinction; 2. Prohibition of disproportionate attacks; 3. Prohibition of undue methods; 4. The dictate of humanity. These principles remain highly relevant when employing drones. Like any other ranged weapon, armed drones are subject to these guidelines. In the relevant literature, however, the question whether the special abilities of armed drone systems facilitate or rather exacerbate upholding these principles remains debatable.

⁶² Anthony Cullen, 'The Concept of Non-International Armed Conflict in International Humanitarian Law', *Cambridge Studies in International and Comparative Law*, vol. 66 (New York: Cambridge University Press, 2010), pp. 51-2. – John J. Klein, 'The Problematic Nexus: Where Unmanned Combat Air Vehicles and the Law of Armed Conflict Meet', (2003) *Air & Space Power Journal*.

⁶³ Christopher Greenwood, 'Scope of Application of Humanitarian Law', in *The Handbook of International Humanitarian Law*, 2nd edn, Dieter Fleck (ed.), (New York: Oxford University Press, 2010), p. 46.

international law (see Article 3 common to the Geneva Conventions). Regular armed forces should comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts however such conflicts are characterized.⁶⁴

A number of states jointly intervening in a non-international armed conflict does not set a precedent for a change of the classification of the conflict. An armed conflict that is conducted solely on the territory of one state can, however, be regarded as an international armed conflict if a foreign state uses its armed forces to fight alongside insurgents against regular government forces. This situation immediately brings to mind the precarious legal situation in Ukraine. In the so-called Tadić case, the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that a non-international armed conflict applies

[...] whenever there is protracted armed violence between governmental authorities and organised armed groups or between such groups within a State⁶⁵

Experts in international law are debating whether a state's military intervention in another state's non-international armed conflict effects an internationalisation of the whole conflict, or only between the two states involved. Thus, two types of conflict could take place concurrently. Common Article 3 defines a lower threshold for a non-international armed conflict than does Protocol II. This is why the terms non-international armed conflict of low intensity (Common Article 3) and high intensity (Common Article 3 and Protocol II) are used.⁶⁶ Altogether Fleck comes to the conclusion that

⁶⁴ Stefan Oeter, 'Methods and Means of Combat', in *The Handbook of International Humanitarian Law*, 3rd edn, Dieter Fleck (ed.), (New York: Oxford University Press, 2013), p. 180.

⁶⁵ International Criminal Tribunal for the former Yugoslavia (ICTY), 'The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', IT-94-1-A, 2 October 1995, para. 70. - In the Tadić case, the *ICTY* further stated: "Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars cannot but be inhumane and inadmissible in civil strife."; cf.: International Committee of the Red Cross (ICRC), 'Customary IHL, Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering', https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70.

⁶⁶ Lars Schmidt, 'Das humanitäre Völkerrecht in modernen asymmetrischen Konflikten', *Schriften zum Völkerrecht*, vol. 198, (Berlin: Duncker & Humblot, 2012), pp. 23-5. - Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, (New York: Cambridge University Press, 2010), pp. 45-7.

[t]here is an important trend in the law towards expanding the scope of application of rules related to the conduct of hostilities originally contained only in the law of international armed conflict to situations of non-international armed conflict, while, at the same time, respecting the distinction which continues to exist in these two types of conflict on matters of status of the fighters.⁶⁷

Protocol II presupposes a high level of organisation among the insurgents, and, in addition, comprehensive, continuous, and coordinated fighting. Furthermore, the non-state conflict party must also be in control of a part of the state's territory. Whether this is the case will be difficult to tell, since the states involved will most probably deny that the non-state parties to the conflict are, in effect, already exercising this control. One example of this is the current conflict in Ukraine. It is also puzzling when insurgent groups, such as, for example, currently in Syria, also fight each other. This particular situation is not even taken into account by Protocol II.⁶⁸

Targeted killings are legal in an international armed conflict as long as they produce a real military advantage. However, individuals who enjoy protected status or that of *hors de combat* must not be attacked. The fact that a target individual cannot be taken prisoner does not automatically justify a targeted killing. This especially applies to persons whose legal status as regards international legal norms cannot be exactly determined. Sanctioning anticipatory calculations in attacks ("There will be no survivors") is not legal (*No Survivor Policy* or carrying out *Follow-On Strikes*). The result of the attack must be proportionate (Proportionality Assessment) as regards potential civilian casualties (Collateral Damage). This also applies to so-called bystanders, i.e. persons who are in the immediate vicinity of a possible drone strike's target individual. With civilians, another crucial question is to what extent their activities contribute to a participation in hostilities, depriving them from their protected status. International humanitarian law is a highly complex composite of interdependent norms which make it necessary for every situation to be assessed

⁶⁷ Dieter Fleck, 'The Law of non-international armed conflicts', in *The Handbook of International Humanitarian Law*, 2nd edn, Dieter Fleck (ed.), (New York: Oxford University Press, 2010), p. 615.

⁶⁸ Schmidt, 'Das humanitäre Völkerrecht in modernen asymmetrischen Konflikten', pp. 23-5; Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, pp. 45-7.

individually, without, however, losing sight of the whole.⁶⁹ This similarly applies to non-international armed conflicts.⁷⁰

Drone strikes only comply with international humanitarian law if certain principles are fulfilled. The principle of distinction requires that only lawful targets (that means combatants or civilians directly participating in hostilities and military objective) are targeted intentionally. The principle of proportionality requires that the expected collateral damage is not excessive in relation to the anticipated military advantage. The principle of humanity requires the use of weapons that will not inflict unnecessary suffering.⁷¹

D. Summary and outlook

Yet, a drone's nature and special characteristics, especially the fact that it is unmanned and can remain above a target for an extended period of time, makes its use more attractive for the military and politicians than that of a conventional, manned military aircraft. The possibility of killing an identified terrorist anywhere in the world, at the push of a button, and almost in real time, increasingly makes the use of drones a politically accepted means of projecting military power. Most of the time, the alleged terrorists or enemies operating covertly hide among the population whose support they enjoy (at least partly). Even by using the most precise weapons, they are difficult to fight without inadvertently producing casualties among the civilian population. This cannot be avoided, even by following all pertinent rules of international humanitarian law. The terrorists are also fully aware of this and therefore deliberately move into the vicinity of civilian environments. In the long run, additional the instrumentalization of civilian casualties can work as recruitment strategy for insurgents and terrorist networks and thus generates new adversaries. Using unmanned weapons systems may makes it possible to produce tactical and operative successes; strategically, however, the very opposite may occur.

As it is simply not possible to identify every enemy individually, and despite diligently taking all preventive measures it is impossible to avoid civilian casualties completely,

⁶⁹ Robert Frau, 'Automatisierung und Autonomisierung als Völkerrechtsproblem', in *Moderne Waffentechnologie - Hält das Recht Schritt? Bildungswerk des deutschen Bundeswehrverbandes*, Forum Innere Führung, vol. 39, Christof Gramm and Dieter Weingärtner (eds.), (Baden-Baden: Nomos, 2015), p. 92.

⁷⁰ Anthony Cullen, 'The Concept of Non-International Armed Conflict in International Humanitarian Law', p. 51-2. - John J. Klein, 'The Problematic Nexus: Where Unmanned Combat Air Vehicles and the Law of Armed Conflict Meet'.

⁷¹ Fleck, 'The Law of non-international armed conflicts', in *The Handbook of International Humanitarian Law*, 2nd edn, p. 615.

the death of an innocent person may have far-reaching consequences. This creates a dilemma which unmanned weapons systems can only partially solve. *Leadership decapitation strikes*, ie the targeted elimination of the leaders of insurgencies or terrorist groups, often turn out to be Pyrrhic victories. As a rule, attempting to solve a conflict through force, irrespective of the type used and whether it is applied in a targeted and precise manner will not produce the hoped-for success. It may plausibly be argued that the US strategy of *signature strikes* gives priority to the elimination of the target and not to the protection of civilians. This approach thus clearly violates international humanitarian law. The important part of any assessment, however, is whether the attacks and their execution conform to international law, not whether they are carried out by *UAVs* or *UCAVs*.

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