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**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

## Extrajudicial, summary or arbitrary executions

### Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, submitted in accordance with Assembly resolution [67/168](#).

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\* [A/68/150](#).



## **Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions**

### *Summary*

In the present report, the Special Rapporteur focuses on the use of lethal force through armed drones from the perspective of protection of the right to life.

Although drones are not illegal weapons, they can make it easier for States to deploy deadly and targeted force on the territories of other States. As such, they risk undermining the protection of life in the immediate and longer terms. If the right to life is to be secured, it is imperative that the limitations posed by international law on the use of force are not weakened by broad justifications of drone strikes.

The Special Rapporteur examines the ways in which the constitutive regimes of international law, including international human rights law, international humanitarian law and the law on the inter-State use of force, regulate the use of armed drones. He reiterates that these legal regimes constitute an interconnected and holistic system and emphasizes the distinctive role of each in protecting the right to life. He cautions against wide and permissive interpretations of their rules and standards and underlines the centrality of transparency and accountability obligations.

## I. Introduction

1. The present report provides an overview of the activities carried out by the Special Rapporteur since the submission of his previous report to the General Assembly ([A/67/275](#)). In section III, he focuses on issues of concern regarding armed drones and the right to life.

## II. Activities of the Special Rapporteur

2. The activities carried out by the Special Rapporteur from 1 September 2012 to 31 March 2013 are outlined in his report to the Human Rights Council at its twenty-third session ([A/HRC/23/47](#) and Add.1-7 and Add.1/Corr.1). In the thematic section of that report, the Special Rapporteur focused on lethal autonomous robots and the protection of life.

### A. International and national meetings

3. From 17 to 19 April 2013, the Special Rapporteur participated in a Wilton Park conference on drone strikes under international law, held in association with the Geneva Academy of International Humanitarian Law and Human Rights and the Office of the United Nations High Commissioner for Human Rights (OHCHR).

4. On 23 May, the Special Rapporteur made a presentation on lethal autonomous robots at the United Nations Institute for Disarmament Research, Geneva.

5. On 29 May, the Special Rapporteur delivered a statement during the urgent debate on the deteriorating situation of human rights in the Syrian Arab Republic and the recent killings in Al Qusayr, held during the twenty-third session of the Human Rights Council.

6. From 24 to 28 June, he attended the twentieth annual meeting of special rapporteurs, representatives, independent experts and chairs of working groups of the special procedures of the Human Rights Council, held in Vienna. On 27 and 28 June, he attended an international expert conference organized by the Government of Austria with the support of OHCHR entitled “Vienna+20: Advancing the Protection of Human Rights”, aimed at continuing the legacy of the World Conference on Human Rights, held in Vienna in 1993.

7. On 13 July, the Special Rapporteur organized an expert meeting on drones and the right to life at the Oxford Institute for Ethics, Law and Armed Conflict, United Kingdom of Great Britain and Northern Ireland, in order to inform the present report. The Special Rapporteur thanks all participants for their assistance in the preparation of the report.

8. On 16 July, the Special Rapporteur delivered a presentation on lethal autonomous robots at Kellogg College, University of Oxford, United Kingdom.

9. On 26 and 27 July, the Special Rapporteur convened a joint meeting with the Working Group of the African Commission on Human and Peoples’ Rights on the Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa at the University of Pretoria, South Africa.

## B. Visits

10. The Special Rapporteur visited Mexico from 22 April to 2 May 2013, at the invitation of the Government. His report on that country visit will be submitted to the Human Rights Council in 2014.

11. Since his previous report to the General Assembly, the Special Rapporteur has sent requests for visits to the Governments of Egypt, the Gambia, Iraq, Madagascar, Mali, Papua New Guinea and Yemen. He welcomes the acceptance of his visit requests by the Governments of Mali and Papua New Guinea. Regrettably, the Government of the Gambia has not agreed to a visit. The Special Rapporteur encourages States to accept his pending requests for visits.

## III. Armed drones and the right to life<sup>1</sup>

### A. Introduction: an opportunity to take stock

12. New methods of employing lethal force are continuously developed. On the horizon, for example, developments in nanotechnology and biotechnology<sup>2</sup> and in autonomy and robotic systems (see [A/HRC/23/47](#)) present eventualities that the international community must address in coordinated ways. Drones, assumed for the purposes of the present report to be armed drones, have moved from the horizon into the realm of the known. The appeal of drones is clear. Among other things, they provide the strategic advantage of greatly reducing the time between the identification of a potential target that could be a great distance away and the deployment of deadly force against that target. Drones, it can safely be said, are here to stay.

13. There is broad agreement that drones themselves are not illegal weapons. This is not the case, for example, with lethal autonomous robots. There is, however, a notable lack of consensus on how to apply the rules of international law that regulate the use of force to drones, the fact that drones are now an established technology notwithstanding. It is the aim of the Special Rapporteur in the present report to contribute to clarifying the application of those rules and to reiterate their authority, from the perspective of protection of the right to life.

14. Drones can be expected to become more sophisticated and available in more compact form, and also to become less expensive and therefore more accessible. They are likely to form part of the arsenals of an increasing number of States that may be able to deploy such force across international borders in relatively non-intrusive and sometimes non-attributable ways, on the battlefield and to pursue targets far removed from what would traditionally be seen as zones of armed conflict. Some States may also wish to use armed drones in domestic law enforcement contexts, such as for border patrols, operations against organized crime and crowd control in

<sup>1</sup> Dapo Akande, Co-Director of the Oxford Institute for Ethics, Law and Armed Conflict and the Oxford Martin Programme on Human Rights for Future Generations, provided assistance by hosting an expert meeting and preparing a discussion paper to inform the present report and is thanked along with all participants in the meeting. Research assistance provided by Thompson Chengeta, Lawrence Hill-Cawthorne and Tess Borden is also gratefully acknowledged. Sarah Knuckey provided valuable advice at various points.

<sup>2</sup> See Frank Simonis and Steven Schilthuizen, "Nanotechnology: innovation opportunities for tomorrow's defence" (TNO Science and Industry, 2006).

demonstrations. Armed drones may fall into the hands of non-State actors and may also be hacked by enemies or other entities. In sum, the number of States with the capacity to use drones is likely to increase significantly in the near future, underscoring the need for greater consensus on the terms of their use.

15. The ready availability of drones may lead to States, where they perceive their interests to be threatened, increasingly engaging in low-intensity but drawn-out applications of force that know few geographical or temporal boundaries. This would run counter to the notion that war — and the transnational use of force in general — must be of limited duration and scope, and that there should be a time of healing and recovery following conflict.

16. Peace should be the norm, yet such scenarios risk making its derogation the rule by privileging force over long-term peaceful alternatives. The expansive use of armed drones by the first States to acquire them, if not challenged, can do structural damage to the cornerstones of international security and set precedents that undermine the protection of life across the globe in the longer term. There is also uncertainty about the extent to which States are newly acquiring the technology and, because their engagement in the current debates is limited, about what their approach will be in the future.

17. On the one hand, it is often said that drones contribute towards more accurate targeting and can reduce civilian casualties. On the other, drones make it not only physically easier to dispatch long-distance and targeted armed force, but the proliferation of drones may lower social barriers in society against the deployment of lethal force and result in attempts to weaken the relevant legal standards.

18. Given that drones greatly reduce or eliminate the number of casualties on the side using them, the domestic constraints — political and otherwise — may be less restrictive than with the deployment of other types of armed force. This effect is enhanced by the relative ease with which the details about drone targeting can be withheld from the public eye and the potentially restraining influence of public concern. Such dynamics call for a heightened level of vigilance by the international community concerning the use of drones.

19. A decade or so ago, the use of armed drones was relatively novel and untested; their human impact and further technological development were hard to predict, and a full discussion of the proper application of the international legal framework had yet to emerge. A vast body of academic and advocacy literature has now developed, and civil society watchdogs are tracking the issue and pursuing transparency. Armed drones have been debated in various forums of the United Nations, intergovernmental bodies and national Governments and courts.<sup>3</sup> Recent initiatives that help to shape the international response and consensus, for example by the European Parliament and an independent advisory committee of the Government of the Netherlands, deserve attention and support.<sup>4</sup>

<sup>3</sup> United Kingdom, High Court of Justice, *The Queen on The Application of Noor Khan v. The Secretary of State for Foreign and Commonwealth Affairs*, case No. CO/2599/2012, judgement of 21 December 2012.

<sup>4</sup> Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, European Parliament, Directorate General for External Policies, Policy Department Study (Brussels, 2013) and Advisory Committee on Issues of Public International Law, “Main conclusions of advice on armed drones” (The Hague, 2013).

20. Looking backwards and forwards, and keeping in mind the advent of new weapons systems waiting in the wings, the current moment provides an opportunity to take stock. It is a chance to reflect on the outlines of the debate as it currently stands, to restate the law in some places, to identify the main disagreements and to address some of the contentious issues. This opportunity may be further facilitated by the fact that available information suggests that the present number of drone strikes may at the moment have declined.<sup>5</sup>

21. The Special Rapporteur emphasizes that the various components of international law developed over the ages create a finely balanced system to address immediate security concerns, in addition to the need to protect the right to life in the short and long terms. International security and the protection of the right to life depend on the principle that the use of force is a matter of last resort.

22. The most immediate protection for the right to life is provided by the international human rights law framework. This is the default legal regime from which deviations are permissible only when, and for as long as, those who justify the more permissive use of force under international humanitarian law can show that the requisite conditions have been fulfilled.

23. An outer layer of protection for the right to life is the prohibition on the resort to force by one State against another, again subject to a narrowly construed set of exceptions. The protection of State sovereignty and of territorial integrity, which on occasion presents a barrier to the protection of human rights, here can constitute an important component of the protection of people against deadly force, especially with the advent of armed drones.

24. A central point made by the Special Rapporteur is that a holistic approach is needed in order to protect the right to life. For a particular drone strike to be lawful under international law it must satisfy the legal requirements under all applicable international legal regimes. Although a particular drone strike may satisfy the requirements for the use of inter-State force, it may nevertheless be inconsistent with applicable rules of international humanitarian law and international human rights law, or vice versa, and thus unlawful under international law. The right to life can be adequately secured only if all the distinct requirements posed by the various constitutive parts of international law are met.

25. The present report is in parallel to that submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which pertains to the topic of drones from the perspective of his mandate (A/68/389). While the two reports are separate and independent, they cover, to some extent, the same ground.

## **B. Mandate of the Special Rapporteur**

26. The mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions focuses on violations of the right to life contrary to international law. The mandate extends to the protection of the right to life and violations of this right in all circumstances, during peace and armed conflict.

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<sup>5</sup> Scott Shane, "Debate aside, number of drone strikes drops sharply", *New York Times*, 21 May 2013. This could be due in part to pressures on Governments by the public.

27. The Human Rights Council, in its resolution 17/5, in which it set out the scope of the mandate, made reference to the Geneva Conventions of 12 August 1949, noting that they, alongside human rights law, provided an important framework of accountability in relation to extrajudicial, summary or arbitrary executions. The Council stated that the mandate was aimed against such executions in all their forms (paras. 1 and 3) and that it had a key role to play in respect of, among other things, war crimes (para. 2), requesting the mandate holder to continue to examine situations of extrajudicial, summary or arbitrary executions in all circumstances and for whatever reason (para. 7 (a)). An important part of the mandate has been to cover issues of armed conflict and, for more than a decade now, drones.<sup>6</sup>

28. The mandate is guided, among others, by the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, paragraph 1 of which provides that exceptional circumstances, including a state of war or threat of war, may not be invoked as a justification of extrajudicial, summary or arbitrary executions and that the prohibition is to prevail over decrees issued by governmental authority.

### C. Protecting people: the right to life

29. The right to life is widely regarded as the supreme right.<sup>7</sup> While its exact scope can be contested, there is no serious challenge to the foundational status of this right.

30. The right against the arbitrary deprivation of life has been described as a rule of customary international law, in addition to a general principle of international law and a rule of *jus cogens*.<sup>8</sup> It is included in the Universal Declaration of Human Rights (art. 3), which is widely regarded as setting out rules of general international law. The right to life is recognized in the constitutional and other legal provisions of States and through a wide range of national and international actions and practices, and unlawful killing is universally criminalized. Some violations of the right to life are considered to be war crimes or crimes against humanity.<sup>9</sup>

31. A further layer of protection is added to the right to life by various human rights treaties and the monitoring mechanisms that they have created to tackle violations by States parties. The International Covenant on Civil and Political Rights calls it an inherent right (art. 6 (1)), which suggests that it exists independently from its recognition in the Covenant,<sup>10</sup> strengthening the points made in the previous paragraph. The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (art. 2) and the American

<sup>6</sup> See E/CN.4/2003/3/Add.3, para. 27, and the seminal 2010 exposition by Philip Alston on targeted killings (A/HRC/14/24/Add.6). See also the report of the current Special Rapporteur on the follow-up to recommendations on the United States of America made by his predecessor (A/HRC/20/22/Add.3), paras. 76-84.

<sup>7</sup> Human Rights Committee, general comment No. 6 (1982), on the right to life.

<sup>8</sup> Human Rights Committee, general comment No. 24 (1994), on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights, para. 10.

<sup>9</sup> See, generally, International Tribunal for the Former Yugoslavia, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, case No. IT-95-13/1-A.

<sup>10</sup> Sarah Joseph, *The International Covenant on Civil and Political Rights* (Oxford, United Kingdom, Oxford University Press, 2004), p. 154.

Convention on Human Rights (art. 4), in addition to the African Charter on Human and Peoples' Rights (art. 4), similarly recognize the importance of the right to life.

## 1. International human rights law

### (a) General

32. As a general rule, human rights treaties state that any deprivation of life must be non-arbitrary.<sup>11</sup> The use of force is, in any event, a matter of last resort under international human rights law. Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that intentional lethal use of firearms may be made only when strictly unavoidable in order to protect life.<sup>12</sup>

33. Any force must be necessary and proportionate, and intentional force can be used only where strictly necessary to protect against an imminent threat to life. A previous mandate holder noted that the police might shoot to kill only when it was clear that an individual was about to kill someone (making lethal force proportionate) and there was no other available means of detaining the suspect (making lethal force necessary) (A/HRC/14/24, para. 35). Other avenues should be explored first, and only when they are shown to be inadequate should there be resort to force.<sup>13</sup>

34. In *McCann and others v. United Kingdom of Great Britain and Northern Ireland*, the European Court of Human Rights held that the killing of members of the Provisional Irish Republican Army by State agents was a violation of their right to life because they could have been arrested upon their arrival in Gibraltar, where the operation was conducted.<sup>14</sup>

35. Under the above international human rights law standards, the intentional, premeditated killing of an individual would generally be unlawful. Where intentional killing is the only way to protect against an imminent threat to life, it may be used. This could be the case, for example, during some hostage situations or in response to a truly imminent threat.

36. While the standards of human rights law remain the same even in situations approaching armed conflict, they have to be applied in ways that are realistic in the context.<sup>15</sup>

37. The view that mere past involvement in planning attacks is sufficient to render an individual targetable even where there is no evidence of a specific and immediate attack distorts the requirements established in international human rights law.<sup>16</sup>

38. States cannot consent to the violation of their obligations under international humanitarian law or international human rights law. A State that consents to the

<sup>11</sup> The European Convention gives an exhaustive list of permissible grounds on which lethal force may be based in article 2.

<sup>12</sup> See also principle 10.

<sup>13</sup> Code of Conduct for Law Enforcement Officials, art. 3.

<sup>14</sup> European Court of Human Rights, application No. 18984/91, judgement of 27 September 1995, paras. 203-214; Human Rights Committee, *Maria Fanny Suárez de Guerrero v. Colombia*, communication No. R.11/45, views adopted on 31 March 1982, para. 13.2.

<sup>15</sup> Melzer, *Human Rights Implications of the Usage of Drones*, p. 33.

<sup>16</sup> United States, Department of Justice, White Paper, "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" (5 February 2003). Available from [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).



activities of another State on its territory remains bound by its own human rights obligations, including to ensure respect for human rights and thus to prevent violations of the right to life, to the extent that it is able to do so.<sup>17</sup>

39. In addition to the right to life issues raised above, the use of drones can also raise questions about possible discrimination in their use, for example if distinct standards are applied to citizens and non-citizens.

**(b) Applicability of international human rights law in armed conflicts**

40. It is now a well-established principle of international law that international human rights law continues to apply during armed conflict, as a complement to international humanitarian law.<sup>18</sup> The right to life as provided under international human rights law therefore continues to apply in times of armed conflict, but the prohibition against arbitrariness is, according to the International Court of Justice, interpreted in terms of international humanitarian law.<sup>19</sup>

41. The applicability of human rights obligations during armed conflict is confirmed by the presence of provisions for derogation in many human rights instruments, permitting States parties to derogate in times of war or public emergency from some of their human rights obligations arising under those treaties.<sup>20</sup> Absent derogation, human rights obligations as a general rule continue to apply in times of armed conflict. This applies even more so to the right to life, which is non-derogable under most treaties.<sup>21</sup>

**(c) Applicability of human rights norms to extraterritorial actions by States**

42. The use of drones by one State in another State's territory raises the question whether States can be held accountable for their actions outside their own territories.

43. Reference was made earlier to the status of the right to life as a general principle of international law and a customary norm. This means that, irrespective of the applicability of treaty provisions recognizing the right to life, States are bound to ensure the realization of the right to life when they use force, whether inside or outside their borders.

44. In addition, States are bound by those treaties to which they are a party and are subject to monitoring by their respective supervisory mechanisms. The applicability of such treaties is normally limited to individuals under the jurisdiction

<sup>17</sup> Draft Articles on responsibility of States for internationally wrongful acts, art. 23, *Yearbook of the International Law Commission 2001*, vol. II, Part Two (United Nations publication, Sales No. E.04.V.17 (Part 2)), as corrected.

<sup>18</sup> See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, paras. 24-25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, para. 106.

<sup>19</sup> Ibid.

<sup>20</sup> See, for example, International Covenant on Civil and Political Rights, art. 4; European Convention on Human Rights, art. 15; American Convention on Human Rights, art. 27.

<sup>21</sup> The European Convention on Human Rights permits derogations from the right to life, but only within the limits of lawful acts of war.

of a State party.<sup>22</sup> Jurisdiction has a territorial and a personal dimension. All persons finding themselves within the territory of a State are presumed to be within its territorial jurisdiction.<sup>23</sup>

45. That human rights treaty obligations can apply in principle to the conduct of a State outside its territory has been confirmed by, among others, the International Court of Justice,<sup>24</sup> the Human Rights Committee,<sup>25</sup> the Inter-American Commission on Human Rights<sup>26</sup> and the European Court of Human Rights.<sup>27</sup>

46. States exercise territorial jurisdiction beyond their own borders where they exercise effective control over other territory, while personal jurisdiction is established where the State has physical power, authority or control over individuals.<sup>28</sup>

47. Drones enable a State to perform targeted killing without exercising effective control over territory and without having the individual in custody, however. Accordingly, it must be asked whether such targeting can result in violations of the right to life under the applicable treaties.

48. There is limited case law on this matter. In *Alejandro*, the Inter-American Commission on Human Rights concluded that the shooting down of two private aeroplanes registered in the United States of America by Cuban military aircraft in international airspace violated the right to life of the passengers.<sup>29</sup> At the same time, in *Banković*, the European Court of Human Rights held that persons killed during aerial bombings by the North Atlantic Treaty Organization of a radio station in Serbia did not fall within the jurisdiction of the participating States for the purposes of establishing whether they had violated the right to life.<sup>30</sup> The broad sweep of this decision has, however, increasingly been narrowed in subsequent cases in the same system,<sup>31</sup> and it is not clear that the position can be sustained.

<sup>22</sup> In the International Covenant on Civil and Political Rights, the obligation of States is further limited to "all individuals within its territory" (art. 2 (1)). However, since *López Burgos v. Uruguay* (communication No. 52/1979, views adopted on 29 July 1981, the Human Rights Committee has held that States parties can also be held accountable for violations outside their territory.

<sup>23</sup> This presumption may be rebutted where the State is unable to exercise its authority over its territory.

<sup>24</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 109.

<sup>25</sup> General comment No. 31 (2004), on the nature of the general legal obligation imposed on States parties, para. 10.

<sup>26</sup> *Coard and others v. United States*, case 10.951, Report No. 109/99, 29 September 1999, para. 37.

<sup>27</sup> *Al-Skeini and others v. the United Kingdom*, application No. 55721/07, Grand Chamber judgement of 7 July 2011, paras 106-186; *Loizidou v. Turkey*, application No. 15318/89, judgement of 18 December 1996; *Ilaşcu v. Moldova and Russia*, application No. 48787/99, judgement of 8 July 2004, para. 392; *Al-Jedda v. the United Kingdom*, application No. 27021/08, Grand Chamber judgement of 7 July 2011.

<sup>28</sup> European Court of Human Rights, *Al-Skeini and others v. the United Kingdom*, *Loizidou v. Turkey* and *Ilaşcu v. Moldova and Russia*; International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168; Inter-American Commission on Human Rights, *Coard and others v. United States*; Human Rights Commission, *Burgos v. Uruguay*.

<sup>29</sup> *Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republic of Cuba*, case 11.589, Report No. 86/99, 29 September 1999, paras. 23-25.

<sup>30</sup> *Banković and others v. Belgium and 16 Other Contracting States*, application No. 52207/99, Grand Chamber decision (admissibility) of 12 December 2001, para. 82.

<sup>31</sup> *Al-Skeini and others v. the United Kingdom*, paras. 106-186.

49. It has been argued that the deliberate killing of selected individuals through extraterritorial drone strikes is likely to bring the affected persons within the jurisdiction of the operating State.<sup>32</sup> Pursuing this line of reasoning, where a State targets individuals abroad with lethal force, it can be argued that it intends to exercise ultimate control over the individuals concerned, resulting in those actions being governed by the State's human rights treaty law obligations.<sup>33</sup>

50. That a State has human rights obligations with regard to conduct outside its territory does not automatically mean that those obligations are the same as those that arise within its territory. In principle, while control of territory means that a State has obligations, guaranteed by international law, not only to respect but also to ensure and to fulfil the human rights of those on the territory, the exercise of authority with regard to an individual by State agents in the absence of territorial control at a minimum triggers the State's obligation to respect the rights of those individuals.<sup>34</sup>

51. It has been held that human rights treaties cannot be interpreted so as to allow a State party to perpetrate violations of the treaty on the territory of another State, which it could not perpetrate on its own territory.<sup>35</sup> The same must apply to the right to life as a part of general international law and custom. The conclusion appears to be that any positive action by a State, on its own territory or that of another State, must be carried out in compliance with its human rights obligations under all applicable rules of international law.

## 2. International humanitarian law

### (a) General

52. Drone strikes currently do not occur in the context of international armed conflict between States. Drones, where used in the context of armed conflict, are rather used where the respective parties are States and non-State armed groups, which potentially makes their use situations of non-international (or non-inter-State) armed conflict. Consequently, the Special Rapporteur focuses herein on the latter.

53. If a drone strike occurs in a situation where a non-international armed conflict exists, the protection afforded to the right to life is commonly interpreted in accordance with the rules of international humanitarian law. It is important to emphasize, however, that not all applications of violence by States against non-State actors meet the threshold requirements to be regarded as an armed conflict. Accordingly, if there is no armed conflict, there can be no non-international armed conflict, and international humanitarian law does not apply to such use of force.

54. It is worth noting the view held by some that, where a State uses force on the territory of another State against a non-State actor without the consent of the latter

<sup>32</sup> See Nils Meltzer, *Targeted Killing in International Law* (Oxford, United Kingdom, Oxford University Press, 2008).

<sup>33</sup> Cordula Droegge, "Elective affinities? Human rights and humanitarian law", *International Review of the Red Cross*, vol. 90, No. 871 (September 2008), p. 516; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford, United Kingdom, Oxford University Press, 2010), pp. 227-231; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford, United Kingdom, Oxford University Press, 2011), pp. 209-221.

<sup>34</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties*, pp. 209-221.

<sup>35</sup> European Court of Human Rights, *Issa and others v. Turkey*, application No. 31821/96, judgement of 16 November 2004, para. 71.

State, the law relating to international armed conflicts will also be applicable because the use of force is also against the territorial State.<sup>36</sup>

**(b) Criteria for the existence of a non-international armed conflict**

55. For violence to amount to a non-international armed conflict, the threshold requirements are that it must be protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.<sup>37</sup> Two cumulative criteria must thus be satisfied for a particular situation to be classified as a non-international armed conflict to which international humanitarian law would apply: the intensity of the conflict and the organization of the parties to the conflict.<sup>38</sup>

56. An armed group will be considered to constitute a party to a non-international armed conflict only if it is sufficiently organized. International jurisprudence has determined the relevant indicative criteria, which include the existence of a command structure, of headquarters and of a group's ability to plan and carry out military operations.<sup>39</sup>

57. For a conflict to qualify as a non-international armed conflict, armed violence must also reach a certain threshold of intensity that is higher than that of internal disturbances and tensions.<sup>40</sup> The armed violence should not be sporadic or isolated but protracted.<sup>41</sup> The requirement of protracted violence, however, refers more to the intensity of the armed violence than its duration.<sup>42</sup> Just as the condition of organization, the intensity of the armed violence is an issue that is determined on a case-by-case basis.<sup>43</sup>

58. In the context of drones, these requirements mean that international humanitarian law will not apply where the threshold levels of violence or organization are not present, leaving international human rights law principles to govern the situation alone.

<sup>36</sup> Dapo Akande, "Classification of conflicts: relevant legal concepts", in Elizabeth Wilmshurst, ed., *International Law and the Classification of Conflicts* (Oxford, United Kingdom, Oxford University Press, 2012), p. 70.

<sup>37</sup> International Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, decision on the defence motion for interlocutory appeal on jurisdiction, case No. ICTY-94-1, 2 October 1995, para. 70.

<sup>38</sup> Ibid., case No. IT-94-1-T, trial judgment of 7 May 1997, para. 562.

<sup>39</sup> International Tribunal for the Former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, case No. IT-03-66-T, judgement of 30 November 2005, paras. 94-134; International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, case No. ICC-01/04-01/06-2842, judgement of 14 March 2012, paras. 536-538.

<sup>40</sup> 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. 1 (2); International Criminal Tribunal for Rwanda, *Prosecutor v. Musema*, case No. ICTR-96-13-A, judgement of 27 January 2000, para. 248.

<sup>41</sup> *Prosecutor v. Musema*, ibid.

<sup>42</sup> International Tribunal for the Former Yugoslavia, *Prosecutor v. Haradinaj and others*, case No. IT-04-84-T, Trial Chamber judgement of 3 April 2008, para. 49; *Prosecutor v. Limaj*, para. 90.

<sup>43</sup> *Prosecutor v. Musema*, para. 249.

**(c) Various organized armed groups**

59. Expanded use of armed drones has been justified by arguments that force may be used not only against an organized armed group in a situation that meets the above requirements but also against its co-belligerents (or affiliates or associates).<sup>44</sup>

60. Co-belligerency is a concept that applies to international armed conflicts and entails a sovereign State becoming a party to a conflict, either through formal or informal processes.<sup>45</sup> A treaty of alliance may be concluded as a formal process, while an informal process could involve providing assistance to or establishing a common cause with belligerent forces.<sup>46</sup>

61. The idea that the concept of co-belligerency can be transposed into non-international armed conflicts has been met with resistance because it ignores the significant differences between the various forms of armed conflict and opens the door for an expansion of targeting without clear limits.<sup>47</sup>

62. The established legal position is that, where the individuals targeted are not part of the same command and control structures as the organized armed group or are not part of a single military hierarchical structure, they ought not to be regarded as part of the same group, even if there are close ties between the groups.<sup>48</sup>

63. Violence by various organized armed groups against the same State can amount to separate non-international armed conflicts, but only where the intensity of violence between each group and the State individually crosses the intensity threshold. Isolated drone strikes alone are unlikely to meet this threshold of violence intensity.<sup>49</sup>

**(d) Question of a “transnational” non-international armed conflict**

64. When a State uses force against non-State actors in a number of foreign States, some commentators have proposed that the entirety of the violence between the State and the non-State actors should be understood to constitute a single, transnational non-international armed conflict, occurring across multiple territories where fighters can potentially be targeted. It has been argued that this could be the case if — and only if — those targeted have a nexus to the same organized armed group.<sup>50</sup> Yet one of the risks posed by a facile acceptance of the possibility of a transnational armed conflict is subjecting unsuspecting communities to the risk of disproportionate collateral damage.

<sup>44</sup> See [www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address](http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address).

See also Curtis A. Bradley and Jack L. Goldsmith, “Congressional authorization and the war on terrorism”, *Harvard Law Review*, vol. 118, No. 7 (2005), pp. 2112-2113.

<sup>45</sup> L. Oppenheim, *International Law: A Treatise*, H. Lauterprecht, ed., 5th ed. (London, Longmans, 1935), pp. 203 and 206.

<sup>46</sup> *Ibid.*

<sup>47</sup> “The [United States] administration’s failure to define what specific organizational features or conduct would lead a group to be classified as an associated force raises concerns that this results in an aggressive and indefinitely expansive scope of targeting authority.” See [www.hrw.org/news/2013/04/11/joint-letter-president-obama-us-drone-strikes-and-targeted-killings](http://www.hrw.org/news/2013/04/11/joint-letter-president-obama-us-drone-strikes-and-targeted-killings).

<sup>48</sup> *Prosecutor v. Haradinaj*, p. 144.

<sup>49</sup> Noam Lubell and Nathan Derejko, “A global battlefield? Drones and the geographical scope of armed conflict”, *Journal of International Criminal Justice*, vol. 11, No. 1 (2013), p. 78.

<sup>50</sup> *Ibid.*, p. 84.

65. It is to be questioned whether the various terrorist groups that call themselves Al-Qaida or associate themselves with Al-Qaida today possess the kind of integrated command structure that would justify considering them a single party involved in a global non-international armed conflict.<sup>51</sup>

66. The view of the International Committee of the Red Cross (ICRC) is that, based on the facts, this type of non-international armed conflict is not and has not been taking place. Instead, a case-by-case approach to legally analysing and classifying the various situations of violence that have occurred in efforts to combat terrorism should be applied. Some situations may be classified as an international armed conflict, others a non-international armed conflict, while various acts of terrorism taking place in the world may be outside any armed conflict.<sup>52</sup>

**(e) Requirement of distinction**

67. Once it has been established that an armed conflict exists, and thus that the rules of international humanitarian law apply in the specific case, the next question concerns who may be targeted. Civilians may not be made the object of an attack unless, and only for such time as, they take a direct part in hostilities.<sup>53</sup> Furthermore, where there is doubt as to whether a person is a civilian or is taking a direct part in hostilities, civilian status must be presumed.<sup>54</sup>

68. In its Interpretive Guidance on Direct Participation in Hostilities, ICRC has taken the view that civilians protected from direct attack in a non-international armed conflict are all those who are neither members of a State's armed forces nor members of organized armed groups. The latter are then defined as "individuals whose continuous function it is to take a direct part in hostilities ('continuous combat function')".<sup>55</sup> Thus, a drone strike carried out against an individual with a continuous combat function in an organized armed group with which the attacking State is engaged in a non-international armed conflict will be consistent with the principle of distinction in international humanitarian law, provided that the other rules of international humanitarian law are also observed. It can never be sufficient to claim that someone targeted is a member of the opposing party; he or she must at least be a member of the armed forces of that group.

69. In addition to targeting on the basis of continuous combat function, individual civilians will lose their protection from direct attack based on conduct when, and only for such time as, they engage in specific acts of direct participation. According to ICRC, there is a three-stage test for determining when a civilian is directly participating in hostilities and thus may be targeted:<sup>56</sup> the actions of the civilian

<sup>51</sup> See Claus Kreß, "Some reflections on the international legal framework governing transnational armed conflicts", *Journal of Conflict and Security Law*, vol. 15, No. 2 (2010), p. 261.

<sup>52</sup> ICRC, "International humanitarian law and the challenges of contemporary armed conflicts", document 31IC/11/5.1.2 (2011), pp. 10-11.

<sup>53</sup> Additional Protocol II, art. 13 (2) and (3) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Production of Victims of International Armed Conflict (Protocol I), art. 51.

<sup>54</sup> Additional Protocol II, art. 13 (2) and (3); Additional Protocol I, art. 50 (1).

<sup>55</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva, ICRC, 2009), p. 27.

<sup>56</sup> Ibid.

must reach a certain threshold of harm; there must be direct causation; and there must be a belligerent nexus to the conflict.<sup>57</sup>

70. The ICRC test may rightly be criticized because of its lack of an authoritative basis in treaty law, but it has the advantage that the question of who is a legitimate target is answered by reference to the performance of activity that directly causes harm to belligerents and/or civilians. This provides some objective basis for determining who may be targeted. It is noteworthy that the ICRC approach to the concepts of “members of organized armed groups” and “direct participation in hostilities” has been followed in recent State practice concerning drone attacks.<sup>58</sup>

71. International humanitarian law provides that all feasible precautions must be taken in determining whether a person has lost protection from attack as described above.<sup>59</sup> This obligation requires parties to the conflict to use all information that is reasonably available in making the determination about whether a person is a lawful target. To the extent that drones enable more precise targeting and have a greater capacity for extended surveillance than other methods of force projection, such as other aeroplanes, there is also a greater concomitant responsibility to take precautions.

72. References are sometimes made to signature strikes, whereby people may be targeted based on their location or appearance.<sup>60</sup> This is not a concept known to international humanitarian law and could lead to confusion. The legality of such strikes depends on what the signatures are. In some cases, people may be targeted without their identities being known, based on insignia or conduct. The legal test remains whether there is sufficient evidence that a person is targetable under international humanitarian law, as described above, by virtue of having a continuous combat function or directly participating in hostilities,<sup>61</sup> and if there is doubt States must refrain from targeting.<sup>62</sup> Insofar as the term “signature strikes” refers to targeting without sufficient information to make the necessary determination, it is clearly unlawful.

73. Where one drone attack is followed up by another in order to target those who are wounded and hors de combat or medical personnel, it constitutes a war crime in armed conflict and a violation of the right to life, whether or not in armed conflict. Strikes on others confirmed to be civilians who are directly participating in hostilities or having a continuous combat function at the time of the follow-up strike could be lawful if the other international humanitarian law rules are respected.

74. The public statements of States that they conduct threat assessments of individuals before targeting them in armed conflict should be welcomed and implementation of these statements should be urged, because this offers a higher level of protection than is required by international humanitarian law in respect of

<sup>57</sup> Ibid., p. 46.

<sup>58</sup> See decision of the German Federal Prosecutor of 20 June 2013. Available from [www.generalbundesanwalt.de/docs/drohneneinsatz\\_vom\\_04oktober2010\\_mir\\_ali\\_pakistan.pdf](http://www.generalbundesanwalt.de/docs/drohneneinsatz_vom_04oktober2010_mir_ali_pakistan.pdf) (in German).

<sup>59</sup> ICRC, *Interpretive Guidance*, p. 74.

<sup>60</sup> Kevin Jon Heller, “‘One hell of a killing machine’: signature strikes and international law”, *Journal of International Criminal Justice*, vol. 11, No. 1 (2012), pp. 8-20.

<sup>61</sup> Ibid. The author distinguishes between “legally adequate” and “legally inadequate” signatures.

<sup>62</sup> Additional Protocol I, art. 50 (1). See also ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Commentary on Additional Protocol II, para. 4789 and *Interpretive Guidance*, recommendation VIII.

legitimate targets.<sup>63</sup> The proviso is that the situation must be correctly classified as an armed conflict; if the requirements posed for a non-international armed conflict are not met, a threat assessment is not enough, and the more rigorous conditions of self-defence under international human rights law must be met.

**(f) Requirement of proportionality**

75. Drones come from the sky, but leave the heavy footprint of war on the communities that they target.<sup>64</sup> The claims that drones are more precise in targeting cannot be accepted uncritically, not least because terms such as “terrorist” or “militant” are sometimes used to describe people who are in truth protected civilians. The principle of proportionality protects those civilians who are not directly targeted but nevertheless may bear the brunt of the force used. According to this principle, it is prohibited to carry out 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.<sup>65</sup> By implication, where it is not excessive, such losses are regarded as incidental (“collateral”) damage and are not prohibited, provided that international humanitarian law rules have been respected. The risk to civilians may be exacerbated where drone strikes are carried out far away from areas of actual combat operations, especially in densely populated areas, and unsuspecting civilians may suddenly find themselves in the line of fire.

76. Avoiding collateral damage requires taking all feasible precautions to prevent or minimize incidental loss of civilian lives and information-gathering relating to possible civilian casualties and military gains.<sup>66</sup>

**(g) Question of whether international humanitarian law requires a capture rather than kill approach**

77. Recent debates have asked whether international humanitarian law requires that a party to an armed conflict under certain circumstances consider the capture of an otherwise lawful target (i.e. a combatant in the traditional sense or a civilian directly participating in hostilities) rather than targeting with force. In its Interpretive Guidance, ICRC states that it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.<sup>67</sup>

<sup>63</sup> See [www.theguardian.com/world/2013/may/23/obama-drones-guantanamo-speech-text](http://www.theguardian.com/world/2013/may/23/obama-drones-guantanamo-speech-text).

<sup>64</sup> International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at New York University School of Law, “Living under drones: death, injury, and trauma to civilians from US drone practices in Pakistan” (2012), available from <http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf>.

<sup>65</sup> Additional Protocol I, art. 51 (5) (b).

<sup>66</sup> Additional Protocol I, art. 57.

<sup>67</sup> ICRC, *Interpretive Guidance*, p. 82.



78. The articulation of this principle has been controversial.<sup>68</sup> It has been criticized for its alleged misrepresentation of the current *lex lata*,<sup>69</sup> in particular on the basis that it suggests that the principle of military necessity sits above every rule of international humanitarian law in a limiting manner, rather than simply as a consideration that has already been factored into the rules.<sup>70</sup> In other words, so the argument goes, States have already decided that it is necessary and proportionate to target combatants on the basis of their status alone.

79. It is too early to determine in which direction the controversy around this concept will be resolved. The issue will likely remain relevant in the context of modern anti-terrorism measures where individuals or small groups may be isolated in territory far away from the conflict zone, which may even be controlled by the State party or its allies.<sup>71</sup> The ICRC approach has been applied in some recent State practice on drone attacks<sup>72</sup> and at least one other State that uses drones has stated that, as a matter of policy, it will not use lethal force when it is feasible to capture a terror suspect.<sup>73</sup>

#### **D. Protecting sovereignty and people: restrictions on the use of force in foreign territory**

80. In addition to the rules of international humanitarian law and international human rights law that must be strictly observed in any drone strike, the use by one State of drones to target individuals located in another State will be lawful only where it complies with the rules on the use of inter-State force. While international humanitarian law and international human rights law are aimed at protecting the individuals concerned, the law on the use of inter-State force serves primarily to protect the legal rights of States, including the right and interest of the State to have the lives of its citizens and inhabitants protected from aggressive acts. It can thus indirectly serve to protect life by containing the geographical spread of conflict.

81. Article 2 (4) of the Charter of the United Nations and customary international law prohibit the threat or use of inter-State force, subject to limited exceptions. A State may consent to the use of force on its territory by another State. The Charter also allows action taken in self-defence.<sup>74</sup>

<sup>68</sup> See Dapo Akande, "Clearing the fog of war? The ICRC's Interpretive Guidance on Direct Participation in Hostilities", *International and Comparative Law Quarterly*, vol. 59, No. 1 (January 2010), pp. 180 and 191.

<sup>69</sup> See Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: a critical analysis", *Harvard National Security Journal*, vol. 1 (2010), pp. 5 and 39-43.

<sup>70</sup> Michael N. Schmitt, "Military necessity and humanity in international humanitarian law: preserving the delicate balance", *Virginia Journal of International Law*, vol. 50, No. 4 (2010), pp. 795 and 835.

<sup>71</sup> Ryan Goodman, "The power to kill or capture enemy combatants", *European Journal of International Law*, vol. 24 (2013) (forthcoming).

<sup>72</sup> Decision of the German Federal Prosecutor of 20 June 2013.

<sup>73</sup> United States, Office of the President, "Fact sheet: U.S. policy standards and procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities", 23 May 2013.

<sup>74</sup> The Security Council can also authorize the use of force. Humanitarian intervention without Council approval is a controversial ground for the use of inter-State force.

## 1. Consent

82. Only the State's highest government authorities have the power to give consent to use force. It is not sufficient to obtain consent from regional authorities or from particular agencies or departments of the Government.<sup>75</sup> Where there is a difference of view between the highest authorities in the Government and lower-level officials, the view of the higher-level officials should be taken as determinative.

83. While there is no requirement that consent be made public, it must nevertheless be clear between the States concerned that consent is being given to a use of force, and the parameters of that consent should also be made clear. Consent must be given in advance.<sup>76</sup> Moreover, consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion.<sup>77</sup>

84. Once consent to the use of force is withdrawn, the State conducting the targeting operations is bound by international law to refrain from conducting any further operations from that moment.<sup>78</sup> States cannot consent to violations of international human rights law or international humanitarian law on their territory.

## 2. Self-defence

85. The use of drones on the territory of other States has also been justified on the basis of self-defence (including where consent was not given or is unclear). International law poses stringent requirements on the use of force in self-defence. Under Article 51 of the Charter and customary international law, a State may invoke self-defence to justify its use of force to target individuals in another State's territory when an armed attack occurs or (see below) is imminent. The International Court of Justice has confirmed that, for an attack to constitute an armed attack and thus enable the State's right to use force in self-defence, the scale and effects of the attack must reach a certain threshold of gravity.<sup>79</sup>

86. In addition, the State claiming to be acting in self-defence must satisfy the dual requirements of necessity and proportionality, grounded in customary international law. These requirements, as defined in the context of the use of inter-State force, are closely linked to the aim of a lawful act of self-defence. Thus, necessity and proportionality mean that self-defence must not be retaliatory or punitive; the aim should be to halt and repel an attack.<sup>80</sup> Action taken lawfully in self-defence, such as the use of drones to target individuals in another State's territory, must serve the purpose of halting and repelling an armed attack and must be both necessary and proportionate to that end.

<sup>75</sup> See International Law Commission, Draft articles on responsibility of States for internationally wrongful acts, commentary to article 20.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid., para. 6.

<sup>78</sup> See *Armed Activities on the Territory of the Congo*.

<sup>79</sup> *Nicaragua v. United States of America, Judgment, I.C.J. Reports 1986*, p. 14, para. 191, *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161, paras. 51 and 62.

<sup>80</sup> See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 25/2625, annex).

87. Article 51 recognizes the right to self-defence where an armed attack occurs, but also refers to self-defence as an inherent right of States. This has given rise to arguments that the right to self-defence under customary law is not displaced by the Charter. The argument that an anticipatory attack against an imminent threat is also permissible rests on this basis (see [A/59/565](#) and Corr.1, paras. 188-192). Under the proper interpretation of Article 51, however, this may be done only in response to an existing threat. It may not be done pre-emptively to prevent a threat from arising in the future. The necessity of the self-defence, in the well-known phrase, must be instant, overwhelming and leaving no choice of means, no moment of deliberation.<sup>81</sup> The body of opinion and State practice that reject the concept of anticipatory self-defence altogether should be noted, and serve at least as a confirmation of the limited scope of the exception.<sup>82</sup>

88. Before 11 September 2001, the claim that force could be used in self-defence in response to an armed attack by a non-State group whose acts were not attributable to a State was not supported — or rather, not entertained — by most commentators. The International Court of Justice also did not follow this view of the law in *Nicaragua*.<sup>83</sup> State practice since 11 September, however, suggests that international law may now permit such a notion.<sup>84</sup>

89. There is an emerging view that the level of violence necessary to justify a resort to self-defence ought to be set higher when it is in response to an attack by non-State actors than to an attack by another State.<sup>85</sup> This specific intensity requirement for the definition of an armed attack must be met vis-à-vis each host State on whose territory action in self-defence is taken.<sup>86</sup>

90. The right to self-defence persists only for so long as it is necessary to halt or repel an armed attack and must be proportionate to that aim. In determining what is necessary to bring an attack to an end and what is a legitimate objective for self-defence, however, States are not entitled to continue to act in self-defence until the absolute destruction of the enemy is achieved, such that the enemy poses no long-term threats.

91. It has been argued that self-defence against an armed group on the territory of another State is permissible only if the host State is unable or unwilling to act against that group.<sup>87</sup> This follows from the requirement that action taken in self-defence must be necessary. The test of unwillingness or inability can therefore not refer to an independent justification for the use of force on foreign soil, but at best constitute part and parcel of a claim to self-defence. Moreover, in determining

<sup>81</sup> Letter from Mr. Webster to Lord Ashburton, 6 August 1842, in R. Y. Jennings, “The *Caroline* and *McLeod* cases”, *American Journal of International Law*, vol. 32, No. 1 (January 1938).

<sup>82</sup> Christine Gray, *International Law and the Use of Force* (Oxford, United Kingdom, Oxford University Press, 2008), pp. 160-161.

<sup>83</sup> *Nicaragua v. United States; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 139.

<sup>84</sup> See Security Council resolutions 1368 (2001) and 1373 (2001).

<sup>85</sup> The Chatham House Principles of International Law on the Use of Force by States in Self-Defence (2005), principle 6; and Leiden Policy Recommendations on Counter-terrorism and International Law, Grotius Centre for International Legal Studies (2010), para. 38.

<sup>86</sup> Kreß, “Some reflections on the international legal framework governing transnational armed conflicts”, p. 251.

<sup>87</sup> Daniel Bethlehem, “Self-defence against an actual or imminent armed attack by non-State actors”, *American Journal of International Law*, vol. 106, No. 4 (2012), pp. 770 and 776.

whether a State is unable or unwilling to take action, the State acting in self-defence might be required to request such action before the commencement of acts taken in self-defence, to establish that it is necessary.

92. Importantly, the imminence requirement in international human rights law that stipulates that life may be taken only to protect life is not to be conflated with the requirement of imminence in the law governing the use of force on foreign territory under Article 51 of the Charter. The former is a condition required for all uses of lethal force to be lawful under international human rights law. The latter applies under the doctrine of anticipatory self-defence and would allow the use of self-defence where an attack is imminent.<sup>88</sup>

93. Article 51 makes it clear that measures adopted by States in exercise of self-defence must be reported to the Security Council.<sup>89</sup> This can be seen as posing an obligation of transparency and justification to the international community, placing the issue formally on the agenda of the Council and recognizing its role. All States Members of the United Nations have an obligation under its founding treaty to submit such reports. While failure to report will not render unlawful an otherwise lawful action taken in self-defence, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.<sup>90</sup> According to Article 51, the right to exercise self-defence shall continue until the Council has taken measures necessary to maintain international peace and security.

94. In addition to its transparency function, it could be argued that the rationale for this reporting requirement is to contribute towards the protection of the legal rights of sovereignty by the international community, given that the State using force is required to offer its justification for that use of force. By extension, it may be concluded that a State must report afresh when the material facts have changed, for example, where self-defence is used as a basis for the use of force on the territory of a new State, or new parties are added to the conflict.

## **E. Accountability and transparency**

### **1. International human rights law**

95. The modern concept of human rights is based on the fundamental principle that those responsible for violations must be held to account. A failure to investigate and, where applicable, punish those responsible for violations of the right to life in itself constitutes a violation of that right.<sup>91</sup>

<sup>88</sup> Contrast United States, Department of Justice, White Paper, "Lawfulness of a lethal operation directed against a U.S. citizen".

<sup>89</sup> *Nicaragua v. United States*, para. 235; *Armed Activities in the Territory of the Congo*, para. 145.

<sup>90</sup> *Nicaragua v. United States*, para. 200.

<sup>91</sup> European Court of Human Rights, *Kaya v. Turkey*, application No. 22729/93, judgement of 19 February 1998, paras. 86-92; Human Rights Committee, general comment No. 31 (2004), para. 15; *McCann and others v. United Kingdom*, para. 169.

96. Legal and political accountability are dependent on public access to the relevant information.<sup>92</sup> Only on the basis of such information can effective oversight and enforcement take place. The first step towards securing human rights in this context is transparency about the use of drones.

97. A lack of appropriate transparency and accountability concerning the deployment of drones undermines the rule of law and may threaten international security.<sup>93</sup> Accountability for violations of international human rights law (or international humanitarian law) is not a matter of choice or policy; it is a duty under domestic and international law.<sup>94</sup>

98. The various components of transparency<sup>95</sup> require that the criteria for targeting and the authority that approves killings be known and that drone operations be placed in institutions that are able to disclose to the public the methods and findings of their intelligence, criteria used in selection of targets and precautions incorporated in such criteria.

99. One of the criticisms levelled against the current drone programmes has been the absence of an official record regarding the persons killed. States must also give guarantees of non-repetition and give effect to the right to reparations of victims of drone strikes.

100. Drone victims, just as any other human rights victims, and society at large have a right to have access to information relating to allegations of human rights violations and their investigation.<sup>96</sup> The Human Rights Council has emphasized the need under international human rights law for transparency, highlighting victims' right to know the truth about the perpetrators, their accomplices and their motives there.<sup>97</sup> Likewise, during an armed conflict, relatives of persons killed or missing have the right to know the fate of their relatives.<sup>98</sup>

## 2. International humanitarian law

101. A parallel obligation to investigate and, where appropriate, punish those responsible in respect of cases of alleged war crimes exists under international

<sup>92</sup> Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para. 16.

<sup>93</sup> Melzer, *Human Rights Implications of the Usage of Drones*, p. 4.

<sup>94</sup> Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (12 April 2011). Available from [www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf).

<sup>95</sup> See Philip Alston, "The CIA and targeted killings beyond borders", *Harvard National Security Journal*, vol. 2, No. 2 (2011), p. 287.

<sup>96</sup> See Inter-American Court of Human Rights, "*Mapiripán Massacre*" v. *Colombia*, judgement of 15 September 2005, para. 238.

<sup>97</sup> Human Rights Council resolution 9/11, preamble and para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 24 (2); Commission on Human Rights resolution 2005/66.

<sup>98</sup> Additional Protocol I, art. 32 and ICRC, Commentary on article 32 of Additional Protocol I, para. 1197; Additional Protocol I, art. 33 and ICRC, Commentary on article 33 of Additional Protocol I, para. 1222; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 138.

humanitarian law.<sup>99</sup> Whenever there are reasons to query whether violations of international humanitarian law may have occurred in armed conflict as a result of a drone strike, such as the incorrect designation of persons as targetable or disproportionate civilian harm, accountability demands at least a preliminary investigation.<sup>100</sup> Civilian casualties must be determined and should be disclosed.

## IV. Conclusions

102. The legal framework for maintaining international peace and the protection of human rights is a coherent and well-established system, reflecting norms that have been developed over the centuries and have withstood the test of time. Even though drones are not illegal weapons, they can easily be abused. The central norms of international law need not, and should not, be abandoned to meet the new challenges posed by terrorism. On the contrary, that drones make targeted killing so much easier should serve as a prompt to ensure a diligent application of these standards, especially in view of the likely expansion in the number of States with access to this technology in the future.

103. The use of drones by States to exercise essentially a global policing function to counter potential threats presents a danger to the protection of life, because the tools of domestic policing (such as capture) are not available, and the more permissive targeting framework of the laws of war is often used instead.

## V. Recommendations

### A. General

**104. The established international legal framework for the use of force (international human rights law, international humanitarian law and inter-State force) should be regarded as setting forth an adequate framework for the use of armed drones.**

**105. It is a matter of concern that there is uncertainty about which States are developing and acquiring armed drones. States should be transparent, and be called upon to be transparent by the international community and by domestic actors in this regard.**

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<sup>99</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), art. 50; Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 129; Fourth Geneva Convention, art. 146; Additional Protocol I, art. 85; Security Council resolution 827 (1993) establishing the International Criminal Tribunal for the Former Yugoslavia and Statute of the Tribunal, art. 2; Security Council resolution 955 (1994) establishing the International Criminal Tribunal for Rwanda and Statute of the Tribunal, art. 4; Rome Statute of the International Criminal Court, art. 8 (2) (a).

<sup>100</sup> The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report — Turkel Commission, “Israel’s mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law” (February 2013), p. 256.

## **B. To the United Nations**

106. Even where self-defence is exercised in accordance with the Charter of the United Nations, Security Council endorsement is desirable. The role of the Council in ensuring multilateral supervision of the use of armed drones should be strengthened.

107. The Security Council should seek transparency from States on the reasons for self-defence when invoked, if this is neither provided nor clear.

## **C. To States using armed drones**

108. States must be transparent about the development, acquisition and use of armed drones. They must publicly disclose the legal basis for the use of drones, operational responsibility, criteria for targeting, impact (including civilian casualties), and information about alleged violations, investigations and prosecutions.

109. States must bring their practices and policies in line with international standards, including their standing orders and rules of engagement as well as their targeting norms. This includes adhering to the rule, in the context of international humanitarian law, that if there is doubt whether a person is a civilian, the person must be considered a civilian.

110. States must ensure meaningful oversight of the use of drones and, where appropriate, investigation and accountability as well as reparations for their misuse.

111. States must recognize the extraterritorial applicability of human rights treaties, in addition to the global applicability of the right to life on the basis of customary law and the general principles of international law, including during armed conflict.

112. Drone operators must not be placed within a chain of command that requires them to report within institutions that are unable to disclose their operations.

113. States that invoke the right to self-defence to use inter-State force should submit a report to the Security Council pursuant to Article 51 of the Charter in respect of each State on whose territory they use force. If a conflict is extended to the territory of a new State, a new report should then be submitted.

114. Whether or not they recognize this as a legal obligation, States should capture rather than kill during armed conflict where feasible.

## **D. To States on whose territory armed drones are used**

115. States must continue to honour their own human rights obligations and recognize that they cannot consent to the violation of human rights or international humanitarian law by foreign States. They must recognize that the duty to protect the right to life of their subjects rests primarily with them. States must investigate allegations of violations of the right to life through drone killings and provide redress where applicable.

116. Where States consent to the use of force, they should do so openly and clearly.

**E. To other actors**

117. Intergovernmental organizations, States and others, especially those with an interest in using armed drones or against whose territory and constituents they are used, should engage in individual and collective consensus-seeking processes to determine the correct interpretation and application of the established international standards for the use of drones that are equally applicable to all States.

118. Civil society should continue and, where possible, expand its assessment and monitoring of the use of drones.

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