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The Use of Armed Drones for Counter-Terrorism Purposes: Whether Customary International Law?

MASTER'S THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

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RIGA, 2019

ABSTRACT

The vast and rapid development of technologies constantly creates gaps in the law within both the international and national law systems. One of such technologies the increased usage of which for military purposes has instituted a debate on the applicable law for its use under the existing legal frameworks is the technology of armed drones, also known as armed unmanned aerial vehicles (AUAVs). The source of the debate is the presumption that armed drones are almost exclusively used for counter-terrorism purposes, thus involving their use against non-state actors operating in a country that a state is not in war with. The author of this thesis will, first of all, identify the established legal framework regulating the use of armed drones in order to identify the gaps in the existing law. Following that the author will further focus the research on the possible emergence of a customary international law on the use of armed drones for counter-terrorism purposes. In order to reach the final conclusion about their legality, with a focus on the possibility to determine the emergence of a customary international law, the author will aim at determining existing practices and *opinio juris* regarding their use.

Keywords: armed drones; customary international law; state practice; *opinio juris*; targeted killing; counter-terrorism; legal validity; non-international armed conflict; fight against non-state actors.

SUMMARY

The debate surrounding the use of armed drones under international law suggests that for proper legal assessment on their legality one should analyse their use with reference to *ius ad bellum*, i.e. the law governing the resort to the use of force (whether and when), as well as with reference to the international humanitarian law (IHL; how force can be used) and international human rights law (IHRL).¹ It is suggested that the non-compliance with any of the laws or principles determined by these three different legal regimes of international law in relation to the use of armed drones result in a legal invalidity of their use. It means that for example compliance with *ius ad bellum* and the non-compliance with international humanitarian law results in the breach of the international law governing the use of armed drones.²

In order to provide a brief insight into the subject of military technologies that may add to the understanding of the subject of the use of armed drones in general, the author would like to, first of all, distinguish between the different types of drones that are commonly used in practice by military. The author sees it as relevant in order to stress the difference between the military drones and the civil drones, and to underline the importance of technological developments that may affect the emergence of new military attack methods. Afterwards the author would like to emphasize the two basic purposes for which armed drones can be used, i.e. in wartime and in the fight against terrorism. Once these two types of usages have been highlighted, the discussion may further evolve around the use of armed drones in the fight against terrorism as the most controversial of the subjects causing debates of international and domestic scope due to which the author has chosen to focus the research on the subject of use of armed drones for counter-terrorism purposes.

Following the first part of the research which aims at providing a short insight into what distinguishes armed drones from other military means, stressing the main characteristics and also tries to answer what are the main ethical issues surrounding the debate on the use of armed drones, the author in the second part of this research chooses to discuss the established international legal framework regulating the use of armed drones. Within the scope of this research the use of armed drones is discussed separately under *ius ad bellum*, international humanitarian law and international human rights law, as well as under several multilateral frameworks, providing for a varying degree of certainty. The reason why the author chooses to discuss the existing international legal framework for regulating the use of armed drones disregarding the fact that the research question is focused on the possibility to determine the emergence of a new international customary law regarding the use of armed drones, is because, in view of the author, codified law helps to better understand the framework which applies to the specific case of the use of armed drones and define the circumstances under which the necessity of establishing a particular international customary rule may arise.

¹ Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne, Thompson Chengeta, “The International Law Framework Regulating the Use of Armed Drones” *International & Comparative Law Quarterly* Vol 65, Issue 4 (2016): p. 791, accessed March 13, 2018. doi:10.1017/S0020589316000385. See also United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. vii. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed May 15, 2019.

² Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, p. 791.

Even more, in view of the author the lack of proper regulations that are detailed enough to be relied upon as a guidance for the usages of advanced technologies, including military ones, may turn into a stumbling block for their continuous development which shall primarily serve for the purposes of the defence. From the one hand the technological development of armed drones is welcomed and should be precipitated, taking into account the fact that armed drones are not only seen as providing military advantage³, but have the added value of being capable to perform a targeted attack with a minimum risk to cause incidental loss to the civilian population and civilian objects, thereby facilitating the compliance with international law. Thus, they provide a protection to the civilian population through the advancement of military capabilities. On the other hand the development of armed drones has raised concerns over the criteria under which the choice to target a certain individual or object is made and in what types of situations they can be used, i.e. in wartime or in fight against terrorism, within the zones of conflict and also outside these zones.⁴

Forasmuch one would assume that the precision of an attack, that can be guaranteed by the use of armed drones in juxtaposition to the armed attack on the ground *per se* justifies their usage in areas where the civilian population or civilian objects might be affected, such authorization may not be legitimate under the law, both international and domestic. At the same time the technological development as such can shape the development of law. If not in the form of codified law, then at least by establishing a new international customary law on the basis of state practices and *opinio juris*.⁵ With this in mind, the third part of this research focuses on discussing the elements to be taken account when determining the emergence or existence of an international customary law. The main elements for determining a new customary law are state practice and *opinio juris*. The author will focus separately on the role of United Nations General Assembly (UNGA) resolutions as a source of *opinio juris* in response to practices already introduced by states, as well as the accelerated formation of a new international customary law discussing the circumstances under which the determination of accelerated emergence of a new customary law is possible or has been possible throughout the history of international law.

With the help of the research the author sees the possibility to disentangle the subjects surrounding the debate on the legality of use of armed drones and to come to the conclusion on the main controversies that might impede or accelerate the emergence of a customary international law on their use for counter-terrorism purposes. At best the author would like to come to the conclusion that on the basis of the existing states practices and *opinio juris* it can be established that a new international customary law, which authorizes the use of a distinct type of warfare, e.g. armed drones, for anti-terrorism purposes against non-state actors in another state's territory has emerged. In case such a conclusion could not be reached, it would be necessary to identify some of the objective factors that are impeding the emergence of the particular rule.

³ Delphine Hayim, "From Just War to Clean War: The Impact of Modern Technology on Military Ethics", in *Legitimacy and Drones: Investigating the Legality, Morality and Efficacy of UCAVs*, ed. Steven J. Barela (London: Routledge, 2015), p. 191.

⁴ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. viii. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed May 15, 2019.

⁵ Michael P. Scharf, "Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change", *Cornell International Law Journal*, Vol. 43, p. 450. Available on: <https://www.lawschool.cornell.edu/research/ILJ/upload/Scharf.pdf>. Accessed April 7, 2019.

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INTRODUCTION

The use of armed drones by military sector of the United States (US) has gradually increased since the 9/11 attacks,⁶ as an alternative to traditional weaponry, thus providing maximum precision for the purpose of targeted killings with an aim to defeat terrorist organizations, i.e. for counter-terrorism purposes. In the case of US the use of armed drones has taken place against non-state actors in another states territory, thus challenging their legitimacy. At the same time, since 2001 the use of armed drones has increased also by the United Kingdom (UK), Israel and North Atlantic Treaty Organization (NATO) within the scope of inter-state conflicts, as well as emerged in Pakistan, Iraq, Nigeria and possibly elsewhere within the scope of non-international conflicts.⁷ The territorially wide application of armed drones raises the discussion of the legitimacy of their usage, mostly within the scope of counter-terrorism operations, but not limited to such operations. Moreover, concerns on threat to the global security that the lack of regulation on the use of armed drones and counter-terrorism methods in general may cause, have been raised by the international community.⁸

This research will, **firstly**, briefly discuss the military advantage of the use of armed drones aiming at stressing what distinguishes armed drones from other military means, starting with identifying different types of drones. The author will further distinguish between the use of armed drones in wartime and in the fight against terrorism. This is necessary to stress the main differences in their use for these two purposes and subsequently assessing the validity of each separately. Last but not least, the author in the first section will also pay attention to the aspect of ethics of the use of armed drones that should be taken into account as a separate element of the analysis adding to the discussion on their legitimacy.⁹ The first section in general shall aim to uncover the reasons behind the selection of the research subject.

Secondly, the author will discuss the existing international legal framework regulating the use of armed drones by focusing on the *ius ad bellum* or the use of force law, as well as international humanitarian law and international human rights law. The discussion of the use of armed drones within the said legal framework shall subsequently lead to defining the main legal obstacles in ascertaining the validity of their use. The determination of obstacles shall

⁶ Avery Plaw, Matthew S. Fricker, Carlos R. Colon, “The Debate over Legality: Are Drone Strikes Permissible under U.S. and International Law?”, in *The Drone Debate: A Primer on the U.S. use of unmanned aircraft outside conventional battlefields*, Avery Plaw et al. (London: Rowman&Littlefield, 2016), pp. 111, 113-116.

⁷ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, p. 792. See also United Nations General Assembly. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/68/389, paras. 25–40. Available on: <https://undocs.org/en/A/68/389>. Accessed May 15, 2019. See also Fortune, Clay Dillow, “All of These Countries Now Have Armed Drones”, February 12, 2016. Available on: <http://fortune.com/2016/02/12/these-countries-have-armed-drones>. Accessed April 11, 2018.

⁸ David Cortright and Rachel Fairhurst, “Assessing the Debate on Drone Warfare”, in *Drones and the Future of Armed Conflict*, ed. David Cortright, et al. (London: The University of Chicago Press, 2015), p. 6. See also United Nations Human Rights Council. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Ben Emmerson, A/HRC/25/29 (11 March 2014), “Achieving a consensus on the applicable legal principles”, p. 18. Available on: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/119/49/PDF/G1411949.pdf?OpenElement>. Accessed May 1, 2018.

⁹ A model of viewing the subject of armed drones from the perspective of legitimacy, morality and efficacy is provided in the following source: Steven J. Barela, “Creating a Drone Court: Integration via a Policy Proposal”, in *Legitimacy and Drones: Investigating the Legality, Morality and Efficacy of UCAVs*, Ed. Steven J Bare Routledge: London, New York, 2016).

contribute to the understanding of the main gaps in the law as well as the subjects on which there is lack of case law or *opinio juris* in general, that might hinder the interpretation of the issue of the use of armed drones for counter terrorism.

Thirdly, this research will further provide a discussion on possibility of emergence of customary international law on the use of armed drones for targeted killings of non-state actors in another states territory. In order to find the answer the author will briefly analyse the objective element, i.e. state practice and the objective element, i.e. *opinio juris*, taken into consideration in the formation of international customary law, the possibility of accelerated formation of such a law and the role of UNGA resolutions in determining the emergence or existence of a new international customary norm.

Fourthly, this research shall provide an analysis of the existing practices against non-state actors of the states which are known to have used armed drones for counter-terrorism purposes, i.e. US and UK. Following a description of such practices the author will focus the analysis on the available *opinio juris* and the responses from the international community regarding practices of each state separately.

Finally, this research shall aim at reaching conclusion on the legality of the use of armed drones for counter-terrorism purposes with the focus on situations in which the attacks are carried out against non-state actors in another states territory and outside of the conflict zone.¹⁰ This conclusion shall be reached on the basis of the analysis on the possibility of determining the emergence or existence of a customary international law permitting drone strikes with reference to state practice and *opinio juris*. To reach the final conclusion the author will simultaneously take into account the framework provided by international codified law on the legality of the use of armed drones as a reference point in case of controversies or lack of relevant practices or *opinio juris*.

Research question: Whether on the basis of the existing practice and *opinio juris* there can be identified the formation of a customary international law which authorizes the use of a distinct type of warfare, e.g. armed drones, for anti-terrorism purposes against non-state actors in another states territory?

Hypothesis: On the basis of the existing practice (*usus*) and *opinio juris* (*necessitatis*) it can be established that the use of armed drones for anti-terrorism purposes has emerged into a customary rule.

¹⁰ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. ix. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed May 15, 2019.

THE MILITARY ADVANTAGE OF THE USE OF ARMED DRONES: WHAT DISTINGUISHES ARMED DRONES FROM OTHER MILITARY MEANS?

Before entering into further discussion aiming at demonstrating the military advantage of armed drones, the author would like to, first of all, distinguish between armed drones and unarmed drones. Unarmed drones used both for civilian and military purposes are designated as Unmanned Aerial Vehicles (UAVs) or Remotely Piloted Aircrafts (RPAs)¹¹, whereas armed drones, supposedly used only for military purposes, are generally referred to as Armed Unmanned Aerial Vehicles (AUAVs)¹² or Unmanned Combat Aerial Vehicles (UCAVs)¹³. However, two other overarching designations for armed drones used for military purposes have been developed: unmanned combat aircraft and unmanned attack helicopter.¹⁴ According to the definitions provided during the 68th session of the UNGA unmanned combat aircraft is:

[m]anned fixed-wing or variable-geometry wing aircraft, designed, equipped or modified to engage targets by employing guided missiles, unguided rockets, bombs, guns, cannons or other weapons of destruction, including versions of these aircraft which perform specialized electronic warfare, suppression of air defence or reconnaissance missions.¹⁵

Whereas the definition of unmanned attack helicopter provides the following:

[u]narmed fixed-wing or variable-geometry wing aircraft, designed, equipped or modified to engage targets by employing guided missiles, unguided rockets, bombs, guns, cannons or other weapons of destruction.¹⁶

To continue, by focusing on more detailed distinction, according to the Study on Armed Unmanned Aerial Vehicles¹⁷, drones are commonly categorized by their weight, endurance and operating range.¹⁸ Hence, they can be divided on the basis of their size as small, medium and large drones. From these the small drones with the maximum take-off weight of 150 kg flying in the altitude of maximum 150 m (~500feet)¹⁹ within the visual line-of-sight²⁰ are

¹¹ Lindsay C. Warrior, "Drones and Targeted Killing: Costs, Accountability, and U.S. Civil-Military Relations," *Orbis* 59, no. 1 (2015): p. 96, doi:10.1016/j.orbis.2014.11.008.

¹² United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed May 15, 2019.

¹³ Lindsay C. Warrior, "Drones and Targeted Killing", p. 96.

¹⁴ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. 9. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed May 15, 2019.

See also United Nations General Assembly. Sixty-eight session of the General Assembly. *General and complete disarmament: transparency in armaments, Continuing operation of the United Nations Register of Conventional Arms and its further development*, p. 17, para. 45. Available on: <https://www.un.org/depts/ddar/Register/Resolutions/5070.htm>. Accessed April 1, 2018.

¹⁵ United Nations General Assembly. Sixty-eight session of the General Assembly. *General and complete disarmament: transparency in armaments, Continuing operation of the United Nations Register of Conventional Arms and its further development*, p. 17, para. 45. Available on: <https://www.un.org/depts/ddar/Register/Resolutions/5070.htm>. Accessed April 1, 2018.

¹⁶ *Ibid.*

¹⁷ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed May 15, 2019.

¹⁸ *Ibid.*, p. 5.

¹⁹ *Ibid.*, pp. 5-6.

most often produced for civil purposes, whereas the military sector uses medium and large size drones. The take-off weight of medium size drones is between 150 kg and 600 kg and they fly in altitude up to 5,500 m (~18,000 feet) within the radio line-of-sight and are used mostly for intelligence, surveillance and reconnaissance purposes.²¹ Whereas large drones have a high take-off weight above 600 kg, capable of flying in altitude above 5,500 m (~18,000 feet) and beyond radio line-of-sight, however they need a runway for take-off and landing.²² Large drones are subcategorized into medium altitude (MALE) drones and high altitude long endurance (HALE) drones²³, from which the MALE UAVs are recognized as particularly suitable for launching targeted attacks.²⁴ Those are drones that are capable of flying approximately up to 13.500 m (~45,000 feet) high above sea level and loiter for several hours. Most well known include systems as MQ-1 Predator, MQ-5 Hunter, MQ-9 Reaper and Hermes 900.²⁵

The categorization of drones is helpful in understanding the purposes for which each type of drone could be used as well as the actors by which they would be most commonly purchased and used, including the military sector. This relatively subtle division reaches beyond the distinction between drones used for either civil or military purposes, and includes both armed or unarmed drones. Simultaneously the categorization sheds the light on the possibility that some types of armed drones would be more likely to be acquired and misused by non-state armed groups than the others, mostly small size drones.²⁶ Therefore, the existence of such category of drones illustrates a legal problem from the side of their misuse by non-state actors. This is in parallel to the main subject of interest of this research, which is the legal validity of the use of armed drones in the fight against terrorism, instead of their use by terrorists. Even though their misuse by non-state armed groups will not be further discussed in this paper, it is relevant to mention that the fact itself implies the need for equally strong legal framework of regulating the use of armed drones, that would be capable to limit the misuse of drones by non-state actors.

Once the categorization has been made it can be clarified that this research shall focus only on the use of armed drones by states for military purposes and designed to perform a targeted killing. It is equally important to mention that within the scope of this research the author will most of the times use the designation “armed drones”, which may cover wide variety of armed unmanned aerial vehicles.

This chapter shall further clarify the main purposes for which armed drones could be used and the goals to be achieved with their usage.²⁷ There are mainly two distinct purposes for which armed drones are commonly used, i.e. for targeted killing directed against an individual or a small group of individuals in the fight against terrorism and in wartime directed against a combatant. In this respect it must be further distinguished that targeted killings are regulated by the law governing the use of force against individuals, i.e.

²⁰ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. 5. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed May 15, 2019.

²¹ *Ibid.*, p. 6.

²² *Ibid.*, pp. 5.-7.

²³ *Ibid.*, p. 7.

²⁴ *Ibid.*, p. 16.

²⁵ *Ibid.*, p. 7.

²⁶ *Ibid.*, p. 15.

²⁷ Cortright and Fairhurst, “Drone Warfare”, p. 12.

international humanitarian law, while the use of armed drones in wartime situations are above all governed by the use of force law, i.e. *ius ad bellum*.²⁸

While the overarching goal for the use of armed drones is to eliminate a threat in act of self-defence, there are other advantages of the use of armed drones that have been listed and are as follows: *diminishing risk of harm to military personnel, capability of drones to hover for long period of time to find the right moment for an attack, facilitating the access to remote areas, reducing civilian casualties as well as collateral damage* [emphasis added]²⁹. At the same time, contra to their use, there is some evidence that suggests that law enforcement operations and political bargaining have proved to be more effective in countering terrorism than military means³⁰, e.g. drone strikes.

However, the use of armed drones is becoming more common in those states with technologically developed military sector. Acknowledging that the use of armed drones has become common in fight against terrorism³¹, it can be derived that they are more often used for targeted killings rather than in wartime, i.e. inter-state or intra-state conflicts. One reason why their use in practice has become common might be that the use of armed drones in counterterrorism operations within the framework of safeguarding global and national security concerns is seen as effective military means. The other reason might be that to some extent their use at this stage is morally validated by the civic society, informed or misinformed, of those countries which use them, even though there are signs of raising discontent at the level of international community which might later result in public denial by the society at a later stage.³²

The question of the legitimacy of the use of armed drones in counterterrorism operation exists independently of the question whether their use in practice receives public approval or disapproval. Moreover, their legitimacy shall be discussed under both international and domestic law. If we look at the counterterrorism operations as a form of countermeasures in response to a wrongful act, then in general those would be considered as precluding wrongfulness, thus being legitimate. However, by looking at the specific case of targeted killings by any means, the reprisal to an armed attack would be subject to use of force law. Therefore, the legitimacy of those attacks could be recognized only subject to very particular circumstances in which an armed conflict situation exists and when the persons subject to an attack are combatants and can be unmistakably identified as such.

²⁸ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. vii. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed May 15, 2019.

²⁹ Jennifer Welsh, *The Morality of "Drone Warfare"*, in *Drones and the Future of Armed Conflict*, ed. by David Cortright et al. (London: The University of Chicago Press, 2015), pp. 24-25. See also Bradley Jay Strawser, "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles", *Journal of Military Ethics*, vol. 9, no. 4 (2010): pp. 342-368.

³⁰ Cortright and Fairhurst, "Drone Warfare", p. 14. See also Seth G. Jones, Martin C. Libicki, *How Terrorist Groups End: Lessons for Countering Al Qaeda*, 2nd ed. (Santa Monica: Rand Publishing, 2008).

³¹ Cortright and Fairhurst, "Drone Warfare", p. 13.

³² Such discontent is presented through the activities of non-governmental organisations, which have raised their concerns over the use of armed drones are American Civil Liberties Union, Open Society Justice Initiative, PAX See also United Nations. *Discussing Drones at the UN Headquarters*. Available on: <https://www.un.org/disarmament/update/discussing-drones-at-the-un-headquarters-2/>. Accessed May 15, 2019. Other organisations e.g., International Committee for Robot Arms Control, Human Rights Watch, Mines Action Canada, which co-organised the campaign "Stop Killer Robots", have taken the action one step further by raising concern over fully autonomous weapon systems.

Acknowledging that armed drones are increasingly used also by the intelligence agencies,³³ the question arises, whether their use for intelligence purposes is seen as legitimate and in what way it is different from the use of technologies that are usually at the disposal of the intelligence forces and would be considered to be of legitimate use in achieving their goals? In other words, whether those are any technological specifications of armed drones that limits the authority of the intelligence services to use them in secret operations? Whether it is the purpose of their use in the hands of intelligence agents which render their use illegitimate? Where exactly is the borderline between a secret operation and a military operation? Even more, acknowledging that under international law the authority to make a decision to perform an armed attack is given to the head of the government,³⁴ then how can the use of armed drones by the intelligence services can be interpreted as legitimate and what is the legal basis for that under international law? All these questions may inspire further clarification of the issue of legitimacy of the use of armed drones under, both international and domestic law, and add to the assessment of democratic accountability of the use of armed drones, whatever would be the method and situation in which they are employed.

Armed Drones Used in Wartime

The use of armed drones in wartime, i.e. in an armed conflict, can be viewed from the perspective of two distinct situations and those are international armed conflicts and non-international armed conflicts. Within this context the parties to the conflict are the main determinants on whether an armed conflict is international or non-international.³⁵ Traditionally with international armed conflict would be understood situations in which there is *established* [emphasis added] state of war between two or more states³⁶, whereas the non-international armed conflict would be understood as a war between a state and a non-state actor³⁷. The possible scenarios that correspond to the situation of non-international armed conflicts, including within the context of counterterrorism operations carrying out targeted killings directed against a single terrorist or a small group of terrorist, will be looked at in the following chapter “Armed Drones Used for Targeted Killings”³⁸.

To continue, the legality of the use of armed drones for military purposes by states is not disputed *per se*.³⁹ In that respect a classical situation of an established armed conflict which takes place, if the state of war has been declared between two states or a state and a non-state actor, creates no legal problems with regard to the use of armed drones, if they are used in accordance with IHL. It is not the technology, but the way it is being used which comes at stake when disputing the legality of the use of any type of weaponry. Therefore at least with respect to the use of armed drones in counterterrorism operations, what rather often

³³ Welsh, “Drone Warfare”, p. 25.

³⁴ Cortright and Fairhurst, “Drone Warfare”, p. 15.

³⁵ International Committee of Red Cross. How does law protect in war? Classification of conflict. Available on: <https://casebook.icrc.org/glossary/classification-conflict>. Accessed May 19, 2019.

³⁶ Common Article 2 of the Geneva Conventions. Available on: <https://ihl-databases.icrc.org/ihl/WebART/365-570005?OpenDocument>. Accessed April 14, 2018.

³⁷ Common Article 3 of Geneva Conventions. Available on: <https://ihl-databases.icrc.org/ihl/WebART/375-590006>. Accessed April 14, 2018.

³⁸ See *infra* p. 13.

³⁹ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, p. 793.

is disputed is whether the requirements for necessity and proportionality under the use of force law have been fulfilled and whether the threshold for entering into war as an act of self-defence has not been lowered too far due to willingness to eliminate potential threats, e.g. terrorism.⁴⁰

To substantiate the claim made above that the legality of the use of armed drones in situations of armed conflict is not disputed, it must be determined under which laws and principles their use can be justified. To start, although the term “armed conflict” is not strictly defined in Geneva Conventions 1949, a sort of definition is established in *Tadić*⁴¹ case where the following definition is provided:

... 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.⁴²

This definition says nothing about the technology used in war therefore there is nothing that suggests that remotely piloted aircraft would be excluded from this definition.

Last but not least, there is a significant difference between the use of armed drones in wartime and the use of armed drones outside an armed conflict under IHL according to which only combatants or persons directly involved in hostilities could be targeted. In the case of established armed conflict the killing could be legal, but in the case of targeted attack carried out outside of armed conflict that would be considered a deliberate killing, based on the status of combatant,⁴³ but not a targeted one, based on the link to a threat. This distinction is relevant to understand why the issue of use of armed drones should be viewed separately in situations of armed conflict and outside of armed conflict. However, both deliberate and targeted killing does not exclude the possibility to be aimed at reaching the military objective of eliminating a threat or defeating an enemy.⁴⁴

Armed Drones Used for Targeted Killings

To start, the author would like to bring clarity on how the targeted killing as an object of study can be defined. The definition provided by the Human Rights Council of the United Nations (UNHRC) states that

[a] targeted killing is the *intentional, premeditated* [emphasis added] and *deliberate use of lethal force* [emphasis added], by States or their agents acting under colour of law, or by an organized armed group in armed conflict, *against a specific individual* [emphasis added] who is not in the physical custody of the perpetrator.⁴⁵

⁴⁰ Delphine Hayim, “From Just War to Clean War: The Impact of Modern Technology on Military Ethics” in *Legitimacy and Drones: Investigating the Legality, Morality and Efficacy of UCAVs*, ed. Steven J. Barela (London: Routledge, 2015), p. 201.

⁴¹ *Prosecutor v. Tadić* (Trial Judgment) IT-94-1-T (7 May 1997). Available on: <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>. Accessed June 6, 2019.

⁴² *Ibid.*, para. 70.

⁴³ Welsh, “Drone Warfare”, p. 28.

⁴⁴ *Ibid.*

⁴⁵ United Nations Human Rights Council. *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24/Add.6*, p. 3, para. 1. Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 15, 2018.

Therefore targeted killing in essence is intentional, premeditated, i.e. planned in advance, and deliberate use of armed force. However, what is even more important to the definition is that is considered to be *asymmetrical* [emphasis added] use of force, even if the source of legitimacy is found at laws governing armed conflicts.⁴⁶ While to some states targeted killings in the global fight against terrorism have become a common method on how to fight injustice in act of self-defence, to others the method itself might seem legally unjustifiable, although politically supported. It shall also be mentioned that targeted killing can be carried out by all kinds of means and does not necessarily involve the use of armed drones, therefore when researching the subject in general one should take into account all the possible methods.⁴⁷ However, for the purposes of this research only the cases in which a targeted killing has taken place within the context of using remotely piloted aircraft by a state, and in particular in situations outside of an armed conflict⁴⁸, shall be viewed. Those are exactly targeted killings outside armed conflict situations which face the challenge of legitimacy in particular within the context of the international human rights law as the applicable law that makes no distinction between the combatants and civilians.

To continue, the author would like to stress that it is the subject of legitimacy of the use of armed drones for targeted killings outside of an armed conflict, that raises controversy, rather than the legitimacy of their use in wartime. In that respect the author would like to further separately discuss the concepts of, first of all, targeted killing and, secondly, its legitimacy, which both follow from the main subject matter, i.e. the use of armed drones.

It is acknowledged that an individual may become a subject of targeted killing only when there is an *armed conflict established* [emphasis added] and the *person can be identified as a combatant* [emphasis added].⁴⁹ In all other cases where the necessary link between an individual and its participation in an armed conflict cannot be established, a targeted killing performed by either armed drones or any other means would not be legitimate. Once a targeted killing fails the test of legitimacy it can be considered as extrajudicial killing⁵⁰ for which the responsible persons should be brought to prosecution.

The issue of the use of armed drones has gained its significance with the increased use of armed drones for targeted killing by one state in another state's territory within the scope of a non-international armed conflict.⁵¹ Such practice can take place either with the consent of the state on the territory of which the armed drones are being used or on the basis of enforcement action under Chapter VII of the UN Charter.⁵² Although states on the territory of which the armed drones are being used against non-state actors as an act of self-defence by another state for counter-terrorism purposes can give their consent to that state for such practices, the resort to force should still take place in accordance with *ius ad bellum*.

⁴⁶ United Nations Human Rights Council. *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24/Add.6*, p. 3, para. 2. Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 15, 2018.

⁴⁷ *Ibid.*, p. 4, para. 8.

⁴⁸ *Ibid.*

⁴⁹ Cortright and Fairhurst, "Drone Warfare", p. 13.

⁵⁰ *Ibid.*

⁵¹ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. 5. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed April 1, 2018.

⁵² Heyns, Akande, Hill-Cawthorne and Chengeta, "Use of Armed Drones", p. 797.

Giving an example, the consent to the US to use armed drones for targeted killings in another state's territory has been given by Pakistan, Yemen and Somalia in the recent past.⁵³ Thereby, since the consent has been legitimately provided, armed drone strikes have satisfied the requirement of consent under *ius ad bellum*. However, for the strike to be fully legitimate it must also satisfy the requirements of necessity and proportionality under *ius ad bellum*.⁵⁴ This has been recognized in various International Court of Justice's judgments, including *Nicaragua*⁵⁵ where it is determined that there is a "specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it"⁵⁶. The judgment also states that "whether the response to an attack is lawful depends on the observance of the criteria of the necessity and the proportionality of the measures taken in self-defence"⁵⁷. Therefore, in the case of the use of armed drones for targeted killing in counterterrorism operations the principles of necessity and proportionality shall be taken into account and seen in the light of the objective to eliminate the threat to the society in an act of self-defence carried out against a single terrorist or a small group of terrorists. To add, the legality of such attacks is challenged also on the basis of fact that they are often carried out in the zones of non-hostility surrounded by civilians, who should generally be protected by IHRL. It is under the IHRL that the bar of the level of protection that must be provided to the civilians is raised and under which that protection shall be guaranteed by state military forces who conduct targeted killing.

Finally, another acknowledged problem in relation to targeted killings is the difficulty in relation to counterterrorism operations in some cases to draw the line between the military leader and the political leader as they are often the same.⁵⁸ In general targeted killing is permissive only if targeted against a military leader, whereas as the political leaders shall be protected from such an attack. Even more in cases of counterterrorism operations the status of the terrorists and their identity is hard to be identified⁵⁹, once more raising doubts and criticism of the legality of the counterterrorism operations as such. As opposed to targeted killing a capture is still the preferred option. However, acknowledging that under the war paradigm terrorists are perceived as enemy combatants and therefore are subject to attack, targeted killing may be permissible as long as their status is identifiable.⁶⁰ However, as opposed to a combatant actively engaged in war, a terrorist is considered less predictable and may also be unlikely to become a subject of capture as that would not eliminate the threat of terrorism,⁶¹ therefore the standard of imminence as a threshold to attack in practice appears to be loosened when it comes to targeting a terrorist.

⁵³ Heyns, Akande, Hill-Cawthorne and Chengeta, "Use of Armed Drones", p. 797.

⁵⁴ *Ibid.*, p. 800.

⁵⁵ Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, p. 14.

⁵⁶ *Nicaragua*, para. 176.

⁵⁷ *Nicaragua*, para. 194. See also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226. See also Oil Platforms (*Islamic Republic of Iran v. United States of America*), Judgment, I.C.J. Reports 2003, para. 74.

⁵⁸ Welsh, "Drone Warfare", p. 31.

⁵⁹ *Ibid.* See also Jeremy Waldron, "Justifying Targeted Killing with a Neutral Principle" in *Justifying Targeted Killings: Law and Morality in an Asymmetrical World*, edited by Algernon Biddle et al. (Oxford: Oxford University Press, 2012).

⁶⁰ Welsh, "Drone Warfare", p. 31.

⁶¹ *Ibid.*, p. 32.

Ethical Issues

To continue, this chapter shall present the ethical dilemmas that the use of armed drones imply. While drones ensure many tactical advantages and add up to reaching strategic goals subject to national and international security concerns⁶², states which use them have been also criticized for the lack of transparency and for the non-compliance with the principles of necessity and proportionality when making the decision to resort to force by using armed drones. Therefore, it is not only within the scope of the discussion on legal issues, but also with respect to evaluation of the ethical issues regarding the use of armed drones that the principles of necessity and proportionality⁶³ shall be taken into account. For the use of an armed drone to be justifiable the targeted killing should be proportional to the collateral damage and incidental loss of lives it creates, which can only be assessed within a certain legal framework.

The discussion on the moral issues related with the use of armed drones within the scope of this research has a secondary role and follows from the discussion on the legal issues. However, the issue of morality from the perspective of legitimacy of one act or another serves in itself as the starting point for forming legal principles that would justify the use of military technology. Within the scope of this research with the moral challenge is to be understood the fact that by using armed drones in wartime, but especially for targeted killing in the zones of non-hostility, the risk to do harm to civilians is substantial and at the same time is hard to be measured because information on military attacks is not publicly disclosed. The question arises whether the advancements in military technology can justify military intervention by lowering the threshold for entering into an armed conflict on the basis of the assumption that the precision of an attack that can be guaranteed with the technology will diminish civilian casualties.⁶⁴

Some authors suggest that the moral paradigm of the issue on the development of war technology as such can be explained with the reference to just war theory⁶⁵ and its shift towards clean law theory which to some serves as a justification for the use of technological advancements in waging war or countering terrorism.⁶⁶ It has to be stressed here that the right to life is one of the inalienable rights and offers a higher level of protection than the IHL governing wartime situations.⁶⁷ The right to life has been explicitly recognized in the article of Human Rights, Article 3⁶⁸, and has also been enshrined in the European Convention on Human Rights (ECHR), Article 2⁶⁹, save with the exception that it does not apply in situations where the use of force has taken place. From that it can be derived that the right to life is limited to self-defence under use of force law.

⁶² Cortright and Fairhurst, "Drone Warfare", p. 16.

⁶³ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. viii. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed April 8, 2018.

⁶⁴ Hayim, "From Just War to Clean War", p. 201.

⁶⁵ Cortright and Fairhurst, "Drone Warfare", p. 6.

⁶⁶ Hayim, "From Just War to Clean War", p. 195.

⁶⁷ Heyns, Akande, Hill-Cawthorne and Chengeta, "Use of Armed Drones", p. 794.

⁶⁸ United Nations. *Universal Declaration of Human Rights*. Available on: <http://www.un.org/en/universal-declaration-human-rights/>. Accessed April 12, 2018.

⁶⁹ Council of Europe. *European Convention on Human Rights*. Available on: https://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed April 12, 2018.

The issue of morality in the time of war is seen within the scope of quantitative and qualitative terms. One of the basic tenets of the law on armed conflict determines that, “[t]he incidental harm done to civilian individuals and objects must not be excessive in relation to the anticipated and direct military advantage that an attack would bring”⁷⁰. The humanization of military attacks in theory is achieved by maximizing the amount of successful attacks and reducing the incidental losses as much as possible. Within this context the modern warfare is therefore seen as a tool to reach the objective to humanize a military intervention as that would render the intervention morally justifiable.⁷¹

Another issue of morality is whether to attack to an individual, whether it would be a combatant, a person directly participating in hostilities or an insurgent, by an unmanned equipment, i.e. partially automated (or automated in present or in the near future) is proportional from a humanitarian perspective. To put it in other words, whether to attack a human being with an aim to eliminate the person, even though rightfully, without putting at risk the life of the person who is directing the attack, must be seen as immoral because it might eliminate the threat to live of national military forces. It is suggested that if the use of remotely piloted aircraft becomes a well established practice then in long-term the thinking about what is an acceptable method of war and the motivation for an attack also changes. *In this regard it becomes crucial to distinguish between what is enemy and what is not and how to apply the principle of necessity and proportionality when using a remotely piloted aircraft in fight against a combatant or a terrorist [emphasis added].*

According to David Cortright (D.Cortright) and Rachel Fairhurst (R.Fairhurst) the main ethical question with regard to the subject of the use of armed drones is “whether their availability increases the propensity of political leaders to use force?”⁷². In other words, whether the supply determines the demand? While the above mentioned question relates to the practical effects of the use of armed drones by military forces, another moral dilemma is provided from the political perspective. As put by D.Cortright and R.Fairhurst, the assessment of morality shall answer the question “whether the use of drone weapons enhances security and prevents terrorist violence?”⁷³ This assessment is primarily related with the assessment of effectiveness of such strikes, but in itself also implies the question on what justifies the use of force, if the aim behind the policy that authorizes such an act has not been reached. Is it worth to continue to execute policy, just or unjust, which does not reach its aim?

There is empirical evidence available which confirms that disregarding the criticism that armed drone strikes are often carried out in zones outside of armed conflicts, therefore putting at greater risk the lives of civilians, in reality the number of incidental deaths during drone strikes is smaller than by applying conventional methods such as missile attacks or attacks on the ground.⁷⁴ On the other hand what raises concerns of seemingly many academics, researchers and human rights activists⁷⁵ is that the list of individuals subject to targeted killing is unknown, primarily for the national and international security reasons in the interests of the society. At the same time, the formation as such of a list for killing would not

⁷⁰ Hayim, “From Just War to Clean War”, p. 207.

⁷¹ *Ibid.*, pp. 197-199.

⁷² Cortright and Fairhurst, “Drone Warfare”, pp. 9, 23.

⁷³ *Ibid.*, p. 23.

⁷⁴ *Ibid.*, p. 8. See also Avery Plaw, “Counting the Dead: The Proportionality of Predation in Pakistan”, in *Killing by Remote Control The Ethics of ab Unmanned Military*, ed Bradley J. Strawser. (New York: Oxford University Press, 2013) p. 150.

⁷⁵ The list is non-exhaustive.

meet the requirement under the use of force law that for an attack to be legitimate it has to respond to an imminent threat.

To continue, it is suggested, that the moral problem that the use of armed drones creates is that the surgical⁷⁶ approach towards killing by performing the act from a distance alienates from the direct consequences of an armed attack. That in turn may result in lowering the threshold for the decision to carry out an attack, including in case of targeted killing.⁷⁷ As well put by R.Fairhurst and D.Cortright,

[d]rone systems partially remove the person from the emotional equation of war, creating a vast psychological distance between the launching of a strike and its bloody impact.⁷⁸

In opposition to the moral dilemma presented above stands the viewpoint that the possibility to perform precise targeted attacks with the help of modern technology such as armed drones may help to avoid bloody wars.⁷⁹ However, such attacks shall still be viewed under the *ius ad bellum* and they still would count as a resort to force, therefore the importance of a decision to carry out a targeted killing shall be considered as no less severe, than a decision to carry out an armed attack by any other military means.

Another equally significant ethical question is to what extent the chain of command is observed with respect to the use of armed drones by military forces.⁸⁰ This question requires to acknowledge that although armed drones, as used at the moment, might not be fully automated, their functioning is partially automated. The sub-question which follows is, whether in case the use of armed drones is partially automated, it creates a psychological distance significant enough to influence the decision-making of a drone operator.⁸¹ Political philosopher Alex Leveringhaus tries to find the answers to these questions through the following prisms: geographical distance, psychological distance, causal distance and temporal distance.⁸²

To sum up, the perspective of the military forces the technological development of weapon systems, including the armed drones, is indispensable for ensuring everlasting or ever-growing security of a state⁸³, whereas from the perspective of normative ethics no use of force and therefore everything related with its enhancement through technological development can ever be justified or moral.

⁷⁶ Rafia Zakaria “The Myth of Precision: Human Rights, Drones, and the Case of Pakistan”, in *Drones and the Future of Armed Conflict*, ed. by David Cortright, et al. (London: The University of Chicago Press, 2015), p.201. See also Cortright and Fairhurst, “Drone Warfare”, p. 22.

⁷⁷ Cortright and Fairhurst, “Drone Warfare”, p. 10.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, p. 11.

⁸⁰ Alex Leveringhaus. Autonomous Weapons Mini-series: Distance, Weapons Technology and Humanity in Armed Conflict, available on: <http://blogs.icrc.org/law-and-policy/2017/10/06/distance-weapons-technology-and-humanity-in-armed-conflict/>. Accessed August 23, 2018.

⁸¹ Centre for Autonomy and Artificial Intelligence. Redefining Human Control: Lessons from the Battlefield for Autonomous Weapons, available on: https://www.cna.org/CNA_files/PDF/DOP-2018-U-017258-Final.pdf. Accessed May 16, 2019.

⁸² Alex Leveringhaus. Autonomous Weapons Mini-series: Distance, Weapons Technology and Humanity in Armed Conflict, available on: <http://blogs.icrc.org/law-and-policy/2017/10/06/distance-weapons-technology-and-humanity-in-armed-conflict/>. Accessed August 23, 2018.

⁸³ Plaw, Fricker and Colon, “Debate over Legality”, p. 2.

ESTABLISHED INTERNATIONAL LEGAL FRAMEWORK REGULATING THE USE OF ARMED DRONES

The legal framework governing the use of armed drones in international law is partially set by the Charter of the United Nations (UN), but can also be found in the Geneva Conventions 1949 as well as in international customary law. However, due to the lack of specific regulations, the laws and principles governing the use of armed drones are subject to wide interpretation.⁸⁴ Nevertheless in order to fulfill the objectives contained in the UN Charter Article 1(1)⁸⁵ on “maintain[ing] international peace and security” the international community asks for increased accountability as well as transparency that can be achieved through promotion of existing norms and principles and investigation of the evidenced violations.⁸⁶

In parallel to international law, the use of both, unarmed and armed drones, can be regulated under the domestic law. However, those regulations are limited to the territory of that state, therefore cannot be applicable in case of international or non-international armed conflicts, in which case the international law would be applicable. The examples of the US and UK, which have formulated their own policies for usage of armed drones and are involved in fight against terrorism, will be discussed further below in this research.

As emphasized in the introductory part and the subsequent chapters of this research the three main branches of international law applicable to the use of armed drones are use of force law, i.e. *ius ad bellum*, international humanitarian law and international human rights law. It is within this framework that the author will further analyse the concept of legitimacy with regard to the use of remotely piloted aircraft, i.e. armed drones, while simultaneously trying to find the answer to the research question: “Whether on the basis of the existing practice and *opinio juris* there can be identified the formation of a customary international law which authorizes the use of a distinct type of warfare, e.g. armed drones, for anti-terrorism purposes against non-state actors in another states territory?”.

Bearing in mind that the UN is primarily a security organization whose aim is to ensure global peace and security, it is also within the UN that a consensus on the future of the practices of using armed drones shall be found. With reference to the *Resolution adopted by the General Assembly on 24 September 2012* known also as the Declaration on the Rule of Law⁸⁷ which reconfirms the “commitment ... to an international order based on rule of law”⁸⁸ and acknowledging that according to Christof Heyns “the future of global security depends on the acceptance of values that are central to the international system ...”⁸⁹ it shall be in the best interests of the international society to keep up with their commitments and to come up to a

⁸⁴ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. viii. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed April 9, 2018.

⁸⁵ United Nations. *United Nations Charter (full text)*. Available on: <http://www.un.org/en/sections/un-charter/un-charter-full-text/>. Accessed April 9, 2018.

⁸⁶ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. ix. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed April 9, 2018.

⁸⁷ United Nations. *Resolution adopted by the General Assembly on 24 September 2012*, A/67/88-E/2012/75. Available on: https://www.un.org/ga/search/view_doc.asp?symbol=A/67/88. Accessed May 4, 2018.

⁸⁸ United Nations. *Resolution adopted by the General Assembly on 30 November 2012*, A/RES/67/1. Available on: <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>. Accessed May 5, 2018.

⁸⁹ Cortright and Fairhurst, “Drone Warfare”, p. 16.

political and legal solution in order to decide on the regulation of the use of both armed and unarmed drones in the light of the technological developments.

The international efforts to establish a common policy in fight against terrorism are reflected also in the UN Global Counter-Terrorism Strategy which was first adopted by Resolution of General Assembly in 2006⁹⁰ and is reviewed every two years.⁹¹ The sixth review of the Strategy took place in 2018 with the UNGA's Resolution adopted on 26 June 2018.⁹² The Strategy is based on four pillars as follows:

1. Addressing the conditions conducive to the spread of terrorism;
2. Measures to prevent and combat terrorism;
3. Measures to build states' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard;
4. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.⁹³

It focuses on non-military means within the framework of preventive mechanisms to fight terrorism, including financial means and enhanced cooperation of international criminal police and intelligence agencies.

Ius ad bellum

The main legal instrument governing the *ius ad bellum* is the Charter of the United Nations, i.e. the UN Charter law. It sets the basic rules and principles following which the resort to the use of force is lawful. The main article of the UN Charter that speaks the use of force is Article 2, paragraph 4 of the Charter of the United Nations, containing within itself a *jus cogens* norm on the prohibition of the use of force, states:

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.⁹⁴

Since the prohibition to the use of force enshrined in the UN Charter is simultaneously a *jus cogens* norm then at least in theory any derogation from this rule is prohibited.⁹⁵ However, a few exceptions are permissible, which will be the subject of the discussion in the paragraphs to follow.

As the first exception shall be mentioned Chapter VII rule on the use of force, Article 51 of the Charter of the United Nations⁹⁶ which speaks on self-defence and states the following:

⁹⁰ United Nations. *Resolution adopted by the General Assembly on 8 September 2006*, A/RES/60/288. Available on: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N0550488.pdf?OpenElement>. Accessed May 5, 2018.

⁹¹ Cortright and Fairhurst, "Drone Warfare", p. 21. See also United Nations Office of Counter-Terrorism. UN Global Counter-Terrorism Strategy, available on: <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>. Accessed May 5, 2018.

⁹² United Nations. *Resolution adopted by the General Assembly on 26 June 2018*, A/RES/72/284. Available on: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/72/284. Accessed May 5, 2018.

⁹³ United Nations Office of Counter-Terrorism. UN Global Counter-Terrorism Strategy, available on: <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>. Accessed May 5, 2018.

⁹⁴ United Nations Charter, art. 2.

⁹⁵ Sondre T. Helmersen, "The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations," *Netherlands International Law Review* 61, no. 02 (2014): p. 168, accessed April 15, 2018, doi:10.1017/s0165070x14001168.

⁹⁶ Helmersen, "Prohibition of the Use of Force", pp. 168-169.

Nothing in the present Charter shall impair the inherent *right of individual or collective self-defence* [emphasis added] 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* [emphasis added]. 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 security⁹⁷.

On the basis of this article the use of force is permitted in the cases of individual or collective self-defence in order to guarantee the fulfillment of one of the main aims of the UN Charter which is to “maintain international peace and security”. Furthermore, the judgment in *Nicaragua*⁹⁸ case presents that to act in self-defence is possible only as a response to an armed attack, but not of an act of less gravity. This principle is formulated by stipulating that “[...] states do not have a right of “collective” armed response to acts which do not constitute an “armed attack””⁹⁹ and in itself presents the principle of proportionality. This of course comes at stake when deciding whether an armed attack carried out by an armed drone which is piloted by a military personnel or an intelligence agent and directed against an individual identified as terrorist is proportional to the attack or threat imposed by that person.

The other exception to the prohibition of the use of force is provided under the Chapter VII rules, Article 39 of the UN Charter, which shall be read in conjunction with Article 41 and 42 of the UN Charter and which stipulates that:

[t]he Security Council [emphasis added] shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or *decide what measures shall be taken in accordance with Articles 41 and 42* [emphasis added], to maintain or restore international peace and security.¹⁰⁰

This article authorizes the Security Council to take action which under certain circumstances may amount to the use of force.

In addition to the rules already mentioned in certain instances the treaty law may regulate the conditions under which both, unilateral or collective use of force, is permissible to the states between which the treaty is concluded. Examples include Cyprus Treaty of Guarantee, Franco-Monegasque Treaty or the Constitutive Act of the African Union.¹⁰¹ The legal problem arises when those states which have concluded a treaty permitting the use of force are at the same time the members of the United Nations and for them under the UN Charter law no derogation from the prohibition of the use of force is legally valid except under Article 51 or authorization by the Security Council provided in accordance with Article 39 of the UN Charter. Given that Article 103 of the UN Charter determines the superiority of the UN Charter over other international agreements and given the *jus cogens* character of the prohibition to the use of force enshrined also in Article 2, paragraph 4 of the UN Charter, there is a reason to object to the validity of any international treaty concluded between the UN member states that permits the use of force under any other exceptions except those mentioned in the UN Charter.¹⁰²

⁹⁷ United Nations Charter, art. 51.

⁹⁸ *Nicaragua*.

⁹⁹ *Nicaragua*, paras. 194, 211.

¹⁰⁰ United Nations Charter, arts. 41, 42.

¹⁰¹ Helmersen, “Prohibition of the Use of Force”, pp. 180-181.

¹⁰² *Ibid.*, p. 181.

The final exception to the prohibition of the use of force is the consent of the territorial state given to another state to perform an armed attack on its ground against a non-state actor. Even though considered to be a legally valid justification for an armed attack, this exception is not contained in the UN Charter.¹⁰³ In the case of the consent the armed conflict would fall under the category of non-international armed conflict and would be legitimate as long as it would be proportional and necessary to the objective of that attack.¹⁰⁴ As already described in the introductory part of this article, such a consent for example has been granted to the US by Pakistan, Yemen and Somalia¹⁰⁵, but also by Nigeria and Iraq in a recent past.¹⁰⁶

This discussion on the validity of the use of force helps to set the framework under which the legitimacy of the use of armed drones can be assessed. The important conclusion with respect to the *ius ad bellum* rules is that the legitimacy of the use of armed drones either in international or non-international armed conflict depends of variety of elements of international law, including the principles of necessity and proportionality, which all serve as a basis of state resort to use of force. Additional criteria for legitimacy include the following ones:

[p]recaution requires that, before every attack, armed forces must do everything feasible to: i) verify the target is legitimate, (ii) determine what the collateral damage would be and assess necessity and proportionality, and (iii) minimize the collateral loss of lives and/or property. AP I, art. 57; ICRC Rules 15-21.¹⁰⁷

To sum up, *ius ad bellum* also referred to as the use of force law primarily defines the rules for entry into war. Since wars nowadays are rarely declared and waged between state actors only, it has broadened the perspective from which the *ius ad bellum* rules could be viewed. The *ius ad bellum* rules prescribe the circumstances under which an armed attack is permissible between state and non-state actors within the territory of that state which performs an attack or within the territory of another state.

Per definition only armed conflicts between states can be considered international, therefore an armed conflict that emerges between a state and a non-state armed group is considered to be a *non-international armed conflict* [emphasis added] subject to the consent by the state on the territory of which the attack has been carried out. Since the use of armed drones has become a common method for targeting individuals, such as terrorists, in another state's territory¹⁰⁸, it has to be acknowledged that in this type of situation the rules on the use of force that would usually apply to international, i.e. inter-state conflicts, are not

¹⁰³ Helmersen, "Prohibition of the Use of Force", p. 177.

¹⁰⁴ Hayim, *supra* note 40. See also Heyns, Akande, Hill-Cawthorne and Chengeta, "Use of Armed Drones", p.815.

¹⁰⁵ Heyns, Akande, Hill-Cawthorne and Chengeta, *supra* note 53.

¹⁰⁶ Heyns, Akande, Hill-Cawthorne and Chengeta, "Use of Armed Drones", p. 792. See also United Nations. *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/68/389, paras. 25–40. Available on: <https://undocs.org/A/68/389>. Accessed April 11, 2018. See also Fortune. All of These Countries Now Have Armed Drones, available on: <http://fortune.com/2016/02/12/these-countries-have-armed-drones>. Accessed April 11, 2018.

¹⁰⁷ International Committee of the Red Cross. Customary International Humanitarian Law - 1. Rules," ICRC Databases on International Humanitarian Law. Available on: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul. Accessed April 20, 2018. See also International Committee of the Red Cross. Treaties, States Parties, and Commentaries - Additional Protocol (I) to the Geneva Conventions of 12 August 1949, art. 57 "Precautions in attack". Available on: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=50FB5579FB098FAAC12563CD0051DD7C>. Accessed April 20, 2018.

¹⁰⁸ Heyns, Akande, Hill-Cawthorne and Chengeta, "Use of Armed Drones", p. 796.

applicable.¹⁰⁹ Moreover, there exists the probability that an armed attack using armed drones is carried against a non-state actor on another state's territory without the consent of that state where the attack takes place.¹¹⁰ It is in this case that presents an example of additional legal problem within the scope of this research.

First of all, in the case of absence of consent of the state on whose territory an armed attack is carried out, there is a probability for such a military activity to be interpreted as an attack against that state, even in case the targeted killing is directed against a non-state actor. For this reason in the absence of consent of the territorial state such an armed attack by a third state could be interpreted as an international conflict and therefore the rules governing international conflicts shall equally be applied the same as in armed conflict between states.¹¹¹

Last but not least, the distinction between an international armed conflict and non-international armed conflict is further crucial to determine the applicable rules and principles under IHL, but not under use of force law. In general under *ius ad bellum* an armed attack by a one state carried out on the territory of another state against a non-state group without the consent of that state, even if it would be necessary and proportional, would not be considered as legitimate, but would still be referred to as international armed conflict. Once this conclusion is reached other applicable laws and principles shall be viewed.

Necessity and proportionality requirement for self-defence

It is a basic principle that under the use of force law necessity and proportionality are the two requirements that shall be fulfilled in order to exercise the right of self-defence provided by Article 51 of the UN Charter.¹¹² These two requirements have been established in customary international law through various judgments and advisory opinions given by the International Court of Justice (ICJ) in the following cases: *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*¹¹³, *Legality of the Threat or Use of Nuclear Weapons*¹¹⁴ or *Case Concerning Oil Platforms*¹¹⁵ (*Iran v. United States of America*).¹¹⁶ Putting a limitation to the right of self-defence the legitimate objective of which is to halt an armed attack, these requirements of international customary law bring clarity on how to establish the legitimacy of an attack.¹¹⁷ The same criteria of necessity and

¹⁰⁹ Heyns, Akande, Hill-Cawthorne and Chengeta, "Use of Armed Drones", p. 815.

¹¹⁰ *Ibid.*, p. 815.

¹¹¹ Commentary on the First Geneva Convention. *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, Commentary to art. 2, paras. 260-262. Available on: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518>. Accessed April 14, 2018.

¹¹² Avery Plaw, Matthew S. Fricker, Carlos R. Colon, "Introduction: The Drone Debate: The Importance of Debating Drones", in *The Drone Debate: A Primer on the U.S. use of unmanned aircraft outside conventional battlefields* ed. Avery Plaw et al. (London: Rowman&Littlefield, 2016), p. 120. See also Heyns, Akande, Hill-Cawthorne and Chengeta, "Use of Armed Drones", p. 800.

¹¹³ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports 1986, p. 14, para. 194.

¹¹⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports [1996], p. 226.

¹¹⁵ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I. C.J. Reports 2003, p. 161.

¹¹⁶ Heyns, Akande, Hill-Cawthorne and Chengeta, "Use of Armed Drones", p. 800.

¹¹⁷ *Ibid.*, p. 801.

proportionality hence can be used to establish the legitimacy of the use of armed drones for targeted killing both in international armed conflict and non-international armed conflict.

It is acknowledged that for an attack to be legitimate under the dual requirement of proportionality and necessity it must either halt or repel an attack, but not to be punitive. It is exactly the risk present when haunting down an enemy such as individual terrorist with the means of a remotely piloted aircraft that the nature of such an attack could be punitive.¹¹⁸ In practice a *targeted* [emphasis added] killing against a non-state actor would be carried out after an armed attack has already ended, because by definition it is a premeditated response to an attack by using lethal force.¹¹⁹ *This aspect creates a legal problem within the context of the principle of necessity, because in the case of targeted killing the act itself does not serve the aim to halt or repel an actual attack, but rather could be described as a strategic move to diminish or eliminate a threat from arising in the future* [emphasis added].

The only exception to the compliance with the principles of necessity and proportionality of an armed attack, including targeted killing, is found under the pre-emptive self-defence doctrine.¹²⁰ This doctrine provides that a preventive attack can be justified, if there is a reasonable difficulty to predict any future attacks of a non-state actor, whereas the attack in itself is seen as imminent in the future.¹²¹ In order to justify a targeted killing under the pre-emptive self-defence doctrine the test of “window of opportunity” is to be applied. In essence it means that

[i]f there is a high risk that unless the person is targeted he will direct and carry out further terrorist acts, it may be argued that use of lethal force may be absolutely necessary to protect others against those acts.¹²²

Although there is no widespread support for the doctrine of pre-emptive use of force¹²³ it seems to be the only legally valid justification under use of force law for targeted killings.

Acknowledging that the dynamics of armed conflicts in nowadays may have changed because the developed countries are less and less engaged in war on battlefields, the question arises what is the threshold between a military activity directed to halt or repel an attack and one that is used as a punitive measure. The theory of pre-emptive self-defence doctrine leaves open questions. If it is recognized that an anticipatory attack against an imminent threat is permissible¹²⁴, then how can an imminent threat be defined with reference to modern warfare.

¹¹⁸ Heyns, Akande, Hill-Cawthorne, Chengeta, “Use of Armed Drones”, p. 800.

¹¹⁹ United Nations General Assembly. *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions Philip Alston, A/HRC/14/24/Add.6.* Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 15, 2018.

¹²⁰ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. 25, para. 15. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed April 9, 2018.

¹²¹ *Ibid.*

¹²² *Ibid.*, p. 28, para. 22. See also David Kretzmer, “The legal regime governing the use of lethal force in the fight against terrorism” in *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, ed. Larissa Van den Herik and Nico Schrijver (Cambridge: Cambridge University Press, 2013) p. 581.

¹²³ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. 25, para. 15. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed April 9, 2018.

¹²⁴ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, p. 802.

Another question arises out of the dual principle of necessity and proportionality as formulated in the above paragraph, whether to launch an attack can be considered to be aimed at halting or repelling also attacks in the future without appearing to be punitive. A preliminary answer to this question is that states are only allowed to act in self-defence until the actual threat has been eliminated but not to carry out military attacks until complete destruction of the enemy is achieved in way that it no longer poses threats in long-term.¹²⁵ It may as well be possible that the same attack is aimed at eliminating an existing threat and to diminishing the possibility that a similar threat may arise in the future.

Requirement for consent

Article 2(4) of the UN Charter that prohibits “the threat or use of force against the territorial integrity or political independence of any state”¹²⁶. In essence that means that any use of inter-state force without the consent given by that state in which the use of force takes place is prohibited. There are only two exceptions to this rule established under the UN Charter and it is the Article 51 providing rights for self-defence and the Chapter VII giving rights to the Security Council to authorize enforcement action¹²⁷, already discussed before. Citing judgment in *Nicaragua*¹²⁸ case there is no rule in customary international law “permitting the exercise of collective self-defence in the absence of a request by the State which is a victim of the alleged attack”¹²⁹.

International Humanitarian Law

For the international humanitarian law to be applicable there must be an established armed conflict either between two different states, i.e. an international armed conflict, or a state and an organized non-state armed group, i.e. a non-international armed conflict. It means that outside of established armed conflict humanitarian law would not be applicable. The establishment of an armed conflict as such is made on the basis of factual and objective criteria¹³⁰ which under the international humanitarian law are twofold: “the *intensity* [emphasis added] of the conflict and the *organization of the parties* [emphasis added] to the conflict”¹³¹. Where the threshold of intensity and organization to establish an armed conflict are not met, the international human rights law applies instead, at the same time giving higher level of protection.¹³² In case about doubts on whether the two criteria are met, the threshold can be reached also by aggregating the violence that is subject to one single organized armed group the level of organization of which can be proved and which is dispersed throughout a region, a state or several states, eventually resulting in the application of international humanitarian law.¹³³ Nevertheless, the violence cannot be aggregated from different non-state

¹²⁵ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, p. 801.

¹²⁶ United Nations Charter, art. 2.

¹²⁷ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, p. 797.

¹²⁸ *Nicaragua*.

¹²⁹ *Nicaragua*, para. 201.

¹³⁰ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, p. 806.

¹³¹ *Prosecutor v. Tadic* (Trial Judgment) IT-94-1-T (7 May 1997) para. 562.

¹³² Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, pp. 806-807.

¹³³ *Ibid.*, p. 807.

organized armed groups¹³⁴, therefore, if the level of organization of several armed groups cannot be aggregated to one single group, then an armed conflict again cannot be established, thus resulting in the application of a higher level of protection of human rights by applying the IHRL. This rule applies despite the tendency of the US in particular to broaden the definition of what is an organized armed group, i.e. what criteria must be reached for several non-state armed groups to be classified as one single armed group, thus applying the lower level of protection of human rights, i.e. IHL in a situation of an armed conflict. However, that is done disregarding the fact that a non-state organized armed group is to be found on the basis of objective criteria and cannot be determined by the attacking state.¹³⁵

Following the establishment of an armed conflict further classification is made with regard to the applicable rules and principles that govern both international or a non-international armed conflict. In both international and non-international conflicts the applicable principles for targeting individuals would be as follows: *principle of distinction* [emphasis added]¹³⁶ and *principle of proportionality* [emphasis added]¹³⁷. Under the principle of distinction only a civilian taking a direct part in hostilities could be targeted¹³⁸, but for this status to be established a certain well-defined criteria applies again.¹³⁹ In order to establish whether a certain individual is directly participating in hostilities, i.e. exercising a continuous combat function¹⁴⁰, a threefold test is applied¹⁴¹. According to the test one must, first of all, find out whether a certain activity is “*likely to adversely affect the military operations or military capacity of a party* [emphasis added] to an armed conflict”¹⁴². Secondly, “[t]here must be a *direct causal link between the act and the harm* [emphasis added]”¹⁴³. Thirdly, “[t]he act must be *specifically designed to directly cause the required threshold of harm* [emphasis added] ... (belligerent nexus)”¹⁴⁴. With the term “direct cause” is meant a harm brought in one causal step.¹⁴⁵ Civilians who are indirectly participating in an armed conflict through providing weapons or training the personnel would not be considered as legitimate targets under the IHL.¹⁴⁶ In general, the same applies to those civilians who finance a party to an armed conflict or contribute to its continuity in any other form.¹⁴⁷

The establishment of whether an individual is taking direct part in hostilities would be crucial when there is a difficulty to establish a direct link between an armed group engaged in

¹³⁴ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, pp. 808-809.

¹³⁵ *Ibid.*, p. 808.

¹³⁶ *Ibid.*, p. 810.

¹³⁷ *Ibid.*, p. 814.

¹³⁸ *Ibid.*, p. 810.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.* See also International Committee of the Red Cross. *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian law*. Available on: <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>. Accessed May 11, 2018.

¹⁴¹ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, pp. 195-198.

¹⁴² *Ibid.*, p. 811.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.* See also International Committee of the Red Cross. *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian law*. Available on: <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>. Accessed May 11, 2018.

¹⁴⁶ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, p. 811. See also International Committee of the Red Cross. *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian law*. Available on: <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>. Accessed May 11, 2018.

¹⁴⁷ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, p. 810.

an armed conflict and an individual who is performing a combat function. In case such an individual considered to be a combatant potentially becomes subject to a targeted killing, then under the international humanitarian law it would be necessary to apply the above-mentioned test to come to the conclusion whether attacking such an individual would be in line with both the principle of distinction and principle of proportionality.

To continue, the principle of proportionality which is defined under customary international humanitarian law, Rule 14, as the “Proportionality to Attack” determines that an armed attack causing loss “of civilian life, injury to civilians, damage to civilian objects, or a combination thereof”¹⁴⁸ that is excessive to the anticipated military advantage, is prohibited.¹⁴⁹ At the same any loss that is not excessive to a direct military advantage would be seen as an incidental loss, including the loss of civilian lives, which is not prohibited.¹⁵⁰ Although there is no specific test applicable to establish whether an attack, including a targeted killing, is performed in accordance with the principle of proportionality, the interpretation of the customary rule defining the principle provides for several guidelines. Firstly, it is provided that the military advantage from an attack should be substantial, excluding “advantages which are hardly perceptible and those which would only appear in the long term should be disregarded”.¹⁵¹ Secondly, the interpretation of the rule of proportionality also provides that decision by the military planners, commanders on whether a concrete attack is in line with the principle of proportionality should be reached upon “assessment of the information from all sources which is available to them at the relevant time”¹⁵². From the practical perspective this appears to be reached by engaging advisers, including legal advisers, in the decision-making process as military forces alone may lack the knowledge of the legal significance of the military decisions they take. Literature suggests that the practice of involvement of legal specialists in the chain of command is becoming common for such states as US, UK and Israel as well as within the North Atlantic Treaty Organization (NATO).¹⁵³

Finally, it is relevant to stress that the same humanitarian law standards apply disregarding whether a certain situation corresponds to an armed conflict between states or a state and a non-state armed group and disregarding whether such an armed conflict is international or non-international.¹⁵⁴ The conclusion which follows from it is that in order for the international humanitarian law to apply in relation to targeted killing there must be an armed conflict established between a state and a non-state armed group or terrorists. In all other situations that could not be considered to fall under the category of an armed conflict the legitimacy of a targeted killing would be subjected to a law enforcement activity to which the human rights standards would apply.¹⁵⁵ The level of protection of both the targeted non-state

¹⁴⁸ International Committee of the Red Cross. Rule 14, Proportionality to Attack, available on: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14. Accessed November 3, 2018.

¹⁴⁹ *Ibid.*

¹⁵⁰ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, p. 814.

¹⁵¹ International Committee of the Red Cross. Rule 14, Proportionality to Attack, available on: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14. Accessed November 3, 2018.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ United Nations Human Rights Council. *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24/Add.6*, para. 30. Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 15, 2018.

¹⁵⁵ Office of the United Nations High Commissioner for Human Rights. *Study on targeted killings*, para. 31. Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 19, 2018.

actors and the civilians under the IHRL would be higher. To conclude, for a targeted killing to be legitimate under the IHL, it can only take place within the context of an armed conflict as an act which is carried out against an individual in accordance with the principle of distinction and which allows to gain direct military advantage which is not excessive to the incidental loss caused in accordance with the principle of proportionality.

International Human Rights Law

Disregarding the fact whether international human rights law (IHRL) applies as *lex specialis* or *lex generalis*, as a general rule it applies in parallel to IHL.¹⁵⁶ Human rights only become inapplicable, if they are in conflict with the IHL and principles established by it in a situation corresponding to an armed conflict.¹⁵⁷ In principle the IHRL in relation to armed conflicts applies only as *lex specialis*,¹⁵⁸ but in situations outside an armed conflict the IHRL would apply exclusively instead of IHL.¹⁵⁹ However, that does not diminish the significance of the legal discussion under IHRL of the subject of armed drones used for targeted killings because the border line between an armed attack in act of self-defence and a targeted killing is often hard to be established.

The right to life is recognized in the law of treaties and customary law as absolute right and under the International Covenant on Civil and Political Rights no derogations are made possible.¹⁶⁰ However, the only exception exists when the two following conditions are met: there is a threat to life and that threat to life is imminent.¹⁶¹ By definition under the human rights law killing is permitted only with an aim to protect the life,¹⁶² primarily that of

¹⁵⁶ Office of the United Nations High Commissioner for Human Rights. *Study on targeted killings*, para. 29. Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 19, 2018. See also United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, para. 2, p. 17. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed April 9, 2018.

¹⁵⁷ Office of the United Nations High Commissioner for Human Rights. *Study on targeted killings*, para. 29. Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 19, 2018. See also United Nations. *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24/Add.6*, paras. 46-53. Available on: <https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed March 10, 2018. See also United Nations. *Civil and Political Right, Including the Questions of Disappearances and Summary Executions, A/HRC/4/20*, paras. 18-19, pp. 358-61. Available on: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/105/00/PDF/G0710500.pdf?OpenElement>. Accessed May 17, 2019. See also United Nations General Assembly. *United Nations Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/11/2/Add.5*, paras. 71-73, 83. Available on: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/135/57/PDF/G0913557.pdf?OpenElement>. Accessed May 18, 2019.

¹⁵⁸ Office of the United Nations High Commissioner for Human Rights. *Study on targeted killings*, para. 29. Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 19, 2018.

¹⁵⁹ *Ibid.* See also Heyns, Akande, Hill-Cawthorne and Chengeta, "Use of Armed Drones", p. 805.

¹⁶⁰ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, p. 26, para. 18. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed April 9, 2018.

¹⁶¹ *Ibid.*, p. 27, para. 19.

¹⁶² *Ibid.*, p. 26, para. 18.

civilians, and only in case if all the other means to achieve this aim have been exhausted.¹⁶³ Moreover, since the targeted killing by definition is a preventive step to eliminate an individual or a group of individuals, it does not correspond to a permissible killing under the human rights law because it is intentional, prearranged and is not a response to an imminent threat but rather a response to a persisting threat.¹⁶⁴ An example of a border case would be that a targeted killing occurs as a response to an imminent threat, but it is less likely that such a situation would present itself outside of an armed conflict. Even more, in such a case when the targeted killing would be carried out within the context of an armed conflict it would be the IHL that would primarily apply.

In general outside of an armed conflict in a situation in which the use of force would most probably be recognized as a law enforcement activity no person would be eligible to a combatant status and therefore a targeted killing by any means the sole aim of which is not to protect the life from an imminent threat would be considered to be illegal.¹⁶⁵ The sole exception would be the law enforcement activities under which the use of lethal force is permissible with an aim to protect the life where all other means have been exhausted. In comparison to situations of armed conflict in which the IHL would be given priority, in law enforcement activities the human rights law applies and overrides the former in importance.¹⁶⁶

Multilateral frameworks

Security Council's Resolution 1540 (2004)

The United Nations Security Council Resolution 1540 (2004), unanimously adopted in 2004, establishes legal framework for prevention of weapons of mass destruction.¹⁶⁷ Although in essence its main aim is defined as to limit the threats to international peace and security by preventing the proliferation of weapons of mass destruction, be them nuclear, chemical or biological, it also covers the means of delivery of such weapons.¹⁶⁸ The unmanned systems, including armed unmanned aerial vehicles, therefore are covered by the resolution 1540 (2004) within the meaning of means of delivery of such weapons.¹⁶⁹ However,

¹⁶³ Office of the United Nations High Commissioner for Human Rights. *Study on targeted killings*, para. 32. Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 22, 2018. See also United Nations. *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, A/61/311, paras. 33-45. Available on: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/488/01/PDF/N0648801.pdf?OpenElement>. Accessed May 15, 2019.

¹⁶⁴ Office of the United Nations High Commissioner for Human Rights. *Study on targeted killings*, p. 11., para.33. Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 22, 2018.

¹⁶⁵ *Ibid.*, p. 10, para. 30.

¹⁶⁶ *Ibid.*, para. 29.

¹⁶⁷ United Nations Security Council. *Resolution 1540 (2004), Adopted by the Security Council at its 4956th meeting, on 28 April 2004*, S/RES/1540 (2004). Available on: [https://undocs.org/en/S/RES/1540\(2004\)](https://undocs.org/en/S/RES/1540(2004)). Accessed September 23, 2018. See also Arms Control Association. Igor Khripunov, A work in progress: UN Security Resolution 1540 after 10 Years, available on: https://www.armscontrol.org/act/2014_05/A-Work-in-Progress-UN-Security-Resolution-After-10-Years. Accessed September 23, 2018.

¹⁶⁸ United Nations Security Council. *Resolution 1540 (2004)*, Adopted by the Security Council at its 4956th meeting on 28 April 2004, S/RES/1540 (2004). Available on: [https://undocs.org/S/RES/1540\(2004\)](https://undocs.org/S/RES/1540(2004)). Accessed September 23, 2018.

¹⁶⁹ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp->

acknowledging that the resolution 1540 (2004) does not cover specifically armed drones, its effectiveness in creating a legal framework for their use is limited. Although the resolution 1540 (2004) has been reviewed and its goals reaffirmed by several following UN Security Council's resolutions¹⁷⁰, the need for more specific multilateral legal instrument has been recognized by the United Nations Office for Disarmament Affairs.¹⁷¹ Although as a legal instrument that creates binding obligations to all UN member states under Chapter VII¹⁷², it is a fact that the resolution 1540 (2004) addresses the threat caused by the proliferation of unmanned aerial vehicles only implicitly, and does not address the legal validity of the use of armed drones by states.

Wassenaar Arrangement

The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (the Wassenaar Arrangement)¹⁷³ was adopted in 1995 and has 42 participating states.¹⁷⁴ It aims at reinforcing the control over the proliferation of weapons of mass destruction, including their delivery systems, by a state or a group of states or terrorist groups.¹⁷⁵ It includes a list of guidelines¹⁷⁶ to which the participating states have agreed to adhere to as well as the list of dual-use goods¹⁷⁷ the proliferation of which shall be prevented

[content/uploads/assets/publications/more/drones-study/drones-study.pdf](https://www.un.org/en/sc/1540/resolutions-committee-reports-and-SC-briefings/security-council-resolutions.shtml). Accessed April 9, 2018. See also United Nations Security Council resolutions of 1540 Committee, available on: <https://www.un.org/en/sc/1540/resolutions-committee-reports-and-SC-briefings/security-council-resolutions.shtml>. Accessed May 15, 2019.

¹⁷⁰ United Nations Security Council. *Non-proliferation of weapons of mass destruction resolution*, S/RES/1673 (2006). Available on: [https://undocs.org/S/RES/1673\(2006\)](https://undocs.org/S/RES/1673(2006)). Accessed May 18, 2019. See also United Nations Security Council. *Non-proliferation of weapons of mass destruction resolution*, S/RES/1810 (2008). Available on: [https://undocs.org/S/RES/1810\(2008\)](https://undocs.org/S/RES/1810(2008)). Accessed May 18, 2019. See also United Nations Security Council. *Non-proliferation of weapons of mass destruction resolution*, S/RES/1977 (2011). Available on [https://undocs.org/S/RES/1977%20\(2011\)](https://undocs.org/S/RES/1977%20(2011)). Accessed May 18, 2019. See also United Nations Security Council. *Non-proliferation of weapons of mass destruction resolution*, S/RES/2055 (2012). Available on: [https://undocs.org/S/RES/2055\(2012\)](https://undocs.org/S/RES/2055(2012)). Accessed May 18, 2019. See also United Nations Security Council. *Non-proliferation of weapons of mass destruction resolution*, S/RES/2325 (2016). Available on: [https://undocs.org/S/RES/2325\(2016\)](https://undocs.org/S/RES/2325(2016)). Accessed May 15, 2019. See also 1540 Committee, Security Council Committee established pursuant to resolution 1540 (2004). Available on: <https://www.un.org/en/sc/1540/about-1540-committee/general-information.shtml>. Accessed September 23, 2018.

¹⁷¹ United Nations. *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, pp. 27-28, para. 21. Available on: <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>. Accessed September 23, 2018.

¹⁷² Arms Control Association. Igor Khripunov, A work in progress: UN Security Resolution 1540 after 10 Years, available on: https://www.armscontrol.org/act/2014_05/A-Work-in-Progress-UN-Security-Resolution-1540-After-10-Years. Accessed September 24, 2018.

¹⁷³ Wassenaar Arrangement Secretariat. *The Wassenaar Arrangement, Founding documents*. Available on: <https://www.wassenaar.org/app/uploads/2015/06/WA-DOC-17-PUB-001-Public-Docs-Vol-I-Founding-Documents.pdf>. Accessed September 23, 2018.

¹⁷⁴ List of participating states in alphabetical order: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Slovakia, Slovenia, Spain, South Africa, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States.

¹⁷⁵ Wassenaar Arrangement Secretariat. *The Wassenaar Arrangement, Founding documents*. Available on: <https://www.wassenaar.org/app/uploads/2015/06/WA-DOC-17-PUB-001-Public-Docs-Vol-I-Founding-Documents.pdf>. Accessed September 23, 2018.

¹⁷⁶ *Ibid.*, p. 6, para. 7.

¹⁷⁷ Wassenaar Arrangement Secretariat. *The Wassenaar Arrangement, Founding documents*. Available on: <https://www.wassenaar.org/app/uploads/2015/06/WA-DOC-17-PUB-001-Public-Docs-Vol-I-Founding-Documents.pdf>. Accessed September 24, 2018.

and export of which shall be controlled by each participating state through their national legislation.¹⁷⁸ The Wassenaar Arrangement serves as a good reference point for classification of dual-use goods and technologies and also includes a definition of unmanned aerial vehicles which is as follows:

unmanned aerial vehicles, specially designed, modified or equipped for military use including electronic warfare, suppression of air defence systems, or reconnaissance missions, as well as systems for the control and receiving of information from the unmanned aerial vehicles.¹⁷⁹

Participating states meet regularly at the headquarters of the Wassenaar Arrangement to review the list and discuss the continuous implementation process of the goals set by the Wassenaar Arrangement through national legal and political instruments. However, its limited territorial scope in comparison to the Resolution 1540 (2004) can be considered as a disadvantage in reaching the aim of non-proliferation of dual-use goods and technologies not only globally but also by the participating states themselves. Instead, the limited list of participating states of Wassenaar Arrangement illustrate the willingness of states already adhering to international order to cooperate in further precipitating the fight against terrorism by constraining the proliferation of weapons of mass destruction through export controls. Moreover the Wassenaar Arrangement the same as UN Security Council Resolution 1540 (2004) is exclusively aimed at proliferation of weapons of mass destruction, therefore cannot be considered as either validating or invalidating the use of armed drones by states in the fight against terrorism. The Wassenaar Arrangement can only be a reference point for distinguishing various types of drones and for giving a picture of attempts at international level to limit the illegal proliferation of weapons, however it is not directly helpful in resolving the question of validity of their use by states, as it covers the validity of certain types of conventional arms, dual-use goods and technologies, but not their use for the purposes to combating terrorism, including targeted killings outside battlefields.

EMERGENCE OF INTERNATIONAL CUSTOMARY LAW

Acknowledging that the provided international legal framework discussed in previous chapters does not bring a clear answer on whether the use of armed drones, also known as armed unmanned aerial vehicles, is legal under international codified law, it becomes relevant to test whether the use of armed drones against non-state actors could be possibly recognized under international customary law. On the basis of this assumption the author will further discuss in detail all the elements that could play part in determination of emerging or existing international customary law.

Elements considered in the formation of international customary law

Traditionally the two main elements considered in the formation of international customary law are the state practice and *opinio juris*.¹⁸⁰ The guidelines for identification of customary

¹⁷⁸ The Wassenaar Arrangement. About us. Available on: <https://www.wassenaar.org/about-us/>. Accessed September 23, 2018.

¹⁷⁹ The Wassenaar Arrangement Secretariat. *The Wassenaar Arrangement, Founding documents*. Available on: <https://www.wassenaar.org/app/uploads/2015/06/WA-DOC-17-PUB-001-Public-Docs-Vol-I-Founding-Documents.pdf>. Accessed September 23, 2018.

international law are issued and once more confirmed by the International Law Commission¹⁸¹ in 2018. It is generally accepted that the state practice, also known as the objective element¹⁸², to serve as an evidence of existing customary law, must be widespread,¹⁸³ whereas the *opinio juris*, also known as the subjective element¹⁸⁴, although relevant in determination of international customary law, subject to the Article 38 and 59 of the Statute of the International Court of Justice, serves as a subsidiary means in its determination.¹⁸⁵ For the purposes of this research it is relevant to understand what are the steps to prove the existence of an international customary law, which might have emerged, but has not been codified yet, therefore the author will further focus on the characterization of the main elements, i.e. state practice and *opinio juris*, afterwards discussing their significance in the light of fundamental change that might accelerate the formation of a new international customary law.¹⁸⁶ Although *opinio juris* might have only secondary relevance in determination of a new customary law, recognizing that the declaration of a new international customary law usually takes place through the international adjudication or resolutions with crystallizing or declarative effect, is crucial for understanding what are the possibilities of emergence of a new customary law to be declared in case there is a lack of widespread practice or the practice is known only within a short period of time.

Since laws are generally made as a reaction to change in circumstances, e.g. introduction of new supervisory rules in the light of the growing money-laundering cases in the European Union, it is reasonable to assume that international customary law would also have to emerge as a reaction to fundamental change of political nature in the *status quo* of states that have resulted in the change of state practices.

Evidence of uniform state practice

As a general rule, for a new international customary law to be declared state practice shall not only be widespread, but also uniform in its application by various states. By uniform here is meant the repetitious nature of practice that is the same or similar in comparison to one another, in order for a certain consistency to be established.¹⁸⁷ The International Court of Justice in its judgments, which in individual cases may be paramount for declaration of a customary international law, has referred to the nature of uniform state practice as enough to be “sufficiently similar”¹⁸⁸ for the purposes of declaration of a new customary law.¹⁸⁹

¹⁸⁰ Michael P. Scharf, “Accelerated Formation of Customary International Law”, *ILSA Journal of International and Comparative Law* 305 (2014): pp. 305, 311. Available on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2479410. Accessed April 22, 2019.

¹⁸¹ International Law Commission. *Draft conclusions on identification of customary international law, with commentaries, 2018*. Available on: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf. Accessed May 19, 2019.

¹⁸² Scharf, “Accelerated Formation of Customary International Law”, p. 311.

¹⁸³ *Ibid.*, p. 305.

¹⁸⁴ *Ibid.*, p. 311.

¹⁸⁵ United Nations. *Statute of the International Court of Justice*. Available on: <https://www.icj-cij.org/en/statute>. Accessed April 22, 2019.

¹⁸⁶ Scharf, “Accelerated Formation of Customary International Law”, p. 306.

¹⁸⁷ *Ibid.*, p. 315.

¹⁸⁸ *Ibid.* See also *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, p. 74, paras. 13, 33, 34, 100 (June 3).

¹⁸⁹ Scharf, “Accelerated Formation of Customary International Law”, p. 315. See also *Anglo-Norwegian Fisheries, U.K. v. Norway*, Order, 1951 I.C.J. 117 (Jan. 18)

Two questions remain subject to interpretation: 1) how many states should apply the same practice in order for it to be declared as widespread, and 2) by how much the practices of one or several states can differ in order to still declare them as uniform, i.e. what are the principles to define similarity of certain practices?

The conclusion which follows is that in order to establish that a new customary has emerged one should look at numerous practices by various states which are sufficiently similar leaving the final conclusion subject to interpretation by international tribunals in the absence of a UNGA resolution with a declarative effect.

Existence of *opinio juris*

The *opinio juris*, also known as subjective element, even though being contingent on the existence of state practices and therefore playing secondary role in establishing the emergence of a customary international law, has nevertheless a determinant role in declaring the existence of such a rule.¹⁹⁰ The two most important sources of *opinio juris* would be the judgments of international tribunals as an authoritative source and the UNGA resolutions adopted by the member states of the United Nations as an expression of the intention of the states to abide by a certain rule.¹⁹¹ Whereas, judgments of the international tribunals may be definitive and final in declaring the existence of a new rule, therefore binding to all member states subject to the tribunal's jurisdiction, UNGA resolutions might leave larger space for interpretation, and the final effect of a certain resolution might be dependent not only on the declarative or crystallizing effect of it, but also on the language used, the practices of states relied on when adopting it, and the vote outcome that may express the unity of states in giving their support to the adoption of a new international customary rule.

Ideally in order to reach a conclusion on whether on the basis of the existing *opinio juris* there can be identified the formation of a customary international law the establishment of such a rule would be based on a judgment of an international tribunal or a UNGA resolution which has a declarative effect, clear language and majority vote outcome. Following the research question, in order to establish the existence of an international customary law, which authorizes the use of a distinct type of warfare, e.g. armed drones, for anti-terrorism purposes against non-state actors in another states territory, one should find a sufficiently determinant judgment of an international court or base the conclusion on the UNGA resolutions in a short or extended period of time.

In this particular case it may also be relevant that at least at the moment such a rule may not be accepted by all the member states of the United Nations neither to be declared to be applicable to all the member states. Rather only to those which possess the technology¹⁹² or which are already involved in the practices of the use of armed drones for counter-terrorism purposes, both from the perspective of attacking states and the states on whose territory the attacks have been carried out. Although the possibility to localize an international customary rule also remains subject to interpretation in case a customary international rule the existence of which would be determined by the practices of a few states would then become abiding to the international community as a whole.¹⁹³

¹⁹⁰ Scharf, "Accelerated Formation of Customary International Law", p. 327.

¹⁹¹ *Ibid.*, p. 311. See also *Nuclear Weapons*.

¹⁹² Scharf, "Accelerated Formation of Customary International Law", p. 311.

¹⁹³ *Ibid.*, p. 317.

Accelerated formation

Accelerated formation of international customary law may refer to “international constitutional moment” or “Grotian moment”¹⁹⁴. While both refer to fundamental change in circumstances that may trigger the creation of a new rule, the former is more suitable to describe constitutional developments, whereas the latter would more likely refer to transformation of an international law in general, including creation of a new international customary law.¹⁹⁵

Short time-frame and few practices

A few examples of accelerated formation of international customary law are known in the history of international law which could be recognized as “Grotian Moment”^{196,197}. Among these examples is the formation of outer space law in the form of the “Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space” adopted by the UNGA¹⁹⁸. The other example is the formation of the principle of “Responsibility to Protect” as a response to humanitarian crises following the NATO intervention in 1999 in Serbia to eliminate the possibility of a Kosovar Albanian genocide to take place.¹⁹⁹ Last but not least, another example of an accelerated formation of customary law is the crystallization of concept of individual criminal responsibility during the Nuremberg trials, making individuals the subjects of international criminal law in comparison of states being the only subjects as it was prior to the Nuremberg trials.²⁰⁰ From the concept of individual criminal responsibility later the doctrine of joint criminal enterprise (JCE) was elaborated.²⁰¹

Role of General Assembly resolutions

Along the judgments of international tribunals, UNGA resolutions are the next authoritative source for determining the emergence or existence of a new international customary rule.²⁰² While being an authoritative source, UNGA resolutions may have declarative or crystallizing effect with respect to the formation of international law, bringing different results. At the same time, the *language used* [emphasis added] in a resolution and the *vote outcome* [emphasis added]²⁰³ for a resolution may also have an effect in determining the degree of

¹⁹⁴ Scharf, “Accelerated Formation of Customary International Law”, pp. 307-308.

¹⁹⁵ *Ibid.*, p. 308.

¹⁹⁶ Scharf, “Seizing the “Grotian Moment””, pp. 443-445, 467-468.

¹⁹⁷ *Ibid.*, p. 450.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*, pp. 450-451.

²⁰⁰ *Ibid.*, pp. 454, 468. See also Frank Lawrence, “The Nuremberg Principles: A Defense of Political Protesters” *Hastings Law Journal*, Vol 40 (1989) pp. 397, 408-410, available on: https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2965&context=hastings_law_journal. Accessed May 13, 2019. See also Leila Nadya Sadat, *Enemy Combatants After Hamdan & Rumsfeld: Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 Geo. Wash. L. Rev. pp. 1200, 2016-07 (2007).

²⁰¹ Scharf, “Seizing the “Grotian Moment””, p. 459. See also Allison M. Danner and Jenny S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law” *California Law Review*, Vol 93 (2005), available on: <https://doi.org/10.15779/Z38VD8H>. Accessed May 17, 2019.

²⁰² Scharf, “Accelerated Formation of Customary International Law”, p. 306.

²⁰³ *Ibid.*, p. 327.

authority of a certain resolution, respectively having higher or lower impact on declaring or crystallizing the emergence of a new rule. All of these elements will be in short described in the following chapters.

Declarative or crystallizing effect

As already mentioned, there are two types of UNGA resolutions that may most likely help to determine the emergence of a new international customary rule – resolutions with declarative and crystallizing effect. While the former may sound as having affirmative character, the latter might be less assertive depending on the circumstances in which the resolution is adopted. It is known that historically the crystallization of new customary norm has in most of the cases taken decades,²⁰⁴ whereas UNGA resolutions may have an instant impact on crystallization or declaration of an emergent rule.²⁰⁵ Sources also refer to the theory of “instant custom”, on the basis of which a new international customary rule would be established instantly after a majority vote of a resolution²⁰⁶, however this theory meets with criticism²⁰⁷. While the line between both, resolution with a declarative and with a crystallizing effect, might be blurry and most likely would depend on the language used, it is important to keep in mind that, in general, since the UNGA is vested only with the power to recommend²⁰⁸, then both types of resolutions most likely will not be able to generate a new international customary law.

Nevertheless, in the case the existence or emergence of a new customary norm of international law cannot be confirmed on the basis of judgments issued by international tribunals or Security Council resolutions, which are binding to all United Nations member states²⁰⁹, then the UNGA resolutions with a declarative or crystallizing effect might be used as a source of affirmation that a new rule is emerging. However, these resolutions alone would not be sufficient to determine the existence of a new rule²¹⁰ and therefore the legal validity of certain activities, e.g. the use of armed drones for counter-terrorism purposes, only on the basis of those resolutions could not be established.

Vote outcome

The vote outcome might result in unanimous vote, majority vote or minority vote. While the minority vote would unlikely serve as a basis to crystallize an emergent rule, a unanimous or majority vote could have an effect in defining the emergence of a new international customary law.²¹¹ However, not only the quantitative element, but also the qualitative element, understood as the reasoning behind the vote,²¹² can be taken into account when assessing the law-generating effect of a resolution. E.g., some votes might be purely formal, done to avoid

²⁰⁴ Scharf, “Accelerated Formation of Customary International Law”, p. 306

²⁰⁵ *Ibid.*, p. 326.

²⁰⁶ *Ibid.*, p. 324. *See also* South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, p. 6. Khurshi Iqbal, The Right to Development in International Law: The Case of Pakistan 120 (2010), dissenting opinion in the South West Africa Cases (*Ethiopia v. South Africa*), 1966 I.C.J. Rep. paras. 248, 291-293.

²⁰⁷ Scharf, “Accelerated Formation of Customary International Law”, pp. 324-326.

²⁰⁸ *Ibid.*, p. 324.

²⁰⁹ United Nations. *United Nations Charter*, arts. 10-11.

²¹⁰ Scharf, “Accelerated Formation of Customary International Law”, p. 326. *See also* Anthea Elizabeth Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation”, *American Journal of International Law Vol 95 (2001)* 95: p. 757, accessed May 21, 2018, <https://doi.org/10.2307/2674625>.

²¹¹ Scharf, “Accelerated Formation of Customary International Law”, p. 327.

²¹² *Ibid.*, pp. 325-327.

braking consensus or to keep with the former practices, the same as in case of some resolutions state may choose to object or abstain from voting.²¹³ Therefore the vote outcome similarly as other elements playing part in the determination of emergence of new customary rule cannot be taken into account isolated from other objective and subjective elements.

Language

When assessing the impact of a certain UNGA's resolution on the determination of an emerging customary rule, the language is another element that plays part, but at the same proportionally to other elements, including objective ones, is relatively insignificant. One reason for this is that in order to reach consensus, the language is stretched and generalized to the maximum. Another reason is that the language used in resolutions might be far-fetched from reality, i.e., not directly related to practices of states.²¹⁴

PRACTICES ON THE USE OF ARMED DRONES

The practices of states which will be in brief described in the following chapters cannot provide a full picture of all the attacks by armed drones carried out against non-state actors in another states territory for counter-terrorism purposes by each state. The practices chosen demonstrate the pattern which is continuously evolving, but is not yet known to be determined as a practice that would have emerged into a new customary international law, eventually allowing these attacks to be affirmed as legally valid under international law.

United States

Actions taken against non-state actors

The first instrument that can be interpreted as allowing the use armed drones for counter-terrorism purposes in the US is the Joint Resolution on the Authorization to Use Military Force by the US Congress²¹⁵ which was adopted shortly after the 9/11 attacks in the territory if the US by terrorist group al-Qaeda.²¹⁶ Although it does not directly mention the use of armed drones or any other particular military methods, it contains authorization of a broad scope, giving the permission "to use all necessary and appropriate force"²¹⁷ in exercising rights of self-defence, an authorization under which also the use of armed drones can easily fall.

Since then the US have gradually expanded the use of armed drones for targeted killings as a lethal force against non-state actors within the context of counterterrorism

²¹³ Scharf, "Accelerated Formation of Customary International Law", p. 327.

²¹⁴ *Ibid.*, p. 326. See also Roberts, "Traditional and Modern Approaches to Customary International Law", p.757.

²¹⁵ Senate and House of Representatives of the United States of America. *Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States*, S.J.Res. 23 (September 18, 2001). Available on: <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>. Accessed May 15, 2019.

²¹⁶ Cortright and Fairhurst, "Drone Warfare", p. 11.

²¹⁷ Senate and House of Representatives of the United States of America. *Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States*, S.J.Res. 23 (September 18, 2001). Available on: <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>. Accessed May 15, 2019.

operations, for the most part engaging the use of armed drones in Iraq and Afghanistan. However, the first known use of remotely piloted aircraft, i.e. armed drone, by the US for the purposes of targeted killing as a response to 9/11 attacks took place on 3 November 2002 in Yemen killing one of the al-Qaeda leaders.²¹⁸

Apart from the fact that US have carried out attacks for counterterrorism purposes against non-state actors in the territories of another states, it is also important to acknowledge the difference between those cases when the authorization of the state on whose territory the attacks were carried out was not given and those cases in which the authorization by the state was actually given. Among such states have been Pakistan, Yemen and Somalia.²¹⁹ However, in case of Pakistan and Yemen, there is evidence that both of these countries withdraw their consent later. Pakistan did it in spring 2012 following a parliamentary vote.²²⁰ Following this decision by Pakistan, however, the US kept carrying out armed drone attacks on the territory of Pakistan.²²¹ Similarly Yemen denounced its consent for the US military using armed drones on their territory at the end of 2013 by adopting a resolution that pronounced a halt to drone strikes.²²²

Opinio juris

In finding any evidence of the existence of *opinio juris* that would support the practice to use armed drones in the fight against terrorism targeting non-state actors in another state's territory, the author focused on the possibility to find available decisions or judgments on the subject issued by international tribunals and the UNGA resolutions concerning the fight against terrorism or the use of armed drones specifically.

In short, the author concluded that there is no case law available at the moment issued by any of the international tribunals or the International Court of Justice, that would adjudge the legality of the use of armed drones for targeted killings or mention the possibility of emerged international customary law with regard such practices. However, there have been several attempts to challenge the US drones strikes in courts at national level, e.g., in Pakistan²²³, UK²²⁴ and the US²²⁵ itself. In case of the judgment issued by the High Court of

²¹⁸ Office of the United Nations High Commissioner for Human Rights. *Study on targeted killings*, para. 29. Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 19, 2018. See also Jane's 360. Yemen Drone Strike: Just the Start, available on:

http://www.janes.com/aerospace/military/news/jdw/jdw021108_1_n.shtml. Accessed April 16, 2018.

²¹⁹ *Supra* notes 53, 105. See also Heyns, Akande, Hill-Cawthorne and Chengeta, "Use of Armed Drones", p.797.

²²⁰ Cortright and Fairhurst, "Drone Warfare", p.15. See also New York Times. Pakistan Gives U.S. a List of Demands, Including an End to C.I.A. Drone Strikes, available on: <https://www.nytimes.com/2012/04/13/world/asia/pakistan-demands-an-end-to-cia-drone-strikes.html>. Accessed May 4, 2018.

²²¹ Cortright and Fairhurst, "Drone Warfare", p. 15.

²²² *Ibid.*, p. 16. See also Reuters. Yemeni Parliament in Non-binding Vote against Drone Attacks (December 15, 2013). Available on: <https://www.reuters.com/article/us-yemen-drones/yemeni-parliament-in-non-binding-vote-against-drone-attacks-idUSBRE9BE0EN20131215>. Accessed May 4, 2018.

²²³ Judgment issued by the Peshawar High Court on 11 April 2013 in the Writ Petition No. 1551-P/2012. Available on: https://www.peshawarhighcourt.gov.pk/image_bank/Mr_Justice_Dost_Muhammad_Khan/wp1551-12.pdf. Accessed May 16, 2019.

²²⁴ United Kingdom High Court of Justice, Queen's Bench Division Case "*The Queen on the application of Noor Khan v. Secretary of State for Foreign and Commonwealth Affairs*", Case No CO/2599/2012. Available on: <https://opil.ouplaw.com/view/10.1093/law/ildc/1965uk12.case.1/law-ildc-1965uk12?prd=OPIL>. Accessed May 16, 2019.

Pakistan, the court declared that the practices of the US to carry out drone strikes in the territory of Pakistan are illegal under international law, whereas in the cases brought before the courts of UK and US, in the former the claim was rejected on the basis of the lack of jurisdiction, and in the latter the claim was dismissed on the basis of political question doctrine.

The most recent court proceedings in which the US drone strikes have been challenged at national level concern two cases brought at the Higher Administrative Court of North Rhine-Westphalia in Münster, Germany.²²⁶ Although these two recent cases are not brought before an international tribunal either, the author would like to use them for the purposes of this research to stress the significance of the subject and the fact that there can be seen an ongoing search of the ways how to make the US responsible for the drone strikes it has carried out over the years. While the previously mentioned cases did not bring any significant repercussions to the US, in the two ongoing case brought before the court in Germany the result is yet unknown. In both cases brought before the German court, the US armed drone program launched from the military base Ramstein Air Base located in the territory of Germany has been challenged. In one case a plaintiff challenges the program carried out in the Middle East, Yemen, and in the other case another plaintiff is challenging the program carried out in East Africa, namely Somalia.²²⁷ In comparison to the previously recorded cases in which the US drone strikes were challenged, in the case of Yemen there is a reason to believe that the plaintiffs might have taken significant steps in trying to establish the causal link between the victims, the air base from which the armed drones were launched and the pilots who control the systems remotely, including on the basis of data transfers.²²⁸

When taking a look at the UNGA resolutions on the subject, the author did not find resolutions condemning the use of armed drones for the purpose of targeted killings by the US. However, one of the most relevant resolution found regarding the subject is the UNGA resolution A/RES/60/288²²⁹ by which the United Nations Global Counter-Terrorism Strategy was adopted by consensus in 2006, is reviewed every two years, and consists of four pillars as follows: 1) Addressing the Conditions Conducive to the Spread of Terrorism; 2) Preventing and Combatting Terrorism; 3) Building States' capacity and strengthening the role of the United Nations; 4) Ensuring Human rights and the rule of law²³⁰. The annex of the UNGA

²²⁵ *Ahmed Salem Bin Ali Jaber v. United States*, Judgment of the U.S. Court of Appeals for the D.C. Circuit issued on 30 June 2017. Available on: [https://www.cadc.uscourts.gov/internet/opinions.nsf/55ACB57812F8FC918525814F00517DA6/\\$file/16-5093-1682112.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/55ACB57812F8FC918525814F00517DA6/$file/16-5093-1682112.pdf). Accessed May 16, 2019.

²²⁶ European Center for Constitutional and Human Rights. *Important judgment: Germany obliged to scrutinize US drone strikes via Ramstein*. Available on: <https://www.ecchr.eu/en/case/important-judgment-germany-obliged-to-scrutinize-us-drone-strikes-via-ramstein/>. Accessed May 16, 2019.

See also Lawfare. *German Courts Weigh Legal Responsibility for U.S. Drone Strikes*, available on: <https://www.lawfareblog.com/german-courts-weigh-legal-responsibility-us-drone-strikes>. Accessed May 15, 2019.

²²⁷ Lawfare. *German Courts Weigh Legal Responsibility for U.S. Drone Strikes*, available on: <https://www.lawfareblog.com/german-courts-weigh-legal-responsibility-us-drone-strikes>. Accessed May 15, 2019.

²²⁸ European Center for Constitutional and Human Rights. *Legally, what shared responsibility does Germany have for the US drone war*, available on: https://www.ecchr.eu/fileadmin/Q_As/QA_Drones_Yemen.pdf. Accessed May 16, 2019.

²²⁹ United Nations. *Resolution adopted by the General Assembly on 8 September 2006, A/RES/60/288*. Available on: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/288. Accessed May 16, 2019.

²³⁰ United Nations Office of Counter-Terrorism. *UN Global Counter-Terrorism Strategy*, available on: <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>. Accessed May 16, 2019.

resolution A/RES/60/288 contains a plan of action and its second section, i.e. the second pillar of the UN Global Counter-Terrorism Strategy lays down measures to prevent and combat terrorism. The last review of the UN Global Counter-Terrorism Strategy was adopted by the UNGA's resolution A/RES/72/284²³¹ on 26 June 2018, which among other states that

[r]ecognizing that international cooperation and any measures taken by Member States to prevent and combat terrorism, as well as to prevent violent extremism as and when conducive to terrorism, must fully comply with their obligations under international law, including the Charter, in particular the purposes and principles thereof, and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law.²³²

The author would like to stress that according to this review of the Global Counter-Terrorism Strategy it can be once more ascertained that no matter what measures are taken by states to combat or *prevent* terrorism, they should all comply with the international law, including and in particular international human rights law, refugee law and international humanitarian law.

Finally, although it may not count as *opinio juris*, the following commentary is relevant to demonstrate the stance of the US in a generalized manner. It is suggested by a former Central Intelligence Agency's (CIA) director John Brennan, that

[t]here is nothing in international law that bans the use of remotely piloted aircraft ... or prohibits us from using lethal force against our enemies outside of an active battlefield.²³³

However, this statement runs against the limitations on the use of force under the use of force law. Nevertheless, the US Government justifies the right to perform targeted killings with the right to self-defence under the use of force law, assuming that the US is or has been involved in an armed conflict with the terrorist organizations on the basis of international humanitarian law according to which terrorists would be unlawful combatants if the criteria for an international armed conflict are fulfilled.²³⁴

Disregarding of the examples demonstrated that speak on the counter-terrorism and the use of armed drones, it must be concluded that there is a lack of *opinio juris*, that would directly address the issue of US armed drones strikes for counter-terrorism purposes carried out in another states territory on the basis of which it could be concluded that due to the practices of the US a new customary international law has emerged that renders such activities legal. Rather there is new evidence on stronger response from the international community which demonstrates objection to these practices and search alternative, comprehensive and more sophisticated methods of countering terrorism.

Response from the international community

Disregarding the conclusion already made in the previous chapter the author would like to further the discussion by stressing that the US fight against terrorism shall be put under scrutiny once more by paying attention to the fact that it has evolved from the fight against al-

²³¹ United Nations General Assembly. *The United Nations Global Counter-Terrorism Strategy Review*, A/RES/72/824. Available on: <https://undocs.org/pdf?symbol=en/A/RES/72/284>. Accessed April 15, 2018.

²³² *Ibid.*

²³³ Plaw, Fricker and Colon, "Debate over Legality", p. 113. *See also* Woodrow Wilson International Center for Scholars, John O. Brennan. The Efficacy and Ethics of U.S. Counterterrorism Strategy, speech, DC, April 30, 2012. Available on: <https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>. Accessed May 2, 2019.

²³⁴ Office of the United Nations High Commissioner for Human Rights. *Study on targeted killings*, para. 29. Available on: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. Accessed April 16, 2018.

Qaeda. The initial motivation to carry out attacks has been born from circumstances of heightened pressure as an act of self-defence against one particular terrorist organization. The end result seems to be that it has become a practice of the US to use armed drones in fight against various non-state actors, i.e. terrorist organizations, in another states territory long after the actual events due to which the practice emerged have taken place. In these situations the threat is no longer imminent, therefore such attacks cannot be considered as to be carried out in self-defence, but rather adopted as a preventive practice.

In the years following the 9/11 attacks there has been a tendency by the US to put the organized groups of terrorists or associated forces under the label of al-Qaeda, therefore claiming that *on the basis of aggravated violence and sufficient level of organization* [emphasis added] there are reasonable grounds to attack the terrorist groups²³⁵. Research shows that the US has failed to distinguish between actual terrorist organizations and the many insurgent groups that are active in the regions where the counterterrorism operations have been carried out, including Yemen and Pakistan. As a result combatants not directly involved in any form of armed conflict might have been killed during the anti-terrorism operations by using armed drones.²³⁶ Later on there has been a tendency to do the same with regard to the fight against the Islamic State in Iraq and Syria, i.e. ISIS.²³⁷

Even more, the practice of the US shows that the standard of imminence established under the use of force law has been replaced by the standard of probability²³⁸, thereby attempting to justify targeted killing with the use of remotely piloted aircraft, i.e. armed drones in another states territory. Such a change in the standard creates both legal and moral problem in justifying the attacks. Acknowledging that killing as a *post factum* act cannot be justified either under use of force law or under international humanitarian law²³⁹, the only standard according to which the act would be legitimate is the standard of imminence.

The concern brought up by some authors is the risk that within the decision-making process on whether a targeted killing shall be carried out concepts such as “imminence” and legal target in accordance with the principle of distinction, are interpreted too broadly.²⁴⁰ As a result legitimizing an attack that would otherwise be seen as disproportional to the military advantage it was aiming at and also the threat faced by the US.

United Kingdom

Actions taken against non-state actors

The practices of the UK to use armed drones in countering terrorism seem to be less controversial than the ones of the US or at least less heard. According to the officially released information by the Ministry of Defence of the UK, some drones, both armed and unarmed have been deployed in Afghanistan over the years and used mostly for the

²³⁵ Heyns, Akande, Hill-Cawthorne and Chengeta, “Use of Armed Drones”, p. 809.

²³⁶ Cortright and Fairhurst, “Drone Warfare”, p. 15.

²³⁷ *Ibid.*, p. 1.

²³⁸ *Ibid.*, p. 12.

²³⁹ Welsh, “Drone Warfare”, p. 30.

²⁴⁰ Barela, “Creating a Drone Court”, pp. 20 – 21.

intelligence purposes to support the military forces on the ground.²⁴¹ Similarly military drones have been deployed in Iraq and Syria in an effort to support the fight against Daesh.²⁴² However, more precise information on the deployment of armed drones and the purposes for their use are not made known publicly subject to the duty not to disclose military information due to security concerns.²⁴³

Even though in most of the cases the UK practices the use of drones for intelligence purposes by supporting ground forces, there is an occasion of the use of armed drones for counter-terrorism purposes which should be brought to the attention. It is the drone strike of 21 August 2015 in which the UK targeted an Islamist terrorist Reyaad Khan, a British citizen, and two other his associates in Syria, as confirmed by the statement of 7 September 2015 of the Prime Minister of the UK at that time, Mr. David Cameron.²⁴⁴ This targeted attack with the use of armed drone was the first time known that the UK carried out a targeted drone strike outside of an armed conflict in another states territory without being engaged in war with that country, i.e. outside of armed conflict.²⁴⁵ However, until today there are no known cases of repetitious drone strikes as the one targeted against the Islamist terrorist.

Opinio juris

When looking at the possible judgments of international tribunals, also in the case of UK there are no known accounts of proceedings brought at international level. One of the reasons could be the fact that in the known cases against the practices of armed drones used for targeted killings the plaintiffs are individuals, which are not subjects under international law. For the case to be brought to an international tribunal the parties should traditionally be states, but definitely not individuals. Until the dispute on the use of armed drones for targeted killings does not arise between two states, it is unlikely that the emergence of a new customary international rule would be established on the basis of case law, since judgments issued by national courts could only serve as a reference point for interpretation purposes, but would not become binding internationally.

However, it can be mentioned here that there is a case²⁴⁶, brought in the national courts of the UK, in which a drone strike has been challenged. The case *The Queen on The*

²⁴¹ Government of the United Kingdom, press release. “New RAF Reapers take to the skies”, available on: <https://www.gov.uk/government/news/new-raf-reapers-take-to-the-skies>. Accessed May 18, 2019.

²⁴² Government of the United Kingdom, press release. “Defence Secretary visits UK personnel taking the fight to Daesh”, available on: <https://www.gov.uk/government/news/defence-secretary-visits-uk-personnel-taking-the-fight-to-daesh>. Accessed May 18, 2019.

²⁴³ Parliament of the United Kingdom. Middle East: Military intervention: Written Question – 45011, available on: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-05/45011/>. Accessed May 18, 2019.

²⁴⁴ Parliament of the United Kingdom. House of Commons. *Statement by the Prime Minister on Syria: Refugees and counter-terrorism*, Column 25. Available on: <https://publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0001.htm#1509074000002>. Accessed May 18, 2019.

²⁴⁵ *Ibid.*, Column 30. See also Intelligence and Security Committee of Parliament of the United Kingdom. Report on *Drone Strikes in Syria*, 26 April 2017, p. 1, para. 3. Available on: <http://isc.independent.gov.uk/news-archive/26april2017>. Accessed May 19, 2019.

²⁴⁶ Case “*The Queen on the application of Noor Khan v. Secretary of State for Foreign and Commonwealth Affairs*”, *supra* note 227.

Application of Noor Khan v. The Secretary of State for Foreign and Commonwealth Affairs was brought to the High Court of the UK in 2012.²⁴⁷ The plaintiff was challenging the drone strike in Pakistan allegedly carried out by US military forces on the basis of the intelligence provided by the UK's drones within the scope of a coalition operation, which resulted in the death of the plaintiff's father. Unfortunately, substantive interpretation for the purposes of supporting the theory of an emerging international customary law could not be found within the judgment, since it the British High Court rejected it on the basis of lack of jurisdiction.

To continue, following the first known armed drone attack within the scope of counterterrorism operation carried out by the UK on 21 August 2015, soon after in May 2016 the UK's policy on the use of armed drones was published²⁴⁸, including the determination of the rules and principles for carrying out targeted killings abroad, i.e. in international conflicts, in non-conflict zones. The "new departure"²⁴⁹ that illustrates a change in the UK's government military strategy to counter terrorism at the same time serves as an example to show that the political choices at times may supersede the law regulating the area in the interests of the public. Even though, a national policy the same as judgments made by national courts, cannot determine the emergence of an international customary law, such policy can clearly serve as an evidence of the change of paradigm of practices on the use of military force by a state. What the government clearly stressed soon after the performed drone strikes was that the attack was absolutely necessary and proportionate in the face of threats imposed, and carried out as a response to an imminent threat.²⁵⁰

Even more, the drone strike led by the UK against Reyaad Khan in Syria on 21 August 2016 according to the Prime Minister "... was not a part of coalition military action against ISIL in Syria; it was a targeted strike to deal with a clear, credible and specific terrorist attack to our country at home."²⁵¹ From this statement it could already be derived that from the perspective of the government of the UK there was and is a difference between a targeted drone strike and an ordinary military action. Whereas the theory suggests that the use of armed drones should comply with both the *ius ad bellum* and IHL from which follows that the use of armed drones cannot be governed by different principles than any other military activity notwithstanding the type of target or the territory where the attack takes place. On this account the political statement that armed drone strike has not been part of a military action does not justify the use of armed drones in accordance with principles of necessity, proportionality and consent under *ius ad bellum* and principles governed by international humanitarian law.

²⁴⁷ Case "*The Queen on the application of Noor Khan v. Secretary of State for Foreign and Commonwealth Affairs*".

²⁴⁸ Parliament of the United Kingdom. *The Governments policy on the use of drones for targeted killings*, available on: <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>. Accessed March 25, 2018.

²⁴⁹ Parliament of the United Kingdom. House of Commons. *Statement by the Prime Minister on Syria: Refugees and counter-terrorism*, Column 30, available on: <https://publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0001.htm#1509074000002>. Accessed May 18, 2019.

²⁵⁰ *Ibid.*, Column 25.

²⁵¹ Parliament of the United Kingdom. *The Governments policy on the use of drones for targeted killings*. Available on: https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/57405.htm#_idTextAnchor014. Accessed March 25, 2018. See also Parliament of the United Kingdom. House of Commons. *Statement by the Prime Minister on Syria: Refugees and counter-terrorism*, Column 30, available on: <https://publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0001.htm#1509074000002>. Accessed March 25, 2018.

Moreover a report by the Ministry of Defence of the UK suggested that the incentive to justify certain military operations abroad had been based on availability of armed drones as it can eliminate the threat to the military personnel and add to the achievement of national security goals.²⁵² From that it can be derived that the moral justification for the decision to use armed drone in military operations was twofold, to reduce the risk to the military personnel and to reduce the incidental loss or harm to the civilian population by performing precise attacks to listed individuals.

Another subject for debate in the UK is the authority to give a decision to use force on another state's territory. Under international law such an authority may only be given to the head of the government, which in the case of the UK is the prime minister, and even then only if there is a situation of an armed conflict.²⁵³ Recognizing that the UK has been and still is involved in counterterrorism operations abroad and is also a frequent ally of the US in facilitating attacks, the debate on the authority of the decision to employ forces or perform an attack by using armed drones is crucial within the UK more from both the political perspective and from the legal one. There is a debate in the UK already since 2003 that the power to make a decision to deploy armed forces could be partially passed to the parliament of the UK.²⁵⁴ One limitation to such a rule that appears self-evident is that an armed attack as a response to an imminent threat shall be carried out instantly, therefore leaving no room for parliamentary debate. So far this initiative has not received support and the reform has not taken place.

All of the opinions and discussion mentioned in the paragraphs above are sources or evidence of formation of national policies in the UK with regard the use of armed drones and the counterterrorism activities in general. Although there is not a sufficient degree of certainty established that could affect the formation of an international customary law with respect of targeted killings, the vivid debate and policy documents available on national level demonstrate the importance of subject and provides varying interpretations for justification of targeted killings outside an armed conflict.

Response from the international community

In the case of the UK there has not been significant response from the international community with respect to the one occasion of a targeted killing. It could be explained with the fact that right after the attack the UK itself came up with a public statement, explaining the process, started the investigation procedures following the proposal from the government,²⁵⁵ and came up with several reports made by the respective authorities. Whereas with respect to the use of military drones for counterterrorism purposes providing intelligence

²⁵² Cortright and Fairhurst, "Drone Warfare", p. 10. See also United Kingdom Ministry of Defence. *The UK Approach to Unmanned Aircraft Systems Joint Doctrine Note 2/11*. Available on: <https://www.law.upenn.edu/live/files/3890-uk-ministry-of-defense-joint-doctrine-note-211-the>. Accessed May 22, 2019.

²⁵³ Cortright and Fairhurst, "Drone Warfare", p. 15.

²⁵⁴ Parliament of the United Kingdom. Parliamentary Approval for Military Action. Available on: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7166>. Accessed May 4, 2018.

²⁵⁵ Parliament of the United Kingdom. House of Commons. *Statement by the Prime Minister on Syria: Refugees and counter-terrorism*, Column 30, available on: <https://publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0001.htm#1509074000002>. Accessed May 18, 2019.

support, the highlight has been the case brought in court by a Pakistani national in relation to the military drone providing supportive intelligence information as part of coalition operation. In general, the procedures during and following the use of military drones by the UK seem to be quite transparent, as much as the situation allows, and therefore there has not been observed a relevant response from the international community.

CONCLUSION

Within the scope of the subject of the use of armed drones for counterterrorism purposes, the balance is to be found between the national security objectives of individual states and the state liability under international law. While from the perspective of the military objectives in relation to state security concerns the technological development of weapon systems, including the armed drones, is indispensable for ensuring everlasting or ever-growing security of a state²⁵⁶, from the perspective of normative ethics no use of force and therefore everything related with its enhancement through technological development can ever be morally justifiable.

The use of armed drones under the existing *ius ad bellum*, IHL and IHRL, can only be justified within the scope of established armed conflict, but not outside of an armed conflict. The *ius ad bellum* determines that an armed attack must meet the threshold of necessity and proportionality to count as legitimate, and limits the use of force by states on another states territory, except in the case of consent. The only exception to the compliance with the principles of necessity and proportionality of an armed attack, including targeted killing, under *ius ad bellum*, can be found under the pre-emptive self-defence doctrine in case of an imminent threat in the future. Whereas, for a targeted killing to be legitimate under the IHL, it can only take place within the context of an armed conflict as an act which is carried out against an individual in accordance with the principle of distinction and which is not excessive to the incidental loss caused in accordance with the principle of proportionality. Finally, IHRL would apply only in situations outside of an armed conflict.

On the basis of the existing practices and *opinio juris* it cannot be established that the use of armed drones for counter-terrorism purposes has emerged into a customary international rule, which would authorize the use of a distinct type of warfare, e.g. armed drones, against non-state actors in another state's territory. In the case of the US the use of drones is relatively common, however there is lack of transparency subject to duty not to disclose military information. Whereas in the case of UK, the practice has been carried out only once, but has instigated a public debate, providing a lot of potential sources for interpretation of the issue that could also amount to *opinio iuris*. Although this evidence of practices and *opinio juris* of both states alone accumulated together could serve as a basis of formulating new international customary law, viewed separately within the context of the national policies of each state, it is not possible to establish a new rule.

At the level of the UN, the emergence of a new international customary law on the use of armed drones has not been established, however a process of formulating the Global Counter-Terrorism Strategy is ongoing for more than 10 years. However, at this stage the formulation of principles and rules in fight against terrorism, in particular the use of armed drones for targeted killings, has not resulted in the formulation of a new customary international law. Rather the former practices to use armed drones for counter-terrorism are continuing, while more and more states and also non-state actors are acquiring in their possession armed drones, therefore even more increasing the need for a regulatory framework, that would reformulate the basic principles of *ius ad bellum* and IHRL, corresponding to today's needs.

²⁵⁶ Plaw, Fricker and Colon, "Debate over Legality", p. 2.

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