



LITIGATING DRONE STRIKES

Challenging the Global
Network of Remote Killing

ECCHR

EUROPEAN CENTER FOR
CONSTITUTIONAL AND
HUMAN RIGHTS

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DRONE STRIKES**
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Network of Remote Killing

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NOTE ON THE ARTWORK

The cover image and images throughout the text are part of the Res Judicata series by New York based artist E. Adam Attia. For this project the artist created artificial life size shadows of drones on low-lying rooftops in populated urban centers. Depicted as large, black, silhouettes these to-scale works created simply using black paint imitate shadows as seen on web-based mapping software of drones flying overhead. With Res Judicata distributed around the globe, users of everyday mapping technology will see their digital worlds change with the addition of each installation as it is absorbed into the maps that we use to navigate our homes, calling to mind an ever increasing presence of surveillance technology and questioning the wider implications of drones.

As a US Army, Iraq War Veteran, E. Adam Attia's unique perspective on the tragedies and cost of war inform his work as an artist. He now works with other like-minded scholars, historians, and artists to engage with the public in what seems like an often-misunderstood story of human strife and perseverance. His work on »Drone Zones« and »The Drone Campaign« garnered international attention with press and interviews in »The New Yorker«, »The Wall Street Journal«, »CNN« and »Fox News«. For his latest project Children of Drones he has combined efforts with the founders of Reprieve in pursuit of an immersive engagement, working on the ground with families from the most impacted drone war regions of Waziristan.



PREFACE

More than »just« another weapons platform – the fundamental threats from drone warfare

Wolfgang Kaleck, ECCHR General Secretary, and Andreas Schüller, International Crimes and Accountability Program, ECCHR

The almost global capacity to conduct airstrikes anytime, anywhere: that is one of the most distinctive features of armed drones – and therefore a new dimension of warfare. The US has been developing such a global program for many years and has begun to use it extensively since 2009, with thousands of strikes to date.

The program establishes a global network of airbases in different regions worldwide, satellite capacities, ground stations and operation centers, e.g. in Ramstein (Germany), Sigonella (Italy), Afghanistan, Pakistan, Iraq, Turkey, UAE and other Gulf states, Djibouti, Tunisia and Niger. Other states aim to follow, though their scope for drone operations remains geographically more limited. On the other side, civilian populations in regions such as Afghanistan/Pakistan, Yemen, Somalia, Libya or Syria/Iraq, are living under a growing number of drone attacks. With the ongoing threat and the uncertainty of when and where the next strike will happen, their experience can only be described as living under a constant threat of terror – no established battlefields which locals could avoid entering, no predictability as to when and where airstrikes will happen and what will constitute a target. The inaccuracy of the data on which strikes are taken contributes in large part to the terrorizing effect on local populations. Strike selection is so unpredictable that everyone in an affected area could become a victim if in the wrong place at the wrong time.

Armed drones combine many distinctive characteristics - they are used mostly in secrecy, but in great numbers. Explicit targets are people who allegedly pose a threat to the targeting state; also targeted are these people's houses, compounds, cars or cell phones. Drones are used across borders, flying over different countries, with and without the permission of affected states, often also attacking local governments' opponents and collecting data.

Without the data collection, strike decisions would be impossible. However, even with the data, which is mostly signal intelligence, and not human intelligence, from sources on the ground or in the vicinity of targets, strikes remain very inaccurate. Often the targeted person is believed to be in a specific house or car based on the data collected, but it turns out that in reality he was not. This explains the high number of unknown victims, multiple strikes on the same target over months killing many other bystanders, as well as the high number of obviously innocent locals living at the target locations of strikes.

This inaccuracy in hundreds of strikes taken makes the entire program illegal. Even if in war, airstrikes in large numbers, conducted without sufficient information and intelligence about the strike target locations are illegal; the principle of distinction between military targets and civilians and the prohibition of indiscriminate attacks are two of the core principles of international humanitarian law. The drone program accumulates thousands of victims, in many different places in the world, over many years and with no end in sight.

Human rights and international law provide a framework for drone strikes, but with their own limitations as to this new kind of air warfare, they insufficiently protect civilians. Thus it is the responsibility of states and primarily of domestic courts to enforce the rights and to interpret the legal frameworks. Moreover, law reforms are necessary in order to effectively protect civilian populations in times of modern warfare. All too often, courts either quickly accept the existence of a legal framework of an armed conflict, which reduces the protection

for civilians significantly compared to the regular human rights framework, or the secrecy of the program prevents legal actions as the persons involved and the intentions and information on which decisions are being taken remain unknown.

Litigating drone attacks nevertheless addresses the most relevant legal questions even beyond the courtroom. It is about such fundamental questions as whether states are permitted to use force on the territory of another state, which is generally prohibited by the Charter of the United Nations, particularly against (individual) non-state actors. In deploying military means such as missiles, the fundamental principle of distinction between military targets and civilians is often breached. Similarly, legally required precautions in attacks – aimed at protecting civilian lives – are not taken in the process of targeting decisions and strikes.

Litigating against the use of armed drones before national courts exposes, on the one hand, the limits of international law and specifically international humanitarian law when it comes to air warfare. As the law stands today, the aim of protecting the civilian population in wartime from air attacks is not being met. Another issue is the lack of enforcement mechanisms for international humanitarian law.

On the other hand, even if courts can hear cases, difficulties in accessing the target areas to gather evidence, as well as the secrecy shrouding the drone program, present tremendous obstacles for judicial control of executive actions. Which information is released still depends to a large extent on national security policies and interests. Only some limited court decisions following Freedom of Information litigation, as well as statements by courageous whistle-blowers, shed some light onto the secret program. In addition, courts in those states most responsible for drone strikes are not accessible for the victims, as the al-Awlaki litigation in the US (see contribution by Brett Max Kaufman and Anna Diakun in this publication) or the Noor Khan litigation in UK (see contribution by

Jennifer Gibson) have shown. In other countries, such as Germany, courts are accessible for victims like Faisal bin Ali Jaber from Yemen (see contribution by Jennifer Gibson and the »find out more« section at the end of this publication). However, litigation in these states only addresses some aspects of the drone program, but not its core. Thus, litigation remains necessary to demand legal standards, to show flaws in the law, to force governments to respond and to give victims the opportunity to present their cases and be heard. In the end litigation alone will not stop the use of armed drones, but it can contribute to a broader movement against their use and expansion.

And Germany? A major part of the data analysis that contributes to the inaccurate target decisions and strikes is conducted in US installations in Germany such as Ramstein Air Base or US Army Garrison Stuttgart. These tasks are often outsourced by the US army to private contractors, which have been granted the same privileges and immunities as armed service personnel by the German Federal Foreign Office. In addition, Ramstein Air Base is crucial for the data transfer to satellites and drones in the operating area as there is no direct real-time line of communication possible to the US. In US budgetary documents, Ramstein Air Base is mentioned as a »single point of failure,« thus showing the importance of the Air Base in the global drone program. In addition, like many other governments, Germany exchanges data with the US which contributes to the large datasets used in identifying targets and making strike decisions. As addressed, these datasets are most often too weak to make reasonable strike decisions, but decisions are made anyway, leading to large numbers of innocent individuals being killed.

What comes next? Military and technical developments point to an even worse future if there is no strong global opposition, including by states and international organizations, to adopt and enforce restrictions and boundaries. Fully automated weapon systems aggravate a number of challenges addressed above. The replacement of human beings with machines and algorithms means avoiding moral judgments, ethics and accountability. Hence, legal accountability remains of the utmost

importance today and in the coming years to counter a weapon system that is falsely portrayed as accurate and effective, avoiding casualties and thus antiwar resistance on the one side, while in fact leading to increasing numbers of battlefields and civilian casualties and spreading terror in many different regions of the world.

INTRODUCTION

Andreas Schüller and Fiona Nelson, International Crimes and Accountability Program, ECCHR

»Litigating Drone Attacks« was the title of a conference hosted by the European Center for Constitutional and Human Rights (ECCHR) in October 2016 in Berlin. We brought together around 20 experts on armed drones, from affected states such as Yemen and Pakistan, from

states conducting lethal operations with armed drones such as the US and the UK as well as from European states which support armed drone strikes in various ways, including Germany, the Netherlands and Italy. We hosted experts on the documentation of drone strikes, victim representation, advocacy, journalism, international law and litigation. Also taking part in the discussions was *Faisal bin Ali Jaber* from Yemen, who lost relatives in a drone strike in 2012 and who is now seeking answers and justice before the courts in Germany and the US in litigation supported by ECCHR and Reprieve.

This publication includes contributions from several of the experts who took part in the conference. Following a summary of the discussions at the conference sessions by *Fiona Nelson*, *Dr. Srdjan Cvijic* and *Lisa Klingenberg* give an insight into the status of the debate on armed drones in European states. The contribution shows that European involvement in drones is much further advanced than is generally thought. *Dr. Robert Heinsch* and *Sofia Pouloupoulou* then focus on the difficulties in prosecuting drone strikes under international criminal law. Turning to litigation, *Shahzad Akbar*, founder of the Foundation for Fundamental Rights in Pakistan and lawyer for a number of Pakistani drone victims, gives an in-depth insight into the situation of victims in Pakistan, domestic litigation and the consequences of the longstanding drone campaign being waged in the region. *Jennifer Gibson* of the international NGO Reprieve addresses litigation activities in Europe on behalf of individual drone survivors from Pakistan and Yemen. Turning to the country most heavily involved in drone strikes, *Brett Max Kaufman* and *Anna Diakun* of the American Civil Liberties Union (ACLU) report on how their litigation has helped shed some light on the formerly secret US drone program by obtaining documents on policies as well as the legal standards put forward by the US as a purported basis for the program.

Berlin, May 2017

LITIGATING DRONE ATTACKS: ECCHR'S EXPERT WORKSHOP AND PUBLIC FORUM IN REVIEW

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On the 17th and 18th of October 2016, the European Center for Constitutional and Human Rights hosted a workshop on drone litigation strategy with more than 20 experts in law, journalism, academia and advocacy from Europe, the US, the UK, Pakistan and Yemen. The opening sessions addressed the latest developments in the use of armed drones and the ongoing documentation of drone strikes, underlining the increasingly urgent need for clarity on the limits of warfare by drone. The next sittings reviewed the applicable legal frameworks and the largely unchallenged moves by some states to water down the traditional limitations on the use of force and redefine legal concepts like imminence. In the final sessions on litigation and advocacy strategies, participants reviewed what worked well and where they encountered difficulties in their work with a view to identifying the most promising avenues for bringing about legal and policy advances in the coming months and years. What follows is a generalized summary of notable points raised.

Session 1: Recent developments in the global use of armed drones – The age of proliferation

Recent years have seen significant shifts in the use of armed drones by the US, the UK and Israel. Meanwhile, several other state and non-state actors have adopted the technology. This opening session

made it clear that the much heralded era of drone proliferation has now very much arrived.

The discussion focused initially on the states which have been involved in the use of armed drones for a number of years. The group heard that there has been a noticeable geographical shift in the United States' use of armed drones. In Pakistan, drone strikes are at their lowest level since 2006/2007, with two or three assassinations each year. Drone strikes are still common across the border in Afghanistan, and over the past two years the UN has warned about increasing civilian casualties from these attacks. Meanwhile, US drone strikes continue in Somalia, with mass civilian casualties in the kind of signature strikes that were previously seen in Pakistan. In Yemen, there are roughly 50 targeted drone strikes a year, primarily against AQAP (al-Qaida in the Arabian Peninsula), along with occasional actions by special forces on the ground. Strikes in Yemen were said to be easier to track since CENTCOM (United States Central Command) started declaring its drone strikes there, adopting AFRICOM (United States Africa Command) policy. On the one hand this improvement in transparency was seen as a welcome development, on the other hand it was pointed out that the press releases describing the strikes risk legitimizing what is not a conventional conflict and exacerbating the blurring of the lines between the traditional battlefield and unconventional airstrikes.

The group also heard that the UK continues to provide operational support and intelligence for US drone killings, as well as a carrying out its own strikes. As of 2016, 236 UK drone strikes were tracked in Iraq and Syria. At one point, one in three UK airstrikes in the region were carried out by drone, whereas only about seven percent of US airstrikes against ISIL are carried out using Reaper and Predator drones. Israel was said to be now deploying armed drones not just in Gaza and the West Bank but also in Lebanon, Egypt, Sudan and Syria.

Other states are also adopting armed drones: Pakistan, Iraq and Nigeria are all now using drones on their own territory, raising serious questions

about the future of domestic law enforcement. One speaker reported that Syria is proving to be a grisly testing ground for the use of drones. Weaponized drones are being deployed there by the US, UK and Israel as well as Iran, and non-state actors are starting to follow suit. All insurgent groups in the region are using tactical mini drones to provide high quality footage of the battlefield, and it seems that at least three non-state actors have also weaponized them. Hezbollah claimed to have carried out a drone strike in September 2014, and in 2015 the group dropped explosives from its mini drones. Jund al Nusra has deployed drone-mounted mortar-rounds, and ISIL has used a »Trojan« drone, flying it in to opponents' camps where, on examination, it explodes. One speaker highlighted that the proliferation of the use of these weapons has been accompanied by something of a gold rush in the arms trade as drones-producing nations scramble for a share of the growing market.

Session 2: Documenting drone strikes and investigations on the ground

In this panel, journalists and activists described the difficulties that arise in gathering information on drone attacks as well as on the chain of command and the processes leading up to a strike. In Pakistan, access to the remote regions where drone strikes occur is often difficult. One expert said that initial obstacles include overcoming the skepticism of many people in Pakistan's tribal regions towards NGOs. Leaks of Pakistani government data have proven to be a useful source of material. The group heard that there is a certain openness in the country for accountability for drone strikes, though depending on the latest developments, a fear of fundamentalism can sometimes mean that drone strikes drop off the radar as a human rights concern. Another participant reported that in Yemen there is no real accountability for drone strikes. Occasionally, the president will pay compensation to victims, especially those from more powerful tribes, but leaks suggest

that the money comes from the US. Freedom of information laws exist in both Pakistan and Yemen but sensitive national security or counter terrorism questions are excluded. In Somalia, fact-finding is difficult; only the tip of the iceberg is known. Documentation is somewhat easier in Syria thanks to community monitoring.

The discussion on the practical experience of gathering information on the ground also brought up a number of insights regarding the impact of drone strikes on local populations. It was reported that in Yemen, locals sometimes respond to drone strikes by retaliating against the nearest tangible target – sometimes military stations or even police stations. This has led to many police stations shutting down, further destabilizing the region. On several occasions the group discussed the argument that drone strikes are counter-productive because they stir up resentment towards the United States and the West. One participant highlighted the risk in this regard of reinforcing stereotypes by claiming that all those living in areas affected by drones are driven to take up arms against the West, stressing the importance of a more nuanced approach.

Session 3: Legal frameworks

The main theme of the discussion on the legal frameworks applicable to drone strikes was the need for states and others to challenge the expansive interpretations of international law principles put forward by the United States and others. The initial focus was on the interpretation of an »imminent threat« as justification for an armed attack. Many speakers noted that the US adopts a very broad interpretation of imminence, and justifies attacks against »continuing and imminent« threats. One speaker raised the United States' theory of »naked self-defense«, which is sometimes invoked to justify the targeting of individuals outside of armed conflicts, in a confusion of *jus ad bellum* and *jus in bello*, the laws governing a state's right to use force and the international humanitarian laws on legitimate targets in an armed conflict. It was stressed by several speakers that the failure

of other states to publicly challenge these new interpretations risks permitting a dangerous shift in international law.

Another issue that arose in this session was the standard of scrutiny to be applied in criminal investigations in cases of potentially illegal drone strikes. There was a discussion on the German Federal Prosecutor's investigation into a US drone strike that killed German citizen Bünyamin E. in Pakistan in October 2010. In finding that there were insufficient grounds to bring charges in the case, the prosecutor found it was not necessary to define exactly which armed conflict the killing related to, nor was it necessary to define which, if any, armed group the victim belonged to. One speaker contrasted this with the approach taken by the International Criminal Tribunal for the Former Yugoslavia, which in complex conflict situations would, in each case, closely examine which parties belonged to which armed groups before adjudicating on the legality of attacks.

Another contributor noted that while the discussion tends to focus on the state launching the drone attacks, it is also worth examining the legal responsibility of European countries who assist in the killings by providing intelligence and other support to facilitate the strike, such as when the UK finds and »fixes« targets in Yemen for US strikes as part of the »find, fix and finish« killing process.

Session 4: Litigation strategies and impact

Workshop participants spoke about their experiences litigating drone strikes in the US, Pakistan, the UK, Germany, the Netherlands and Italy. Unsurprisingly, the covert nature of many drone operations creates difficulties when litigating, but there is some potential for breakthroughs in the future. A judicial review case taken in the UK concerning a March 2011 drone strike that killed over 40 tribal elders

was rejected by the Court of Appeal in 2014 in reliance on the foreign act of state doctrine – on the basis that a finding that the strikes were illegal »would be seen as a serious condemnation of the US«. The UK Supreme Court decision in *Belhaj v Straw* – pending at the time of the workshop but handed down in January 2017 – rejects the view that UK courts should refuse to investigate acts of a foreign state just because doing so might prove embarrassing from a foreign policy point of view. In Pakistan, a court case against a CIA station chief in Islamabad led to a Pakistani court ordering a police investigation. A constitutional law complaint brought in Germany on behalf of a Yemeni family who lost members of their family in a drone strike in 2012 is currently on appeal. The group heard that the Netherlands could prove to be an interesting forum for litigation as international law has direct effect in Dutch courts and there is no act of state doctrine under the Dutch system. The group discussed the relative merits of other forms of intervention, such as freedom of information requests and soft law mechanisms like OECD complaints against companies involved in the provision of drone technology, including telecommunications and commercial satellite providers.

Lawyers working in the UK and Germany noted that litigation in those two jurisdictions helped to create lasting public debate there on the issue of complicity with drone strikes. Two participants also spoke about the positive impact of drones litigation »on the ground« in countries where drones operate. The group heard that in Pakistan, the recognition by a court that people with no connection to terrorist groups were being killed in attacks reduced the perceived stigma of losing a relative in a drone attack and helped people to talk about their loss. One speaker described how litigation in Europe and the US shows people in Yemen that there is Western opposition to the drone strikes and helps to undermine al-Qaida's narrative of an eternal war with the West.

Session 5: State policies and legal positions – Advocacy in diverse political climates

This session examined the scope for advocacy in Europe concerning both European states' own policy on drones, to the limited extent that their policies are known, and their complicity in US drone strikes. The discussion highlighted the very different climates in various countries in Europe. The group heard that since the advent of ISIL there is less appetite for critical scrutiny of counter-terrorism operations. This was said to be especially true in France, a country which doesn't currently use armed drones but may do so in the future, and which has already embraced kill lists as part of its covert counter-terrorism operations. In the UK, the only country in Europe with a sizable drone fleet, current state policy on the legality of the use of drones is less than clear. One speaker noted the UK government's desire to distinguish its use of drones from the United States' approach – a potentially useful advocacy lever.

Some participants noted that there is more scope for shaping policies in countries that have yet to start using armed drones, such as Germany and Italy. At the close of the discussion it was pointed out that while these states might refrain from going down the same path as the US and the UK, important questions will remain concerning complicity in US drone strikes and the extent of their willingness to actively challenge unlawful use of armed drones by other states.

Public Forum: From Washington to Sanaa via Ramstein – The impact of drone wars on law, warfare and society

The workshop was followed by a public event in the packed-to-capacity TAK Theater in Berlin. The discussion opened with an address from Faisal bin Ali Jaber from Yemen, who spoke about his brother-in-law and nephew who were killed in a drone strike in 2012. Bin Ali Jaber described how his late brother-in-law, Salem, campaigned against al-Qaida and extremism right up until his death by a US drone and how he, Faisal, saw his subsequent involvement in litigation on drone strikes as a continuation of Salem's commitment to challenging injustices by peaceful means.

The first panel discussion, moderated by Sarah Harrison of the Courage Foundation, explored the impact of drone strikes in the international fight against terrorism with journalists Jeremy Scahill of the Intercept and Chris Woods of Airwars as well as Pakistani lawyer Shahzad Akbar and Jennifer Gibson of Reprieve, both of whom contributed to this publication. The emphasis was on the huge number of civilian casualties, the lasting political instability that ensues in countries where armed drones are deployed and the dangerous precedent set by the adoption of a global system of extrajudicial killing. Wolfgang Janisch of the Süddeutsche Zeitung moderated the second panel, which focused on Germany's role in the US drone program, offering much scope for heated debate among Oliver Fixson from the German Federal Foreign Office's legal division, Professor Andreas Zimmermann from the University of Potsdam and ECCHR General Secretary Wolfgang Kaleck. The conversation grew even more impassioned as the floor was opened up for comments from the audience, indicating a robust public interest in the German position on armed drones.



Faisal bin Ali Jaber

ARMED DRONES POLICY IN THE EU: THE GROWING NEED FOR CLARITY

SRDJAN CVIJIC AND LISA KLINGENBERG

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I. Introduction

Surveillance, armed drone programs and targeted killing of terrorist suspects by the United States Department of Defense and CIA have been a reality since the early 2000s. In Europe,¹ with the exception of the United Kingdom,² lethal drones and targeted killing practices remain on the margins of the mainstream policy debates.

The underlying legal rationale for the armed drones policy in the EU: The growing need for clarity of US drone programs – enabling targeted killing outside of active zones of combat – is based on a relatively idiosyncratic interpretation of international law of the 2001 Authorization for Use of Military Force (AUMF).³ The AUMF, designed to provide a legal justification for US engagement in post-September 11th asymmetric warfare, provides the President with the authorization to engage US forces in operations against al-Qaida and other affiliated terrorist groups worldwide. The overly permissive interpretation of self-defense from the AUMF, together with the concept of »continuous imminence« of a terrorist threat justifying the majority of the kinetic drone operations is generally not shared

by European countries who have a more classical understanding of international law when it comes to self-defense and engagement in military operations abroad.

This chapter will analyze armed drones and targeted killing practices outside of traditional battlefields in Europe from two different angles: European states developing their own armed drone programs and complicity (intelligence sharing, logistical support, military-technical cooperation) with the US drone operations. Whereas it does not aim to be an exhaustive overview of all drone policy related information in Europe, it does provide an illustration of different developments, positions and debates in relevant European countries.

II. Armed drones in Europe

In July 2016, the US administration took unprecedented steps to shed some light on the US drone program. Under increased pressure from civil society organizations in the US, the Obama administration released redacted versions of classified documents related to the drone policy. Those include the Presidential Policy Guidance (PPG)⁴ on Procedures for Approving Direct Action Against Terrorists, casualty statistics⁵ including deaths of non-combatants in areas outside active hostilities and an Executive Order (EO)⁶ on Measures to Address Civilian Casualties. Towards the end of his presidency, President Obama further published a Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations.⁷

Having in mind that the acquisition and use of armed drones is not only a hypothetical scenario in Europe anymore, the publication of these documents makes the US drone policy arguably more transparent compared to any other European government. Many EU member states are already in the process of

- developing armed drones, e.g. the joint development of a Medium Altitude Long Endurance Unmanned Aerial System (MALE UAS) by Italy, France, Germany and Spain⁸ and the joint French-British Future Combat Air System (FCAS);⁹
- arming their existing drone fleet (Italy, potentially France);
- leasing armed drones (Germany); or
- acquiring armed capable drones (Netherlands, Spain, and potentially Poland).

To date, the **United Kingdom** remains the only European country that possesses and deploys armed drones. According to data by the Stockholm International Peace Research Institute (Sipri), the UK has become the world's largest importer of drones in the period between 2010 and 2014.¹⁰ Its lethal drone fleet consists of 10 Reaper drones, with the intention to replace the existing Unmanned Aerial Vehicle fleet with 20 new »Protector« Drones (rebranded Reapers), expected to be operational in 2021. In the long term, the British government is funding a research project for the development of an advanced and much more autonomous drone – likely to be based on BAE Systems' Taranis drone.

Under close scrutiny from various British civil society organizations and the Parliament,¹¹ the UK government has traditionally tried to distance itself from the US targeted killing policy, highlighting that the British drones were operating only in support of the UK and the International Security Assistance Force (ISAF) ground forces in Afghanistan, under a Chapter VII mandate with the legal authority of UN Security Council resolutions and with the consent of the Afghan, or later, as part of the anti-ISIS coalition, Iraqi government.¹²

The first challenge to this policy came with the announcement by the former Prime Minister David Cameron on 7 September 2015 in the House of Commons that a British drone had killed UK citizens Reyaad Khan and Ruhul Amin in Syria. In his statement, he made clear that the strike »was not part of coalition military action against

ISIL in Syria«,¹³ but a targeted strike to deal with a terrorist threat. He qualified this operation as a »new departure«¹⁴ for the UK, as it was the first time the UK conducted a lethal drone strike in a country where it was not involved in a war.¹⁵ He further explained that he was prepared to take similar action »whether the threat is emanating from Libya, from Syria or from anywhere else«. ¹⁶ Other ministers, including the Secretary of State for Defence, reiterated this position. On the day of Cameron's statement, the UK Permanent Representative to the UN explained in a letter to the UN Security Council that the strike in Syria was not only in self-defense of the UK but *also* in exercise of the right of collective self-defense of Iraq.¹⁷

The invocation of the individual right to self-defense, the seemingly expansive interpretation of an imminent threat and the lack of territorial limitation of the use of lethal force sounded only too familiar. Media, public opinion and the Parliament recognized the risk of the UK following the US example of a national targeted killing policy and engaged in a public debate on this new policy.¹⁸ Hence, the targeted killing in Syria on 21 August 2015 prompted an inquiry into the Government's policy on the use of drones for elimination of terrorist targets by the Joint Human Rights Committee (JCHR). In the course of the inquiry, the UK Government laid out some elements of its drone policy in a Memorandum¹⁹ and during questioning of UK Defence Secretary Michael Fallon at the JCHR.²⁰ Based on these government explanations, the Committee has established that it is the Government's policy to »use lethal force abroad against suspected terrorists, even outside of armed conflicts, as a last resort, if certain conditions are satisfied«. ²¹

In the final report on the inquiry,²² the Committee recommended the Government to provide clarification of its position on a set of legal questions (related among others to imminence, the application of the Law of War and Article 2 of the European Convention on Human Rights). But the government's response²³ to the inquiry fell short of the Committee's expectations. Hence, the JCHR reacted

with a commentary²⁴ to the government's response, underlining its disappointment. A major element of concern for the Committee is the watering down of the definition of imminence of an attack, when the government claims that it can take lethal force in self-defense »even if there is no specific evidence of where an attack will take place or of the precise nature of the attack«. ²⁵ The British Parliament's Intelligence and Security Committee (ISC) has launched its own inquiry into the killing of Reyaad Khan and Ruhul Amin.²⁶ In December 2016 ISC submitted its Report 'UK Lethal Drone Strikes in Syria' to Prime Minister May for redaction. In reaction to these developments, on 24 February 2017, several members of the UK Parliament have sent a public letter to Prime Minister asking her to: disclose a redacted ISC report or provide a proposed release date; disclose a redacted version of the Ministry of Defense Joint Service Publication (JSP) 900 UK Targeting Policy; as well as identify any 'Kill List' targeting since the Khan drone strike in August 2015 by disclosing the name, date and approximate location of such a strike.²⁷

Latest reports from the UK press, quoting confidential MOD sources, assert that the Royal Air Force (RAF) pilots have indeed been »working their way through a ›Kill List‹ of key targets« including suspected British jihadists in Syria and Iraq.²⁸

Together with the UK, **Italy** was amongst the first countries to acquire unarmed Predator drones from the US already in 2001. This initial purchase was followed by the acquisition of six additional US MQ-9 Reaper drones in 2006. In 2011, Italy requested US permission to weaponize its drone fleet. In May 2012 the United States Administration had agreed to arm the six Predator and six Reaper drones of the Italian Air Force with Hellfire missiles and satellite-guided bombs. Yet, the final approval from the US Congress and the Defense Security Cooperation Agency was pending until November 2015 when the US government approved Italy's request to arm its drones.²⁹ Thus, Italy became the second US partner, along with the UK, to be in a position to arm its drone fleet. The total cost of the sale is estimated

at \$129.6 million and would include \$18 million worth of munitions. The significance of the US authorization to sell hellfire missiles to Italy is perceived as a further recognition of a strategic partnership between the two NATO allies. The timing of deployment of weapons for the Italian drone fleet is not yet decided – with financial aspects of the contract playing a major role in the current delay in procurement.

Policy discussions on Italy's drone use are largely part of a broader geopolitical debate on the Italian involvement in global (especially Middle Eastern and North African) affairs and the nature of its US and NATO partnership. Public opinion, political elites and civil society in the country remain scarcely acquainted with the legal and ethical dimension of the armed drones program. If anything, use of lethal drones and more broadly air warfare (if conducted within the framework of multilateral operations) is seen by the majority of the public as a preferred form of foreign military engagement as compared to deployment of troops on the ground. »Operation Ancient Babylon«, i.e. the deployment of Italian forces during the Iraq War from 2003 to 1 December 2006, and the loss of lives of the Italian military during that operation, remains a bitter reminder of the political cost of foreign interventionism via deployment of the troops on the ground. The armed drones program and air warfare, especially if conducted under the politically more acceptable international (UN) or coalition (NATO) frameworks, are largely seen as »safer« alternatives to military engagement abroad.

Nevertheless, when the population was consulted on the US use of armed drones (Pew Research Centre poll in July 2014³⁰), an overwhelming majority expressed themselves against it (74% against, 18% for; amongst the left wing voters 82% against and on the right 63% against).

To a great extent, as a political legacy of the World War II, Italy, much like Germany, has a different approach to war and defense than for example France or the UK. The foundational document of the Italian

Republic, the 1948 Constitution, in its Article 11 stipulates, »Italy rejects war as an instrument of aggression against the freedoms of other peoples and as a means for settling international controversies...«³¹ Article 11, or better »l'Italia ripudia la Guerra«, has become a »battle-cry« of all the pacifist organizations in the country ever since. Opposition to the lethal use of armed drones (especially if conducted outside of traditional battlefields), to the extent the awareness of the program exists in the country, can to a large extent be explained by this.

France currently possesses five unarmed military drones – three Reapers and two French-made Harfang drones – in active service in northern African as part of Operation Barkhane. A procurement order for three additional Reaper drones was made in December 2015, with a delivery date set for 2019. France has committed to acquiring 12 Reapers under the 2014-19 military budget law.³² With regard to the armament of this drone fleet, French ministers remained ambiguous and evasive.³³

To date, the French government has not formulated a policy on the use of armed drones. In the light of its significant use of lethal force in counter-terrorism operations against non-state actors – including allegations of an increase in covert targeted killing operations against individuals by the secret service DGSE in Libya and the Sahel since 2012³⁴ – it is not entirely unlikely that France might consider using armed drones for lethal anti-terrorist operations. In fact, targeted killing operations by armed drones, should France possess them, would be entirely in line with operations 'homo' (from homicide) reportedly approved by the President of the French Republic and practiced by the French military and security services at least since the 1950s and the war in Algeria to this day.³⁵ Moreover, the French Defense Ministry had commissioned a study on »legal and ethical aspects of remote strikes against strategic human targets«,³⁶ which concluded that armed drones could be used to kill high value targets outside the traditional battlefield, as long as this use was exceptional and restricted. Following

a similar line, Jean-Baptiste Jeangène Vilmer, philosopher, lawyer and mission head at the Center for Analysis, Prevision and Strategy (CAPS) – a research center directly linked to the French Ministry of Foreign Affairs – justified the use of armed drones for targeted killings outside of recognized armed conflict, conducted by the French secret service DGSE.³⁷ Yet, contrary to the US, and to an extent the UK – which attempts to provide an innovative interpretation of international law to fit the realities of contemporary asymmetric warfare – the abovementioned French report promoted an »exceptional approach that recognizes the illegality of the action while justifying the exceptional violation of law (...) in operations, which always need to be specified as not being a precedent«. ³⁸ Additionally, on 4 January 2017 *Le Monde* revealed that the French President admitted to having ordered targeted killings of terrorist suspects abroad.³⁹ These unlawful operations, sinisterly nicknamed operation »homo« (from homicide) are often carried out by the special forces of the DGSE, sometimes even reportedly »outsourced« to the US drone program. The number of civilians killed in the process remains unknown.

French official policy insists on the territorial limitation of each individual military campaign, which would be decisive to define the legal terms of an operation.⁴⁰ Hence, in the Sahel, France regards itself as engaged in an armed conflict at the invitation of the Malian government. With the consent of neighboring countries, France can pursue members of jihadist groups linked to the conflict in Mali across national borders. Similarly, in its fight against ISIS, France limits the conflict to a specific territory across the borders of Iraq and Syria. In these areas, France distinguishes between those members of terrorist groups who take part in hostilities and those who play other roles and cannot be directly targeted.⁴¹

The **Netherlands** does not possess armed drones, but is currently in the process of acquiring armed-capable MQ9 Reaper Drones. The Dutch government has not publicly voiced any intention to arm these drones and plans to use them only for ISR (intelligence, surveillance

and reconnaissance) missions.⁴² While the purchase of the first four Reapers was foreseen in 2016, budgetary considerations led to a postponement of the acquisition process.⁴³ The Dutch government and aerospace services company Strat Aero had also discussed the establishment of a UAV Training Center in the Netherlands, which would be the first in Northern Europe.⁴⁴

The Netherlands is specifically committed to a multilateral process leading towards greater transparency in the development, proliferation and use of armed UAVs. Among others, it hosted a side-event, together with the Dutch peace organization PAX, on the issue at the 2016 UN General Assembly First Committee.⁴⁵ Moreover, during the first week of the general debate of the UN First Committee in 2016, the Netherlands stated its commitment to an »open international dialogue [...] in order to guarantee transparent and responsible use [of armed drones].«⁴⁶

Compared to other European Member States, the Netherlands has arguably laid out its policy on the issue of armed drones and lethal operations in the clearest and most detailed way. Taking together the Advisory Report on Armed Drones by the Foreign Ministry's Advisory Committee on Issues of Public International Law (CAVV),⁴⁷ Dutch statements at the UN level⁴⁸ and the public answers to the TMCASSER Institute's questionnaire,⁴⁹ one can discern a legal interpretation of the Dutch government which adopts a far less permissive interpretation of international law than the US legal rationale for example. The CAVV report, for instance, which was later endorsed by the Dutch Government, stated that:

[...] the targeted killing of an individual outside the context of an armed conflict is prohibited in all but the most exceptional situations and is subject to strict conditions. These situations are limited to the defence of one's own person or a third person from a direct and immediate threat of serious violence, the prevention of the escape of a person who is suspected or has been convicted of a particularly serious offence,

or the suppression of a violent uprising where it is strictly necessary to employ these means (i.e. targeted killing) in order to maintain or restore public order and public safety and security. In situations of this kind, lethal force is always a last resort which may be used if there are no alternatives and only for as long and in so far as strictly necessary and proportionate [...] The deployment of an armed drone in a law enforcement situation will hardly ever constitute a legal use of force. The principle of proportionality as it applies within the human rights regime is considerably stricter than under IHL, in particular to prevent innocent people falling victim to such attacks.⁵⁰

On 1 March 2017, Dutch non-governmental organization PAX published a report based on a survey of political parties in the Netherlands outlining their positions on the procurement and use of armed drones by the Dutch armed forces.⁵¹ Whereas a majority of Dutch political parties remains concerned about the use of armed drones for extrajudicial executions, no single party is opposing armed drones *per se*. The Socialist Party (SP) called for a moratorium on armed drones, other parties such as the Christian Democrats (CDA) and the Party for Freedom (PVV) want to speed up the acquisition process. Only the populist PVV is open to the use of armed drones for targeted killing operations.

Germany has used unarmed Israeli Heron 1 surveillance drones in its military operations in Afghanistan since autumn 2010 and decided in January 2016 to lease up to five arms-capable Israeli Heron TP drones. While the government proved somewhat reluctant to comment on the potential weaponization of these UAVs, the Inspector General Volker Wiekert told the Defense Committee of the *Bundestag* (equivalent to the lower house of parliament) that the drones will be ordered directly with ammunition.⁵² The German government has already started negotiations with Israeli Aerospace Industries. However, US drone producer General Atomics has taken legal action against the German government's preference of Heron TP over Reaper drones, presumably because the lease of Israeli

drones might not have been the best option, economically and technologically.⁵³ This could potentially postpone the leasing process until 2019.

The leasing of Heron TP drones is considered as a mid-term bridging solution. Meanwhile, Germany has taken the lead in a joint European initiative to develop a European MALE (Medium Altitude – Long Endurance) UAV (see above). Developed in a joint effort with France, Italy and Spain – and open to other European partners – this UAV is expected to be operational in 2025.

As far as the policy regarding the use of armed drones for targeted killing is concerned, the 2013 coalition agreement⁵⁴ between both ruling parties (Christian Democrats and Social Democrats) stated that the decision on whether or not to procure armed drones would only take place after an extensive public debate and a careful assessment of legal, security and ethical questions related to their use. In summer 2014, a public expert hearing⁵⁵ and a plenary discussion⁵⁶ on the issue took place in the German Parliament. The Ministry of Defense considers these debates as sufficient justification for the procurement of armed drones, in line with the Coalition agreement. However, many MPs and civil society organizations criticize the lack of public debate and transparency on the procurement decision.

The coalition agreement stating that the present Government »[...] categorically refuse[s] to participate in extrajudicial killings by armed drones in contravention of international law [...]«,⁵⁷ remains the main statement on the German policy on armed drones to this day. Following this statement the German Defense Minister Ursula Von der Leyen has ruled out any possibility of German drones being used to conduct extrajudicial killings, alluding to the US drone operations and civilian harm.⁵⁸ Furthermore, following the aforementioned coalition agreement, spelling out that »[...] Germany will advocate the inclusion of armed unmanned aircraft in international disarmament and arms control regimes [...]«, Berlin has shown support for multilateral

initiatives in the disarmament and arms control framework, such as United National Disarmament (UNIDIR) Research project »Increasing UAV Transparency, Oversight and Accountability«.⁵⁹

German society's opposition to armed drones can mainly be explained by the broad public rejection of German military interventions in other countries. Such engagement is often seen as in violation of Article 26 of the 1949 German basic law (*Grundgesetz*) that prohibits the planning of aggressive war on German soil.⁶⁰ As a consequence, a strong anti-drone movement, consisting mainly of peace organizations, is calling for the ban of (armed) drones.

Other European countries have also raised concerns about the ongoing drone operations, particularly at the UN level. The **Irish** government went as far as expressing concern at the UN Human Rights Council about the disproportionate civilian casualties caused by the use of armed drones and urging that »[t]he limitations imposed by international law on the use of lethal force must not be weakened by relaxing interpretations of international legal standards«.⁶¹ The **Austrian** government stated at the UN Human Rights Council that »the implications of these developments on humanitarian and human rights law require urgent further discussion with an aim to ensure that these weapons will not be used in a way that violates universally recognized principles of international law.«⁶² **Switzerland** underlined »that it is fundamental to have more transparency in every use of armed drones. This would allow to evaluate the consequences, determine the applicable legal framework and thus, evaluate the legality of every use [of armed drones]. Moreover, we underline that states have the obligation to investigate every presumed violation of human rights or international humanitarian law.«⁶³ However, these statements are usually not backed by comprehensive policies at the national level, mainly due to the fact that these countries do not possess or develop armed drones.

While a few European governments have laid out some policy principles on the use of armed UAVs,⁶⁴ public information on

procurement, development and planned use of these systems remains very limited. As many EU Member States are in the process of developing armed drones or arming their drone fleets, this opacity in Europe remains worrying. At the same time, the examples above also illustrate a tendency of some European governments to edge towards the US rationale for the use of force against military actors, while stopping short of adopting the principle of a global war on terror.⁶⁵ Instead, EU member states should learn from the mistakes of the US drone program, and provide clear safeguards preventing the use of armed drones in secret, unaccountable, borderless wars.

III. Complicity with the US armed drones and targeted killing program

While many European states are increasingly using, developing and acquiring armed drones, some of them are also – directly or indirectly – involved in or facilitating US drone operations. With little public information on the existing safeguards in place to prevent complicity in unlawful US operations, national European parliaments, as well as civil society organizations, lawyers and investigative journalists, have taken a crucial role of oversight to investigate and challenge potential allegations of complicity.⁶⁶

In addition to the **United Kingdom**'s own controversial drone use, there are several allegations of potential British complicity in US drone operations. Allegations range from data sharing,⁶⁷ data transfer through UK facilities,⁶⁸ embedding personnel⁶⁹ to cooperation in joint targeting.⁷⁰ In 2012, UK-based human rights organization Reprieve filed a lawsuit on behalf of Noor Khan against the British government for complicity in US drone strikes in North Waziristan in the Federally Administered Tribal Areas (FATA) in Pakistan. Noor Khan was the son of Malik Daud Khan, one of 40 alleged civilian victims of a drone

strike that took place in North Waziristan in the Federally Administered Tribal Areas (FATA) in Pakistan in March 2011. Mr Khan took his case to the Court of Appeal after judges in the High Court refused to allow it to proceed to a trial, arguing it could »imperil international relations«. ⁷¹ Even though British government and intelligence officials had admitted that »Britain does provide intelligence to the United States that is almost certainly used to target strikes«, ⁷² the Court of Appeals eventually rejected the case, with the argument that Mr. Khan was inviting a UK court to sit in judgment of the United States.⁷³ The UK Parliament's All-Party Parliamentary Group on Drones also launched an inquiry into US-UK cooperation in drone operations,⁷⁴ and published two new Memorandums of Understanding, obtained under the Freedom of Information Act, which address UK-US Reaper sharing,⁷⁵ and the assignment of personnel to USAFRICOM to fulfill US operational requirements.⁷⁶

Italy has authorized the stationing and operation of US armed UAVs at the US Naval Air Station Sigonella in Sicily for the purpose of the anti-ISIS bombing campaign in Libya. With the US deployment of armed drones and the Global Hawks of the NATO Alliance Ground Surveillance (AGS), Sigonella base in Sicily is becoming a regional hub of growing relevance in North Africa and the Sahel. The geopolitical significance of Italy, underscored by the US DoD's European Infrastructure Consolidation⁷⁷ (announced in January 2015), presents an important recognition of Italy as one of the closest NATO allies of the US.

The 1995 Shell Agreement⁷⁸ offers an overall scheme for specific accords relative to the use of every specific US base in Italy. It is within the framework of this agreement that the two countries concluded on 6 April 2006 a Technical Arrangement (TA) on Sigonella.⁷⁹ A classified document published by Wikileaks revealed that US officials considered the approval of the TA to be critical to the US-Italian military relationship at the time, in the sense that Italy saw the agreement as a »litmus test« for the seriousness and respect for

the terms of US basing in Italy, as well as that Italy's »willingness to approve various US military requests depended on getting the Sig TA completed«. ⁸⁰ This agreement delineates the authority of the US Command structure of the base vis-à-vis the Italian state.

According to the legal interpretation of Diego Mauri from the University of Palermo and the Catholic University of Milano, the Sigonella base and its operations remain under the authority of the Italian state while the US Commander of the base retains »full military command over US personnel, equipment and operations«. ⁸¹ The US Commander however, has the obligation to inform the Italian authorities of »all significant U.S. activities, with specific reference to the operational and training activity«. »Significant« is understood as opposed to routine and it would most definitely include deployment of the armed drone fleet. The Italian Commander has the responsibility to inform his US counterpart when he considers that the US activities do not respect »applicable Italian Law« and to intervene »to have the U.S. Commander immediately interrupt U.S. activities which clearly endanger the life of public health and which do not respect Italian law«. ⁸² Any significant change to the operational capabilities of the US in Sigonella, such as the installation of the armed drone fleet would necessitate the consent of the Italian government and a separate agreement.

This was already the case for the September 2010 agreement ⁸³ on the deployment of ISR drones at the Sigonella base and is the case of the agreement reported on in February 2016 on the deployment of armed drones for defensive missions in Libya. ⁸⁴ Although neither the 2010 nor 2016 agreements are public, the spirit of the 6 April 2006 Technical Agreement on Sigonella would imply that Italy will have the authority to approve US armed drone operations in Libya on a case-by-case basis. This was confirmed by the Italian Prime minister at the time, Matteo Renzi, commenting on the 2016 agreement. ⁸⁵ According to the abovementioned legal analysis, this therefore opened the way for legal responsibility of the Italian state by virtue of the Technical Agreement

inserting the Italian command structure in the US military »decision making system« as far as the selection of targets and the execution of kinetic operations is concerned (expression taken from Markovic and Others v. Italy). ⁸⁶

In the **Netherlands**, reports based on Edward Snowden's NSA revelations have shown that Dutch intelligence services have shared meta-data on Somali phone traffic with the NSA in exchange for technical support. ⁸⁷ This has raised concerns about the data being used for US targeted drone killings against members of Al Shabaab and prompted an investigation by the Dutch Parliament's Review Committee on Intelligence and Security related to the contribution of the Military Intelligence and Security Service (MIVD) to targeting. Published in September 2016, the Committee's final report concluded that the MIVD's legal provisions are insufficient to assess the risk of contributing to unlawful targeted killings by sharing intelligence with allies. ⁸⁸ While the Committee could not find evidence that the shared data was used for unlawful strikes, it could not exclude this possibility either. The Dutch Defense Minister J. A. Hennis-Plasschaert has announced that the Committee's recommendations would be taken into account. ⁸⁹ Meanwhile, the Dutch human rights law firm Prakken d'Oliveira has taken legal action against the Dutch government for complicity on behalf of two Somali victims who were hit by an American drone missile and lost two young daughters. ⁹⁰

As far as **Germany** is concerned, in October 2010, the Federal Government came for the first time under strong domestic criticism on this issue after a US drone strike killed Bueyamin Erdogan, a German citizen of Turkish descent in Pakistan amid claims that Germany had provided US intelligence agencies with information about his movements. The German Attorney General investigated the case, but eventually did not press charges arguing that Mr. Bueyamin Erdogan had been a member of an armed group involved in an armed conflict. Mr. Erdogan was therefore not considered a person protected under international humanitarian law. ⁹¹ Following these

developments, media reports indicated that German intelligence services started to add caveats to the intelligence it shared with foreign partners, prohibiting the use of this data for the conduct of unlawful strikes.⁹² During the German Parliament's Investigation Committee's ongoing inquiry into NSA surveillance and Germany's involvement in the US drone wars, German government officials confirmed that Germany is adding a »disclaimer« to all intelligence it shares with the United States.⁹³ This disclaimer explicitly forbids the use of German data for military operations, torture and killings, but includes a second sentence: »Use for the purpose of lethal force is only permitted in case of an ongoing or imminent attack«. ⁹⁴ Given the US government's broad interpretation of an »imminent threat«, this revelation raises new questions about the German involvement in US drone operations. Whereas the German Government acknowledged that it shared mobile phone data with the US, it persistently insisted that this data alone could not be used to locate a suspected terrorist and conduct a targeted killing. This was debunked in September 2016, when an expert opinion, commissioned by the NSA Investigation Committee, concluded that a phone number is sufficient to conduct a targeted strike against an individual.⁹⁵ The final report of the NSA inquiry is expected in spring 2017.

In addition, investigative journalists⁹⁶ and revelations by Edward Snowden and former drone pilot Brandon Bryant have exposed the central role that the US Air Force Base Ramstein and the United States Africa Command (AFRICOM) are playing in US drone operations. In this context, two lawsuits have been filed by the European Center for Constitutional and Human Rights (ECCHR) and Reprieve,⁹⁷ as well as by the Open Society Justice Initiative (OSJI)⁹⁸ on behalf of Yemeni and Somali victims over Germany's role in US drone operations. In ECCHR's and Reprieve's lawsuit, the judge in the administrative court in Cologne has dismissed the claim, arguing that the »German government is not obliged to prohibit the USA from using Ramstein airbase for the execution of drone attacks in Yemen«. However, the judge allowed the claimants to appeal.⁹⁹ The appeal hearing is expected to take place in the near future.

The **Danish** Intelligence Service PET (Politiets Efterretningstjeneste) was allegedly involved in the drone strike against the American citizen Anwar al-Awlaki, conducted by the CIA in Yemen in September 2011. According to evidence, PET recruited the Danish citizen Morten Storm as a double agent who helped track down his friend Anwar al-Awlaki in Yemen.¹⁰⁰ In 2012, when Morten Storm openly claimed to be involved in the CIA killing of Anwar al-Awlaki, and when Danish media first revealed details on the case, a public and political controversy started in Denmark. In April 2014, Open Society Foundations filed a series of Freedom of Information requests with the Danish authorities for all information and records relating to the Danish government's knowledge of and involvement in the drone killing of Anwar al-Awlaki.¹⁰¹ The Danish government refused to acknowledge any involvement in the killing. Then Defense Minister Nick Hækkerup added that »if there are grounds for believing that sensitive personal data will be used in a context that, from the Danish view, would not be in accordance with international law, the Military Intelligence Service would not disclose the information to a foreign partner. This applies whether Denmark is in an armed conflict or not.«¹⁰²

IV. Conclusion

This chapter illustrates that the debates about the use of armed drones for targeted killings outside of traditional battlefields should not be confined to the US context. Europe is already far more involved in remote control warfare than many think. Whether European governments are developing or acquiring armed drones or supporting drone operations through data sharing, the hosting of airbases or joint targeting, they should make sure to be as transparent as possible about it and provide adequate safeguards to prevent unlawful action.

While the Obama administration has taken steps to improve the transparency – and legacy – of the drone program (through the US Presidential Policy Guidance, casualty statistics and an Executive

Order), European states' drone policies remain largely opaque. However, there are some indicators showing that European states generally do not follow the US rationale for a global war on terror. Certain government statements (e.g. Netherlands, Germany, Ireland) and significant control and oversight by national parliaments (e.g. United Kingdom, Germany, Netherlands) show that Europeans are wary of following the US down the slippery slope of unaccountable, borderless, remote counter-terror operations.

Through a more transparent approach in their own drone policies, European states could help the US further engage in the process of questioning the legal rationale for targeted killings outside of armed conflicts. In a context of rapidly increasing drone proliferation in the world, there is a need to challenge the underpinning legal interpretation of the US global war on terror in order to prevent this approach from becoming a common practice among states.

1 This paper will focus in a comprehensive manner on France, Germany, Italy, Netherlands and the UK. Occasionally examples from other EU member states will be mentioned.

2 The UK acquired their first pair of MQ-9 Reaper drones from General Atomics in 2006. In November 2007, the UK British Ministry of Defence announced that its Reapers had begun operations in Afghanistan against the Taliban.

3 The Authorization for Use of Military Force (AUMF), Pub. L. 107-40, codified at 115 Stat. 224 and passed as S.J.Res. 23 by the United States Congress on September 14, 2001, authorizes the use of United States Armed Forces against those responsible for the attacks on September 11, 2001. The authorization granted the President the authority to use all »necessary and appropriate force« against those whom he determined »planned, authorized, committed or aided« the September 11th attacks, or who harbored said persons or groups.

4 Presidential Policy Guidance on Procedures for Approving Direct Action Against Terrorists Located Outside the United States and Areas Outside Active Hostilities, available at: <https://www.lawfareblog.com/declassified-procedures-approving-direct-action-against-terrorists>.

5 Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities, available at: <https://www.dni.gov/index.php/newsroom/reports-and-publications/214-reports-publications-2016/1392-summary-of-information-regarding-u-s-counterterrorism-strikes-outside-areas-of-active-hostilities%22>.

6 Executive Order on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, available at: <https://obamawhitehouse.archives.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures>.

7 Report on the Legal and Policy Frameworks Guiding The United States' Use of Military Force and Related National Security Operations, The White House, December 2016, available at: https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

8 In 2015, German, French and Italian governments signed an agreement to launch a two-year feasibility study for the development of a European drone (MALE UAV). Germany has taken the lead in this project and Spain joined at the end of 2015. If the program proceeds as planned, the first systems are expected to be delivered in 2025. The main task of the remotely piloted aircraft will be reconnaissance and surveillance, but they can be armed if necessary. (cf. Defense News: »Germany To Lead Development of European UAV«, by Lars Hoffmann, December 2015, available at: <http://www.defensenews.com/story/defense/air-space/isr/2015/12/11/germany-lead-development-european-uav/77132118/>).

9 At the beginning of 2015, the UK and France launched a two-year feasibility study for the development of the FCAS. The study is conducted by BAE Systems and Dassault Aviation and is building on the two demonstrator drones Taranis by BAE Systems and the nEUROn by a six nations consortium consisting of France, Sweden, Greece, Spain, Switzerland and Italy. (cf. Peggy Hollinger, 'Europe plays catch-up with U.S. in drone technology', Financial Times, 12 August 2015, available at: <https://www.ft.com/content/d9209910-33b5-11e5-bdbb-35e55cbae175>).

10 Cf. G. Arnett, »The numbers behind the worldwide trade in drones« The Guardian, 16 March 2015, available at: <https://www.theguardian.com/news/datablog/2015/mar/16/numbers-behind-worldwide-trade-in-drones-uk-israel>.

11 Founded in October 2012, the All-Party Parliamentary Group on Drones (APPG) continuously examines the use of drones (unmanned aerial vehicles) by governments, for domestic and international, military and civilian purposes. The Intelligence and Security Committee (ISC) and the Joint Human Rights Committee (JCHR) also launched inquiries into the British government's targeted killing policy.

12 Cf. Secretary of State Philip Hammond: Answers to Chair of Foreign Affairs Committee, 10 October 2014, available at: <http://www.parliament.uk/documents/commons-committees/foreign-affairs/BokoHaram.pdf>.

13 In response to a question from the Chair of the Joint Human Rights Committee, as to whether this was the first time in modern times that a British asset has been used to conduct a strike in a country where the UK is not involved in a war, the Prime Minister [David Cameron] said: »The answer to that is yes. Of course, Britain has used remotely piloted aircraft in Iraq and Afghanistan, but this is a new departure, and that is why I thought it was important to come to the House and explain why I think it is necessary and justified.« (Joint Committee on Human Rights Inquiry »The Government's policy on the use of drones for targeted killing«, 9 May 2016, available at:

<http://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/57405.htm>).

14 Ibid.

15 Cf. *ibid.*

16 Ibid.

17 Ibid.

18 Cf. Abigail Watson, »Targeted killing: a new departure for British defence and security policy?«, Remote Control, available at: http://remoteproject.org/wp-content/uploads/2017/03/Targeted-Killing-PDF-1.pdf?utm_source=Remote+Control+Project+Newsletter&utm_campaign=502a258a79-EMAIL_CAMPAIGN_2017_03_28&utm_medium=email&utm_term=0_8ac46cda2a-502a258a79-165895333%22.

19 Joint Committee on Human Rights: Government Memorandum to JCHR, available at: http://www.parliament.uk/documents/joint-committees/human-rights/Government_Memorandum_on_Drones.pdf.

20 Cf. Chris Cole, »Fallon to face questions on drone targeted killing, but will there be answers?«, Dronewars UK, December 2015, available at: <https://dronewars.net/2015/12/14/fallon-to-face-questions-on-drone-targeted-killing-but-will-there-be-answers/>.

21 Joint Committee on Human Rights: »The Government's policy on the use of drones for targeted killing«, Second Report of Session 2015-16, 10 May 2016, available at: <http://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>.

22 Joint Committee on Human Rights:

»The Government's policy on the use of drones for targeted killing«, Second Report of Session 2015-16, 10 May 2016, available at: <https://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>.

23 Joint Committee on Human Rights:

»The Government's policy on the use of drones for targeted killing: Government Response to the Committee's Second Report of Session 2015-16«, available at: http://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74705.htm#_idTextAnchor032.

24 Joint Committee on Human Rights:

»The Government's policy on the use of drones for targeted killing: Government Response to the Committee's Second Report of Session 2015-16«, available at: <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74702.htm>.

25 Ibid.

26 Cf. »UK drone strikes ›could leave all those involved facing murder charges«, The Guardian, 10 May 2016, available at: <https://www.theguardian.com/politics/2016/may/10/uk-drone-strikes-murder-charges-clarify-legal-basis-targeted-kill-policy-isis>.

27 Cf. »SNP MP writes to PM on use of drones against UK civilians«, SNP Helensburgh, 24 February 2017, available at: <https://www.helensburghsnp.scot/index.php/item/1419-snp-mp-writes-to-pm-on-use-of-drones-against-uk-civilians>.

28 Cf. »Secret RAF drone strikes take out British jihadis: Our ›pilots‹ working way through kill list of UK fanatics fighting ISIS in Iraq and Syria«, 23 February 2017, available at: <http://www.dailymail.co.uk/news/article-4251122/Our-pilots-working-way-kill-list-UK-jihadis.html>

and cf. »Spies told to come clean on Cameron's order to kill«, 19 February 2017, available at: <http://www.thetimes.co.uk/article/spies-told-to-come-clean-on-cameras-order-to-kill-ppfnlwsdd>.

29 Cf. »U.S. government approves Italy's request to arm its drones«, Reuters, 4 November 2015, available at: <http://mobile.reuters.com/article/idUSKCNOST1V20151104>.

30 Pew Research Center:

»Global Opposition to U.S. Surveillance and Drones, but Limited Harm to America's Image«, July 2014, available at: <http://www.pewglobal.org/2014/07/14/global-opposition-to-u-s-surveillance-and-drones-but-limited-harm-to-americas-image/>.

31 University of Trento: »The Constitution of the Italian Republic«, January 2008, available at:

<http://www.jus.unitn.it/dsg/publicazioni/costituzione/costituzione%20genn2008eng.pdf>.

32 Cf. Defense News: »France Orders New Batch of Reapers«, 11 December 2015, available at:

<http://www.defensenews.com/story/defense/air-space/isr/2015/12/11/france-orders-new-batch-reapers/77147952/>.

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been more extensive than that of the other NATO members in that Italy had provided major political and logistical support, such as the use of its air bases by aircraft engaged in the strikes on Belgrade and the RTS. The defendants to the action were the Prime Minister's Office, the Italian Ministry of Defence and the NATO Allied Forces Southern Europe (AFSOUTH) Command.

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DIFFICULTIES IN PROSECUTING DRONE STRIKES AS A WAR CRIME UNDER INTERNATIONAL CRIMINAL LAW: AN INTERNATIONAL HUMANITARIAN LAW PERSPECTIVE

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I. Introduction: Deployment of aerial drones under IHL - Special rules compared to traditional aerial warfare?

The use of unmanned combat aerial vehicles (UCAVs) or remotely piloted aircrafts has become a central pillar of the global security

agenda and a common feature of contemporary armed conflicts.¹ Among the benefits they present is the limited risk of exposure given that the distance between the personnel operating the drone and the target can sometimes be continents or oceans apart,² as well as the technical ability to cruise over an area or individual much longer than planes and at a considerably slower speed.³ Moreover, attacks can be carried out based on the most suitable timing while they can also be suspended at very short notice.⁴ Because of the growing importance of the use of drones in today's combat operations, including the phenomenon of »targeted killings«, more and more commentators as well as civil society have raised the question as to which possibilities there are to prosecute certain attacks as war crimes, e.g. as »unlawful attacks« under international criminal law before national or international courts and tribunals. Connected to the different modalities of »unlawful attacks« as a war crime, is the question of whether and how international humanitarian law (IHL) is applicable to drone attacks.

The question of whether IHL is applicable, and especially which specific rules of the law of armed conflict are applicable, depends of course primarily on the existence of an armed conflict, but also on the kind of weapon which is used. Due to historical reasons, there are certain specialized rules concerning air and missile warfare, which today are laid down in the »HPCR Manual on International Law Applicable to Air and Missile Warfare«. In view of its technical characteristics, and despite its not being manned, a drone is to be classified as an »aerial vehicle« for purposes of international law, rather than as a rocket or missile,⁵ which has effects on the legal provisions to be applied. The Manual on International Law Applicable to Air and Missile Warfare requires that the following circumstances must be met: »(a) the aerial vehicle must be operated by the armed forces of a state; (b) it must bear the military markings of that state; (c) it must be commanded by a member of the state's armed forces; and (d) it must be controlled, manned or must have been pre-programmed by a crew subject to regular armed forces discipline.«⁶

It is important to state that from an international humanitarian law perspective, the »law does not provide for any general prohibition against the deployment of aerial drones as such.«⁷ Therefore, the legality of aerial drone strikes does not have to be evaluated based on a different legal benchmark compared to other types of weapons or other aerial combat operations.⁸ The general standard for deciding on the legality of weapons can be found in Articles 35 and 36 of Additional Protocol I. As the Commentary to Article 35 of Additional Protocol I puts forward, the words »methods and means« in this context »include weapons in the widest sense, as well as the way in which they are used.«⁹ This is supported by the statement of the Special Rapporteur on extrajudicial, summary or arbitrary Executions:

»[A] missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.«¹⁰

Drones can be used in three different directions, namely (a) to provide assistance by delivering humanitarian assistance, (b) to closely watch and collect information from the ground, and (c) to target individuals and potentially kill.¹¹ This last use of drones, the practice of targeted killings and most specifically the efforts to ensure accountability, will be the focus of this chapter. This contribution will first present the scope of application of IHL with a particular focus on trans-border operations and will subsequently continue with highlighting the most important IHL principles applicable to armed conflicts. It will then proceed with providing a short overview of some selected challenges encountered in attempts to ensure accountability for drone strikes under the war crimes regime and it will conclude with some reflections and recommendations for future steps to be taken in this direction.

II. Scope of application: Establishing the existence of an armed conflict

In the context of drone attacks, one of the crucial questions is whether the attack appeared in the context of an (international or non-international) armed conflict, triggering the application of international humanitarian law. Not every single drone attack as such necessarily triggers the application of IHL. International humanitarian law operates on the basis of the existence of an armed conflict, either between the armed forces of two or more states, i.e. an international armed conflict (IAC), or a non-international armed conflict (NIAC). The latter category sets out rules relating to non-international armed conflicts between a state and non-state actors who have control over distinguishable parts of the state's territory with armed forces at their disposal,¹² or even with regard to protracted armed violence just between organized armed groups without state participation.

In the case of an international armed conflict, Common Article 2 to the 1949 Geneva Conventions provides that the Conventions »apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.«¹³ The provision is interpreted as including two requirements; the conflict must be between two or more states and it must be armed. Usually, no specific duration or intensity criterion is required, which is reiterated in the commentary to the Geneva Conventions by Jean Pictet:

»[A]ny difference arising between two states and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a State of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.«¹⁴

Based on this traditional definition, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Tadić case adopted the following similar definition of an international armed conflict: »an armed conflict exists whenever there is a resort to armed force between States.«¹⁵ While there is no intensity threshold required for the triggering of an international armed conflict, there are two requirements that are deemed indispensable for a situation of violence to be qualified as a non-international armed conflict, namely the organization and intensity requirements, which are analyzed below. Applied to our general scenario of a drone attack, this means that a drone attack committed by one state against the armed forces or the infrastructure of another state would usually trigger an international armed conflict. According to the new 2016 commentary from the International Committee of the Red Cross (ICRC), this could include a situation where a foreign state is attacking non-state actors on a state's territory without that state's consent.¹⁶

A. ORGANIZATION REQUIREMENT

However, one has to consider that many of the drone attacks which we are witnessing today, are not necessarily connected with an international armed conflict, and are rather directed against non-state actors, and often with the consent of the »host« state. In order to classify a situation of violence as a non-international armed conflict within the meaning of Article 3 of the Geneva Conventions, according to the ICTY we need »protracted armed violence between governmental authorities and organized armed groups or between such groups within a State«. In this case, the parties involved must demonstrate a certain level of organization, and the violence must reach a certain level of intensity.¹⁷ Organization may be demonstrated by indicative factors as developed by international jurisprudence. They include the existence of a command structure, intelligence sharing, the ability to plan, coordinate and carry out military operations as well as ability to procure, transport and distribute weaponry.¹⁸ This means that non-state armed actors must have a certain amount of organization

However, one has to consider that many of the drone attacks which we are witnessing today,

before they may be seen as parties to the conflict.¹⁹ Even if the intensity of violence in a given context is quite high, the situation could not be classified as a non-international armed conflict if the requirement of organization is not fulfilled.

It is questionable whether a number of actors acting in parallel could be assessed together in order to reach the necessary degree of organization.²⁰ Smaller and fragmented groups, which carry out isolated attacks while sharing a common ideology may not reach the level of organization required. Moreover, if the carrying out of attacks is coinciding with the situation of an armed conflict but is not designed to support one of the belligerents against another a group will not be considered to be involved in the hostilities.²¹ Applied to our main situation of drone attacks against non-state actors, it would be necessary to decide on a case-by-case basis whether the targeted group meets the organization requirement.

B. INTENSITY REQUIREMENT

The second requirement to determine the existence of a non-international armed conflict concerns the intensity of the violence involved. Article 1 of Additional Protocol II states that »situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature« are excluded from its application.²² This requirement is also included in the Rome Statute of the International Criminal Court.²³ Furthermore, and as mentioned above, the ICTY defined the notion of non-international armed conflict as »protracted armed violence between governmental authorities and organized armed groups or between such groups within a State,«²⁴ a definition that has also been relied on by subsequent decisions of the Tribunal. Nevertheless, the possible temporal element of »protracted« armed violence seems not to be required by conventional law.²⁵ For those drone attacks which occur only in a sporadic and isolated manner, the condition of a certain »intensity« of the armed violence would mean that they would not necessarily trigger a non-international armed conflict, and therefore IHL would *not* be applicable.

C. NEXUS TO AN ARMED CONFLICT

As indicated above, the drone attacks in question always need to have taken place in the context of an armed conflict (the so-called »nexus«). In the case of international armed conflicts, Common Article 2 to the Geneva Conventions states that IHL »shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of the war is not recognized by one of them.«²⁶ Moreover Additional Protocol I provides a similar formulation and presents the different cases for the scope of application of IHL.²⁷ In addition, the ICTY in its 1995 Tadić jurisdiction decision held that IHL applies in the entire territory of the warring parties in case of an armed conflict.²⁸

Unlike the geographical scope of application in international armed conflicts which seems to be more straightforward, the situation in cases of non-international armed conflicts is more complicated.²⁹ One of the important questions to pose is whether armed violence between a state and a non-state actor taking place in the territory of more than one state can be characterized as a non-international armed conflict.³⁰ From a first look at the Geneva Conventions, it becomes evident that there is no clear reference to the geographical scope of application of IHL in Common Article 3 to the Geneva Conventions, which speaks of »an armed conflict not of an international character occurring *in the territory* of one of the High Contracting Parties«.³¹ Article 1 of Additional Protocol II states that the Protocol only applies where an organized non-state armed group exercises control over a part of a High Contracting Party's territory, thus making reference to the geographical application of IHL and imposing geographical limitations.³² In addition to this, in accordance with the wording of Article 1 of Additional Protocol II its application is limited to an armed conflict between a state and a non-state actor and not between organized armed groups.³³

Following from this is the requirement of a connection between the target and an already occurring armed conflict. If there is no other

fighting activity taking place in another region between members of an armed group and the state, then one would need to rely on the drone strikes themselves in order to establish the existence of an armed conflict.³⁴ There is a good argument to say that a one-sided drone strike probably will not meet the threshold of intensity for an armed conflict under IHL, since according to the Tadić formula »protracted armed violence« between two (or more) parties is required.³⁵ The state that carries out the drone strikes must be a party to the fighting taking place or acting with the consent or jointly with a state which is party to the hostilities for the drone strikes to be considered part of the armed conflict.³⁶

Looking, for example, at the drone strikes in Pakistan, where reports have indicated that individuals from a wide range of militant groups have been targeted, it seems that not all of them seem to possess a link to the armed conflict in Afghanistan.³⁷ The situation becomes even more complicated when a state uses military means to fight a non-state actor outside of its own territory.³⁸ For example, the US administration itself is of the opinion that it is involved in two types of conflicts. The first, a non-international armed conflict with a transnational character, is one in which there are supposedly no geographic limitations on the scope of the conflict. The second is seen as a traditional non-international armed conflict in which a US ally fights a rebel group within its borders, and the US is a participant in that non-international armed conflict.³⁹ However, the ICRC and a number of academic commentators do not agree with the view that an armed conflict of global dimensions with the above-mentioned participants has taken place or is currently ongoing.⁴⁰

III. The most important IHL rules with regard to drone attacks

After the question of the existence of an (international or non-international) armed conflict has been confirmed in the positive, the next step would be to examine which IHL rules could be violated by a drone strike. Provisions which come to mind in this context are (A.) the prohibition of causing unnecessary suffering; (B.) the principle of distinction; (C.) the prohibition of indiscriminate attacks; (D.) the obligation to use precautions in attack; and (E.) the principle of proportionality.

A. NO UNNECESSARY SUFFERING (ARTICLE 35 (2) AP I)

Drones strikes could violate IHL if they cause unnecessary suffering. IHL rules are generally characterized by the effort to balance the principle of military necessity and principle of humanity.⁴¹ The relation between the two principles is also described in the famous Martens' clause:

»Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.«⁴²

The principle of necessity in IHL is one of the oldest principles of the law of armed conflict⁴³ requiring that »a belligerent may apply only that amount and kind of force necessary to defeat the enemy«⁴⁴ therefore prohibiting »unnecessary or wanton application of force«. ⁴⁵ It should be noted that the principle of necessity is not

explicitly codified in current IHL conventions but is instead referred to in specific provisions of the above humanitarian conventions.⁴⁶

B. PRINCIPLE OF DISTINCTION (ARTICLE 48, 52 AP I)

One of the IHL principles which might be espe-

cially challenged by the use of drone attacks as a more and more popular way of conducting hostilities is the principle of distinction. The principle of distinction is one of the cardinal principles of IHL aiming at the protection of the civilian population and civilian objects and establishing the distinction between combatants and non-combatants.⁴⁷ Pursuant to the principle of distinction, the parties to an armed conflict must distinguish between civilians and combatants at all times and may direct attacks only against combatants.⁴⁸ The crucial importance of this principle is also highlighted by the fact that it is contained in Rule 1 and Rule 7 of the ICRC customary law study.⁴⁹

Additional Protocol I contains a negative definition of civilians by stating that a civilian is any person who is not a member of the armed forces, while the civilian population is defined as comprising all persons who are civilians.⁵⁰ In case of doubt whether a person is civilian, he or she must be considered to be a civilian.⁵¹ Therefore, civilians are protected from attacks as long as they do not directly participate in hostilities, since refraining from direct participation in the hostilities is a prerequisite for the protection afforded to civilians under the principle of distinction.⁵² In the situation of a non-international armed conflict, the civilian population and individual civilians shall enjoy general protection against ongoing military operations and shall not be the object of attack unless and for such time they take part in hostilities.⁵³

Civilian objects are defined by the use of a negative formulation, namely »civilian objects are all objects which are not military objectives«. ⁵⁴ In case of doubt whether an object is being used to make an effective contribution to military action, it shall be presumed not to be so used.⁵⁵

The lack of combatant status in non-international armed conflicts, in addition to the features of contemporary warfare (including the use of drones) with military operations taking place in civilian population centers and armed actors failing to distinguish themselves from the civilian population, pose significant challenges to the law of targeting.⁵⁶ Given the increased involvement of civilians in activities related to the conduct of hostilities, determining what conduct amounts to direct participation in hostilities is crucial.⁵⁷ In 2009, the ICRC published an Interpretive Guidance on the Notion of Direct Participation in Hostilities.⁵⁸ The ICRC Interpretive Guidance brings forward three cumulative criteria for the qualification of direct participation in hostilities, namely (a) threshold of harm, (b) direct causation and (c) belligerent nexus.⁵⁹ Civilians shall enjoy protection »unless and for such time« as they take a direct part in hostilities with the suspension lasting exactly as long as the direct participation in hostilities.⁶⁰ At the same time, members of organized armed groups are not considered civilians as long as they remain members of the armed group and undertake a continuous combat function.⁶¹

Some of the criticism expressed in relation to the Interpretive Guidance focuses on the following issues: the criteria of distinguishing civilians from members of organized armed groups, the term »for such time« and the issue of »revolving door«, the restraints on the use of force as well as human shields.⁶² Nevertheless, it should be noted that the Interpretive Guidance provides recommendations which shall be applied to the operational context in order to be specific and provide guidance in the targeting process.⁶³

Given the complicated matter of distinguishing »normal« civilians from civilians directly participating in hostilities, it might be questionable whether drones operated by persons thousands of miles away are always able to make this judgment call. However, one also needs to point out that in some cases, drones – because of their ability to linger longer over a given target than a usual fighter jet – might be able to accumulate more intelligence information to take this decision.

Again, it will depend on the specific case to determine whether a drone is able to comply with this IHL principle.

C. PROHIBITION OF INDISCRIMINATE ATTACKS (ARTICLE 51 (4) AP I)

Another IHL prohibition which is closely connected to the principle of distinction, and which might be endangered in the context of drone attacks is the prohibition of indiscriminate attacks. Indiscriminate attacks are defined as those attacks that: a) are not directed at a specific military objective, b) employ methods or means of combat which cannot be directed at a specific target, or c) employ a method or means of combat the effects of which cannot be limited as required by Additional Protocol I (or API).⁶⁴

Concerning those attacks that are directed at a specific target and in close connection to the principle of precautions in attack, all available means of intelligence shall be used in order to ensure that the object of attack is a military target. Moreover, the second type of indiscriminate attacks prohibited by Article 51 (4) of Additional Protocol I concerns the use of weapons that cannot be directed at a specific target. Independent of the context-specific circumstances, this provision requires that weapons must be suitable for discriminate use and must be capable of being directed at a specific military target.⁶⁵ The Commentary to sub-paragraph (b) of Article 51 (4) of Additional Protocol I refers to possible examples like »long-range missiles which cannot be aimed exactly at the objective«.⁶⁶

Indiscriminate attacks are also described as attacks employing means of combat the effects of which cannot be limited. This could also be related to the prohibition on inflicting widespread, long-term and severe damage to the natural environment⁶⁷ as well as with the provision on the protection of works and installations containing dangerous forces.⁶⁸ In the Prosecutor v. Martić case at the ICTY, the Trial Chamber held:

»[T]he M-87 Orca, by virtue of its characteristics and the firing range in this specific instance, was incapable of hitting specific targets. For these reasons, the Trial Chamber also finds that the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas [...], will result in the infliction of severe casualties.«⁶⁹

Using these guidelines concerning the prohibition of indiscriminate attacks in the context of drone attacks, one must come to the conclusion that determining whether it complies with this rule very much depends on the circumstances and the type of drone. Usually, one would assume that – given the technical advancement – modern drones are indeed able to comply with these requirements, and would not violate the prohibition of indiscriminate attacks. But of course, there might be other cases and especially specific types of drones which would not comply with this principle.

D. PRECAUTIONS IN ATTACKS (ARTICLE 57)

One IHL principle which might also be especially relevant for the examination of the legality of drone strikes is the principle of precautions. The principle of precautions in attack requires that constant care shall be taken to spare the civilian population, civilians and civilian objects. In accordance with Article 57 of Additional Protocol I, everything feasible must be done to verify that the object of attack is a military objective. In addition to this, the obligation to choose means and methods of warfare to avoid, or at least limit loss or damage to the civilian population or civilian objects, imposes restrictions on the timing, location and angle of the attack.⁷⁰ Furthermore, the principle of precautions requires that parties must refrain from an attack which may be expected to cause excessive incidental civilian damage or casualties⁷¹ as well as that »effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.«⁷²

The scope and content of the term »feasible« has been defined as »those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.«⁷³ Furthermore, the Eritrea-Ethiopia Claims Commission held that feasible precautions do not include »precautions that are practically impossible.«⁷⁴ Unlike other precautionary obligations under treaty and customary law, the word »feasible« is not used in relation to effective warning. Instead it speaks of an obligation to give advance warning »unless circumstances do not permit.«⁷⁵ Additional Protocol II applicable in non-international armed conflict does not contain rules on precautions. Nevertheless, rules on precautions may be implied from the rules concerning the protection of the civilian population as well as customary international law.⁷⁶

As with any other attack from the air, a commander ordering a drone strike will need to take into account these requirements when launching a drone attack. The problematic term in this context is the qualifier »feasible« which might give the operator an opening to say that it was not feasible for the drone to give an effective warning. This might indeed be one of the specific disadvantages of a drone, especially if it has fewer operational possibilities than a fighter jet, which could lead to the violation of this rule.

E. PRINCIPLE OF PROPORTIONALITY (ARTICLE 51 (5) & 57 (2) (A)(III))

Finally, one of the most important IHL principles applicable to drone strikes is the principle of proportionality. The principle of proportionality concerns the prohibition »to launch 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.«⁷⁷ It should be noted that neither the word »proportionate« nor »disproportionate« are used in the text of Additional Protocol I; the term »excessive civilian loss« is used instead.

Moreover, both Articles 51 and 57 of Additional Protocol I refer to civilian loss that is expected, as the proportionality assessment is *ex ante* and not *post factum*.⁷⁸ Therefore, an attack causing excessive losses among the civilian population in relation to the military advantage actually achieved will not amount to an indiscriminate attack if no such excessive losses were to be expected by the attacker before the event. The Ethiopia-Eritrea Claims Commission pronounced that civilian losses may be »regrettable and tragic consequences of the war, but they do not in themselves establish liability for this claim under international law.«⁷⁹ It should be noted that there is no precise formula for weighing the incidental civilian harm against the military advantage expected.⁸⁰ Such assessment is context-dependent; therefore there is inherent subjectivity in the proportionality assessment, a fact that presents a major challenge for the conduct of hostilities.⁸¹

In relation to the Interpretative Guidance on the notion of direct participation in hostilities, some of the criticisms expressed focused on the fact that the Interpretative Guidance suggests that under certain circumstances an individual should be captured rather than attacked under the principles of military necessity and humanity. This is a restriction which is not existent in IHL.⁸² In the ICRC's view and in accordance with the Interpretative Guidance »the absence of an unfettered 'right' to kill does not necessarily imply a legal obligation to capture rather than kill regardless of the circumstances.«⁸³ Moreover, as indicated in the abovementioned document, it was stated:

»[W]hat kind and degree of force can be regarded as necessary in an attack against a particular military target involves a complex assessment based on a wide variety of operational and contextual circumstances. The aim cannot be to replace the judgment of the military commander [...]; rather it is to avoid error, arbitrariness, and abuse by providing guiding principles for the choice of means and methods of warfare based on his or her assessment of the situation.«⁸⁴

In conclusion, one has to say that every drone operator who is conducting a drone strike against a military target with the likelihood to also create civilian collateral damage, needs to be aware of the concrete factual circumstances. In addition, a drone operator has to make an assessment of the expected incidental loss of civilian lives or other civilian damage which is not excessive in relation to the concrete and direct military advantage anticipated.

IV. Further IHL aspects important when prosecuting IHL violations as war crimes

A. STATUS OF THE TARGETED INDIVIDUAL

A fundamental principle of international humanitarian law relevant for determining the legality of drone strikes is that »all persons who do not belong to the official military forces of a state are considered to be civilians and therefore enjoy protected status. [...] [I]n cases of doubt the person should be presumed to enjoy civilian status.«⁸⁵ The only persons against whom – in the view of the ICRC – lethal force may be used are on the one hand, civilians directly participating in hostilities, but only for the duration of the specific act of direct participation, or members of armed groups in a non-international armed conflict who perform a continuous combat function.⁸⁶ However, it is important to highlight that it is permitted to use violence against persons who represent a serious threat to law and order or public security, even where it is not obvious that they are directly participating in hostilities.⁸⁷ In such cases, use of force must, however, be governed by the standards of law enforcement or individual self-defense.⁸⁸

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has at least indirectly criticized the approach which is promulgated by the ICRC, namely to categorize a member of an armed

group as someone who has a continuous combat function. According to former Special Rapporteur Philip Alston, the ICRC focuses *de facto* not on the function of the person but on their status, and this has to be seen as a questionable status determination given the specific treaty language that limits direct participation to »for such time« as opposed to »all the time«.⁸⁹

In the recent past, the abovementioned criteria were applied in some national jurisdiction cases dealing with drone attacks. In the case of the German national Bünyamin E., the prosecutor found »that the persons killed through the drone attack were not civilians under the law of non-international armed conflict in light of their continuous combat function and the same was true for the male survivors of the attack«.⁹⁰ Bünyamin E. and seven other persons present at the scene of the strike were considered members of an organized armed group under international humanitarian law having directly participated in hostilities.⁹¹

The ECCHR expert opinion on the case criticized »the categorization of Bünyamin E. and the seven other persons present at the scene of the strike as members of an organized armed group under international humanitarian law and the subsequent finding that they directly participated in hostilities based on a disputed legal framework and insufficiently researched suspicions against those persons present.«⁹²

Another relevant case in the context of so-called »targeted killings« was the *Public Committee v. Government of Israel, Supreme Court of Israel, 2006* (The Targeted Killing Case):⁹³ The background was that in 2002, two human rights organizations, the Public Committee Against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment, filed a petition against Israel's policy of eliminating alleged terrorists by targeted killings, arguing that this policy contravened, among others, Israeli law, the laws of war and human rights law. The Court established that the alleged terrorists were not combatants under international humanitarian law, as they did not belong to armed forces or other units to which international

law gives a status similar to that of combatants.⁹⁴ The Court did not consider them as civilians under international humanitarian law, because they took part in hostilities and were therefore 'unlawful combatants', who forfeit the right to protection a regular civilian would enjoy. The Court considered that it could not determine the overall legality of targeted killings⁹⁶ but that on a case-to-case basis four criteria had to be applied in order to assess the legality of a targeted killing:

- The decision to kill has to be based on reliable evidence;
- The measure of targeted killing has to be proportionate;
- The attack must be followed by a thorough investigation; and
- Collateral damage must be proportionate.⁹⁷

This decision is interesting in the context of our chapter because it raises issues which are very often connected with drone attacks: the interplay between international humanitarian law and human rights law. While the Israeli Supreme Court did not consider the targeted persons as either combatants or protected civilians, it nevertheless required the attacker to comply with four criteria which seem to be a mixture of IHL and human rights law components.

B. IMMUNITIES OF CERTAIN PERSONS FROM PROSECUTION

Another aspect which is closely related to the difficulties connected to prosecuting drone attacks

as a war crime is the particular status official combatants have under international humanitarian law. According to Article 43 (2) API, in an armed conflict only combatants are entitled to directly participate in hostilities and as a consequence they enjoy immunity from prosecution. This is of course only under the assumption that they comply with the rules and principles of international humanitarian law. To enjoy this status the individual in question must be clearly identifiable as a member of a party to the conflict by the conditions indicated in Article

44 AP I, including the wearing of a uniform and holding a weapon openly, although one has to be aware that Article 44 AP I is more lenient with regard to the exact requirements for combatants of distinguishing themselves compared to Article 4A of the Third Geneva Convention. The legal purpose for wearing uniforms is to ensure that during active hostilities, the combatant is readily distinguishable from the civilian population⁹⁸ and not to assist in the status-based targeting of a combatant outside of active hostilities.⁹⁹

In the context of drone attacks, this creates the problem of distinguishing military operations from the activities of secret services of a state, assuming that the latter are usually to be regarded as civilians. This could present problems in a scenario in which secret service agents take part in hostilities by, for example, being in charge of controlling a drone and launching an attack through it. Especially with regard to CIA employees who have been reported to be in charge of part of the US drone program, this begs the question as to whether they are to be seen as members of the US armed forces and whether they can benefit from combatant privilege.¹⁰⁰ This issue has been discussed in jurisprudence and by commentators with slightly different results.

According to one view as indicated by the decision of the German Attorney General to terminate proceedings in the Bünyamin E. case, CIA employees who operate drones in the described way are also supposed to be seen as »armed forces« within the meaning of Article 43 Paragraph 1 of Additional Protocol I to the Geneva Conventions. This definition would also cover non-international armed conflicts despite the fact that AP I is only applicable to non-international armed conflicts.¹⁰¹ Although the relevant CIA operatives and the respective weapons systems are not integrated into the traditional military command structure, they seem to actually be somehow integrated in the hierarchy since they act under the orders of higher-ranking government agencies, which in turn carry responsibility for military operations.¹⁰²

Against the cross-border reach of insurgent groups, the relevant CIA operatives are, as a matter of practice, pressured to regularly exchange operational information with the military actors.¹⁰³ Civilian colleagues who have been attributed a »continuous combat function« by one of the parties to the conflict thereby become integrated *de facto* into that party's armed forces.¹⁰⁴ They can therefore no longer be considered »civilians« with regard to the principle of distinction's requirement to always distinguish between civilians and combatants.¹⁰⁵ As a consequence, CIA operatives could be the legitimate target of a (counter-)attack if they had been responsible for the command and control of drone attacks in the first place. At the same time, however, they would not be criminally liable under the national penal code, since they would enjoy the combatant privilege and could not be prosecuted for murder or manslaughter. This would, however, not exclude the possibility that their actions could be characterized and prosecuted as war crimes if for example, they directly attacked a civilian.

A different opinion was put forward in 2010 by the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions at that time, Philip Alston, who stated that »intelligence personnel do not have immunity from prosecution under domestic law for their conduct. They are thus unlike State armed forces which would generally be immune from prosecution for the same conduct [...] Thus, CIA personnel could be prosecuted for murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law.«¹⁰⁶ Furthermore, it has been noted:

»The CIA is a civilian agency and not a branch of the U.S. Armed Forces. Even under a liberal reading of Article 4 from GC III, the CIA would not meet the requirements of lawful belligerency as a militia or volunteer corps because, while they do report to a responsible chain of command (albeit not always a military chain of command), as a group they do not wear uniforms or otherwise

distinguish themselves, nor do they carry their arms openly. CIA personnel are therefore unprivileged belligerents in this conflict.«¹⁰⁷

This stands in contrast with the legal analysis conducted by the German Attorney General. The ECCHR Expert Opinion on the Bünyamin decision seems to rather go into the direction of the argumentation of the UN Special Rapporteur.¹⁰⁸ It argued that the »fact that both entities share the same ultimate commanding authority does not support a conclusion that the CIA is part of the military«. ¹⁰⁹ It, furthermore, argued that »[w]hile the US President may have ultimate authority over both the military forces and the secret service, this does not automatically mean that the CIA and the military are embedded in the same command structure.« Rather one would have to see the »CIA has an independent hierarchy and organization¹¹⁰ that is *not* incorporated into any military command structure«. ¹¹¹ In addition, one would have to be doubtful with regard to the intensity of the cooperation between the military and the CIA regarding the specific situation in Pakistan, »since the CIA has its own informants in Pakistan and the tribal areas to provide guidance on targeting of drone strikes«. ¹¹²

Another important aspect was highlighted when pointing out that the training in the application of international humanitarian law is a further important distinction between the two entities. It was stated that usually »[o]nly members of the armed forces [would] undergo this training; CIA agents [would] not«. ¹¹³

V. Conclusion

This chapter has highlighted different problematic issues from an international humanitarian law perspective which usually arise when prosecuting drone attacks as possible war crimes. One of the crucial problems and challenges of litigating drone strikes in the area of war crimes is the establishment of the existence of an armed conflict, be it an international or a non-international one. The transnational use of drone

attacks in situations, which however *prima facie* seem to be either a non-international armed conflict or even only enforcement measures below the armed conflict threshold, creates difficulties in establishing a clear war crimes case. Although the new 2016 ICRC Commentary on the First Geneva Conventions seems to have lowered the threshold for indicating the existence of an international armed conflict, these statements are not completely without controversy.

Equally controversial is the question of the so-called »transnational armed conflict« when it comes to the question whether a non-international armed conflict has »spilled over« to the neighboring state's territory. The current state practice and academic commentators still have not found a completely satisfying solution. In the end, one has to follow a »case-by-case« approach in order to establish an armed conflict according to the traditional criteria as indicated by the Geneva Conventions and especially the jurisprudence of the ICTY.

We have also seen that the litigation of drone attacks under the war crimes regime requires in particular taking into account the basic principles of the conduct of hostilities, especially the principle of distinction, the prohibition of indiscriminate attacks, the principle of proportionality, and the principle of precautions in attack. While the use of drones in modern warfare might involve certain challenges in the application of these principles, and the corresponding war crimes, in the end it is not *per se* given that a drone attack would necessarily violate said principles. In this regard, everything will depend on the context of the drone strike, and how the operators ensured that they took these IHL principles into account.

Finally, when prosecuting drone attacks as war crimes, one is also faced with additional difficulties which arise from the special status certain persons enjoy under international humanitarian law. When it comes to the potential target of a drone strike, one needs to clarify whether a combatant, a protected civilian, or a civilian directly participating in hostilities is the object of the attack. Especially the latter category raises certain challenges which are only partly solved

by the ICRC's »interpretative guidance on the notion of direct participation in hostilities«. While the status of the target is not always easy to determine, one needs also to take into account that the status of the person operating the drone can be decisive for the criminal liability of the operator. If one comes to the conclusion that this person is a combatant in the sense of Article 4A Geneva Convention III and Article 44 of Additional Protocol I, the consequence is that he or she cannot be prosecuted for »ordinary« domestic crimes like murder or manslaughter, but only for war crimes. At the same time, the operator becomes a legitimate military target him/herself. However, there is a strong opinion in international law that drone operators belonging, e.g., to the secret service of the respective state have to be seen as civilians and therefore will not enjoy the combatant privilege.

Overall, one needs to take into account that the litigation of drone strikes encounters certain problems which are however not limited to this special kind of warfare, but are partly attributable to the fact that the distinctive lines between combatants and civilians, as well as between international and non-international armed conflict seem to be increasingly blurring. In this regard, it is necessary to apply the traditional standards established in the respective areas and apply them with good faith and accuracy in the respective situations.

¹ C. Heyns, Preface: Coming to Terms with Drones in D. Cortright, R. Fairhurst, K. Wall (eds.), *Drones and the Future of Armed Conflict, Ethical, Legal and Strategic Implications*, The University of Chicago Press (2015); P. Grzebyk, Who can be killed?: Legal targets in non-international armed conflicts, in S. Barela (ed.), *Legitimacy and Drones, Investigating the Legality, Morality and Efficacy of UCAVs*, Ashgate (2015), at 49.

² See C. Kreß, Aerial Drone Deployment on 4 October 2010 in Mir Ali Pakistan, (Case No 3 BJs 7/12-4) Decision to Terminate Proceedings, Germany, Federal Prosecutor General. 23 July 2013, at 756 [Kreß].

³ D. Cortright, R. Fairhurst, Assessing the Debate on Drone Warfare in D. Cortright, R. Fairhurst, K. Wall (eds.), *Drones and the Future of Armed Conflict, Ethical, Legal and Strategic Implications*, The University of Chicago Press (2015), p. 1; R. Frau, »Unmanned Military Systems and Extraterritorial Application of Human Rights«, *Groningen Journal of International Law*, Vol. 1(1), at 9.

⁴ See J. Pejic, »Extraterritorial targeting by means of armed drones: some legal implications«, *International Review of the Red Cross*, September 2015, at 4 [hereinafter Pejic]; C. Heyns, Preface: Coming to Terms with Drones in D. Cortright, R. Fairhurst, K. Wall (eds.), *Drones and the Future of Armed Conflict, Ethical, Legal and Strategic Implications*, The University of Chicago Press (2015).

⁵ See R. Frau: *Unbemannte Luftfahrzeuge im internationalen bewaffneten Konflikt (Unmanned Aerial Vehicles in International Armed Conflicts) in Humanitäres Völkerrecht (Humanitarian International Law) No 2 (2011)*, at 62.

⁶ Harvard Program on Humanitarian Policy and Conflict Research: *Manual on International Law Applicable to Air and Missile Warfare*, 2009, Regulation 1 lit. (x).

⁷ C. Schaller: *Gezielte Tötungen und der Einsatz von Drohnen: Zum Rechtfertigungsansatz der Obama Administration (»Targeted Killings and the Use of Drones: On the Justification Strategy Used by the Obama Administration«) in Humanitäres Völkerrecht No. 2/2011 (hereinafter, Schaller)*, at 96; J. Pejic, supra note 4, p. 3.

⁸ Ibid.

⁹ Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, para 1402.

¹⁰ UN General Assembly, »Report of the Special Rapporteur on Extrajudicial,

Summary or Arbitrary Executions«, by Philip Alston, 28 May 2010, para. 79, p. 24.

¹¹ J. Welsh, The Morality of »Drone Warfare«, in D. Cortright, R. Fairhurst, K. Wall (eds.), *Drones and the Future of Armed Conflict, Ethical, Legal and Strategic Implications*, The University of Chicago Press (2015), at 24.

¹² Expert opinion on the decision (File no. 3 BJs 7/12-4) of the Federal Prosecutor General at the Federal Court of Justice to discontinue investigatory proceedings into the killing of German national Bünyamin E. on 4 October 2010 in Mir Ali / Pakistan, ECCHR, October 2013, p. 10. [ECCHR Expert Opinion], with reference to C. Greenwood, Scope of application of humanitarian law, in D. Fleck (ed.), *The Handbook of International Humanitarian Law (2008)*.

¹³ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art.2, Aug. 12, 1949, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Art.2, Aug. 12, 1949, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, Art.2, Aug. 12, 1949, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art.2, Aug. 12, 1949, 75 U.N.T.S. 287. [Common Article 2].

¹⁴ Jean Pictet (ed.), *Convention (III) Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, Commentary (1960), at 23.

¹⁵ The Prosecutor v. Tadić, International Criminal Tribunal for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-I, October 1995, para. 70.

¹⁶ See, 2016 Commentary on the First Geneva Convention, Article 2, para. 261.

¹⁷ See Protocol Additional to the Geneva Conventions of August 12 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, Art. 13(3), June 8, 1977, 1125 U.N.T.S. 609, Art.1(2) [hereinafter Additional Protocol II]; GC I, Art.3; GC II, Art.3; GC III, Art.3; GC IV, Art. 3 [Common Article 3]; Dietrich Schindler, »The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols«, in *Collected Courses of the Hague Academy of International Law*, Vol. 163, Martinus Nijhoff, The Hague, 1979, p. 147.

¹⁸ The Prosecutor v. Fatmir Limaj, International Criminal Tribunal for the Former Yugoslavia, Judgment, Case No. IT-03-66-T, November 2005, paras. 94-134; See also M.

Schmitt, »Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law«, 52 *Columbia Journal of Transnational Law* 77 (2013), at 95 [Schmitt, Extraterritorial Legal Targeting]; Pejic, supra note 4, p. 13.

19 Expert opinion on the decision (File no. 3 BJs 7/12-4) of the Federal Prosecutor General at the Federal Court of Justice to discontinue investigatory proceedings into the killing of German national Bünyamin E. on 4 October 2010 in Mir Ali / Pakistan, ECCHR, October 2013, at 10. [ECCHR Expert Opinion].

20 ECCHR Expert Opinion, supra note 12, at 10.

21 Ibid; N. Melzer, »Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities«, in *New York University Journal of International Law and Politics*, Vol. 42 (2010), at 839. [Melzer, Keeping the balance between military necessity and humanity].

22 Additional Protocol II, supra note 17, art. 1(2).

23 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 98, art. 8(2) (d).

24 The Prosecutor v. Tadić, International Criminal Tribunal for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-I, October 1995, para. 70.

25 N. Melzer, Targeted Killings in International Law (OUP 2008), at 250.

26 Common Article 2, supra note 13.

27 Additional Protocol I, Art.1(3) & 3(b).

28 The Prosecutor v. Tadić, International Criminal Tribunal for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-I, October 1995, para. 70.

29 On this topic, see R. Heinsch, The Geographical Scope of Application under International Humanitarian Law in Modern Warfare, in: *Journal of International Law of Peace and Armed Conflict* 25/4 (2012), 184 - 192 (http://www.ifhv.de/documents/huvi/huvi-2012/huv_4_2012.pdf).

30 Cf. on this topic, 2016 ICRC Commentary on the First Geneva Convention, para. 261; and N. Lubell & N. Derejko, Global Battlefield? Drones and the Geographical Scope of Armed Conflict, in: Derejko, 11 *Journal of International Criminal Justice*, (2013), at 77-78.

31 Common Article 3, supra note 17; for

more information, see International Law Association (ILA), *Challenges of 21st Century of Warfare: The Conduct of Hostilities and International Humanitarian Law*, Interim Report (2015), italics by authors, available at: http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1040.

32 Additional Protocol II, supra note 17, Art. 1(1).

33 Ibid, »This Protocol shall apply to all armed conflicts [...] which take place in the territory of a High Contracting Party between its armed forces, and dissident armed forces«.

34 See N. Nubell and N. Derejko, »A Global Battlefield: Drones and the Geographical Scope of Armed Conflict«, 11 *Journal of International Criminal Justice* (2013), at 77-78.

35 Tadić, Jurisdiction Decision on Interlocutory Appeal, para. 70.

36 See N. Nubell and N. Derejko, A Global Battlefield: Drones and the Geographical Scope of Armed Conflict, 11 *Journal of International Criminal Justice* (2013), at 78.

37 See, F. Hampson, »Afghanistan 2001-2010«, in Wilmschurst (ed.), *International Law and the Classification of Conflicts* (OUP 2012).

38 ECCHR Expert Opinion, supra note 12, at 8.

39 See Hamdan v. Rumsfeld, 548 U.S. 557, 631 (2006), where the US Supreme Court regarded the classification of violence taking place between the United States and »Al-Qaeda, the Taliban and associated forces, which the United States was of the view that is an international armed conflict of global dimensions, as being non-international in nature.«

40 ICRC, Report on IHL and the Challenges of Contemporary Armed Conflicts, Report presented to the 31st International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 28 November-1 December 2011, at 10.

41 See Y. Dinstein, *The Conduct Of Hostilities Under The Law Of International Armed Conflict*, CUP (2004) at 16.

42 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Preamble; Article 1 (2) Additional Protocol I and the fourth preambular paragraph of Additional Protocol II state that »Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of

humanity and the dictates of the public conscience.«

43 For more information see R. Heinsch, Lieber Code, in: Alexander Mikaberidze (ed.), *Atrocities, Massacres, and War Crimes: An Encyclopedia*, ABC Clio, June 2013, at 414-417.

44 C. Greenwood, Historical Development and Legal Basis, in D. Fleck (ed.), *Handbook of International Humanitarian Law*, 2nd edition, margin number 131.

45 Ibid.

46 See for instance, the prohibition of the use of means and methods of warfare that are likely to cause unnecessary suffering, in Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 23, lit. e; Additional Protocol I, Art. 35 (2).

47 International Court of Justice (ICJ), Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, para. 78.

48 Additional Protocol I, Art. 48; Jean-Marie Henckaerts, Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Vol.1: Rules*, Cambridge University Press (2005), Rule 1 [hereinafter ICRC Customary Law Study].

49 L. Doswald-Beck & J.-M. Henckaerts (eds.) *ICRC Customary Law Study* (2005), Rules 1 & 7.

50 Additional Protocol I, Art.50(1) (2).

51 Ibid.

52 Ibid, Art. 51(3).

53 Additional Protocol II, supra note 17, Art. 13; ICRC Customary Law Study, supra note 48, Rule 1.

54 Additional Protocol I, Art.52(1); ICRC Customary Law Study, supra note 48, Rule 7. In accordance with Art. 52(2) of Additional Protocol I military objectives are defined as »those objects which by their nature, location, purpose or use make an effective contribution to military action«.

55 Ibid, Art. 52(3).

56 See M. Schmitt, E. Widmar, *The Law of Targeting in P. Ducheine, M. Schmitt, F. Osinga (eds.) Targeting: The Challenges of Modern Warfare*, Springer (2016), at 123-129. [The Law of Targeting].

57 See N. Melzer, supra note 21, at 328.

58 Melzer, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, ICRC (2009) [Interpretive Guidance].

59 Ibid, at 46.

60 Ibid, at 70.

61 Ibid, at 71.

62 The Law of Targeting, supra note 56, at 127; Melzer, Keeping the balance between military necessity and humanity, supra note 21, at 834.

63 Pejic, supra note 4, at 26; See N. Melzer, The ICRC's clarification process on the notion of direct participation in hostilities under International Humanitarian Law, Proceedings of the Annual Meeting, 103 American Society of International Law (2009), at 301.

64 Additional Protocol I, Art.51(4) a-c.

65 W. Boothby, *Weapons and the law of armed conflict*, OUP (2009), at 78.

66 Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, para 1958.

67 Additional Protocol I, Art.35 (3).

68 Ibid, Art. 56 (1).

69 The Prosecutor v. Martić, International Criminal Tribunal for the Former Yugoslavia, Judgment, IT-95-11-T, 12 June 2007, para. 463.

70 Additional Protocol I, Art. 51 (7); See J.F. Quèguiner, »Precautions under the law governing the conduct of hostilities«, *International Review of the Red Cross*, Precautions under the law governing the conduct of hostilities, Vol. 88, No. 864 (2006), at 801; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edition, CUP (2016).

71 Additional Protocol I, Art.57(2) (a) (iii).

72 Ibid; ICRC Customary Law Study, supra note 48, Rule 20.

73 Amended Protocol II to the 1980 Conventional Weapons Convention, 3 May 1996, Article 3(10); Protocol III to the 1980 Conventional Weapons Convention Art. 1(5).

74 Eritrea-Ethiopia Claims Commission, Partial Award, Central Front, Ethiopia's Claim 2 (2004), para. 110.

75 Additional Protocol I, Art. 57 (2) (c).

76 Additional Protocol II, supra note 17, Art. 13; ICRC Customary Law Study, supra note 48, Rules 14-21.

77 ICRC Customary Law Study, supra note 48, Rule 14; Additional Protocol I, Art.51 (5), 57 (2) (3).

78 Schmitt, Extraterritorial Lethal Targeting, supra note 18, at 108.

79 See Eritrea-Ethiopia Claims Commission, Partial Award, Western Front, Eritrea's Claims 1,3, 5, 9-13, 14, 21, 25, 26, 19 December 2005, para. 97.

80 Pejic, supra note 4, at 20.

81 Ibid; See also Schmitt Extraterritorial

Lethal Targeting, *supra* note 18, at 108-109.

82 Interpretive Guidance, *supra* note 58, p. 77-82; See also Schmitt Extraterritorial Lethal Targeting, *supra* note 18, at 106; W. Hays Parks, »Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect«, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, at 799; J. Kleffner, »Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: the End of Jus in Bello Proportionality as we know it?«, 45 *Israel Law Review* (2012); N. Melzer, Keeping the balance between military necessity and humanity, *supra* note 21.

83 Interpretive Guidance, *supra* note 58, at 78.

84 Interpretive Guidance, *supra* note 58, at 80; Pejic, *supra* note 4, at 25.

85 ECCHR Expert Opinion, *supra* note 12, at 15.

86 See J. Pejic, *supra* note 4, at 26.

87 ECCHR Expert Opinion, *supra* note 12, at 16.

88 See ICCPR, Art. 6; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990 (BPUFF), available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/>.

89 P. Alston, Study on Targeted Killings, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 28 May 2010, A/HRC/14/24/Add.6, para. 65, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

90 Aerial Drone Deployment on 4 October 2010, in Mir Ali/Pakistan (TARGETED KILLING IN PAKISTAN CASE), (Case No 3 BJs 7/12-4), Decision to Terminate Proceedings, Germany, Federal Prosecutor General. 23 July 2013, 157 ILR 722, at 748-9.

91 *Ibid.*

92 ECCHR Expert Opinion, *supra* note 12, at 6.

93 Judgment available at: http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

94 Public Committee v. Government of Israel, Supreme Court of Israel (13 December 2006), para. 24.

95 *Ibid.*, para.26; 29-40.

96 *Ibid.*, para. 60.

97 *Ibid.*, para. 40.

98 Protocol Additional to the Geneva

Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3., Art. 44 (only requiring combatants to distinguish themselves from the civilian population when they are engaged in an attack or actions preparatory to an attack).

99 M. Lewis & E. Crawford, »Drones and Distinction: How IHL encouraged the rise of Drones«, *Georgetown Journal of International Law*, Vol. 44, No. 3 (2013), at 1161.

100 See D. Cline, An Analysis of the Legal Status of CIA Officers Involved in Drone Strikes, 15 *San Diego International Law Journal* 51 (2013).

101 See Claus Kreß, Aerial Drone Deployment on 4 October 2010 in Mir Ali Pakistan, (Case No 3 BJs 7/12-4) Decision to Terminate Proceedings, Germany, Federal Prosecutor General. 23 July 2013, at 758.

102 *Ibid.*

103 *Ibid.*

104 *Ibid.*

105 See ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, at 39.

106 P. Alston, Study on Targeted Killings, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 28 May 2010, A/HRC/14/24/Add.6, para. 71, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

107 M. Lewis & E. Crawford, citing Ryan J. Vogel, »Drones and Distinction: How IHL encouraged the rise of Drones«, *Georgetown Journal of International Law*, Vol. 44, No. 3 (2013), p. 1160; R. J. Vogel, »Drone Warfare and the Law of Armed Conflict«, 39 *Denver Journal of International Law and Policy* (2011), at 134-135.

108 ECCHR Expert opinion, *supra* note 12, at 19-22.

109 ECCHR Expert opinion, *supra* note 12, at 21.

110 See National Security Act of 1947, Sections 104 and 104A; M.E. O'Connell, »Spy vs. Soldier«, *New Republic*, 2 April 2013, available at: <https://newrepublic.com/article/112810/cia-drone-program-move-pentagon>.

111 ECCHR Expert opinion, *supra* note 12, at 21.

112 *Ibid.*

113 *Ibid.*, see also E. Crawford, Identifying the Enemy, Civilian Participation in Armed Conflict, (OUP 2015), at 135.



DRONES: BEYOND THE MYTHS OF PRECISION AND LEGALITY

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The advent of drones as the United States of America's weapon of choice in the War on Terror belies the ancient Chinese proverb:

»In a war, you begin to shape yourself in the image of the enemy«

To seek retribution for the savagery that befell upon its homeland on September 11, 2001, the United States has settled on its preference for a new era weapon; the unmanned aerial vehicle (»UAV«) or, in more common parlance, the drone, to combat the »enemy«. It has been claimed that this new era war weapon fulfills a checklist of the three P's for a successful drone strike: precision, precaution and planning. But in reality there is one factor that takes precedence over all others: in this new era of warfare, there is no risk of harm for the one controlling the drone but all is at risk for the ones on the ground.

I. Federally Administered Tribal Areas

One of the key target regions of the US drone strikes has been the Federally Administered Tribal Areas¹, or FATA, which make up Pakistan's northwestern boundary with Afghanistan. FATA, a legacy of

the colonial era in the subcontinent, is a significantly underdeveloped area in comparison with the rest of Pakistan. There is no well-established infrastructure, hospitals, schools or recreation facilities, and adherence to custom, tradition and religion is of optimum importance. As the area is disconnected from the rest of Pakistan's »settled areas« in a plethora of ways, it would be apt to assert that FATA is a vulnerable area and its vulnerability has in turn shaped it into a victim of ignorance and senseless killing of innocent civilians.

These civilians are people who happen to be in the garb similar to that of the »enemy«, or perhaps the beards that they don make them justifiable targets for the CIA. However, there have been instances of drone strikes where there is no room for mistaken identity; they have unlawfully and cruelly targeted the elderly, women and children.

Since 2004, at least 966² civilians in the impoverished areas have fallen victim to a fate alarmingly similar to that of the victims of 9/11; the key difference being that the executioners here are not the radical terrorists belonging to al-Qaida but the suave, sophisticated and knowledgeable gentlemen of the Central Intelligence Agency of the United States. The other difference is that these civilians are not taken by complete surprise as the victims of 9/11 were; rather, the victims of drone strikes have lived in fear for years under the drone-filled sky until it is their turn to be executed for the sole crime of being mistaken for a terrorist or being in the wrong place at the wrong time. For almost thirteen years, millions of citizens in the region have lived terrified lives, their souls crushed by the awareness of a constant humming sound of the drones above, and a »fire in the blue sky« which can come down upon any one of them at any time, on any day.

II. Humanity – An aspect not widely recognized in drone strike discourse

As various commentators have pointed out,³ it is the human side of the debate about drone attacks which is most often absent in public discourse. The dialogue in policy circles often gets entangled in details about strategic and policy issues of the War on Terror – whether drones are helpful in fighting terrorists or whether they can be manufactured more cheaply and used more efficiently. The key point for international human rights organizations gets mired in the befuddling interpretation of the language of international law – whether the CIA and the Taliban or the more recent targets, the TTP,⁴ are lawful combatants, or whether the killings were proportionate. There are many questions and no plausible answers. There is blatant ignorance in both policy and legal circles with regard to the human rights implications of drone strikes. Seldom is the issue perceived from the victim's perspective. It is as if in a world governed by strategic imperatives and international law, human stories simply do not matter.

III. Civilian victims – The human aspect of »collateral damage«

Sadaullah, 15, was a student in the village of Machi Khel, Mir Ali, North Waziristan, Pakistan. On 7 September 2009, two drones were observed hovering over the village throughout the day. This prompted fear and anger amongst the villagers, who viewed the drones' presence as a threat and an interference with their religious observations of the holy month of Ramadan.

In the evening, Sadaullah and his family, including grandfathers, uncles, and cousins, gathered at his grandfather's house to celebrate

the breaking of their fast. Upon the ritual breaking of the fast, the family stepped outside into the courtyard to offer *Maghrib*, the evening prayer. Sadaullah joined the prayer late, as he had been serving the guests. As the family members finished their prayers, they returned into the main room of the house. Sadaullah and his elder cousin Ajman Ullah were the last to finish their prayers. As they were about to re-enter the house from the courtyard, the two drones fired their missiles at the building. Sadaullah was hit by the debris that fell from the roof and was knocked unconscious.

He woke up in a hospital in Peshawar. Both his legs had been amputated, and he had lost the use of one eye due to flying shrapnel. A number of his family members had been killed in the blasts: Mautullah Jan, his uncle, who had been in a wheelchair for a decade and his cousins; Kadaanullah Jan and Sabir-ud-Din.

Sadaullah would have been alive today if his family had enough resources to provide him with proper medical care. He died in 2013 due to an infection that developed from the wounds on his amputated legs caused by the wooden legs he was forced to use because he could not afford prosthetics. Justice and redress are important for the victims of drone strikes. Justice may begin with an acknowledgment of the strikes' existence, but for redress, immediate steps for compensation of such victims ought to be taken.

On October 24, 2012, Momina Bibi, aged 67, was working in a field in the village of Tappi, North Waziristan, collecting vegetables when she was struck by a drone missile which killed her and also the family's livestock. The second drone strike left her body in pieces. Momina Bibi is described by her son, Rafiqur Rehman and her grandchildren as the life of their household and the organizer of the festive events in the family. She was killed in front of her grandchildren; Safdarur Rehman, aged 3, Asma Bibi, aged 5, Naima Bibi, aged 7, Nabila Bibi, aged 8, Samadur Rehman, aged 12, Zubairur Rehman, aged 13 and Kaleemur Rehman, aged 17, who were playing in the field near her.

IV. Perilous statistics

According to estimates by independent sources, at the time of writing, there have been at least 425 drone attacks within the sovereign territory of Pakistan, out of which President Obama authorized 370 strikes.⁵ These drone strikes, over the two presidencies, killed, extra-judicially and illegally, between 2,501 and 4,003 people, including women, children, and the elderly and handicapped.⁶ Of these, between 424 and 966 were confirmed to be civilians.⁷ We know the real number to be far higher but the difficulty in accessing the areas where the drone strikes are being carried out to conduct independent investigations and the covert nature of the drone program makes it impossible to determine the true number of civilian casualties. At least 172 of those killed were children. Over a thousand more have been injured and have lost their property or livelihoods.⁸ It has been claimed that for every militant killed, at least 10 to 15 civilians are killed.⁹ A comprehensive investigation by the Bureau for Investigative Journalism found that only 12% of those killed in Pakistan by drones over the past ten years were militants. As stated above, al-Qaida members – the original intended targets of the drone program – constituted only 4% of those killed.¹⁰

All available evidence shows that civilians are not just »collateral damage« but in fact account for the overwhelming proportion of drone strike victims. However, what really belittles the concept of human rights is not just the lack of investigative journalism conducted into the thousands of civilian casualties but the empty claims of minimal civilian casualties coming from the White House and the CIA.

V. Campaigns against unlawful targeted killings by the most underprivileged

On 9 and 10 December 2010, Sadaullah, aged 15, Faheem Qureshi, aged 14 and Saddam Hussein, aged 13, traveled hundreds of miles from their native villages in North Waziristan Agency, FATA, to protest outside the Parliament in Islamabad against the atrocities committed by the CIA's drone program. This was their first trip to the capital and they were accompanied by at least a dozen victims who had lost loved ones to drone strikes. This was a long way from home. Yet these brave *Waziris* decided to register their protest and seek justice from their government and from the most powerful nation, the United States. This was the first occasion in Pakistan since the beginning of drone strikes in 2004 that civilian victims had publicly protested against these unlawful extrajudicial killings and demanded justice and redress.

The civilian victims' campaign against unlawful drone strikes in Pakistan struggled to gain attention in Pakistan and internationally. The protestors sought to highlight a daunting aspect of drone strikes: that the drone strikes are not conducted with the precision or accuracy that the US and CIA claimed to be a hallmark of the technology.

For this, Momina Bibi's grandchildren, Nabila Rahman and Zubairur Rahman travelled to the United States and spoke with congressmen. Another victim, Kareem Khan, visited German, Dutch and British parliaments and also met with members of the European Parliament to brief them about the damage inflicted by drone strikes in Pakistan. All these efforts finally yielded fruit; they managed to have an impact in particular segments of the international community.

The first response to these efforts came from two American universities: Stanford University and New York University. They issued a detailed report on the impact of drone strikes in Pakistan titled »Living

under Drones». ¹¹ Following this report, other international human rights groups also raised their voices. The efforts of victims were also vindicated in a judgment by the Peshawar High Court (PHC), ¹² which unequivocally declared these strikes unlawful and a war crime. The UN Special Rapporteur on Counter-terrorism and Human Rights, too, recognized the high proportion of civilian harm and the lack of redress for victims. ¹³ In 2014, the UN Human Rights Council convened a special session on drone strikes in Pakistan ¹⁴ that recognized the alarming proportion of civilian harm and called on member states to address the issue of civilian victims.

VI. No compensation for Pakistani victims of drone strikes

Despite the international community's recognition of the plight of civilian victims of these atrocities, the perpetrator of these drone strikes, the US, offers only a deafening silence. It took a very long time for the US to admit that it had been conducting the drone program and to date it has not recognized any deaths of Pakistani civilians. In stark comparison to his response to the deaths of Pakistan civilians, President Obama apologized for the deaths by drone of two Western hostages in 2015 and not only recognized his mistake but also offered both families his full support and compensation. He also promised a full investigation to determine the cause of such a mistake.

It is this selective approach which sends the wrong message to Faheem, Saddam and Saadullah, Nabila Bibi, Zubairur Rehman and other Pakistani victims of drone strikes; does one need to be from the West to be publicly acknowledged as a human being worthy of an apology, or for one's family to receive compensation for the unlawful death of their innocent loved ones?

VII. Legal success in Pakistan

On May 11, 2013, in its judgment titled *Foundation for Fundamental Rights vs. Federation of Pakistan & 4 others*, ¹⁵ the PHC found, based on physical verification by the political authorities of North and South Waziristan Agencies, that up to 1,449 Pakistani civilians were killed between 2008 and 2012 while a »negligible« number of al-Qaida operatives have been killed by the drone strikes.

The PHC gave clear directions to the Government of Pakistan to protect the citizens of Pakistan from any future drone strikes by petitioning for their rights at international forums or even shooting down the drones. This case was filed on behalf of the civilian victims of the March 2012 *jirga* strike which killed over forty tribal elders and tribesmen who had gathered in a public place to resolve a mining dispute between two tribes.

The decision itself is a declaratory order, asking the Pakistani government to primarily protect the right to life of its citizens against any foreign power. Following the decision, the Pakistani government kept dragging its feet until the petitioner went to the court again this time to indict the Prime Minister for contempt of court for not implementing a clear direction of the High Court. These actions taken by the victims, coupled with advocacy and public campaigning by political parties and civil society in 2014, finally brought down the frequency of drone strikes on Pakistani soil. However, the issue of accountability and redress still remains unresolved.

In 2014 the Islamabad High Court, on petition of civilian drone victim Karim Khan, ordered Islamabad police to initiate criminal proceedings against the CIA station chief in Islamabad and against other officials of CIA involved in drone strikes. This decree from the High Court vindicated the argument of victims that drone strikes in Pakistan are illegal and those involved in such killings could be held accountable for homicide.

Despite this, the drones physically remain in the skies over FATA, and their presence is felt by locals at all times. In recent years, the CIA unofficially claimed to have abandoned the most troubling strikes such as signature strikes and double tap strikes but recent strikes have proved this assertion to be false. The killing of two western civilian hostages¹⁶ in early 2015 is one example of continuity of the same old practice of signature strikes where targets are selected on basis of their »pattern of life«.

VIII. Ambiguities surrounding secrecy

One prominent issue that remained with drone strikes inside Pakistan pertains to secrecy. We never hear the names or identities of those targeted, or the extent of someone's purported involvement in militant/terrorist activity; instead we hear merely numbers and figures of the »bad guys« that have been killed. It seems that the citizens of Pakistan are expected to idly sit, wait and watch as the push of a button continues to authorize another extrajudicial killing in FATA which not only violates the very extent of our legal system, but completely disregards due process and undermines the sovereignty of Pakistan as a nation.

The US did not officially recognize its drone program until 2012, before then it was referred to as the »alleged drone program«. To date the US has not publicly declared who has been killed apart from those rare occasions when some prominent militant is actually killed in any such strikes. According to one report¹⁷ and judicial findings by the Peshawar High Court, a rough ratio is that for every militant killed, 30 civilians are killed.

One significant reason for secrecy around drone strikes is apparent from the outset: the lack of intelligence and the fact that the US

itself does not have any idea who they are killing. Jonathan Landay, a well-known American journalist writing for McClatchy reviewed the CIA's leaked data on drone strikes carried out between 2010 and 2011.¹⁸ His most important finding was that more than half of the people killed were not al-Qaida but assessed to be associates, probably Afghans, by the CIA. Only six top al-Qaida leaders were killed out of a total of more than eight hundred drone casualties that year. Furthermore, the CIA has no on-the-ground human intelligence in Waziristan.

The little information the CIA gathers is through local spies who are reporting in return for large sums of money and are thus hardly reliable or credible informants. There are hardly any (technical) intercepts in Waziristan as there is no mobile phone service or access to the internet. Landlines are operated by the Pakistan military, which listens to each and every conversation of the locals but the »bad guys« are well informed of this practice of phone surveillance. Another question that remains unanswered is who are the local assets on ground? Tribal animosity or fear of pointing out the real targets might impose more of a threat than pointing out some irrelevant civilian or low-level militants who do not meet the necessary threshold. It is believed that there might have been some cooperation between Pakistani intelligence (ISI) and the CIA in the past. Does it still continue or has it ceased to exist since 2009?

To further highlight the vulnerability of intelligence in remote territories such as FATA, in April 2011 in Afghanistan – where the US/NATO are on the ground and can have access to better intelligence than Waziristan – two American soldiers were killed by a drone after being mistaken for Taliban fighters by US troops.¹⁹ Another such occurrence took place in September 2010, when the intended assassination of Muhammad Amin, the then Taliban deputy governor of the Takhar province went awry and instead killed someone named Zabet Amanullah who was out campaigning in parliamentary elections; also killed in the strike were nine of his fellow election workers.²⁰

IX. Conclusion – The way forward

While the US has adopted an approach to combating the enemy without ever setting foot on enemy territory, keeping US troops safe and minimizing military budgets, FATA's residents have had to change their lifestyle in order to avoid falling victim to drone strikes. Dispute settlements through local *jirga's* have been minimized, children refuse to play outdoors and the constant whirring sound of the drones has caused unrest and fear amongst all factions of FATA's society.

Recently, there have been increasing murmurs in the parliament of merging FATA with the province of Khyber Pakhtunkhwa. Politicians and law makers alike believe that merging FATA with the province will end FATA's isolation from the rest of Pakistan, but what will this mean for the people of FATA? Will Pakistan's sovereignty as a country be taken more seriously when FATA is no longer an underdeveloped and deserted part of the country?

It is also pertinent to note that with such alarming statistics of civilian casualties, the acknowledgement of the errors committed by US officials are met with silence and growing resentment by victims and their families. It should not be forgotten that the *pukhtoons* value their self-dignity and integrity very highly and that they have suffered in silence for many years. Just as FATA's geographic location is delicate in nature, so is the status of its people. The US should take into account that its drone program has been counter-productive in the region and if the innocent victims are not acknowledged, the US could be aiding fundamentalist views in the region while venturing to eradicate the »bad guys«.

¹ To date FATA has been targeted in at least 425 drone strikes, see »Strikes in Pakistan« data base from the Bureau of Investigative Journalism, available at: https://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&show_injuries=1&show_strikes=1&location=pakistan&from=2004-1-1&to=now.

² The Bureau of Investigative Journalism, CIA and US military drone strikes in Pakistan, 2004 to present, database available at: <https://www.thebureauinvestigates.com/projects/drone-war/pakistan> (figures correct as of 24 March 2017).

³ See Madiha Tahir, »The Business of Haunting,« Wounds of Waziristan, 2 September 2013, accessed 26 March 2017, <http://woundsofwaziristan.com/business-of-haunting/> and T. Gregory, »Drones, Targeted Killings, and the Limitations of International Law«, (2015) International Political Sociology 9, 197-212.

⁴ Tehreek e Taliban Pakistan, more commonly known as the Pakistani Taliban.

⁵ The Bureau of Investigative Journalism, CIA and US military drone strikes in Pakistan, 2004 to present, see above, note 2.

⁶ Ibid.

⁷ Ibid.

⁸ The Bureau of Investigative Journalism, Most US Strikes in Pakistan Attack Houses, 23 May 2014 <https://www.thebureauinvestigates.com/stories/2014-05-23/most-us-drone-strikes-in-pakistan-attack-houses>.

⁹ D. Byman, »Do targeted killings work?«, Brookings, 14 July 2009, available at: <http://www.brookings.edu/research/opinions/2009/07/14-targeted-killings-byman> »US Drone strikes in Pakistan claiming many civilian victims, says campaigner«, The Guardian, 17 July. 2011, available at: <http://www.theguardian.com/world/2011/jul/17/us-drone-strikes-pakistan-waziristan>.

¹⁰ The Bureau of Investigative Journalism, Only 4% of Drone Victims in Pakistan named as Al Qaeda Members, 16 October 2014, <https://www.thebureauinvestigates.com/stories/2014-10-16/only-4-of-drone-victims-in-pakistan-named-as-al-qaeda-members>.

¹¹ International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), Living Under Drones: Death, Injury, Trauma to Civilians from US Drone Practices in Pakistan (September, 2012).

¹² Peshawar High Court, Judgment of 11 April 2013, Writ Petition No. 1551-P/2012 available at: http://www.peshawarhighcourt.gov.pk/image_bank/Mr_Justice_Dost_Muhammad_Khan/wp1551-12.pdf.

¹³ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, 18 September 2013, A/68/389.

¹⁴ See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15080>.

¹⁵ Pakistani Law Decisions 2013 Peshawar 94, judgment of 11 April 2013, available at: <https://www.thebureauinvestigates.com/stories/2013-05-09/pakistani-court-rules-cia-drone-strikes-are-illegal>.

¹⁶ See e.g. »US hostage deaths: Western captives held by al-Qaeda were killed in US counter-terrorism operation, says White House«, Independent, 23 April 2015, available at: <http://www.independent.co.uk/news/world/americas/warren-weinstein-and-giovanni-loperto-western-hostages-held-by-al-qaeda-were-killed-in-us-counter-10198909.html>.

¹⁷ S. Ackerman, »41 men targeted but 1,147 people killed: US drone strikes – the facts on the ground«, The Guardian on a report from Reprieve, 24 November 2014, <https://www.theguardian.com/us-news/2014/nov/24/-sp-us-drone-strikes-kill-1147>.

¹⁸ J. Landay, »Obama's drone war kills ›others,‹ not just al Qaeda leaders«, McClatchy, 9 April 2013, available at: <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html#.Ue4Vm431IRY>.

¹⁹ E. MacAskill, »Two US soldiers killed in friendly-fire drone attack in Afghanistan,« The Guardian, 11 April 2011, available at: <https://www.theguardian.com/world/2011/apr/11/us-soldiers-killed-in-drone-attack>. While this occurred in Helmand Province, Afghanistan, it underscores the dubious nature of the intelligence relied upon by the US to carry out these strikes.

²⁰ P. Chatterjee, »How lawyers sign off on drone attacks,« The Guardian, 15 June 2011, available at: <https://www.theguardian.com/commentisfree/cifamerica/2011/jun/15/drone-attacks-obama-administration>; »The Takhar attack: Targeted killings and the parallel worlds of US intelligence and Afghanistan,« Afghanistan Analysts Network, May 2011, available at: http://aan-afghanistan.com/uploads/20110511KClark_Takhar-attack_final.pdf.



THE US'S COVERT DRONE WAR AND THE SEARCH FOR ANSWERS: TURNING TO EUROPEAN COURTS FOR ACCOUNTABILITY

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I. Introduction

»Salem's voice was so powerful, and he used it to make peace. He always said he did not want to 'die silent'. Today I am trying to speak on his behalf and on behalf of all the other victim's families...A mere body count is not the end of the story. It is where the story begins.«¹
– Faisal bin Ali Jaber (2016)

President Barack Obama swept into office in January 2009 on a wave of hope – hope that he would swiftly bring to an end the so-called »War on Terror« and the corresponding abuses that had so stained America's global reputation. Hope that America would once again regain its standing as a country that upholds, rather than undermines, the rule of law and human rights.

Eight years later, he left the White House having presided over the vast expansion of a covert drone program that has targeted and killed thousands of people, including hundreds of civilians in countries far

from the battlefield, such as Yemen, Somalia and Pakistan. In his first year alone, Obama took more covert drone strikes than President Bush took in his entire time in office. By the time his two terms came to an end, he had institutionalized a covert killing program that had taken a total of 563 strikes, ten times more than his predecessor, and killed thousands of largely unnamed individuals, including 807 civilians.² Many of those killed remain to this day unknown – killed using a controversial tactic called »signature strikes« whereby the CIA would kill unknown individuals merely because they exhibited »suspicious« patterns of behavior.³ The practice stands in direct contradiction to the bedrock principle of distinction enshrined in international humanitarian law. Practically speaking, the result is that even the US is now unsure of exactly who it has killed.⁴

During his time in office, President Obama not only normalized and institutionalized the covert drone program, but he also cloaked it in enough secrecy that accountability has remained elusive. Key questions persist around the legal basis for the program, how it operates, and what, if any, oversight and post-strike investigation procedures exist. The usual checks and balances have proved ineffective, as both US political parties have been hesitant to criticize, while US courts have been unwilling to weigh in on issues of national security involving victims, the vast majority of whom are non-American.⁵ With the US unable and unwilling to shed light on the program, those advocating on behalf of the victims have had to turn elsewhere for answers. In doing so, they've found that as with renditions before it, America's key allies in Europe have played a critical, but largely hidden, role.

This paper looks at that European involvement through the lens of two legal cases brought in UK and German courts on behalf of civilian victims of the US's covert drone program. In the first case, *Noor Khan v. Secretary of State for Foreign and Commonwealth Affairs*, Reprieve sought a review of the UK's intelligence sharing policy for drone strikes on the grounds that such sharing could make UK intelligence officers complicit in war crimes. In the second case, Reprieve and ECCHR

brought a challenge against the German government for failing to take appropriate measures to stop the US from using its bases on German soil for drone strikes in Yemen.

The cases have given rare voice to the victims behind the numbers, and in doing so, challenged the conventional wisdom around just who the program is killing. Never has this been more important than now, as President Trump takes the reins of this covert and unaccountable program.

II. Mapping European complicity

»Some people, perhaps some German people, may think that the story was really about who presses the button and perhaps Germany isn't responsible for that. But actually, the infrastructure and what goes on behind the scenes to allow all of this to take place is crucial to the story... [T]hat's what this case is aimed at – to help the German people understand that Ramstein plays a fundamental role in the process.«⁶
- Faisal bin Ali Jaber (2015)

There is a common refrain heard from the UK when challenged about their involvement in the US drone program: »The US does not operate [drones] from the UK.«⁷ It is usually quickly followed with »Drone strikes are a matter for the Yemeni/Pakistani and US governments.«⁸ Substitute the UK with Germany and the answer is the same. But this obscures a crucial fact: behind every drone strike lies a complex infrastructure of intelligence and bases without which any given strike could not happen and it is here where European allies play a critical – and complicit – role.

Each US drone strike lies at the end of a chain of activity, known as the Kill Chain, that includes the gathering of intelligence, its analysis, the selection of targets, and the communication of those targets to operators

who launch lethal strikes. The Kill Chain is often expressed in military and intelligence circles as »find, fix, track, target, execute, and assess.«⁹ This is frequently simplified to: »find, fix, finish.«¹⁰

The »finish«, or the pressing of the button, is often the easiest and it is the one part of the chain that is done exclusively from the US, usually by a pilot sitting in a container at Creech Air Force Base in Nevada. In countries like Pakistan and Yemen, where remote locations, intertribal conflict, and a poor understanding of local dynamics are at a play, the »find« and »fix« are much more complicated. It is here where European governments have become indispensable.

Mounting evidence over a period of years suggests that both the UK and Germany have played a critical role in sharing geolocational intelligence with the US for use in finding and fixing targets. While not the focus of this paper, there are been several criminal investigations in Germany that revolved around potential German intelligence sharing, including a US drone strike on 4 October 2010 that killed several German citizens.¹¹ Links to the October 2010 strike forced the German government to announce in May 2011 that it would limit the type of information it shared with the US.¹² Yet, reports have continued to emerge in the intervening years of German assistance to the US for drone strikes in Pakistan, including through the provision of mobile phone numbers of victims.¹³ Even more troubling, in June 2013, reports began to emerge that a key US base in Southern Germany – Ramstein Air Base – was playing a »substantial role« in the US drone war.¹⁴

British complicity in the US drones program via intelligence sharing is even more multi-faceted. From the identification of targets from bases in Britain,¹⁵ to MI6 officers based in Yemen and sharing intelligence with US counterparts,¹⁶ the UK is America's foremost ally in its assassination program. In addition to geolocational intelligence sharing, recent evidence indicates the UK's Government Communications Headquarters (GCHQ), the UK's main intelligence and communication organization, is »tasking targets« to the US covert targeting program that are key to

drone operations in Yemen.¹⁷ By doing so, the UK is instigating drone strikes in countries such as Yemen and Pakistan, knowing full well what their actions will lead to – a step change from merely sharing intelligence.

III. Challenging the UK and intelligence sharing: Noor Khan v. Secretary of State for Foreign and Commonwealth Affairs

»The tragedy of March 17, 2011 has been a great loss not only for the families that lost husbands, sons and brothers, but for all the people in Datta Khel... The men who died in this strike were our leaders; the ones we turned to for all forms of support...I am determined to get answers from the UK government about the part they have played in the death of my father.« – Noor Khan (2012)

In March 2012, after a number of newspapers and media outlets reported GCHQ had been passing geolocational intelligence to the US government for use in drone strikes, Reprieve launched a judicial review challenging the UK policy underlying the practice. At the heart of the challenge was Noor Khan, whose father, Malik Daud Khan, had been killed in what remains one of the most infamous drone strikes in Pakistan taken to date.

A. THE JIRGA STRIKE TAKEN IN REVENGE

Noor Khan was a postgraduate student studying towards his MA in Political Science when

his life was forever altered by a drone strike that killed his father and 40 other tribal elders on 17 March 2011. The tribal elders had gathered for a jirga, a traditional dispute resolution mechanism frequently used in Pakistan's tribal areas. Malik Daud Khan, Noor's father, was

chairing the jirga that day, presiding over discussions as the elders tried to resolve a disagreement over a nearby chromite mine.

As Malik Daud and those gathered debated potential solutions, a drone hovering overhead launched four hellfire missiles. According to Pakistan's own internal government data, the strike killed 41 people and injured nine, including tribal elders from dozens of tribes and sub-tribes, and »khasadars«, who are employed by the Pakistani government to act as local police.¹⁸ Reports suggest it was a signature strike gone horribly wrong.¹⁹

Witnesses of the jirga strike that day report that »only pieces of the victims remained« for burial. Some families lost two generations of men, father and son dying alongside each other. Those who survived suffered debilitating injuries. In a rare instance of condemnation, Pakistan's most senior military official, General Kayani, publicly condemned the strike: »[P]eaceful citizens including elders of the area [were] carelessly and callously targeted with complete disregard to human life.«²⁰

While anonymous sources within the US government insisted »[t]hese men weren't gathering for a bake sale,«²¹ five months after the strike, the Associated Press reported that the US Ambassador to Pakistan, Cameron Munter, tried unsuccessfully to stop the CIA strike, but was overruled by then CIA Director, Leon Panetta.²² Citing anonymous sources and a former Munter aide, AP reported the CIA »was angry« and the strike was taken »in retaliation for Davis.«²³ Davis was Raymond Davis, a CIA contractor who shot and killed two young men in a Lahore street in January 2011. The CIA refused to acknowledge him as a CIA contractor, so the Pakistani government refused to release him. After two months of negotiation, the US finally acknowledged him and the Pakistanis finally released him. They did so on March 16, 2011, the day before the jirga strike.²⁴

B. THE LEGAL CHALLENGE: COMPLICITY IN WAR CRIMES

A few months before the strike that claimed Malik

Daud's life, an anonymous official from GCHQ briefed *The Sunday Times* about the UK's provision of locational intelligence for US drone operations in both Afghanistan and Pakistan. Sources told *The Sunday Times* that GCHQ was able to »provide more extensive and precise technical coverage in the region than its American sister organization, the National Security Agency, because Britain has a better network of intercept stations... to collect and analyze the location of telephones used by militants.« The newspaper went on to state that GCHQ was »proud of the work it did with America...«²⁵ Several other news outlets subsequently published corroborating stories.²⁶

Faced with a lack of answers in Pakistan and continuing denials from the US, Reprieve in consultation with Noor Khan, solicitors Leigh Day & Co, and Reprieve's partner organization in Pakistan, the Foundation for Fundamental Rights (FFR), decided in March 2012 to bring a judicial review of the UK's intelligence sharing policy where the information might lead to drone strikes. Asking for urgent consideration in the matter, the judicial review argued that the »strikes posed a continuing risk to the lives and properties of [Noor] and his remaining family members.«²⁷

At the heart of the legal challenge was the argument that because the UK is not engaged in an armed conflict with Pakistan, a policy and practice of intelligence sharing by GCHQ staff with the CIA for use in drone strikes potentially opened those individual officers up to prosecution under UK law for conspiracy to commit murder.²⁸

The High Court never engaged in the substance of the issue, instead refusing to grant permission for the case on the basis of the Act of State doctrine, a procedural move barring the courts from hearing cases that require them to »sit in judgment on the sovereign acts

of a foreign state.« The court argued that any attempt to examine Britain's role would necessarily require it to sit in judgment of the legality of US actions and in doing so, potentially »imperil relations between the states.« Reprieve and solicitors Leigh Day & Co subsequently appealed the decision, but the appellate court upheld the High Court's decision. Stating that they found Mr Khan's arguments »persuasive«, the Court of Appeal nonetheless held the case could not proceed because »a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood...by the US as a condemnation of the US.«²⁹

IV. German soil, Ramstein Air Base and the Right to Life: Faisal bin Ali Jaber v. Bundesrepublik Deutschland

»Were it not for the help of Germany, men like my brother-in-law Salem and my nephew Waleed might still be alive today. It is quite simple: without Germany, US drones would not fly over Yemen.« - Faisal bin Ali Jaber (2016)

In 2013, reports began to emerge that a US base in southern Germany – Ramstein Air Base – played a key role in every drone strike the US launched in Yemen. In October 2014, Reprieve and ECCHR brought litigation against the German government in the Administrative Court of first instance in Cologne on behalf of Faisal bin Ali Jaber, and two of his family members, Ahmed Saeed bin Ali Jaber and Khaled Mohamed bin Ali Jaber. Having experienced firsthand the devastating impact of drone strikes, they are asking the German courts to stop the US from using Ramstein Air Base to launch any further attacks that might threaten their right to life or that of their families.

A. THE YEMENI IMAM WHO PREACHED AGAINST AL-QAIDA

Faisal bin Ali
Jaber was born in
Khashamir, Had-

ramout, Yemen in 1959. He graduated with a degree in civil engineering from Aden University in 1986. In the nineties, after Yemen's unification, he moved to Sana'a and obtained a Masters' degree in Water and Environment in cooperation with a Dutch university. Until recently, he worked at Yemen's equivalent of the US Environmental Protection Agency.

On August 29, 2012, Faisal's brother-in-law, Salem bin Ali Jaber (an anti-al-Qaida imam), and his 26-year-old nephew Waleed bin Ali Jaber (a traffic policeman), were killed in an apparent drone strike on the family village of Khashamir. The strike disrupted the second day of celebrations for the wedding of Faisal's eldest son.

Five days before the strike, Salem used his sermon at Friday prayers to strongly preach against al-Qaida, harshly criticizing them for targeting non-Muslim civilians. »*I challenge al-Qaida to show me one piece of evidence in Islam that says killing his justified,*« he told his audience. When a relative expressed concern that he may have angered al-Qaida, he told his family he would take the risk. »*If I don't use my position to make it clear to my congregation that this ideology is wrong, who will?*« he replied.³⁰

His remarks denouncing al-Qaida's violent ideology, caused Faisal and the rest of the family to fear Salem would face reprisal. The day of the strike, three men unknown to the village arrived and asked for Salem. He avoided them for hours but in the evening went to speak to them, taking Waleed for protection. As they began speaking to the men outside, four missiles struck, killing Waleed, Salem, and the unknown men.

Faisal witnessed the strike from afar, and experienced the unimaginable horror of attempting to recover the bodies of his

relatives, who had suffered a direct hit from a drone. Hours after the strike, a Yemeni counter-terrorism official called him to apologize for the mistake in targeting Salem and Waleed.

Since then, Faisal has been trying to get answers as to what went wrong. He has visited the US, where he met with members of Congress, the National Security Council, and the State Department, but did not receive the explanations he sought.³¹ Faisal also wrote an open letter to President Obama, but received no answer. In July 2014, he and his family received \$100,000 in sequentially marked US dollar bills from the Yemeni intelligence. The money, however, came without any acknowledgement as to who it was from or explanation for why Salem and Waleed had been killed.³²

Faisal describes the effect of drone strikes on his community: »Hadramaut used to be known for its celebrations, for its dancing in the evening. People stopped dancing and stayed home. It was only if you absolutely had to, for example if you were sick, that you took your car out to go to the hospital and then returned quickly home. The idea was that any person walking anywhere or encountering an unknown car could be a target. It could be that one of these cars stopped in front of your house by accident and you were in danger of being killed.«

B. THE LEGAL CHALLENGE: THE RIGHT TO LIFE AND PROSPECTIVE RELIEF

Since the first reports of
Ramstein's involvement
in the US drone program
in 2013, further evi-

dence, including leaked documents, have put the base at the epicenter of the US's covert drone program. Those documents show that Ramstein is involved in virtually every drone attack because it acts as a real time relay station, transmitting data from drone pilots in Nevada to the drones carrying out the strikes in Yemen.³³

Based on these reports, Reprieve and ECCHR, working with local counsel, filed litigation in October 2014 on behalf of Faisal and his family. Citing the family's constant fear for their lives, the complaint argues that the US use of Ramstein for drone strikes violates the family's right to life, as established by the German Basic Law.³⁴ Under Article 2, Paragraph 2, Sentence 1 of the German Basic Law, it is the German state's duty to protect everyone's basic rights from infringement by third parties, even if the infringement emanates from a foreign state. The complaint also argues that the German government has a duty to protect because the covert US drone war in Yemen violates international law.

In May 2015, the Administrative Court handed down its decision. Although it dismissed the claim, the judge acknowledged the »plausibility« that the base had been used to carry out drone strikes – something the German government had to date denied knowledge of.³⁵ Despite this, the court held the German government was neither »obliged to prohibit the USA from using Ramstein airbase for the execution of drone strikes in Yemen« nor was it »politically realistic« to expect it to terminate the contract for use of the base with the US.³⁶

In a rare move, the judge did, however, give Faisal and his family immediate leave to appeal and in September 2015, Reprieve and ECCHR, assisted by local council asked the Higher Administrative Court in Münster to order an end to German complicity in the strikes by ordering it to stop the bases on its territory from being used in the attacks.

While the case is still awaiting a hearing, in December 2016, the German government for the first time admitted that it had knowledge that Ramstein was in fact being used by the US to facilitate drone strikes. In response to a parliamentary question asked by Die Linke, the government said that in August 2016 the US had finally responded to its request for further information, and informed the German government that »planning, monitoring and evaluation« of drone operations were carried out via Ramstein Air Base.³⁷

V. Conclusion: When a loss is a win

Although neither the UK nor the German case have yet to »succeed« in traditional legal terms – no one has been held to account, nor has a court yet been willing to take on the state to stop a state's involvement – both cases have achieved perhaps an even greater success. For the first time in each country, the victims of drone attacks were given the right to be heard. It was their voices, the voices of those most affected, that were at the forefront of initiating a debate in these countries on use of drone strikes for targeted killings.

Equally importantly, their cases highlighted the covert role European countries were playing in support of those unlawful killings, thereby raising pressure on both governments to respond. In Germany, the case was in no small part responsible for forcing the German government to ask hard questions of the Americans, and for the answers it eventually received in response to those questions. In the UK, the case raised concerns among intelligence officials about their own culpability in sharing information,³⁸ concern that was reiterated quite recently by a key parliamentary committee looking into the issue.³⁹

And all is not yet lost. While the challenge faces an uphill battle, the Higher Administrative Court in Munster has yet to decide Faisal's appeal. And, in the UK, a decision by the UK Supreme Court in January 2016 in *Belhaj & Rahmatullah (No 1) v Straw & ORs [2017] UKSC 3* potentially re-opens cases like *Noor Khan*. In *Belhaj* the UK Supreme Court rejected the idea that UK courts should refrain from adjudicating cases on the grounds of foreign acts of state simply because doing so would embarrass the UK in its international relations.⁴⁰

For Faisal, Noor and the hundreds of others who have lost loved ones and continue to live in constant fear of the drones hovering overhead, the fact that the cases were brought at all, is a win. As Faisal said after the initial hearing in Germany: »Today's hearing was a momentous

occasion for drone victims. Of course, it is disappointing that we did not win. But the fact that – finally – our opinions are being expressed in court is a victory in itself...I will continue to place my faith in the law.«⁴¹

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UNITED STATES TARGETED KILLING LITIGATION REPORT

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I. Overview of the US targeted killing program

Once entirely shrouded in secrecy, the basic contours of the United States’ lethal-force program have gradually come to light over the past six years. Continued pressure on the government – through Freedom of Information Act («FOIA») requests, accountability litigation, and other advocacy initiatives – has led the government to disclose a meaningful amount about the legal and policy framework surrounding the program, though the government continues to withhold many critical details from the public.

Lawsuits brought by the American Civil Liberties Union («ACLU») and others have sought both accountability and transparency concerning the US program. These efforts have led to the disclosure of a number of significant documents, including two redacted legal memoranda laying out the government’s claimed authority to target US citizens abroad and the government’s so-called targeted killing «playbook,» known as the «Presidential Policy Guidance» or «PPG.» The PPG is a now-partially declassified 18-page document that details the executive branch’s internal approval process for targeted killings

(as well as little-used capture operations) against suspected terrorists outside the United States and »areas of active hostilities.«¹ The document contains both general substantive standards and procedural requirements.

Additionally, within the last year, the Obama administration voluntarily released some information about this lethal-strike program and its consequences. For example, in July 2016, the administration released its calculation of how many individuals it has killed since 2009 in drone and other airstrikes »away from areas of active hostilities.« Although this step toward transparency was welcome, the administration’s estimates – for example, that its lethal-force strikes have killed between 64 and 116 non-combatants during this timeframe – fell far below all independent assessments of the program’s death count.²

The information the Obama administration publicly acknowledged is dwarfed by the large amount that the public still does not know. Many of the factual and policy details of the targeted killing program remain secret, making it difficult to understand what the legal and policy frameworks documented in various government memoranda and policy documents mean in practice. Towards the end of its tenure, the Obama administration committed itself to greater governmental transparency, most significantly through the issuance of the July 2016 Executive Order in tandem with the release of the official casualty numbers.³ The Executive Order provides for the regular disclosure of information about the number of US government strikes outside »areas of active hostilities« and the number of combatant and non-combatant deaths associated with those strikes. Critically, though, this Executive Order – and the PPG – could be rescinded by the current administration.

As this article was being finalized, President Trump was reportedly considering whether to modify or rescind the Obama-era rules.⁴ Any decision to do so will likely have grave consequences for civilian harm. Moreover, in President Trump’s first two months, his administration

has approved drone strikes at a rate far surpassing his predecessor.⁵ The Trump administration has publicly released insufficient information about these strikes and why they were carried out, and sustained pressure is as critical as ever to achieving accountability and transparency in the targeted killing program.

II. Legal framework

The US lethal-force program is subject to both international and constitutional law. Although the Obama administration gestured at these legal frameworks and their constraints, it crafted legal interpretations to distort international and constitutional law requirements to the extent that they are nearly unrecognizable. Other legal interpretations have been shielded from view altogether. The US approach violates both international and domestic law.

The international legal framework governing the use of lethal force is clear and long-established. Both international human rights law and the Constitution prohibit the United States from using lethal force outside of an armed conflict unless it is a last resort against a concrete, specific, and imminent threat to life and the use of force is proportionate.⁶ In the narrow context of an armed conflict – the existence of which is based on facts, such as the intensity and duration of any hostilities and the level of organization of an armed group – international humanitarian law (also known as the »law of war«) applies.⁷

Under international humanitarian law, lethal force may only be used against the armed forces of an opposing state, or against civilians who are directly participating in hostilities – in both instances, military objectives must be legitimate. States must abide by key legal requirements, including the principle of »distinction,« which mandates that states distinguish between combatants (against whom lethal force may be used as long as all law of war requirements are met) and civilians.⁸ In an armed conflict between a nation state and an armed

group, it is clearly established that individuals who are not members of state armed forces are civilians who may not be directly targeted »unless and for such time as they take a direct part in hostilities.«⁹ Finally, international law prohibits the use of force in the territory of other states, except in narrow circumstances, including self-defense and consent.¹⁰

The Obama administration's targeted killing program violates international humanitarian law and international human rights law frameworks. The administration insists that international humanitarian law (or law-of-war) standards, and not human rights law, applies to lethal strikes, even outside the context of recognized armed conflict. The US government's claimed authority to kill has virtually no meaningful temporal or geographic limits and is accepted by virtually no other nation.¹¹ Perhaps in recognition of criticisms of the targeted killing program and out of concern that the authority President Obama claimed could be even more grossly misused by the next president, the Obama administration articulated certain constraints as a matter of policy – but not of law.

Many of these policy constraints are contained in the PPG.¹² It purports to apply heightened standards in what it calls »areas outside of active hostilities.«¹³ But these standards still fall short of the human rights law standards that apply in such areas.¹⁴ Moreover, the PPG uses distorted definitions of international law standards. For example, under the government's version of »imminence,« lethal force could be used based on a perceived danger that may (or may not) materialize at an undefined point in the future or based on a group's generalized intent to use force against the United States, even if the US government is not aware of any actual plans for a specific attack. The PPG explains that the government may only use lethal force in areas outside of active hostilities when the target presents a »continuing, imminent threat« – contorting the meaning of imminence beyond any acceptable understanding.¹⁵

Among the PPG's other policies are a limitation on the use of lethal force only to prevent or stop attacks against US persons when capture is »infeasible«; a limitation on the use of lethal force only against senior operational leaders of terrorist organizations or the forces such an organization is using or intends to use to conduct terrorist attacks; a requirement that there be »near certainty« that non-combatants will not be injured or killed; a requirement that the relevant government where an action is proposed cannot or will not effectively address the threat to US persons; and a requirement that there be no other reasonable alternative to addressing the threat.

Finally, it is also clearly established that at least when it comes to lethal strikes against US citizens outside the context of armed conflict, the Constitution provides safeguards similar to those found in human rights law. The Fourth Amendment unambiguously prohibits the deprivation of life and the use of excessive force in effecting seizures, except where lethal force is a last resort in the face of an imminent threat.¹⁶ Moreover, in the absence of a truly imminent threat, the Fifth Amendment's Due Process Clause requires, at a minimum, fair notice and an opportunity to be heard before government officials may cause such deprivation.¹⁷ But the government's own legal justification for the targeting in Yemen of Anwar al-Aulaqi, a US citizen, makes clear that the government does not consider itself bound by these rules. For example, it both distorts the meaning of »imminence« to encompass generalized threats and omits critical elements of the Constitution's requirements for due process.¹⁸

III. Targeted killing litigation in the United States

During the Obama administration, there were various lawsuits filed in US courts seeking accountability and transparency concerning the government's targeted killing program. While the merits lawsuits have

not resulted in winning judgments, they have been important advocacy tools for organizations in the United States seeking to call attention to the government's policies and their consequences. Transparency lawsuits have produced critical and central documents outlining the government's basic legal and policy justifications for the program, and efforts to uncover more detailed information are underway. Both transparency and merits litigation and the advocacy surrounding them have spurred the executive branch to make certain documents and information public and to engage in transparency initiatives outside of litigation.

A. ACCOUNTABILITY LAWSUITS

There have been three major legal challenges to the merits of the US targeted killing program. Two are concluded, and one remains on appeal in a federal circuit court. In 2010, non-governmental organizations the ACLU and the Center for Constitutional Rights (»CCR«) filed an injunctive suit, *al-Aulaqi v. Obama*, against President Obama on behalf of Nasser al-Aulaqi asking the government to justify its placement of his US citizen son, Anwar al-Aulaqi, on a kill list.¹⁹ The organizations filed the lawsuit in response to news reports indicating that the United States maintained a so-called »kill list« that included intended targets of its program, and that Anwar al-Aulaqi had been placed on the list.²⁰

The plaintiff filed claims under both the US Constitution and a federal statute, the Alien Tort Statute, but the district court (Judge John Bates) dismissed the complaint on procedural grounds. First, the court ruled that Nasser al-Aulaqi lacked standing to challenge the lethal targeting of his son because he »failed to provide an adequate explanation for his son's inability to appear on his own behalf.«²¹ The court explained that because »there [wa]s nothing preventing [Anwar al-Aulaqi] from peacefully presenting himself at the U.S. Embassy in Yemen and expressing a desire to vindicate his constitutional rights in U.S. courts,« his father could not sue on his behalf.²² The court went on to reject the plaintiff's Alien Tort Statute claim, in essence a claim that the US

government's intended lethal targeting of Anwar al-Aulaqi violated international law.²³ The court explained its conclusion that »there is no basis for the assertion that the threat of a future state-sponsored extrajudicial killing – as opposed to the commission of a past state-sponsored extrajudicial killing – constitutes a tort in violation of the ›law of nations.« Finally, the district court concluded that all of the plaintiff's claims were barred because they implicated questions protected by the judicially crafted »political question« doctrine, under which certain types of complex policy questions are deemed unfit for judicial resolution and must be left for decision by the political branches of government.²⁴ The plaintiff did not appeal the district court's ruling.

Ten months after the district court's decision in *al-Aulaqi v. Obama*, in September 2011, US government drones killed Anwar al-Aulaqi and one other American, Samir Khan, in a strike in Jawf Province, Yemen. Two weeks after that strike, al-Aulaqi's teenage son (and Nasser al-Aulaqi's grandson), Abdulrahman al-Aulaqi, was killed by another US drone in Shabwa Province, Yemen. The US government later officially acknowledged that it had carried out the killings, though it claimed that neither Khan nor Abdulrahman al-Aulaqi were deliberately targeted.²⁵

The ACLU and CCR then filed a second lawsuit, *al-Aulaqi v. Panetta*, against five high-ranking military and intelligence officials who authorized the killings of Anwar al-Aulaqi, Samir Khan, and Abdulrahman al-Aulaqi in violation of the US Constitution.²⁶ The organizations brought the suit under the seminal US Supreme Court case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,²⁷ which permits suits to be brought directly under the provisions of the US Constitution. The plaintiffs – Nasser al-Aulaqi, on behalf of his deceased son and grandson, and the parents of Samir Khan – alleged that the killings of the three American citizens violated the Fourth and Fifth Amendments to the US Constitution, which protect against unreasonable searches and seizures and against deprivations of liberty without due process of law.

The district court (Judge Rosemary Collyer) dismissed the complaint. In a significant reversal from the earlier *Al-Aulaqi v. Obama* case, Judge Collyer rejected the government's arguments that the suit was barred by the political question doctrine. On that issue, the court accepted the plaintiffs' argument that the judiciary had a clear role to play in adjudicating the rights of US citizens under the Constitution.²⁸ However, the court went on to reject the substance of the plaintiffs' claims, primarily on the grounds that prior case law in the D.C. Circuit – though, notably, not the US Supreme Court – had effectively prohibited direct constitutional claims (i.e. *Bivens* claims) arising out of the executive branch's decision to use lethal force in this national-security context.²⁹ The plaintiffs did not appeal.³⁰

In 2015, a third accountability lawsuit was brought by the non-profit organization Reprieve. The suit, *Ali Jaber v. Obama*, arose out of a US »signature strike« that killed five individuals – none of them US citizens – in Eastern Yemen in 2012. The families of two of the victims of the 2012 strike sued government officials in federal court seeking a declaration that the United States and government officials violated the Torture Victim Protection Act (»TVPA«) by conducting the 2012 strike, and that the United States and government officials wrongfully caused the deaths of the plaintiffs' family members in violation of customary international law.³¹ As had happened in *Al-Aulaqi v. Obama*, the court dismissed the plaintiffs' claims on »political question« grounds.³² It held that the claims sought »a judicial determination that a particular action by the Executive violated domestic and international law, i.e., a quintessential mixed question of law and fact« requiring the dismissal under binding precedent.³³ The plaintiffs appealed, and in December 2016, the D.C. Circuit heard oral argument; a judgment is expected in 2017.

B. TRANSPARENCY LAWSUITS

The ACLU and various other non-profit groups and news organizations have filed several

lawsuits under the Freedom of Information Act («FOIA») seeking legal and policy memoranda, intelligence records, statistics, and other information concerning the US government's targeted killing program. Several of those efforts remain ongoing.

In January 2010, the ACLU filed a FOIA request with multiple agencies seeking information about the standards governing the use of drones to carry out targeted killings around the world; the process by which individuals are added to government «kill lists»; the measures taken to avoid or minimize bystander casualties; the numbers and identities of those who have been killed; and the factual basis for specific strikes.³⁴ The Departments of Justice, Defense, and State partially responded to the original FOIA request, but the Central Intelligence Agency («CIA») denied the request, stating that it could not confirm or deny even an «intelligence interest» in the drone program without compromising national security. The ACLU filed suit in federal district court in Washington, D.C., in March 2010. The district court upheld the CIA's non-response to the request but, in March 2013, a unanimous panel of the Court of Appeals for the D.C. Circuit reversed.³⁵ The Court held, in essence, that the CIA could not lawfully refuse to confirm or deny an intelligence interest in the targeted killing program when senior administration officials had already disclosed so much information about the CIA's involvement in the program in public remarks and press interviews. The court wrote: »In this case the CIA has asked the Court to stretch [the relevant] doctrine too far—to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible.« The court ordered the CIA to produce indices listing the documents responsive to the ACLU's FOIA request and to explain why the documents were being withheld. Unfortunately, after another round of litigation in both the district and circuit courts, the CIA was not ordered to disclose any records. In a brief, unpublished order, the court held that the CIA had satisfied its burden to show that the records the

ACLU sought were properly classified and that none of the information in the records had been officially acknowledged by the government.³⁶

The ACLU filed another FOIA request in October 2011, this time seeking records showing the legal and factual bases for the killings of three US citizens, Anwar al-Aulaqi, Abdulrahman al-Aulaqi, and Samir Khan. Various agencies provided a »no-number no-list« response to the request, acknowledging that they had responsive records but asserting that they could not enumerate or describe the records without compromising national security. The ACLU filed suit in federal district court in New York in February 2012, and its case was joined with a similar lawsuit filed by the New York Times. The district court sided with the government, but in an unusual preamble to its decision (which applied to both cases), the court expressed skepticism about the lawfulness of the targeted killing program and expressed frustration about the laws that, in its view, precluded it from requiring the government to release more information.³⁷ It wrote:

»[T]his Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret.«³⁸

On appeal, a unanimous panel of the Second Circuit reversed, ordering the agencies to produce indices listing the documents responsive to

the ACLU's FOIA request and to explain why the documents were being withheld. It also ordered the release of a redacted version of a 41-page July 2010 Barron Memorandum analyzing the legality of a contemplated lethal operation against Anwar al-Aulaqi under federal criminal law and the Constitution.³⁹ This litigation led to the release of several other critical targeted killing documents, including a February 2010 OLC memo (which contained an earlier and shorter treatment of the issue compared to the July 2010 Barron Memorandum) and a November 2011 White Paper drafted by the Department of Justice. These documents helped shed light on the government's legal theories concerning its targeted killing program. The ACLU filed a third FOIA request in response to a May 2013 speech by President Obama at National Defense University. Addressing the targeted killing program at some length, President Obama explained that the government would carry out lethal strikes only when there was a »near certainty« that innocent civilians would not be killed. The ACLU's request sought the »presidential policy guidance« implementing this commitment. The request also sought information relating to civilian casualties, including pre-strike assessments of potential civilian casualties; post-strike assessments of actual civilian casualties; and information about the number and identities of those killed in each strike.

In the course of the litigation, the government abandoned extremely broad claims of executive privilege and committed to releasing the PPG, as well as four Defense Department documents. The two most important of these Defense Department documents were reports to Congress describing the government's claimed legal, policy, and operational considerations in carrying out targeted killings; the government has already produced heavily redacted versions of both documents to the ACLU as part of this litigation. One, the »Report on Process for Determining Targets of Lethal or Capture Operations,«⁴⁰ contains general discussions of the PPG's legal and policy standards concerning the use of force »outside of active hostilities« and how the government applies them.

The second report, the »Report on Associated Forces,«⁴¹ contains the government's assessment of groups against which the United States asserts it is at war. The report explains the government's view of the legal difference between groups that are »associated forces« of al-Qaida, against which the government claims it may use lethal force under the 2001 Authorization for Use of Military Force, and groups that are »affiliates« or »adherents« of al-Qaida, against which the government thinks it may not. But much of the report is still secret, including specifics about how the government defines each group. The report also redacts information that apparently indicates sources of legal authority on which the government is relying in addition to the AUMF in carrying out the targeted killing program.

In addition to the three ACLU transparency lawsuits discussed above,⁴² several other groups have engaged in FOIA work concerning targeted killing.

In 2011, the First Amendment Coalition filed a FOIA request seeking legal memoranda concerning the legality of the killing of Anwar al-Aulaqi. In an unpublished decision that preceded the Second Circuit's release of the July 2010 Barron Memorandum, a district court in California granted summary judgment to the government, permitting it to withhold the memorandum from the public.⁴³

In 2012, jointly with the ACLU, CCR filed a FOIA request seeking information about a December 17, 2009 airstrike on a rural community in southwestern Yemen's al-Majalah region. The strike was reportedly the first strike in Yemen authorized by the Obama administration and killed a reported 41 people, including 21 children. The government never produced records responsive to this request.⁴⁴

Also in 2012, reporter Jason Leopold filed a FOIA request concerning records related to the government's lethal use of drones against terrorist targets.⁴⁵ The government released almost 100 pages of material in response to the request, but refused to release more. After several

years of litigation, a district court in Washington, D.C., determined that the government had satisfied its burdens under the law to search for and withhold records in response to the request.⁴⁶ An appeal in the D.C. Circuit is pending.⁴⁷

IV. Continuing issues and objections in US targeted killing litigation

The documents that have been released through transparency efforts – including the significant releases of a pair of OLC opinions concerning the targeting of Anwar al-Aulaqi, the PPG, and two reports to Congress by the executive branch – still leave many questions unanswered. For example, neither of the OLC memoranda explain the circumstances in which a threat would be deemed sufficiently »imminent« to warrant the use of lethal force, the circumstances that would make »capture infeasible,« or the facts on the basis of which the government concluded that its targeting of Anwar al-Aulaqi met its professed legal standard. In addition, the memoranda cite to a body of secret law that the administration continues to shield from the public.

Also, while the PPG and other related documents invoke general legal and policy standards, those invocations are divorced from any substantive discussion about what the government’s chosen legal and policy standards actually mean and how they are applied in practice. For example, in the redacted »Report on Process,« the government merely repeats phrasing used in a 2012 speech by then–Attorney General Eric Holder concerning whether a threat is »imminent« under the government’s interpretation of the law: that »[t]he evaluation of whether an individual presents an ‘imminent threat’ incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous

attacks against the United States.«⁴⁸ And while the PPG asserts that »[I]ethal action should be taken... only when capture of an individual is not feasible and no other alternative exists to effectively address the threat,« the document does not define the term »feasibility« and imposes a number of additional considerations (including a plan for detention, interrogation, and »long-term disposition options for the individual«) that go well beyond any fact-based assessment of »feasibility.«

Those vague standards raise as many questions as they answer: When does an individual pose a »continuing and imminent threat« to the United States? How does the government decide when capture of a target is »feasible«? What informs the government’s determination that there is a »near certainty that non-combatants will not be injured or killed«? Nothing that the government has released to date provides satisfying answers to those questions.

Adding to the uncertainty of these standards is the reality that the policy framework put into place by the Obama administration (which at least includes some policy constraints) could be swiftly undone with the stroke of a pen by the Trump administration. This would make the government’s claimed legal and policy standards more difficult to ascertain. Advances toward transparency in Executive Orders could likewise be undone, as President Trump could circumvent or rescind these Orders. For example, the July 2016 Executive Order could be rescinded, removing the obligation President Obama placed on his successor to release information about combatant and civilian casualties. Flawed as the Obama administration’s statistics were, the periodic release of such information nonetheless would be an important step forward for transparency. It remains critical for rights groups in the United States to continue to monitor legal and policy developments in this area, through FOIA and other means, during this new administration.

1 Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, 22 May 2013 https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance_0.pdf («Presidential Policy Guidance» or «PPG»).

2 Charlie Savage & Scott Shane, «U.S. Reveals Death Toll from Airstrikes Outside War Zones», *The New York Times*, 1 July 2016 <http://www.nytimes.com/2016/07/02/world/us-reveals-death-toll-from-airstrikes-outside-of-war-zones.html>.

3 Exec. Order No. 13732, 81 Fed. Reg. 44485 (1 July 2016).

4 Charlie Savage & Eric Schmitt, «Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules», *The New York Times*, 12 March 2017 <https://www.nytimes.com/2017/03/12/us/politics/trump-loosen-counterterrorism-rules.html>.

5 Micah Zenko, «The (Not-So) Peaceful Transition of Power: Trump's Drone Strikes Outpace Obama», *The Council on Foreign Relations*, 2 March 2017 <http://blogs.cfr.org/zenko/2017/03/02/the-not-so-peaceful-transition-of-power>.

6 Human Rights Committee, General Comment No. 6, HRI/GEN/1/Rev.6 (1982), para. 3; see also Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. A/HRC/14/24/Add.6 (2010) («Alston Report»), para. 32; U.S. Const. amends. IV, V.

7 See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY Appeals Chamber Oct. 2, 1995); *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-4-84-T, Judgment, ¶ 38 (ICTY Trial Chamber Apr. 3, 2008).

8 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8); see, e.g., Harold Hongju Koh, Legal Adviser, U.S. Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010).

9 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

(Protocol II), art. 13(3), June 8, 1977, 1125 U.N.T.S. 609; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; accord *Hamlily v. Obama*, 616 F. Supp. 2d 63, 77 (D.D.C. 2009).

10 UN Charter art. 2, para. 4.

11 See Alston Report ¶¶ 46-47. <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

12 The PPG also describes the procedures that the executive branch uses when deciding whether to kill or capture an individual or group. As to procedure, the PPG explains that the DOD and the CIA may nominate a target for proposed killing (or capture) after a review by top agency lawyers. Another government agency is then tasked with creating an intelligence report about the potential target that is assessed under the government's standards for the use of lethal force. If a National Security Council committee known as the «principals committee,» consisting of top agency decision makers from several agencies, agrees that a strike would be lawful, it can proceed without the approval of the president; if there is disagreement among the principals, the president must make the final decision. However, the PPG permits the president to waive policy constraints in «extraordinary cases,» including where there is only a «fleeting opportunity» that does not permit following the PPG's procedures.

13 See Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013) https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

14 See Brett Max Kaufman, Details Abound in Drone «Playbook»—Except the Ones That Really Matter Most, *ACLU Speak Freely Blog*, 8 August 2016, 5:30 p.m. <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>.

15 See Department of Justice, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force (White Paper) (Nov. 8, 2011)

https://www.aclu.org/sites/default/files/field_document/november_2011_white_paper.pdf.

16 See *Scott v. Harris*, 550 U.S. 372, 384 (2007); see also, e.g., *Graham v. Conner*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

17 See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

18 See David Barron, Office of Legal Counsel, Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi [Redacted] at 21 (July 16, 2010) («July 2010 Barron Memorandum») https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf; see also Plaintiffs' Opposition to Defendants' Motion to Dismiss at 29-39, *al-Aulaqi v. Panetta*, No. 12-cv-01192 (D.D.C. Feb. 5, 2013), ECF No. 21.

19 *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

20 *Ibid* at 11.

21 *Ibid* at 17.

22 *Ibid*. The court also rejected various other theories of standing put forward by the plaintiff. See *id.* at 17-35.

23 *Ibid* at 35.

24 *Ibid* at 46-52.

25 Charlie Savage & Peter Baker, Obama, in a Shift, to Limit Targets of Drone Strikes, *The New York Times*, 22 May 2013 <http://www.nytimes.com/2013/05/23/us/us-acknowledges-killing-4-americans-in-drone-strikes.html?smid=tw-share>.

26 *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014).

27 403 U.S. 388 (1971).

28 See *ibid* at 68-70.

29 See *ibid* at 74-80.

30 Charlie Savage, Relatives of Victims of Drone Strike Drop Appeal, *The New York Times*, 3 June 2014 <http://nyti.ms/1tGdbCj>.

31 *Ali Jaber v. Obama*, 155 F. Supp. 3d 70 (D.D.C. 2016).

32 See *ibid* at 77-81.

33 *Ibid* at 80.

34 A PDF version of this FOIA request is available at: <https://www.aclu.org/files/assets/2010-1-13-PredatorDroneFOIARequest.pdf>.

35 *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013).

36 *ACLU v. CIA*, 640 F. App'x 9 (D.C. Cir. 2016).

37 *ACLU v. DOJ*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013).

38 *Ibid* at 516-17.

39 *ACLU v. DOJ*, 756 F.3d 97 (2d Cir. 2014).

40 Report on Process for Determining Targets of Lethal or Capture Operations, Dep't of Defense (6 March 2014) https://www.aclu.org/sites/default/files/field_document/drone_tk3_Report_on_Process_for_Determining_Targets_of_Lethal_of_Capture_Operations.pdf.

41 Report on Associated Forces, Dep't of Defense (July 2014) https://www.aclu.org/sites/default/files/field_document/drone_tk3_Report_on_Associated_Forces.pdf.

42 In September 2016, the ACLU filed another FOIA request seeking records pertaining to the following: legal and policy standards under which the government alleges it may use lethal force outside of traditional armed conflicts; the process by which the government designates individuals or groups for lethal strikes; before-the-fact assessments of civilian or bystander casualties in lethal strikes, as well as records relating to after-action investigations into these strikes; and the number and identities of individuals killed or injured in lethal strikes. At the time of writing, the government had not yet responded to this request.

43 See First Amendment Coalition v. DOJ, No. 12-cv-1013, 2014 WL 1411333 (N.D. Cal. Apr. 11, 2014).

44 See *al-Majalah Freedom of Information Act Request*, Ctr. for Constitutional Rights <https://ccrjustice.org/home/what-we-do/our-cases/al-majalah-freedom-information-act-request> (last visited 24 March 2017).

45 See *Leopold v. DOJ*, 130 F. Supp. 3d 32 (D.D.C. 2015).

46 See Order, *Leopold v. DOJ*, No. 14-cv-168 (D.D.C. July 11, 2016), ECF No. 46.

47 See *Leopold v. DOJ*, No. 16-5237 (D.C. Cir. docketed Aug. 17, 2016).

48 Attorney General Eric Holder, Speech at Northwestern University School of Law (5 March 2012) (transcript available at: <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>).

FIND OUT MORE

For more on ECCHR's drone litigation generally, see www.ecchr.eu/en/our_work/international-crimes-and-accountability/drones.html.

See also

ECCHR and Reprieve's litigation with Faisal bin Ali Jaber on the use of Ramstein Air Base in drone strikes:

www.ecchr.eu/en/international-crimes-and-accountability/drones/yemen.html

ECCHR's expert opinion on German investigation into US drone strike in Pakistan in October 2010:

www.ecchr.eu/en/international-crimes-and-accountability/drones/pakistan.html

Video with Faisal bin Ali Jaber, drone strike survivor and claimant in the Ramstein case:

<https://www.ecchr.eu/en/videos/drones.html>

Video with Forensic Architecture on reconstructing October 2010 drone strike based on victim's testimony together with ECCHR:

<https://vimeo.com/94335243>

Video statement by whistleblower Brandon Bryant at ECCHR:

<https://www.ecchr.eu/en/videos/drones.html>

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