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I Target with My Little Eye...

Drones and Targeted Killing under the Scope of *Ius
In Bello*

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Faculdade de Direito | Escola do Porto

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DISSERTAÇÃO DE MESTRADO EM DIREITO INTERNACIONAL,
PÚBLICO E EUROPEU

FACULDADE DE DIREITO | ESCOLA DO PORTO

2017

To the Dreamers.
We owe them to the Dreamers...

*I suppose I see a different world than you do.
And the truth is what I see frightens me.
I'm frighten because our enemies are no longer known to us.
They do not exist on a map, they're not nations, they're individuals.
Look around you. Who do you fear?
Can you see a face, a uniform, a flag, NO!
Our world is not more transparent now, it's more opaque, it's in the shadows.
That's where we must do battle.
So, before you declare us irrelevant, ask yourselves ...
How safe do you feel?*

Judi Dench as M., in the Movie 007 - *Skyfall*

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First, to my dissertation supervisor, Professor Dr. Maria Isabel Tavares, for introducing me to the world of International Humanitarian Law, and, above all, to the world of Drones.

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To my Friends, my own resolute Army, who stayed beside me, through thick and thin, page after page, despite the fact that most of them did not know what I was talking about.

All, most of all, to my Parents. I could not have asked for better examples of courage, sacrifice, care and love. Thank you for being there whenever I needed shelter, encouragement and motivation. My entire journey, I owe it to you.

PREVIOUS NOTE

Before we start, about the references in this dissertation, due to the limit of characters permitted, we choose not to indicate the “links”, that will refer to the papers, reports, news, articles and other relevant documents that we refer.

We refer the reader to the “Bibliography” section of this dissertation, where you will find all the information required.

RESUMO

Inês Isabel Dias Nunes, Mestrado em Direito Internacional, Público e Europeu, Universidade Católica Portuguesa, submetida a 15 de maio de 2017:

“I Target with My Little Eye; Drones and Targeted Killing under the Scope of *Ius in Bello*”

Esta dissertação terá dois pontos que nos iremos focar: um, determinar a legalidade do uso de drones e das operações de “targeted killing” num contexto de conflitos armados; dois, pretendemos confrontar os requisitos teóricos com a atuação dos Estados, nomeadamente o programa de drones dos EUA, uma vez que é aquele que surge como o mais problemático. Nesta última parte, iremos abordar a prática de “Signature Strikes”, como uma das maiores críticas apontadas ao programa de drones americano, especialmente aquele levado a cabo pela CIA.

No final pretendemos estabelecer duas ideias: a primeira, que DIH é capaz de regular a utilização de drones e as operações de “targeted killing”, sem ser necessário a criação de novos tratados ou convenções; e segundo, no que concerne esta questão, o problema não está nas regras existentes, mas no facto de a sua aplicação depender da vontade dos Estados. E parece-nos que os EUA não terão essa vontade.

Palavras-chave: Targeted Killing, UAV, Drones, Signature Strikes, Programa de Drones da CIA, Estados Unidos da América, Civis, Combatentes.

ABSTRACT

Inês Isabel Dias Nunes, Master in International, Public and European Law, Universidade Católica Portuguesa, submitted May 15 2017:

“I Target with My Little Eye; Drones and Targeted Killing under the Scope of *Ius in Bello*”

This master dissertation has two major focuses: one, to determine the legality of drones and targeted killing operations in armed conflicts, subjected to International Humanitarian Law; second, we intend to confront the theoretical conditions that we established to State practice, namely the US drone program, since it has been the most problematic. For this last section, we will discuss the practice of Signature Strikes as a great critic to the US is how they're conducting their drone program, specially the one carried out by the CIA.

In the end we purpose to establish two things: the first is that IHL covers the use of drones and targeted killing operations, not requiring the creation of new treaties or conventions; and second, the need, when it comes to this subject, it's not about the existing rules, but it is dependent on the Sates will to comply with them. And it seems that the US does not have that will.

Keywords: Targeted Killing, UAV, Drones, Signature Strikes, CIA Drone Program, United States of America, Civilians, Combatants.

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ACRONYMS AND ABBREVIATIONS

AP – Additional Protocol

CIA – Central Intelligence Agency

E.g. – For example

EUA – Estados Unidos da América

GC – Geneva Conventions

IAC – International Armed Conflict

IHL – International Humanitarian Law

NIAC – Non-International Armed Conflict

Op. Cit. – *Opus Citatum*

US – United States (referring to the United States of America)

UAS – Unmanned Aerial System

UAV – Unmanned Aerial Vehicle

UN – United Nations

INTRODUCTION

Technology has the capacity to amazes us. Every day, many objects emerge that trigger our interest, especially when they are able to influence people's lives in a significant matter.

Wars have been, since the beginning of mankind, a motivation for the development of technology. States have sought new means and methods to make war, hoping to inflict maximum damage to the enemy, while saving their own resources. This has been achieved with the development of weapons, strategies and even means of transportation.

After the attacks on 9/11, the US engaged in a relentless "crusade" that led the country to engage in a series of conflicts¹, always with the ultimate goal to fight and eradicate terrorism and terrorist organizations.

Due to the different challenges these conflicts present, the US took the lead and took drones from the surveillance world, where they emerged, to endow them with lethal capacity. Associated with targeted killing operations, they are a vital tool in US endeavors to fight terrorism.

For the purpose of this work, we intend to take drones and targeted killing too determine their legality under the scope of International Humanitarian Law. It is important to us, to ascertain whether the means and methods that have been applied for nearly sixteen years are allowed in the course of an armed conflict.

We will focus on situations and practices that involve the US's drone program, since they are the State that is the most committed to use drones with lethal capacity, in and outside the battlefield.

We start with the notions of targeted killing and drones, separately, to determine the objects of our analysis, what we envisioned when discussing these issues.

Then, we will take on the main subject of our work. Since drones are here to stay and targeted killing seems to be a reality, even in the context of an armed conflict, it is important to determine what are the conditions in which this practice is lawful under IHL.

¹ The US has carried on attacks in countries like Afghanistan, Yemen, Iraq, Pakistan. However, not in all of these countries the hostilities raised to the level of an armed conflict.

From determining if drones comply with the requirement of precaution, or determining who is a lawful target to comply with the principle of distinction, these are vital questions to determine the lawfulness of the attack.

For the last chapter, we will address one of the major critics associated with US practice, signature strikes, that are related with other major concerns, such as the lack of transparency. Although this is not the main focus of our work, we believe that State practice must be confronted with legal theory, in order to evaluate the lawfulness of the attacks.

A few notes before we proceed. First, we do not intend to analyze the use of drones for targeting killing under *ius ad bellum*, meaning that it is not our place in this moment to determine if these attacks constitute self-defense from the US or if it is an attack against State sovereignty.

Our analysis will be strictly from a *ius in bello* perspective².

² In this dissertation, we will only resource to data that comes from operations that we believe occurred during armed conflicts, as they are determined by IHL.

1. MEANS AND METHODS

In November 2001, the US undertook the first recorded use of a drone in combat, when a Predator killed Mohammed Atef³. Since then, the use of armed drones has become a central feature when it comes to American intervention inside and outside the battlefield. In an effort to reach remote targets, avoid the spill of American blood, evade controversy surrounding the deployment of troops, and achieve optimal accuracy and efficiency when performing targeted killing operations, the US has relied more and more on drones to target, surveille and kill enemies in current armed conflicts⁴.

Initially, they were primarily used for conducting intelligence, surveillance and reconnaissance missions but now, they stepped up and play a noteworthy role in armed conflicts, representing a significant change in the way that targeting strategies and tactics to counter armed opposition groups are conducted. Now, they seem to have arrived in style and conquer American hearts, likely to expand in number as a result of several factors quite appealing like “the relatively low costs involved, shrinking overall defense budgets (...) the very low risk to United States personnel, the rapidly growing sophistication on (...) targeting”⁵.

The term “Drone” has been generally adopted through the years, but it is not the most accurate when addressing the ones that have been used for military purposes. The US prefers the term Unmanned Aerial System (UAS), which comprise “not only the aerial vehicle but also the ground control station, the human operators, and the mobile containers used to transport the UAV’s and ground equipment”⁶.

The DOD defines an UAV as a “powered aerial vehicle that does not carry a human operator, ... can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload”⁷.

³ KAAG, John & KREPS, Sarah, “Drone Warfare”, 1st Ed., Cambridge, Polity Press (2014); p. 19

⁴ VOGEL, Ryan J., “Drone Warfare and the Law of Armed Conflict”, in *Denver Journal of International Law and Policy*, Volume 39, n°1, (2011); p. 3.

⁵ ALSTON, Philip, “The CIA and Targeted Killing Beyond Borders”, *Public Law and Legal Theory Research*, New York University School of Law (September, 2011), p.3.

⁶ KAAG, John & KREPS, Sarah (2014), *op. cit.*, p. 19.

⁷ O’Connell, Mary Ellen, “Unlawful Killing With Combat Drones – A case Study of Pakistan, 2004-2009”, *Notre Dame legal Studies Paper No. 09-43* (July 2010), p.2.

Drones⁸, that began as a surveillance “tool” for the CIA, turned out to be an important weapon for military operations. They are (at least for the purpose of this work) remotely piloted by a pilot, which means that they do not carry a pilot on board. Both the Predator⁹ and the Reaper¹⁰ are capable of surveillance (which is a valuable feature when conducting attacks against specific targets) and combat, serving as a killer and a scout¹¹.

The US is the most enthusiast of countries when it comes to the use of drones in the hostilities¹², containing two parallel initiatives. One, public acknowledge or a “military version”¹³, is carried out by the US Armed Forces and mostly operates in recognized war zones, such as Afghanistan and Iraq; the second, is of a more covert nature (although it is currently public knowledge its existence) that is ran by the CIA¹⁴.

O’CONNEL suggests that the two programs might not be so clearly separated. Although most of the facts about the drone campaign are classified, some evidence suggests “that all drone operations are ‘joint’ operations”¹⁵ with the military.

The use of drones and the extensive coverage by the media about their effects, makes both of the programs susceptible to critics, one of them in common: there is a disturbing lack of information that they are willing to reveal, even the military program, considering that they are bound by IHL rules and the need of transparency in their actions. The Government choose to reveal little about targeting rules or what requisites are imposed for someone (or something) to be considered a legitimate target.

⁸ Although this is not the technical term that it’s used, for this dissertation we will maintain the term Drone, because it is the one that is more familiar and well known, although we will be referring to UAV’s, as they are described above. Also, we will focus our attention to the ones that have lethal capacity, such as the Predator or the Reaper.

⁹ Also known as MQ-1B Predator is has been the one that is more used in US operations, especially the ones carried by the CIA. The Predator can be equipped with two Hellfire missiles and has a 24h flight endurance. It is use for close air support for ground troops, striking specific targets, and IRS missions. The fact that is has a “multi-spectral” targeting system, provides to the operator “a real-time full-motion system” that allows the pilot to have a live streaming of what is happening. *See*: KAAG, John & KREPS, Sarah (2014), *op. cit.*, pp. 21

¹⁰ Also known as MQ-9 Reaper. The Reaper, on the other hand, it is a more lethal weapon. It can carry, not only Hellfire missiles, but Paveway II and Join Direct Attack Munitions. It has only 14 hours of flight endurance and it has primarily a “hunter” role, not a surveillance one. *See*: KAAG, John & KREPS, Sarah (2014), *op. cit.*, pp. 21

¹¹ *See*, KAAG, John & KREPS, Sarah (2014), *op. cit.*, p. 24.

¹² Not only the US has a drone program, specially one with lethal capacity; Israel and the UK already possess the technology. However, none of them as shown, in practice, such enthusiasm like the American one. That is why we will focus or analyses on the US drone program.

¹³ MAYER, Jane, “The Predator War”, *The New Yorker*, 26th October 2009

¹⁴ CIA attacks occur primarily in Somalia, Yemen and Pakistan, and they are covert operations.

¹⁵ O’CONNELL, Mary Ellen, “Drones Under International Law”, *International Debate Series*, Washington University Law, Whitney R. Harris World Law Institute (October, 2010), p.6.

Surrounded by even more secrecy is the CIA drone program, which was initiated during President Bush administration¹⁶. Authorized to perform attacks by Title 50¹⁷, the agency has the authority to influence conditions abroad “without the appearance or acknowledgment of a US government role” and do not require public disclosure¹⁸. The program is classified as covert, and the agency declines to provide any information to the public about “where it operates, how it selects targets, who is in charge or how many people have been killed”¹⁹.

The reality is that many of the information comes from the media, government leaks, scholars or the work of a few investigative journalist²⁰ that recover information directly from the places where the attack occurs.

But, even if there is not an official and precise account, it is clear that the CIA was engaged in an “aggressive campaign to eradicate local and foreign militants”²¹.

Even with all the secrecy surrounding both programs, the US never denied the role that drones play in their targeted killing operations²². The problem is the shortage of information about these operations or the way the attacks are conducted, although the American Government continuously reassure that the rules of engagement are not unlawful and fully comply with IHL. Yet, news reports, local statements and government leaks might contradict the official reports

¹⁶ MAYER, Jane, “The Predator War”, op.cit.

¹⁷ Title 50, titled “War and National Defense,” governs how the US declares and conducts wars, and how it ensures national security. Composed of 43 chapters, the title touches on intelligence operations, espionage, military equipment and assets, emergency powers, and nuclear security, among other issues. See, <http://www.americansecurityproject.org/fact-sheet-u-s-c-title-10-title-22-and-title-50/>

¹⁸ KAAG, John & KREPS, Sarah (2014), op. cit., p. 26

¹⁹ MAYER, Jane, “The Predator War”, op.cit.

²⁰ For example, The Bureau of Investigative Journalism has been mention as one of the most reliable sources when it comes to the results of Drones Attacks in various places.

²¹ MAYER, Jane, “The Predator War”, op.cit.

²² For instance, in 2010 Harold Koh, then legal adviser to the US Department of State, gave a speech where he talked openly about targeting individuals using drones. For more information see: <http://www.cfr.org/international-law/legal-adviser-kohs-speech-obama-administration-international-law-march-2010/p22300>

Commonly associated with the use of drones in the pursuit of known terrorists are targeted killing operations^{23,24}.

Targeted killing has become a common antiterrorism practice, especially after 9/11, having experienced a significant growth during President Obama's mandate, emerging as "an effective means to disable non-uniformed combatants while sparing civilians many of the horrors of full scale battle"²⁵.

Almost sixteen years after the 9/11 attacks, there is no doubt that targeted killing has become an official US policy. Regardless, there is no generally accepted definition on targeted killing and even government publications dealing with the subject are not consistent.

One that we might take in consideration containing several elements of IHL, defines targeted killing as "the intentional killing of a specific enemy combatant or civilian enemy fighter, who cannot reasonably be apprehended, who is taking a direct part in hostilities, the targeting done at the direction of the state, in the context of an international or noninternational armed conflict."²⁶

Another notion is given to us by MELZER. The author defines it as:

*the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in physical custody of those targeting them*²⁷

For the author, targeting killing "is a method of employing lethal force against human beings", and the means to do so doesn't necessarily need to be a weapon, there are other means to take a human life. So, "the notion of 'lethal force' must, therefore include

²³ Many authors, like SOLIS, STERIO or BENSON, believe that are two forms of targeted killing that are being conducted. First, what is called Personality Strikes, are conducted against specific individuals, who are identified as posing a significant threat to the US and whose targeting has been approved by the President. Second, Signature Strikes represent the most controversial form of targeting, and we will mention them in more detail in the final chapters.

²⁴ Although it is the most known practice associated with drones that possess lethal capacity, it is not the only one.

²⁵ GROSS, Michael L., "Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict" 118-21 (2010). *Apud* ALSTON, Philip, "The CIA and Targeted Killings Beyond Borders", *Harvard National Security Journal*, NYU School of Law, Public Law Research Paper No. 11-64 (September 16, 2011), pp.6.

²⁶ SOLIS, Gary D., "The Law of Armed Conflict: International Humanitarian Law in War", 2nd Ed., New York, Cambridge University Press (2016), p. 555.

²⁷ MELZER, Nils, "Targeted Killing in International Law", 1st edition, New York, Oxford University Press, (2009), p.5.

any forcible measure, regardless of the means employed, which is capable of causing death of a human being”²⁸.

The two concepts complement and overlap each other at the same time. Looking closer it is safe to assume that both of them show some concern that targeted killing operations must be submitted to the laws of war. Also, both indicate that this must be the last resort, when apprehension is not a valid option, and applying lethal force is the only solution.

We will continue our journey by observing targeted killing and drones through the lenses of IHL and determine, first if IHL prohibits the use of drones for military purposes, and second in what conditions can we accept targeted killing as a lawful method of conducting war.

²⁸ MELZER, Nils (2009), *op. cit.*, p.3.

2. UNDER THE SCOPE OF INTERNATIONAL HUMANITARIAN LAW

The starting point in this analyses occurs “under the umbrella” of IHL. Article 1 common to the four GC provides that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”. And since most of the GC and AP provisions are International Customary Law, the norms might also be applicable to none signatory States.

The majority of the US targeted killing operations occurred in non-international armed conflicts, where some of the IHL rules do not apply (mostly regarding detention). However, the core IHL rules respecting targeting are the same in international or non-international armed conflict. These are rules like distinction, proportionality, military necessity and humanity²⁹. These are the main rules that we will be mentioning when assessing the means and the methods of targeted killing operations.

2.1. THE MEANS: DRONES IN THE BATTLEFIELD

As wars evolve weapons tend to become technologically advanced, which usually arises some important questions.

When it comes to armed conflicts the choice of means and methods of war falls on the parties of the conflict. However, this choice is not unlimited³⁰ since IHL imposes some rules. When conducting the review on new weapons is important to determine “whether the weapon itself is banned or restricted by international law, and if not, whether the effects of the weapon are banned or restricted by international law”³¹.

Potentially, the use of drones in the battlefield is uncontroversial under IHL, since there is not much practical difference between the “use of a Cruise missile or an aerial bombardment and the use of a drone equipped with explosive weapons”³². Even in the

²⁹ O’CONNELL, Mary Ellen (October, 2010), *op. cit.*, p.21.

³⁰ Cf. Article 35 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977;

³¹ BACKSTROM, Alan and HENDERSON, Ian, “New capabilities in warfare: an overview of contemporary technological developments and the associated legal and engineering issues in Article 36 weapons review”, in *International Review of the Red Cross*, Vo. 95, Number 886 (2012), p.486.

³² CASEY-MALSEN, Stuart, “Pandora’s box? Drone strikes under jus ad bellum, jus in bello, and international human rights law”, *International Review of the Red Cross*, Vol. 94, Number 886 (2012), p. 606.

words of Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions said “in the exceptional circumstance of armed conflict, they may be legal”³³. Whether or not the use of Drones is considered aggression or self-defense, if they take place in a situation of armed conflict they will be judge under international laws³⁴.

Evaluating the legality of a weapon system requires a multi-part analysis³⁵. Weapons are subject to specific prohibitions that arise from treaty law, such as the ban on biological and chemical weapons, while others are regulated by customary law, such as poisoned weapons³⁶. Every time that a new weapon emerges there is an “obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable”³⁷.

Article 35 (2) in API prohibits the use of “weapons, projectiles, material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”³⁸. This is also a requirement that amounts to customary law³⁹, that mandates the use of those feasible means and methods of attack which will minimize harm to civilians, without sacrificing military advantage⁴⁰.

In the specific case of drones, we believe that this requirement does not refer to the drone itself, since it plays a role similar to jets or a F-16 (an aerial vehicle basically), but the missiles it carries. It has been said that Hellfire missiles⁴¹ have a very limited effect radius “since its explosive force is designed to penetrate forward into the target it is attacking” and when it comes to attack specific targets it is an important feature⁴².

³³ CASEY-MALSEN, Stuart (2012), *ob. cit.*, p. 606.

³⁴ *Ibidem*

³⁵ GLAZIER, David, Statement in the Hearing on “Rise of the Drones II: Examining the Legality of Unmanned Targeting”, *Hearing Before the Subcommittee on National Security and Foreign Affairs of the Committee on Oversight and Government Reform House of Representatives, One Hundred Eleventh Congress, Second Session, April 2010, N° 111-120*, p. 29.

³⁶ *Ibidem*

³⁷ Cf. Article 36 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977;

³⁸ Cf. Article 36 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977;

³⁹ CASEY-MALSEN, Stuart (2012), *ob. cit.*, p. 607.

⁴⁰ SCHMITT, Michael N., “Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the ‘Fog of Law’”, *Yearbook of International Humanitarian Law*, Forthcoming, (March 2, 2011), p. 11.

⁴¹ Hellfire Missiles are the ones most associated with drone attacks.

⁴² SCHMITT, Michael N., “Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate”, *30 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL*, 595-619 (2012), p.599.

While the assessment of this requirement is subject to different interpretations, it does not forbid “the killing or injury of opposing combatants” by means of missiles, so a drone launching Hellfire missiles is “equivalent to those traditionally employed from other platforms” and, therefore, not violating this rule⁴³.

The requirement to take precaution in attacks also mandate the use of means and methods that “will minimize harm to civilians and civilian objects”⁴⁴. In this aspect, drones, being a precise weapon with the ability of surveilling a target for a long period of time, might be able to provide less collateral damages compared to other systems, like artillery or ground attack⁴⁵.

When conducting attacks, drones afford an incredible range of capabilities and options available to the ones that possess the technology. SCHMITT highlights the advantages they offer, like diminish the occurrence of mistakes in attacks, by “enhance the ability to verify the nature of a target before striking it with other assets”⁴⁶. Also, they provide “near real time” information about the target are for long periods, “without risk to the operators”, and with a better assessment of the possibility of collateral damage⁴⁷. Further, they are “very accurate”, enhancing the rate of a successful strike⁴⁸.

Drones have been appointed by many as the weapon of the future, superior in many ways.

SOLIS considers that drones are superior to manned aircraft, or even artillery, for several reasons: can gather photographic intelligence from areas that are too dangerous or inaccessible for manned aircraft; carries no risk of death or capture; their accuracy is greater, thus having the potential to reduce collateral damage⁴⁹; and they do not “suffer from human weaknesses” like hunger, pain or fear⁵⁰.

SINGER calls the technology “worryingly ‘seductive’”, because it creates the perception of a costless war⁵¹. It is easy to understand the appeal of a “push-button”⁵²

⁴³ GLAZIER, David (2010), *ob. cit.*, p. 29.

⁴⁴ SCHMITT, Michael N. (March 2, 2011), *op. cit.*, p. 11.

⁴⁵ *Ibidem*

⁴⁶ *Ibidem*, p. 4.

⁴⁷ *Ibidem*.

⁴⁸ *Ibidem*

⁴⁹ SOLIS, Gary D. (2016), *op. cit.*, p.550.

⁵⁰ O’CONNELL, Mary Ellen (October 2010), *op. cit.*, p.5

⁵¹ MAYER, Jane, “The Predator War”, *op.cit.*

⁵² *Ibidem*

approach when fighting terrorists, but the embrace of the drone program has occurred with little (or none) public discussion, given it represented “a radically new and geographically unbounded use of state-sanctioned lethal force”⁵³.

Since this is considered a “precision weapon” some might say that there is almost an obligation to use it. However, SCHMITT and WIDMAR explain that this statement is wrong and that the mandatory resource to this weapon might be “unfeasible, because it would require increased risk to ground forces in order to designate the target”, when other systems might have the same capability of reducing civilian risk, without sacrificing military advantage⁵⁴.

At this point, it can easily be argued that they might fulfil the requirements demanded by IHL. First, drones allow a real-time image of the target so that the absence of civilians near the target can be monitored; second, some of the targets are located using a device attached to the drone; third, in certain cases nearby military forces must also monitor the target; fourth missiles fired from drones are believed to have a smaller blast radius than other conventional munitions that might be deployed from jets⁵⁵.

These factors do not eliminate the risk of civilian lives being lost, but they can minimize it, complying with the principle of distinction. If drones really enable a level of accuracy directed only against lawful targets, they could represent an adherence to the principle of distinction never before possible⁵⁶.

But the real innovation lays not in what they can do on their own, but in the way they connect, in the same platform, intelligence capabilities and the capacity to deliver precision attacks⁵⁷. By linking intelligence with the ability to target opponents, drones enable a “contextually sensitive mechanism of targeting”, which, for example, allow pilots to delay attacks until the target distance himself from civilian population⁵⁸.

Regardless of the technological advantages drones possess, they are not immune to some criticism. They are not prepared for air-to-air combat; and they are not invulnerable

⁵³ MAYER, Jane, “The Predator War”, *op.cit*

⁵⁴ SCHMITT, Michael N. and WIDMAR, Eric W, “On Target!: Precision and Balance in the Contemporary Law of Targeting”. 7 *Journal of National Security and Policy* 379-409 (May 16, 2014), p. 402.

⁵⁵ CASEY-MALSEN, Stuart (2012), *op. cit.*, p. 607.

⁵⁶ ROTHENBERG, Daniel, “Drones and the Emergence of Data-Driven Warfare” in *Drone Wars, Transforming Conflict, Law and Policy*, Edited by Peter L. Bergen and Daniel Rothenberg, Cambridge University Press (2015), p. 449.

⁵⁷ *Ibidem*, p. 443

⁵⁸ *Ibidem*

to signal disruption or jamming⁵⁹. This has not been a relevant problem so far because the countries where most of the attacks occur don't possess the necessary technology to take advantage of this flaw⁶⁰.

Related with the image that drones provide, a technological constrain that has been mentioned by some scholars is, what could be called, "the soda straw effect"⁶¹. This argument warns us that relying solely on the drone camera might lead to some problems in target identification, since looking through a drone camera "is somewhat like looking through a soda straw", meaning that the image might become distorted, making it difficult to distinguish individuals⁶². Also, when zooming in on a target, it loses a wider picture of the area, losing the ability to see if there are civilians around as well⁶³.

It has been also disputed that Drones technical precision is not as accurate as one might think, despite the praises from the US military forces and Government. Software companies that developed the software used in targeting say that latency reduces the precision of the attacks. This means that there might be a delay between movement on the ground and the arrival of the video image to the drone pilot⁶⁴.

Even if this latency is minimal, and most likely already adjusted given the rapid developments in drone technology (turning the image more precise) casualties and damages might not confine to the specific target, some argue that Hellfire missiles blast radius can extend anywhere from 15-20 meters⁶⁵, which implies a necessary evaluation of the surroundings. They have no defensive capabilities, they can maneuver well to avoid attacks, their performance can be affected by bad weather or their communication systems experience problems and delays⁶⁶.

When it comes to the principle of proportionality, there has also been some concerns, that originate from the media, that has been reporting high numbers of civilian casualties. Nonetheless, the existence of the principle acknowledges that "attacks may in

⁵⁹ KAAG, John & KREPS, Sarah (2014), *op. cit.*, p. 25

⁶⁰ *Ibidem*

⁶¹ HOLEWINSKI, Sarah, "Just Trust Us: The Need to Know More About the Civilian Impact of US Drone Strikes" in *Drone Wars, Transforming Conflict, Law and Policy*, Edited by Peter L. Bergen and Daniel Rothenberg, Cambridge University Press (2015), p.57.

⁶² O'CONNELL, Mary Ellen (July, 2010), *op. cit.*, p.6.

⁶³ HOLEWINSKI, Sarah (2015), *op. cit.*, p.57.

⁶⁴ International Human Rights and Conflict Resolution Clinic and Global Justice Clinic, "Living Under Drones: Death, Injury, and Trauma to Civilians from US Drones Practices in Pakistan", September 2012, p.9

⁶⁵ *Ibidem*

⁶⁶ ROTHENBERG, Daniel (2015), *op. cit.*, p. 445.

some cases be lawful even when there is absolute certainty that civilians will be killed or injured or that civilian property will be damage or destroyed”⁶⁷. And proportionality is assessed from the perspective of the attacker⁶⁸, and what for one might be considered proportional, bearing in mind the goal achieved, others might have a different interpretation. So, a proportional attack, using drones or not, must always be measured through a case-by-case analysis, just like when other means are employed.

Some authors might even raise some concerns that the use of the technology is “weakening the barriers to killing”⁶⁹. People feel comfortable with drones, not considering the killings carrying by them as a serious matter as killing carrying out by troops or piloted planes⁷⁰, giving a sense there is “easy” to kill with drones.

The fact that drones can be deployed without carrying the risk that a pilot might come home “in a body bag”, makes the decision easy, especially for political reasons⁷¹. Also, there are psychological factors, since some believe that the distance between the operator and the victim “makes the decision to kill easier”, since they are not at risk of retaliation⁷².

Regardless the praises and critics that drones are subjected to, we must bear in mind (not only with drones but with any other vehicle or weapons) that “the weapon or weapon system used is completely irrelevant”⁷³. Ultimately, falls on the operator to take constant care and attention in to sparing the lives of civilians. The decision to attack (still) falls on the human, not the machine.

As CASEY-MALSEN says, “drones are only platforms, other weapons can be – and are – used, which may fall foul of the rules prohibiting the use of unlawful weapons in armed conflict”⁷⁴.

⁶⁷ SCHMITT, Michael N. (March 2, 2011), *op. cit.*, p. 10.

⁶⁸ *Ibidem*

⁶⁹ O’CONNELL, Mary Ellen, “Seductive Drones: Learning from a Decade of Lethal Operations”, *Journal of Law, Information & Science*; Notre Dame Legal Studies Paper No. 11-35 (August 19, 2011), p.20.

⁷⁰ *Ibidem*

⁷¹ O’CONNELL, Mary Ellen, (August 19, 2011), *op. cit.*, p.21.

⁷² *Ibidem*, p.23.

⁷³ SCHMITT, Michael N. (March 2, 2011), *op. cit.*, p. 10.

⁷⁴ CASEY-MALSEN, Stuart (2012), *op. cit.*, p. 614.

2.2. THE METHODS: TARGETED KILLING UNDER IHL

Targeted killing has been a practice commonly associated with the use of drones for military purpose. Since it is a method used in the battlefield a few considerations are in order.

For starters, an international or noninternational armed conflict must be in progress in order to be relevant under IHL. Without an ongoing conflict the targeted killing of an individual, including a terrorist, would be considered extrajudicial assassination, homicide and could be considered a domestic crime. It is the existence of an armed conflict that raises the right to lawful combatants to kill their enemies and to attack locations and objects vital to the development of the hostilities, including other State's armed forces (in IAC) or nonstate actors, like armed groups or civilians who directly participate in the hostilities (in NIAC).

Nowadays, it has been a practice mostly associated with targeting terrorists⁷⁵, even outside the battlefields, which CASSESSE finds it justifiable. For example, if “suspected suicide bombers do not respond to summons or (...) where it is ‘manifest’ that they are concealing explosives on their body”⁷⁶. For this he turns to ECHR and the standards applied in counter-terrorist operations. His analysis lays, first, in the observation of certain circumstances that when predominant in a specific context may affect the

⁷⁵ One aspect to keep in mind, while we continue our work, is that targeted killing is associated with attacks to terrorist's outside the traditional battlefields. In fact, it might be questionable to call these operations (the sort that targeted a specific individual) targeted killing in an armed conflict, since, if we are referring to lawful targets, it is simply a lawful attack. Targeted killing is indeed commonly associated with the resource to force by a state, e.g. the US, in persecution of known terrorists (lets no forget the infamousness kill lists). But this use of force in an international context is widely controversial. Even to invoke self-defense (*see*: article 51, UN Charter), as perceived by the ICJ is questionable, since terrorist attacks do not amount to the necessary requirement of “significant amount to force”. *See*: O'Connell unlawful (July 2010).

The UN Charter does not directly regulate the use of force between states and non-state actors (especially ones that are not), which is concerning, due to the nature of today's conflicts. This void does not exclude the enforcement of some international principles, applied to the use of force. In fact, that has been a current content of necessity and proportionality in *ius ad bellum* and *ius in bello*.

Proportionality and necessity are not only requirements of legitimate self-defense, but they also have a part to play in the collective security system. As GARDAM claims, we also believe that “necessity and proportionality are firmly established as integral components of the law, in relation to the unilateral resort to force by States”. *See*: GARDAM, Judith, “Necessity, Proportionality and the Use of Force by States”, *Cambridge Studies in International and Comparative Law*, Cambridge University Press, (2004), p. 186

The potential of proportionality and necessity to restrain unnecessary and excessive force must not be underestimated. The more suspicious the arguments presented to justify the attack, the more demanding the requirements become. *See*: GARDAM, Judith (2004), *op.cit.*, p. 187

⁷⁶ MELZER, Nils, “Targeted Killing in International Law”, 1st edition, New York, Oxford University Press, (2009), p. 61.

standards by which lethal force might be lawfully used. Second, taking these circumstances into account, CASSESE does not make the criteria governing lawful targeting under IHL more flexible, but the requirements of precaution, necessity and proportionality of human rights law.

We do not deny that this is a practice associated with targeting terrorists, sometimes outside battlefields. However, we will focus our attention to those who are considered lawful targets under IHL. And yes, these individuals possibly are also targeted because of their terrorist activities but, as O'CONNELL says "acts of terrorism do sometimes occur during armed conflict, permitting the use of lethal force against terrorists under armed conflict rules"⁷⁷.

For a better and constructed analyses, we will be dividing the next part in rules concerning the targets (who they are and how to qualify them) and then we will concern ourselves with the effects of the attack and the method employed.

2.2.1. WHO CAN BE TARGETED?

GLAZIER highlights a unique aspect of current drone strikes that is different from historic uses of force which is "the apparent deliberate long range targeting of specific individuals or small groups rather than physical objects of military value"⁷⁸. And adds "there is nothing inherently problematic about selective targeting provided that the selected individuals are otherwise lawful objects of attack"⁷⁹.

As for the target, it must be a pre-determined specific one, so that it might be considered targeted killing. For instance, if the targeted person is not known in advance, or if his activities are not previously confirmed as unlawful, before the deployment of the drone, it is not targeted killing; it is simply a mission in search of a target. So, when enemy fighters or a group of enemy fighters are killed by a missile launched from the drone does not necessarily constitute a targeted killing⁸⁰; it could simply be a strike that occurred during a specific mission or military operation, that required the drone's assistance.

⁷⁷ O'CONNELL, Mary Ellen, (August 19, 2011), *op. cit.*, p.8.

⁷⁸ GLAZIER, David (2010), *op. cit.*, p. 31.

⁷⁹ *Ibidem*

⁸⁰ SOLIS, Gary D. (2016), *op. cit.*, p. 558.

Targeted killings must contain elements of “intent, premeditation and deliberation to kill”⁸¹. Premeditation, since the targeted must be determined prior to the attack; intent and deliberation to kill since any accidental, unintentional or negligent death caused by the use of force will not be considered targeted killing.⁸²

On a more critical note, for KREMNITZER, targeted killing goes against the logic of “de-personalized warfare between collective entities” and that “personalization and individualization of military aims could cause the collapse of the conventional view of war and the justification for killing in its context”.⁸³ However, he recognizes that the existing law regulating armed conflicts does not prohibit targeting a specific isolate individual, as long as is directed against an lawful target and doesn’t involve treacherous means. For this author, only self-proclaimed, unequivocal terrorist leaders (in the context of the “war on terror”) would be lawful targets (as civilians directly participating in hostilities).

To constitute targeted killing, the object of the attack must be targeted because of his or her confirmed activities related to the conflict. If the targeted individual is a lawful combatant, uniformed and openly armed, as in an international armed conflict, he is an opposing combatant, so a lawful target with no further discussion necessary.

If not a combatant but a civilian, as in a noninternational armed conflict, identification and confirmation of the target should be positive, so that it would be lawful under IHL⁸⁴.

International treaties and conventions do not provide clear criteria to established their status in the conflict. And, when the conflict is of a noninternational nature, is even harder. Even under the rules of IHL, “reprisal and punitive attacks on civilians” are forbidden, meaning that a targeted killing might only be lawful when targeting someone who is a legitimate target⁸⁵.

⁸¹ MELZER, Nils (2009), *op. cit.*, p. 61.

⁸² *Ibidem*

⁸³ *Ibidem*, p. 63.

⁸⁴ This evaluation depends on resources like military intelligence, gathering of information, and should be decided after everything that is expected and possible to determine the identity of the target has been done, as well the nature of his role in the armed conflict.

⁸⁵ ALSTON, Philip (September 16, 2011), *op. cit.* p. 14.

So, international community has relied mostly on the *Interpretive Guidance on the Notion of Direct Participation in Hostilities*⁸⁶ to determine who might be considered a legitimate target.

As for the notion of civilians, the Interpretive Guidance starts by explaining that it's a concept determined in a negative way, meaning that they are the ones that are not members in a State's Armed Forces, members of armed groups, or participants in a *levée en masse*^{87,88}.

The ones that are part of the State's armed forces, traditionally are determined through article 4(2) in III GC⁸⁹ and the standards that the article gives us. However, the Interpretive Guidance calls our attention to the fact that this article defines post-capture requisites to ensure the protection of prisoners of war, it does not give us a definition on what is a member of the armed forces⁹⁰. In fact, if someone fails to fulfil the requirements of article 4(2) III GC⁹¹, doesn't necessarily mean that they are civilians; they can still be part of the armed forces (and a lawful target). Even though they don't get the status of prisoners of war, doesn't automatically allow them to enjoy a more protectionist one.

While it is generally accepted that members of armed forces do not qualify as civilians, the same cannot be said about members of an organized armed group, that are a part of the hostilities.

For an organized armed group to be considered a lawful target under IHL they must be *part*⁹² of the conflict⁹³, which means that they need to have a relation with one of the parties to the conflict⁹⁴. This connection can be verified through the group's actions, that must represent a clear indication that they are fighting for one side, in detriment of the other. Also, the group might make public announcements expressing their support to one side or the other.

As for establishing the membership in these groups, it will depend on the individual's role in it, and there is an unequivocal necessity to match the individual's

⁸⁶ For the purpose of this work, we will refer to this document as Interpretive Guidance

⁸⁷ International Committee of the Red Cross, "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law", (2009), p. 20.

⁸⁸ Same as conscription: when in times of war do not exist enough volunteers in the armed forces, the government of a State might demand, by law, that all men capable of fighting must join the hostilities.

⁸⁹ Cf. Article 4 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

⁹⁰ International Committee of the Red Cross (2009), *op. cit.*, p. 22.

⁹¹ Cf. Article 4 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

⁹² Highlighted by the author.

⁹³ Not part of the conflict. Need to be A PART of the conflict, standing and fighting for one side against the other.

⁹⁴ International Committee of the Red Cross (2009), *op. cit.*, p. 23.

conduct to the group's position during the hostilities. This is an important requisite to determine if we are looking at an individual with a continuous combat function⁹⁵, and consequently, a lawful target. It is a condition that helps distinguishing members of an organized armed group as a part to the conflict, from civilians who sporadically and spontaneously engage in the hostilities⁹⁶.

As for these civilians who take part in the hostilities, their protection stays on hold "unless as for such time"⁹⁷ as they directly participate in hostilities, returning once they cease all activities related to the conflict⁹⁸.

The notion of direct participation in hostilities is a concept that ICRC says it is destined to civilian conducts during hostilities that lead to the suspension of their protection.

The concept does not intend to determine a status, function or affiliation but only the commitment of a certain individual in the hostilities. There are three requisites that the Interpretive Guidance has established to determine if a certain civilian is engaging in the hostilities⁹⁹.

First, their actions must achieve a "threshold of arm", meaning that they need to be able to cause considerable damages or disturb the enemy's armed forces. In the absence of any damage, this requisite might be fulfilled if the act itself is likely to cause death, injury or destruction of infrastructures or individuals protected against direct attack.

Second, it must exist a direct causation between a specific act and the damage inflicted; the damage must result from the act itself, or from a military operation in which this conduct is part of¹⁰⁰. This conduct is expected to cause harm that reaches the threshold of harm in order to fulfilled the requisite.

Finally, "belligerent nexus" requirement is fulfilled when "an act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another"¹⁰¹.

⁹⁵ International Committee of the Red Cross (2009), *op. cit.*, p. 33.

⁹⁶ *Ibidem*, p. 34.

⁹⁷ The criteria "unless and for such time" only applies to civilians directly participating in hostilities, not to members of an organized armed group.

⁹⁸ Also called theory of the "revolving door".

⁹⁹ International Committee of the Red Cross (2009), *op. cit.*, pp. 47.

¹⁰⁰ *Ibidem*, p. 58.

¹⁰¹ *Ibidem*, p. 64.

All three requisites must be fulfilled in order to qualify civilian actions as DPH. In fact, as we can observe, all three contain elements of the others, which clearly indicates the direct link between them.

SCHMITT calls our attention to three aspects related to the notion: first, those civilians who participate directly in hostilities might be targeted as combatants; second, their death or injury will not be taken in consideration when accessing proportionality of the attack; and third when armed forces from a State are attacking, they don't need to take any precautions considering the protection of those civilians who are participating directly in the hostilities¹⁰².

Determine if we are targeting a lawful target under IHL might be complicated but it is needed, especially when theory comes to practice. During targeting operations, “the parties to the conflict must at all times distinguish between civilians and combatants”¹⁰³, in order to avoid unnecessary civilian casualties.

In fact, this translates into the principle of distinction¹⁰⁴, “it is the foundation on which the codification of the laws and customs of war rests”¹⁰⁵.

We can find the rule established in article 48 of API:

*In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives*¹⁰⁶.

Even though this is an important rule, it's sometimes conditioned by the circumstances of the hostilities and it is, in certain situations, confronted by the other principles. SOLIS¹⁰⁷ give us a simple example: an enemy defense factory is a target even if the workers are considerate civilians. This is not a violation of the principle of distinction as any civilians killed are considerable collateral damage, since they were not

¹⁰² SCHMITT, Michael N., “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, in *Harvard National Security Journal*, vol. 1 (2010), p. 21.

¹⁰³ HENCKAERTS, Jean-Marie and DOSWALD-BECK, Louise, “Customary International Humanitarian Law”, Oxford University Press, Vol. 1 Rules (2005), p. 3.

¹⁰⁴ State practice already established this principle as customary international law, applied in IAC and NIAC. The term “combatant” is used in a generic meaning, referring to persons who do not enjoy protection from attack. It does not speak of a certain status in the armed conflict, like members of a state armed forces. The evaluation of an individual status, although necessary, does not find definition in this article.

¹⁰⁵ Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949.

¹⁰⁶ Cf. Art. 48 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

¹⁰⁷ SOLIS, Gary D. (2016), op. cit., p. 271.

the intended target. If the targeting of the factory represented a military advantage and if the losses were not disproportional to that advantage, chances are it is a lawful attack.

Many argue today, that the reality in most armed conflicts is different and that the principle of distinction is much harder to comply with. Many armed groups failed to distinguish themselves from the civilian population, masquerading their belligerent status, making the task of distinction harder. In some situations, civilians might be used, by combatants, as shields, trying to avoid a direct attack. Because of this practice, the US is sometimes compelled to use force in area populated by civilians, requiring “to do all it can to ensure that it is targeting the right kind of individuals”¹⁰⁸. For example, Taliban forces, doesn’t wear uniforms, “they are civilian individuals that were running around weapons, people dressed as civilians that were engaging our forces from that site”, which might indicate a violation of article 44(3) API that states “combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack”¹⁰⁹. This article shows that this precaution should be applied to both parties, an “inward-looking responsibility”¹¹⁰.

In the specific case of Taliban, the lack of uniform was an insistent argument used by the US, to justify the difficulty to distinguish them, representing a danger for the civilian population. However, that might not be the intention behind the lack of uniform. As PEREIRA explains “the lack of uniform by the Taliban doesn’t translate in a planned strategy to be confused with the civilian population”^{111,112} taking advantage from the protection granted to the civilian population under IHL. The author justifies their conduct through a simple and yet logical explanation – they simply never wore uniforms – and for that reason it would be “ridiculous” to expect them to do so now¹¹³.

In fact, article 44 (3) API foresees the existence of situations “where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself”¹¹⁴, providing

¹⁰⁸ VOGEL, Ryan J., “Drone Warfare and the Law of Armed Conflict”, in *Denver Journal of International Law and Policy*, Volume 39, n°1, (2011), p. 18.

¹⁰⁹ Cf. Art. 44 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

¹¹⁰ SOLIS, Gary D. (2016), *op. cit.*, p. 273.

¹¹¹ PEREIRA, Maria de Assunção do Vale, “A ‘guerra contra o terrorismo’: um novo tipo de conflito armado?”, in *Estudios de Derecho Internacional Y Derecho Europeo En Homenaje al Profesor Manuel Pérez González*, Tomo I, Ed. Tirant Lo Blanche, (2012), p. 512.

¹¹² Author’s Translation.

¹¹³ PEREIRA, Maria de Assunção do Vale (2012), *op. cit.*, p. 512.

¹¹⁴ Cf. Art. 44 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

different indications that it might be a lawful target during the hostilities, already predicting different behaviors from does in the traditional armed forces.

We believe the assesse should not be black or white. Yes, it is true that Taliban forces do not, or ever, wore uniforms. But situations, like the use of human shields arises the necessity of a case-by-case analyses, and requires that other aspects might be taken in consideration when distinguishing civilians from combatants.

When addressing specifically NIAC, APII addresses also the principle of distinction through article 13(2) stating that “The civilian population as such, as well as individual civilians, shall not be the object of attack”¹¹⁵. Again, civilian population in the broader sense, excluding those already mentioned.

Violation of this rule, meaning a direct attack at civilian populations, even in an NIAC, constitutes a war crime under the Statue of the International Criminal Court¹¹⁶. Also, violations of this rule have been highly condemned by the international community, from States to the Security Council.

2.2.2. THE ATTACK

Targeted killing should be looked as a last resort, after all options were taken in consideration and when there is no feasible option of capture. Only when the capture and detention is impossible, should states resort to targeted killing operations. This is, in fact, more of a human rights law concern¹¹⁷, but a necessary one in our opinion. Targeted killing should be last resort, after all attempts and possibilities of arrest revealed to be unsuccessful or impossible. Also, we believe that it is safe to assume that, at the time of the attack, the individual in question cannot be under custody of those that are targeting him.

The preference for capturing over killing, for ISSACHAROFF AND PILDES it’s a “departure from the traditional laws of war”, since enemy combatants can be killed even if they could be captured, unless they surrender or are considered *hors de combat*¹¹⁸. For

¹¹⁵ Cf. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

¹¹⁶ Cf. Article 8(2)(e)(i) Rome Statute of the International Criminal Court.

¹¹⁷ SOLIS, Gary D. (2016), *op. cit.*, p.558.

¹¹⁸ ISSACHAROFF, Samuel and PILDES, Richard, “Drones and the Dilemma of Modern Warfare”, in Drone Wars, Transforming Conflict, Law and Policy, Edited by Peter L. Bergen and Daniel Rothenberg, Cambridge University Press (2015), p. 403.

the authors, there is no obligation under IHL to differentiate “between soldiers whose treat can be neutralized by capture versus those who can be neutralized only by killing”¹¹⁹; meaning this could only be part of a legal requirement to justify targeted killings, or a merely policy rooted in strategic calculations, or even concerning moral considerations.

There is also been argued that targeted killing should only be applied when the intended target “has a senior operational role”¹²⁰, just as Attorney General Holder asserted when speaking about the terms in which a targeted killing should occur.

Still, many scholars and human rights agencies believe that the contrary is in practice, suggesting that “the overwhelming percentage of those targeted are lower-level militants who do not have the capacity to plot effectively against the United States”¹²¹.

Once determined the lawfulness of the targeted article 57 of API calls for “constant care ... to spare the civilian population, civilians, and civilian objects”¹²². To take precautions in attack is an important requirement when conducting an attack. IHL requires for an attacker to do everything feasible¹²³ to confirm that the individuals under attack are not civilians, protecting civilian lives. This standard requires attackers to “take those measures to avoid civilian harm that a reasonable attacker would take in the same or similar circumstances”¹²⁴.

To meet this requirement, any state that engages in targeted killing must at least, take precautions through “extensive intelligence gathering, preparing collateral damage estimates” or resourcing to other technologies, like “the use of a computer program to model the likely effects of a given weapon on a given target and the area nearby”¹²⁵. This precaution extends not only to the attack itself, but also the preparations¹²⁶.

¹¹⁹ ISSACHAROFF, Samuel and PILDES, Richard (2015), *op. cit.*, p. 403.

¹²⁰ *Ibidem*, p. 401.

¹²¹ BERGEN, Peter L. and ROWLAND, Jennifer, “Decade of the Drone, Analyzing CIA Drone Attacks, Casualties and Policy” in *Drone Wars, Transforming Conflict, Law and Policy*, Edited by Peter L. Bergen and Daniel Rothenberg, Cambridge University Press (2015), p. 15.

¹²² Cf. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

¹²³ Feasible for this purpose means that the steps that were taken “are practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations”. See: SCHMITT, Michael N. (March 2, 2011), *op. cit.*, p. 11.

¹²⁴ SCHMITT, Michael N. and WIDMAR, Eric W. (May 16, 2014), *op. cit.*, p. 401.

¹²⁵ JENKS, Chris, “Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict”, *North Dakota Law Review*, Vol. 85, p. 649, March (2010), p. 668.

¹²⁶ SCHMITT, Michael N. and WIDMAR, Eric W. (May 16, 2014), *op. cit.*, p. 401.

The level of “legal certainty”¹²⁷ required is not established by law. Some demand near absolute certainty defending that any attacker, facing a “slight doubt” about the target, should seek further information. Nevertheless, the reality in combat makes this demand impractical, especially in counterinsurgency battlefields “were the enemy deliberate uses the civilian population to disguise their activities”¹²⁸.

Also, attackers must warn civilian population that an attack will occur, unless the circumstances do not permit so, especially when it will result in “loss of operational surprise or increase risk to friendly forces is not required”¹²⁹.

So, as long as the attacker complied with the requirement and still believes that the target is a lawful one, there will be no issue regarding the lawfulness of the attack, under IHL¹³⁰.

When arm to civilians cannot be avoided, proportionality¹³¹ is the requirement that is called do determine the lawfulness of the attack.

Article 51(2/2/b) AP I describes an unproportionate attack as “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”¹³². Article 57(2/b) AP I reinforces the necessity to protect civilian lives¹³³, stating that “an attack shall be cancelled or suspended if it becomes apparent that (...) the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”¹³⁴.

In the US Army Field Manual on counterinsurgency, the requirement of proportionality is not a precise copy from the norm in API, but reflects influences of IHL,

¹²⁷ SCHMITT, Michael N. and WIDMAR, Eric W. (May 16, 2014), *op. cit.*, p. 401

¹²⁸ *Ibidem*, p. 402.

¹²⁹ *Ibidem*, p. 404

¹³⁰ SCHMITT, Michael N. (March 2, 2011), *op. cit.*, p. 11.

¹³¹ Proportionality is a precaution to take in attacks directed against civilians, not combatants, although the responsibility to comply to the principle falls on them.

¹³² Cf. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

¹³³ The fact that both these articles refer to the necessity of proportionality in the attack, avoiding unnecessary loss of civilian lives and infrastructures, proves to SOLIS a reinforcement in the protection of civilians. *See: SOLIS, Gary D. (2016), op. cit.*, p. 293.

¹³⁴ Cf. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

adding two positive commitments for combatants: preserve “noncombatant lives by limiting the damage they do”; and assume “minimal risk to minimize potential harm”¹³⁵.

Proportionality “is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and military advantage gained”¹³⁶. The last ones “seek to maximize the death of combatant enemies and maximize the destruction of enemy military objects, quite the reverse of their goal in regard to civilians”¹³⁷.

This principle, like any other, will require a case-by-case assessment. *E.g.*, if a sniper is spotted in a desert high spot, with nothing and no one else around, he could be targeted and killed with a thousand-pound bomb. It would be a waste of munitions and a bit exaggerated, but it would not be a violation of the principle of necessity. On the other hand, if there is a sniper in a crowded orphanage killing him with a simple hand grenade would be a clear violation¹³⁸.

It will always depend on the balance between the losses of civilians predicted and the military advantage that the combatants are seeking. So, if the level of the military advantage raises, the number of civilian casualties predicted, even if higher, becomes acceptable.

Any attack cannot be justified if it doesn’t represent a military advantage. The Field Manual on Counterinsurgency writes that the military advantage is not calculated in how many enemies are killed, but which enemies are killed¹³⁹. This means, for the purpose of the calculus of proportionality in the attack, it will weight a lot more “how much harm the targeted insurgent could do if allowed to escape”¹⁴⁰, than the number of enemies defeated.

Article 52 (2) in AP I clearly requires that armed attacks must be “limited strictly to military objectives” and offer a “military advantage”¹⁴¹. The requirement of military necessity prohibits the targeted killing of an individual when “such killing is military

¹³⁵ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24: COUNTERINSURGENCY (2006), *Apud*, VOGEL, Ryan J. (2011), *op. cit.*, p. 125.

¹³⁶ *Ibidem*

¹³⁷ SOLIS, Gary D. (2016), *op. cit.*, p. 295.

¹³⁸ *Ibidem*, p. 296.

¹³⁹ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24: COUNTERINSURGENCY (2006), *Apud*, VOGEL, Ryan J. (2011), *op. cit.*, p. 125.

¹⁴⁰ *Ibidem*.

¹⁴¹ Cf. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

unnecessary, either because it offers no military advantage or because the targeted person could have been captured without unreasonable risk to the operating forces”¹⁴². It must also comply with the prohibitions of treachery.

NATO defines the principle of military necessity as “the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war”¹⁴³. The interpretation requires that military action be both necessary for the achievement of a legitimate military purpose, and not otherwise prohibited by IHL has been confirmed both in international jurisprudence and in contemporary legal doctrine¹⁴⁴.

However, military necessity doesn’t mean doing whatever it takes, because, to comply with the principle, all the actions must come with a significant military advantage and the weakening of the military enemy forces, while preventing collateral damages or disproportional civilian casualties. RUYS calls our attention to the fact that even in an armed conflict does not exist a “carte blanche” for the use of lethal force although IHL essentially permits the singling out and killing of an individual who is a lawful target¹⁴⁵.

The difficulty emerges when is required to determine what constitutes military necessity. SOLIS determines, as a starting point, that we must assume “good faith on the part of the commander”, and given the information available at the time of the decision the commander made the one that military necessity reasonably required them to do¹⁴⁶.

Still, the author points out that the test is not entirely subjective being extremely difficult to “apply judicial oversight to decisions taken in combat”¹⁴⁷. There are a few important questions (that reflect the link between the four core principles) that one should make when accessing these decisions like “Did the commander take reasonable steps to gather information to determine (...) the legitimacy of the target, and that incidental damage would not be disproportionate?” or “Did the commander act reasonably in light of the information gathered?”¹⁴⁸.

Serious concerns also have been raised about erroneous targeting and incident casualties among the civilian population, which for us, reinforces the idea that the resort to targeted killing must be delimited by rigorous criteria.

¹⁴² MELZER, Nils (2009), *op. cit.*, p. 57.

¹⁴³ *Ibidem*, p. 283.

¹⁴⁴ *Ibidem*, p. 285.

¹⁴⁵ MELZER, Nils (2009), *op. cit.*, p. 63.

¹⁴⁶ SOLIS, Gary D. (2016), *op. cit.*, p. 282.

¹⁴⁷ *Ibidem*, p. 283.

¹⁴⁸ SOLIS, Gary D. (2016), *op. cit.*, p. 283.

Finally, only a senior military commander, representing the targeting state may authorize a targeted killing. It might be the president, or a senior domestic government official to whom the president has delegated targeting authority, such as the secretary of defense¹⁴⁹. But it must be someone in the top of the military chain of command. This should never be a light decision to make; all the elements described above must be taken in consideration and IHL principles like proportionality, must always be at the top of an authorizing commander's considerations, to avoid collateral damage. Also, and this is an important aspect to keep in mind, targeted killing should never be the main military strategy to a specific conflict, but an act to be taken in consideration in specific situations. As BEN-NAFTALI and MICHAELI puts it "while specific targeted killing might be lawful, a general policy of targeted killing cannot"^{150,151}.

This takes us back to the fact that only high value targets might be targeted, resulting in a great advantage to the counterpart.

Overall, RUYS¹⁵² concludes that current international law governing the use of lethal force ensures a basic balance between the interests of State security, individual security and civil liberties, when properly implemented, since IHL provides a clear normative framework for State-sponsored targeted killing.

¹⁴⁹ *Ibidem*, p. 558.

¹⁵⁰ MELZER, Nils (2009), *op. cit.*, p. 61.

¹⁵¹ These idea reveals the influence of HRL in the interpretation of IHL rules specially when determining who can be considered a legitimate target.

¹⁵² MELZER, Nils (2009), *op. cit.*, p. 63.

3. FROM THEORY TO STATE PRACTICE – SIGNATURE STRIKES

So far, we can safely say that targeted killing using drones is legal under IHL, if it complies with the parameters established above. It has the undeniable potential to minimize civilian casualties, property damages and costs of war (either human or financial).

However, when we look at the media or human rights organizations reports, the reality on drone strikes might not be as lawful as one might assume.

When confronting theory to U.S. practice many problems arise. From the inconsistent and yet high number of civilian casualties, property loss or displacement, there is indeed a lot of red flags being raised contradicting some of the praises that we all have heard over the years.

One major issue that has been discussed is the resource to signature strikes, mainly by the CIA in their covert program.

Signature strikes are appointed as a category of targeted killing, as well as personality strikes. These strikes are carried out against “suspected terrorists or militants whose identities are not known”, being targeted for their observed pattern of behavior that “would seem to indicate that they are involved in some militant/terrorist activity”¹⁵³.

For ROTHENBERG, signature strikes represent a response to the “particular targeting demands of non-international armed conflicts”¹⁵⁴, since in the absence of a clearly defined combatant status “targeting has to be based on information gathered and processed by the applicable laws of war”¹⁵⁵.

In this form of attack, drones play a “key role”, since they are capable of contributing with information vital for the analysis that will enable targeting decisions, while delivering precision attacks¹⁵⁶.

These strikes based on signatures deserve a second look due to some reports that state that signature strikes might make up a significant proportion of the covert drone

¹⁵³ STERIO, Milena, “The Covert Use of Drones: How Secrecy Undermines Oversight and Accountability”, in *Albany Government Law Review*, Vol.8 (2015), p. 163.

¹⁵⁴ ROTHENBERG, Daniel (2015), *op. cit.*, p. 451.

¹⁵⁵ *Ibidem*.

¹⁵⁶ *Ibidem*, p. 450.

program, with a strong possibility that they constituted most of the strikes in Pakistan¹⁵⁷. U.S. officials reported that most of the people on the CIA's kill list have been killed in signature strikes, without the CIA's certainty about who was the target¹⁵⁸.

This situation, if confirmed, exposes civilians to living under the constants fear of attack, since they don't know what constitutes a signature behavior that could get them killed¹⁵⁹.

One example that sums up the problem has been provided by HELLER: "On February 4, 2002, a Predator drone operated by the CIA spotted three men standing in Zawhar Kili (...) one of the man was tall; the others were supposedly acting reverently toward him. Convinced that the men were legitimate targets – and hoping the tall man was Osama Bin Laden – the CIA fired a Hellfire missile from the Predator, killing all three instantly." The man was not Bin Laden, and journalists determine that none of them were affiliated with al-Qaeda or Taliban.¹⁶⁰

Later, a Pentagon Spokesperson admitted that the "CIA had no intelligence indicating that the "tall man" was actually Bin Laden" but there was no indication that they were innocent locals.¹⁶¹ They remained convinced that the men were "an appropriate target" even though they were not sure "who it was the drone had killed"¹⁶².

The theory behind signature strikes is the individual's pattern of behavior (basically a signature behavior), serving as a "proxy for determining either a continuous combat function" or if the individual is directly participating in the conflict¹⁶³. This basically means that strikes might be directed at people who might demonstrate a behavior similar to those in organized armed groups or similar to civilians who directly participate in hostilities.

So, what is considered a "signature behavior"? Basically, is a military-age male who bears "defining characteristics associated with terrorist activity, but whose identities

¹⁵⁷ Center for Civilians in Conflict (formerly CIVIC) and Human Rights Clinic at Columbia Law School, "The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions" (2012), p. 9.

¹⁵⁸ *Ibidem*.

¹⁵⁹ HOLEWINSKI, Sarah (2015), op. cit., p. 46.

¹⁶⁰ HELLER, Kevin Jon, "One Hell of a Killing Machine: Signature Strikes and International Law", in Melbourne Legal Studies Research Paper, no. 634 (2012), p. 1.

¹⁶¹ HELLER, Kevin Jon (2012), op. cit., p. 1.

¹⁶² *Ibidem*.

¹⁶³ BENSON, K., "Kill 'em and Sort it Out Later: Signature Drone Strikes and International Humanitarian Law", *Pacific McGeorge Global Business & Development Law Journal*, Vol. 27, No. 1 (2014), p. 29.

aren't known"¹⁶⁴. In fact, according to Daniel Klaidman, when the CIA's Deputy Director clarified to President Obama what constitute a signature strike he explained "there are a lot of military-age males down there, men associated with terrorist activity, but we don't necessarily know who they are"¹⁶⁵.

But let's not be hasty judging this practice. There is, in fact, signatures behaviors that, when observed and confirmed by "on the ground" information, are not questionable, like signatures that exhibit involvement in planning and executing attacks. Basically, any signature that might reveal an involvement with the conflict, could lead to a lawful strike.

The controversial cases are the ones that "involve individuals who exhibit signatures that do not clearly indicate membership in an organized armed group or direct participation in hostilities"¹⁶⁶. Nevertheless, in practice, it has been quite hard to determine if these are behaviors that justify a lawful attack or not, since the U.S. does not disclosure what behaviors justify a signature strike¹⁶⁷.

Given the wide scope of activities that exposes individuals to being targeted by a drone strike due to a specific behavior, is possible that the requirements that constitute a signature have "been defined so broadly, and the definition of imminence expanded so greatly, that it serves as a poor proxy for direct participation or continuous combat function"¹⁶⁸. For BENSON might not even be a question of a broad concept, but a cultural one since "suspicious behavior in the United States may not be suspicious in Pakistan"¹⁶⁹. For example, a young man with weapons driving around in convoys may appear suspicious and his behavior might be a reason for a signature strike; however, in Pakistan's tribal areas this behavior might not imply any unlawful activities that might end up select them as a lawful target under IHL¹⁷⁰.

These strikes are harder to justify under the law of armed conflict, because it is "uncertain whether they can adequately comply with the principles of distinction,

¹⁶⁴ SOLIS, Gary D. (2016), *op. cit.*, p. 561.

¹⁶⁵ ZENKO, Micah, "Targeted Killings and Signature Strikes", in Council on Foreign Relations, July 16, 2012.

¹⁶⁶ SCHMITT, Michael N. and WIDMAR, Eric W. (May 16, 2014), *op. cit.*, p. 390.

¹⁶⁷ HOLEWINSKI, Sarah (2015), *op. cit.*, p. 46.

¹⁶⁸ BENSON, K. (2014), *op. cit.*, p. 35.

¹⁶⁹ *Ibidem*.

¹⁷⁰ HOLEWINSKI, Sarah (2015), *op. cit.*, p. 46.

proportionality and precautions”¹⁷¹. Many lawyers argue that targeting an individual based on a set of activities that suggest some form of allegiance but are not linked to actual participation in hostilities may violate international law¹⁷².

In fact, without no ground based intelligence, it is not very believable that drone operators alone, can “determine whether men targeted in signature strikes are not armed shepherds on their way to a market or locals patrolling their land”¹⁷³, which is a normal behavior in some areas in Pakistan, for example. These behaviors, can only be confirmed as lawful, combining the use of drones with other intelligence sources and through continuous observation of an individual’s suspicious behavior¹⁷⁴.

Bearing in mind that their identity is unknown, these targeted individuals may be confused with civilians who cannot be directly targeted, and confirming their identity requires means that the U.S. might not possess, like personnel on the ground to investigate^{175,176}. Even current and former governments might have suggested that signature strikes might lead to greater civilian casualties¹⁷⁷.

If proved lawful, they might raise issues about the targeting process that has been conducted, since they enable distinct and intrusive forms “of projecting power, that redefine the conditions under which individuals (...) are identified”¹⁷⁸.

HELLER provides us with a few examples on unlawful attacks that relied on signature behaviors. These are attacks on a “military age male in area of known terrorists”; consorting with known terrorists; armed men travelling in AQAP¹⁷⁹ controlled area; and the existence of a suspicious compound¹⁸⁰.

These examples represent obvious violations on IHL principles. First, no one can be targeted simply because they are military-age males since it’s not the age that

¹⁷¹ STERIO, Milena (2015), *op. cit.*, p. 163.

¹⁷² HOLEWINSKI, Sarah (2015), *op. cit.*, p. 46.

¹⁷³ *Ibidem*.

¹⁷⁴ ROTHENBERG, Daniel (2015), *op. cit.*, p. 454.

¹⁷⁵ Center for Civilians in Conflict (formerly CIVIC) and Human Rights Clinic at Columbia Law School (2012), *op. cit.*, p. 33.

¹⁷⁶ For example, the access to the Tribal areas of Pakistan is very restricted, which makes it harder to get reliable sources. It’s easier in locations where the US already has personnel on the ground.

¹⁷⁷ In June 12, 2012, 26 members of Congress wrote a letter to President Obama sharing concerns about the targeted killing program with drones, including concerns about signatures strikes. More details: <https://www.thebureauinvestigates.com/stories/2012-06-29/a-journey-into-moral-depravity-us-congressman-dennis-kucinich-on-covert-wars>

¹⁷⁸ *Ibidem*, p. 452.

¹⁷⁹ Al-Qaeda in the Arabian Peninsula.

¹⁸⁰ HELLER, Kevin Jon (2012), *op. cit.*, pp. 11 to 14.

determines someone's involvement in the hostilities, it's their confirmed actions, that are associated with one side or the other of the conflict. Without any further information, an attack on an individual based in these criteria is "plainly inconsistent with the principle of distinction"¹⁸¹.

Also inconsistent with the principle of distinction is targeting an individual based on a signature such as consorting with known terrorists. An individual status cannot be determined just because someone is "consorting" with a legitimate target. Doesn't qualify as DPH, since it doesn't comply with the three requirements previously discussed, and it does not even rise to the level of indirect participation in hostilities, since it is not an act that contributes "to the war effort", such as helping produce military equipment¹⁸².

RUYS contends that "a membership approach" which means that all members of a certain organized armed group could be attacked, would be "too broad, because some members never engaged in hostilities", leaving targeted killings to be permissible only when there are individuals preparing or engaging in an attack¹⁸³. Considering this situation, individuals "run the risk of being collateral damage"¹⁸⁴, due to the proximity to a lawful target. But they are not the targeted ones, therefore, if the attack complies with the principle of proportionality and all the necessary precautions were taken, there is no question about the legitimacy of the attack.

Lastly, as for targeting trucks transporting armed man in areas controlled by organized armed groups or targeting compounds that might harbor combatant activities, it is again a signature that no reveals enough information to ensure that it is a lawful target. In the absence of additional information provided by other sources, the visual image that comes from the drone does not suffice. While operators can track such movements at a time, like continuous crossing the border between Pakistan and Afghanistan, the image alone does not provide adequate clarity as to the individuals' status¹⁸⁵. The mere image of someone carrying a gun or the suspicion that a compound is being used for military purposes does not suffice to establish a legitimate military objective¹⁸⁶. An attack under these signatures would violate not only the rule of distinction, but also proportionality and military necessity.

¹⁸¹ HELLER, Kevin Jon (2012), *op. cit.*, p. 11.

¹⁸² *Ibidem*, p. 12.

¹⁸³ MELZER, Nils (2009), *op. cit.*, p. 63.

¹⁸⁴ HELLER, Kevin Jon (2012), *op. cit.*, p. 12.

¹⁸⁵ HOLEWINSKI, Sarah (2015), *op. cit.*, p. 46.

¹⁸⁶ HELLER, Kevin Jon (2012), *op. cit.*, pp. 13 and 14.

Taking into account that most of the news and reports are referring to examples like the previous ones, it does not mean that all signature strikes might be considered illegal. HELLER points out that there are indeed some signatures that are “legally adequate” under IHL. For the author planning attacks, transporting weapons, handling explosives, and attacks on Al-Qaeda compounds and training camps¹⁸⁷ are adequate since they answer affirmatively to two questions. First, was the signature legally sufficient to determine the legality of the target? Second, was the evidence sufficient to determine if the “targeted individual was engaged in the signature behavior?”¹⁸⁸

In order to answer affirmatively to both questions, it will be required reliable information and on the ground sources. Meaning that to comply with IHL, signature strikes must rely on information gathered and processed by the applicable laws of war.

Within the context of NIAC, ROTHENBERG believes that targeting is “always a question of gathering intelligence, whether the data comes from informants on the ground, satellite imagery, or intercepted communications”¹⁸⁹.

There are significant issues with the resource to signature strikes in current conflicts. It is clear that errors have been made concerning target identification. Do to the uncertainty about the target behavior. In an published article, SHANE argues that “it has become clear that when operators in Nevada fire missiles into remote tribal territories (...) they often do not know who they are killing, but are making an imperfect best guess”¹⁹⁰.

Without knowing the evidentiary bases of the strikes, it is impossible to conclude that they violated the principle of distinction. They also suggest that the U.S. is willing to attack on the basis of evidence that is far from definitive¹⁹¹. In fact, there is a very famous “joke”, one which many scholars refer to, that says “when the CIA sees ‘three guys doing jumping jacks’, they think it is a terrorist training camp”¹⁹².

¹⁸⁷ The last two mentioned are only lawful targets when they are serving as Al-Qaeda facilities, not when they are being used by civilians.

¹⁸⁸ HELLER, Kevin Jon (2012), *op. cit.*, p. 7.

¹⁸⁹ ROTHENBERG, Daniel (2015), *op. cit.*, p. 448.

¹⁹⁰ SHANE, Scott, “Drone Strikes Reveal Uncomfortable Truth: U.S. Is Often Unsure About Who Will Die”, in *The New York Times*, April 23, 2015.

¹⁹¹ HELLER, Kevin Jon (2012), *op. cit.*, p. 20.

¹⁹² ZENKO, Micah, “Targeted Killings and Signature Strikes”, in *Council on Foreign Relations*, July 16, 2012.

It is also an open question whether the U.S. is capable of accurately distinguish between member of organized armed groups and civilians who DPH¹⁹³. This is important because the lawfulness of the target is determined by their status in the hostilities. For HELLER, is even unlikely that the U.S. attempts to make that distinction. Since the U.S. considers any military-age male in an area of known terrorist activity and any individual who consorts with known combatants to be a lawful target, which bears “little resemblance to long-standing principles of IHL”¹⁹⁴.

There is, of course, another major difficulty when accessing the legality of US’s signature strikes. We are talking about the categorically refusals to reveal the criteria used to perform such attacks, or even if there are signature strikes occurring, that relate to the media reports. To this day, it’s still not possible to determine with absolute certainty, that the U.S. requires evidence that is sufficient to justify signature strikes. Another issue is the amount of evidence necessary to determine that individuals are legitimate military targets. This is not clear and consensual, and in some cases, facing any doubt, absolute certainty might not even be required¹⁹⁵.

We are more inclined to look at this requirement through ICRC’s position that when facing even the slightest doubt about the status of the individual, it should be required from the attacker further investigation¹⁹⁶.

Many authors see this practice as violation of IHL, stating that as a result of the program’s secrecy, especially when conducting signature strikes, drone strikes are illegal, and that the lack of total transparency and an effective accountability mechanism means that the U.S. cannot fulfill its obligations under IHL¹⁹⁷.

There is one more problem that we must address, although it is not directly related with Signature Strikes, it is relevant since it demonstrates that one specific policy might influence a significant range of aspects in the drone program.

Some believe that one of the causes for the inconsistent numbers of civilian casualties, between the US Government and Journalist’s reports, derives from the

¹⁹³ HELLER, Kevin Jon (2012), *op. cit.*, p. 20.

¹⁹⁴ *Ibidem*, p. 22.

¹⁹⁵ *Ibidem*, p. 19.

¹⁹⁶ *Ibidem*.

¹⁹⁷ ROTHENBERG, Daniel (2015), *op. cit.*, p. 451.

possibility of different conceptions on what is a signature behavior¹⁹⁸. If the US really considers “all military age-male” to be enough of a behavior to be targeted, the number of civilian casualties must be, indeed, very low.

On the other hand, if these reports proven to be right in accusing the US of indiscriminate attacks, based on wrong assumptions about a civilian status, then there is a possibility that the principle of distinction as not been complied with, and that the numbers of civilian casualties is a lot higher.

But in here lays the greatest issue when accessing these strikes. Without transparency and a clear policy about the rules of targeting that the CIA applies, there will always be uncertainty and assumptions.

¹⁹⁸ Center for Civilians in Conflict (formerly CIVIC) and Human Rights Clinic at Columbia Law School, “The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions” (2012); pp. 32 and 33

CONCLUSION

Drones came and conquer a place in the conduction of hostilities. Capable of surveillance and attack they fit perfectly with targeted killing operations, due to their capabilities to scout and to kill.

The following conclusions were drawn from this dissertation, and intend to summarize our views concerning this subject.

I. Drones are not illegal under IHL. This should not even be questioned since, considering their function, there is no much difference between drones, helicopters or other combat aircraft, as so on. They are aerial vehicles that carry munitions and are those that give them a lethal capacity. In fact, since they are considered very precise, providing real time surveillance and attack, they are capable of enhancing the targeting abilities, reducing the probability of an unlawful attack.

II. The Drone itself does not (and must not) have autonomy to engage in attack. The decision to strike relays on the commander in charge of the operation, especially if it amounts to targeted killing. This call must, and it's never enough to highlight this, always come from a combination between cultural awareness, intelligence and real time image of the target. And one might ask, why cultural awareness? Because, as we demonstrated before, different societies have different interpretations on what is an acceptable behavior. For us, to see a man or women, carrying arms openly and patrol a specific area (without having any connection to law enforcement) it's alarming. But the same might not be said in Pakistan or Afghanistan.

III. As for targeted killing under IHL, we believe that it deserves a lot more care and attention when determining the lawfulness of such operations, specially the requirements for such attack. But, *ius in bello* does not require to avoid targeted killings on lawful targets; if an individual is considered a lawful target under IHL, it can be killed. Simple as that.

However, we believe that, when is possible, to opt for a capture operation, rather than a targeted killing one, since it might end up benefiting them. Some might

argue this is a human rights requirement, but for us, there is no need to kill an individual when capturing will lead to the same military advantage.

IV. The rules governing armed conflicts are still actual and relevant. IHL provides an incredible range of rules and principles to guide the conduction of hostilities, from customary law, to the array of treaties and conventions related to this subject. So, we do not believe that there is need for a specific set of rules regulating targeted killing operations. The only thing required is to comply with the laws of armed conflict, while carrying these operations.

To comply or not, depends entirely on the rules implemented by each States, and if those follow IHL.

V. This leads to the last chapter. When confronting theory with US practice, there are a lot of inconsistencies, driven by the constant need to keep the program a secret. As for signature strikes they represent some of the biggest issues with the American drone program.

There is no public knowledge of what is considered a signature behavior. If we believe the reports and the US is carrying strikes to all military-age males in the area of known terrorists (basically until proven innocent) the repercussions on the toll of civilian casualties could indeed be a lot higher than they made us believe.

Lack of a disclosed targeted killing policy, whether referring to personality strikes or signature strikes, leads to a void of accountability. If, indeed the US is engaging in this attacks under the laws of war, there is no problem to reveal which behaviors amount to a lawful attack.

VI. Without a public policy about the drone program, specially the CIA's, a sort of fog covering the lawfulness of these attacks, leads us to be more incline to accept the media and Human Rights Organizations reports, and share their concerns.

If proven, it would mean that serious violation of the principle of distinction had occurred. As the US should not take these accusations as lightly as it appears for almost two decades. In an unprecedented ruling, the Peshawar High Court, in Pakistan, ruled the strikes conducted by the CIA, that occurred in the tribal areas a "breach of International Law and Conventions on the subject matter", demanding

compensation for the civilian casualties and property damages as well as further investigations in to the nature of the attacks¹⁹⁹.

Of course, Pakistani entities weren't able to up hold the ruling, especially when it comes to the US and the CIA. But, the simple existence of this decision it is an evidence of the need of transparency when conducting these operations.

VII. With these actions the US is at risk of establishing a dangerous precedent for future drones and/or targeted killing programs, instead being an example of transparency and compliance with IHL.

To believe that this technology will remain exclusive accessible only to “responsible nations” is to disregard the history of technology itself²⁰⁰. It should not be acceptable that, after all this years, there is still this level of secrecy surrounding these practices.

So, the US should be setting the example and public disclose the rules applied to their drone program. Only by doing that, the international community could hold the accountable for their actions.

¹⁹⁹ ROSS, Alice, “Pakistani court rules CIA drone strikes are illegal”, The Bureau of Investigative Journalism, May 9, 2013, <https://www.thebureauinvestigates.com/stories/2013-05-09/pakistani-court-rules-cia-drone-strikes-are-illegal>

²⁰⁰ CASEY-MALSEN, Stuart (2012), *op. cit.*, p. 625.

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