



Vested Interest or Moral Indecisiveness? Explaining the EU's Silence on the US Targeted Killing Policy in Pakistan

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Abstract

The CIA's targeted killings with drones in Pakistan is a highly problematic practice that has continued to expand in secrecy without proper democratic control. In the US, targeted killing is regarded as a necessary and, with some caveats, effective counterterrorism policy. As such, it is setting a controversial precedent for covert warfare that jars with the understanding underlying counterterrorism cooperation between the US and the EU. That notwithstanding, the Union has apparently opted for a policy of silence or, better, for having no policy at all on the matter. In so doing, the EU might be avoiding a potentially harmful rift with the US, but it is also deliberately refusing to face one of the moral dilemmas related to counterterrorism in the 21st century.

Keywords: *United States / US counterterrorism policy / Pakistan / Targeted killings / Drones / Central Intelligence Agency (CIA) / Bilateral relations / European Union / International law*

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by Nathalie Van Raemdonck*

Following the attacks of 11 September 2001, the cooperation between the European Union and the United States on counterterrorism increased substantially. In 2004 the EU and US adopted a Declaration on Combating Terrorism that spelled out the objectives of their counterterrorism cooperation.¹ In this declaration it is stated that US-EU counterterrorism cooperation would be in keeping with human rights and the rule of law. However, the US has over time expanded its counterterrorism tactics beyond what many in the EU would consider the limits of international law.

US practices that have proven to be particularly controversial include the maintenance of the US detention centre in Guantanamo Bay, Cuba, where suspect terrorists have been held on an often dubious legal basis; the use of interrogation systems bordering torture, such as waterboarding², the so-called extraordinary renditions, whereby terrorist suspects abducted in third countries were then transferred to states where no guarantee against torture or inhuman treatment was in place; and targeted assassinations of suspect terrorists in Afghanistan and Pakistan through Unmanned Aerial Vehicles (UAV), better known as drones.

The dispute over Guantanamo seems to have somewhat subsided, although the detention centre still exists, while waterboarding and extraordinary renditions have apparently been terminated. As for the drone strikes, no significant public discontent has emerged thus far, although they are increasingly being brought into the spotlight. These last few years drone strikes have become omnipresent in media reports on counterterrorism efforts, yet they remain covert operations of which the US gives out as little information as possible. Under the Barack H. Obama administration, the number of drone attacks have increased remarkably.

Now that these targeted killing operations with drones have become a regular phenomenon, it is opportune and indeed necessary to question the legitimacy of this practice and to monitor the actions of the United States in areas under the nominal jurisdiction of other countries. It is also necessary to reconstruct and evaluate the

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¹ Council of the European Union, *EU-U.S. Declaration on Combating Terrorism* (10760/04 Presse 205), Dromoland Castle, 26 June 2004, http://www.consilium.europa.eu/uedocs/cmsUpload/10760EU_US26.06.04.pdf.

² Waterboarding is an interrogation technique by which water is poured over the face of a tied, chained or otherwise immobilised prisoner, creating the sensation of drowning. The technique is generally associated with torture, as it can cause extreme pain, damage to lungs and even brain damage due to oxygen deprivation. The Obama administration banned the use of waterboarding in January 2009.

position the EU and its member states have taken on the matter, as it is relevant to any assessment of transatlantic counterterrorism cooperation.

1. What is targeted killing?

According to the US-based international relations expert, Steven David, “targeted killing is the intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval”.³ Swiss international law expert Nils Melzer has worked out five criteria to define targeted killings:

- there is a use of lethal force;
- the killing is intentional, premeditated and deliberate;
- the target is an individually selected person (unlike unspecified collective targets);
- there has been no physical custody or due process before the killing;
- and, last, it must be carried out by a state, or an actor that is subject to international law.⁴

The act of targeting an individual has been a warfare tactic used as long as there has been war. But only in the last decade have these tactics been carried out systematically, and have some proponents like Israel made them an official government policy. Most of the current uses of targeted killing are directed against suspected terrorists.

2. The US targeted killing policy in Pakistan

In 2001, the US Congress authorised the use of all necessary and appropriate force against all nations, organisations and persons that the president determined to have specific connections to the 11 September terrorist attacks. This proviso is contained in the Authorisation for Use of Military Force (AUMF) Act.⁵ A domestic law then gave the US government a free pass to fight everyone associated with terrorism. This is supposedly the domestic legal basis for the targeted killing programmes US authorities have since been carrying out.

The US has adopted two targeted killing programmes, only one of which is openly admitted as an official policy. This is the Predator drone programme operated by the US Air force in the war zones of Afghanistan and Iraq (where the Predator is the most commonly used armed type of UAV, together with the Reaper which is a derivative of the Predator).⁶

The other Predator drone programme is operated by the Central Intelligence Agency (CIA), which has permission to kill al-Qaeda members virtually anywhere. There have

³ Steven R. David, “Israel’s Policy of Targeted Killing”, in *Ethics & International Affairs*, Vol. 17, No 1 (March 2003), p. 111-126, at p. 112, <http://www.ukrainianstudies.uottawa.ca/pdf/david%202003.pdf>.

⁴ Nils Melzer, *Targeted Killing in International Law*, Oxford, Oxford University Press, 2008.

⁵ US Congress, *Authorization for Use of Military Force* (S.J. RES. 23), 107th Congress, 18 September 2001, <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>.

⁶ Michael Elliot, “Where Precision is the Aim: Locating the Targeted Killing Policies of the United States and Israel within IHL”, in *Canadian Yearbook of International Law*, Vol. 48, (2009), p. 99-160.

been known cases of CIA-operated drone attacks in Somalia, Yemen and above all Pakistan.⁷ The CIA drones are remote-controlled by operators on the ground in the Langley Air Force Base in Virginia, and for the Pakistan attacks they depart from bases in Afghanistan near the Pakistan border, and some even from a secret base in Pakistan.⁸ More CIA drone bases are being built on the Arabian peninsula, in Ethiopia and the Seychelles according to diplomatic cable leaks.⁹

Even though the CIA has never given any official confirmation of using this tactic, it is an open secret that the agency uses Predator-type drones.¹⁰ A fact that has also been somewhat casually confirmed by ex-CIA boss and current Secretary of Defence Leon Panetta, who once said of the Predator programme in Pakistan that “it’s the only game in town”.¹¹ Very recently the Obama administration has briefly confirmed that al-Qaeda affiliates are being targeted with drones in the Federally Administrated Tribal Area (FATA), in north-western Pakistan during a Youtube conversation of the president with internet users. Not many details were given, nor was the role of the CIA mentioned.¹²

On 5 March 2012 the Obama administration, in the person of US Attorney General Eric Holder, gave a speech on the legal rationale of targeting US civilians that cooperate with al-Qaeda. This speech came in response to the polemic around the targeted killing of US citizen Anwar al-Awlaki in Yemen on 30 September 2011.¹³ Even though this is a step forward towards more transparency and acknowledgement of targeted killing, no legal rationale behind the CIA strikes in Pakistan on non-US citizens has been offered, nor is there an official policy that specifies the rules governing the CIA’s use of drone strikes. With the wording “I cannot discuss or confirm any particular programme or operation”, Holder’s speech was a shallow attempt at defending a policy the US is still not willing to talk about openly.¹⁴

⁷ Richard Murphy and Afsheen John Radsan, “Due Process and Targeted Killing of Terrorists”, in *Cardozo Law Review*, Vol. 31, No. 2 (2009), p. 405-450.

⁸ K. Alan Kronstadt, “Pakistan, Key Current Issues and Developments”, in *CRS Report for Congress*, No. R41307 (1 June 2010), <http://www.fas.org/sgp/crs/row/R41307.pdf>.

⁹ Craig Whitlock and Greg Miller, “US Assembling Secret Drone Bases in Africa, Arabian Peninsula, Officials Say”, in *The Washington Post*, 21 September 2011, http://www.washingtonpost.com/world/national-security/us-building-secret-drone-bases-in-africa-arabian-peninsula-officials-say/2011/09/20/gIQAJ8rOjK_story.html.

¹⁰ In response to the Freedom of Information Act litigation where the American Civil Liberties Union sought the legal basis for alleged CIA targeted killing, the CIA says it cannot confirm nor deny the existence of any records because that information is protected and classified from disclosure. Letter available at <http://www.aclu.org/national-security/predator-drone-foia-cia-letter-refusing-confirm-or-deny-existence-records>.

¹¹ “U.S. airstrikes in Pakistan called ‘very effective’”, in *CNN*, 18 May 2009, <http://edition.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/>.

¹² During “Google+ Hangout” virtual interviews, internet users were able to ask questions to president Obama. See *President Obama’s Google+ Hangout*, in the White House website, 30 January 2012, <http://www.whitehouse.gov/photos-and-video/video/2012/01/30/president-obama-s-google-hangout>.

¹³ US Dept. of Justice, *Attorney General Eric Holder Speaks at Northwestern University School of Law*, Chicago, 5 March 2012, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

¹⁴ *Ibidem*.

2.1. The drones attacks in Pakistan: some figures

The US military is allowed to venture occasionally into Pakistani airspace to pursue militants, but the Pakistani government has to be notified first and give its permission.¹⁵ They need this permission because there is a “no boots on the ground” policy in Pakistan, in keeping with the limitations imposed by the principle of sovereignty. Most experts assume a clear distinction between CIA-operated and military-operated drone attacks, although there are some that dispute such an assumption.¹⁶ Certainly not much is known of these operations from official sources. For one, it is not even clear whether the CIA owns the Predators it is using, or whether it uses the US Air Force’s drones.¹⁷

The drone operations in Pakistan, however, are mostly carried out by the CIA. Contrary to the USAF intrusions into Pakistan, CIA operations are covert operations, of which the Pakistani government is less informed and for which permission is not requested. In April 2011 the CIA promised to inform the Pakistani government when there would be a strike in which more than twenty militants might die.¹⁸ Such bigger strikes are known as *signature strikes*. A group of men is targeted because they are believed to be militants just through their association with terrorists groups, yet their identity is not always known. Most CIA attacks are signature strikes. Where known senior terrorist leaders are targeted, one speaks of *personality strikes*.

No significant information about drone strike casualties is confirmed by the US Departments of State and of Defence because much of it is classified. According to statistic data provided by the non-partisan New America Foundation (NAF), which collects and analyses numbers of drone attacks, between 1,667 and 2,614 individuals have been killed in Pakistan by 277 drone attacks since 2004. The Bureau of Investigative Journalism speaks of an even higher number, estimating the casualties between 2,413-3,058.¹⁹ Approximately 20 percent of the fatalities were non-militant, according to the NAF²⁰, which is in stark contrast with Obama administration Chief counterterrorism advisor John Brennan’s claim in July 2011 that there has not been a single collateral civilian death in Pakistan since August 2010.²¹ The US also carries out

¹⁵ Noah Shachtman, “US Military Joins CIA’s Drone War in Pakistan”, in *Wired*, 10 December 2009, <http://www.wired.com/dangerroom/2009/12/us-military-joins-cias-drone-war-in-pakistan/>.

¹⁶ For instance, Mary Ellen O’Connell, “Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009”, in *Notre Dame Law School Legal Studies Research Paper*, No. 09-43 (July 2010), p. 26, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144.

¹⁷ Hillel Ofek, “The Tortured Logic of Obama’s Drone War”, in *The New Atlantis*, No. 27 (Spring 2010), p. 35-44, <http://www.thenewatlantis.com/publications/the-tortured-logic-of-obamas-drone-war>.

¹⁸ Adam Entous, Siobhan Gorman and Julian E. Barnes, “US Tightens Drone Rules”, in *The Wall Street Journal*, 4 November 2011, <http://online.wsj.com/article/SB10001424052970204621904577013982672973836.html>.

¹⁹ David Pegg, “Drone statistics visualised”, in *The Bureau of Investigative Journalism*, 10 August 2011, <http://www.thebureauinvestigates.com/2011/08/10/resources-and-graphs>.

²⁰ Determining who is militant and who is not is based on the press accounts and military statistics in which fatalities are estimated as militants. More numbers at *The Year of the Drone. An Analysis of US Drone Strikes in Pakistan, 2004-2012*, in the New America Foundation website, <http://counterterrorism.newamerica.net/drones>.

²¹ Chris Woods, “US Claims of ‘No Civilian Deaths’ Are Untrue”, in *The Bureau of Investigative Journalism*, 18 July 2011, <http://www.thebureauinvestigates.com/2011/07/18/washingtons-untrue-claims-no-civilian-deaths-in-pakistan-drone-strikes>.

an innumerable amount of non-lethal attacks. Most of them make no casualties; sometimes the operation just fails or the drone crashes. Of the 581 militants reportedly killed in 2010, only thirteen were considered “high-value” targets²², falling into the category of “personality strikes”. The remainder were signature strikes, where no high-level militants died.

2.2. Effectiveness of targeted killing as a counterterrorism policy

As the Obama administration has massively expanded the use of drones, with an average of one strike every four days, targeted killing has apparently become a key element of US counterterrorism and counterinsurgency operations in both Pakistan and Afghanistan.²³ The massive use of drone strikes seems to imply that they are effective, and yet this is subject to dispute. As most of the targeted militants are comparable to foot soldiers, the question arises whether drone strikes actually curb their operations and, even if they do, whether the targets can really be considered such a threat that they should be struck individually and at the high costs that the use of drones implies.

When questioning the effectiveness of targeted killing, it is necessary, in the first place, to make a distinction between *counterterrorism* and *counterinsurgency*, since they are two different policies and imply different strategies. This difference often means that what can be effective and useful as a counterterrorism tactic can be harmful from a counterinsurgency perspective.

One counterproductive effect of targeted killings is that innocents often die when a militant is targeted. As *New York Times* reporters David Kilcullen and Andrew McDonald Exum argue, “every one of these dead noncombatants represents an alienated family, a new desire for revenge”.²⁴ Clearly, such an outcome does not correspond to a good counterinsurgency strategy, since it may spur militant recruitment among those angered by the attack’s “collateral damage” and create more insurgents in the long run. Unsurprisingly, the drone strikes in Pakistan are highly unpopular and cause a lot of fear among the population. Such fear turns into huge animosity against the United States and its cooperation with the Pakistani government. Public surveys conducted in 2011 in Pakistan by the Pew Research Center, a non-partisan Washington based think tank, say that only twelve percent have a favourable opinion of the United States, the lowest point in nearly a decade, and of those who know about the drone strikes, a staggering 97 percent say they are a bad thing.²⁵ Regardless of whether targeted killing is or is not a good counterterrorism tactic, it remains at high risk of backlash in theatres where counterinsurgency is also taking place.

²² Greg Miller, “Increased US Drone Strikes in Pakistan Killing Few High-Value Militants”, in *The Washington Post*, 21 February 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>.

²³ Peter Bergen and Katherine Tiedemann, “Washington’s Phantom War”, in *Foreign Affairs*, Vol. 90, No. 4 (July/August 2011), p. 12-18.

²⁴ David Kilcullen and Andrew McDonald Exum, “Death From Above, Outrage Down Below”, in *The New York Times*, 17 March 2009, www.nytimes.com/2009/05/17/opinion/17exum.html.

²⁵ Pew Research Center, “Support for Campaign Against Extremists Wanes. U.S. Image in Pakistan Falls No Further Following bin Laden Killing”, in *Pew Research Center’s Global Attitudes Project*, 21 June 2011, <http://www.pewglobal.org/2011/06/21/chapter-3-death-of-bin-laden-and-the-battle-against-extremists>.

Yet many in the US defend the use of targeted killing as effective. International law expert W. Jason Fisher provides four reasons why it is an effective practice. First, targeted killing prevents terrorist attacks by eliminating those who commit and plan them. Second, it removes leaders, and even though there is succession, new leaders are likely to be less skilled and experienced than their predecessors, or at least will need some time before reaching the same level of experience. Third, the constant threat of being under attack reduces their strike capabilities. Fourth, the attacks can serve as a deterrent for followers, who have the prospect of constantly having to hide and the danger of dying in a drone attack themselves. This way new insurgents might be less eager to join the terrorist network.²⁶ Brookings Institution research fellow Daniel Byman also makes the point that the attacks force an enemy to concentrate on defence rather than offence.²⁷

These might be valid points, but killing people does not necessarily kill their ideology. In fact, it can even plant the seed for a revival of ideology-driven terrorism, with the result that the positive results targeted killings achieve in the short term might be reversed in the long term. Since the general goal of targeted killing is to end terrorist attacks all together, it is debatable whether they can be considered effective.

2.3. Are there any alternatives to targeted killing?

To fight the insurgency in Afghanistan, the US has built up an extensive relationship with Pakistan, the territory across the border that provides safe havens which Afghan insurgents use for recovering, reorganizing and planning. Besides training the Pakistan's Frontier Corps²⁸, the US supports Pakistan financially so that it can set up counterinsurgency programmes itself²⁹, and backs the civil society and civil government in order to reduce the appeal of insurgents and terrorists in the indigenous population.³⁰ In the eight fiscal years between 2002 and 2010, the US has appropriated over 20.73 billion dollars in financial aid to Pakistan, of which more than two thirds has gone to security-related aid. Most of it has been disbursed in the form of the Coalition Support Funds (CSF), a programme which reimburses Pakistan for the military operations that are conducted against militant groups along its border.³¹ Due to a lack of transparency by the Pakistani Army, however, the US and Pakistani governments

²⁶ W. Jason Fisher, "Targeted killing, Norms and International Law", in *Columbia Journal of Transnational Law*, Vol. 45, No. 3 (2007), p. 711-758.

²⁷ Daniel Byman, "Do Targeted Killings Work?", in *Foreign Affairs*, Vol. 85, No. 2 (March/April 2006), p. 95-111.

²⁸ The frontier corps is used mostly for military operations against insurgents in the Federally Administered Tribal Areas (FATA).

²⁹ In 2009, Congress established two new funds - the Pakistan Counterinsurgency Fund (PCF) within the Defence Department appropriations and the Pakistan Counterinsurgency Capability Fund (PCCF) within the State-Foreign Operations Appropriations - to build Pakistan's counterinsurgency capabilities. Susan B. Epstein and K. Alan Kronstadt, "Pakistan: US Foreign Assistance", in *CRS Report for Congress*, No. R41856 (28 July 2011), <http://www.fas.org/sgp/crs/row/R41856.pdf>.

³⁰ David Kilcullen and Andrew McDonald Exum, "Death From Above, Outrage Down Below", *cit.*

³¹ Colin Cookman, Brian Katulis and Caroline Wadhams, *The Limits of U.S. Assistance to Pakistan*, in the Centre for American Progress website, July 2011, http://www.americanprogress.org/issues/2011/07/pdf/pakistan_aid.pdf.

are unable to audit the expenses of the CSF properly, with corruption, mismanagement and waste of funds being the natural consequence.³²

The US has tried to extend the scope of aid to Pakistani civil society beyond the focus on security, with the approval by Congress of the Kerry-Lugar-Berman bill, also known as the Enhanced Partnership with Pakistan Act (EPPA). The EPPA focuses on improving the economic and political environment in Pakistan and enhancing Pakistani governance capabilities. The EPPA authorises 1.5 billion dollars to be spent between 2010 and 2014.³³

Seth G. Jones and Martin C. Libicki from RAND Corporation argue, “the U.S. military can play a critical role in building indigenous capacity but should generally resist being drawn into combat operations in Muslim societies, since its presence is likely to increase terrorist recruitment.”³⁴ Yet the administration persists in using targeted killing in Pakistan, apparently because the US government believe that it has few alternatives. The result is that all the efforts put into development aid and security aid might be in vain because of the anti-American sentiment created by the drone strikes.

In sum, on the one hand the effectiveness of the drone strikes policy is questionable, while on the other hand simply standing on the sidelines and supporting the indigenous population to fight terrorists and militants is a risk America is not willing to take. Thus, there is the real chance that the US administration’s reliance on drone strikes might have engendered a vicious circle, as the targeted killings do weaken the militants but at the same time can create the conditions for new recruitments and broader support for the militants’ stated goals.

3. Legal assessment of targeted killing

3.1. How do attacks get approved in the US?

The exact details on how CIA-run attacks are approved by the US government are unknown.³⁵ According to investigative journalists Jane Mayer and Dana Priest³⁶, former president George W. Bush handed trigger authority to the head of the CIA counterterrorism centre. This means that the decision on when to fire is not made by elected officials, but by the intelligence service. The CIA, not being one of the armed forces, has the advantage of not being subject to the laws of war, unlike US troops who are restricted in their actions and have to comply with the laws of armed conflict. The CIA has its own rules of engagement, which are classified. The White House is usually notified immediately after signature strikes take place.³⁷ On the decision as to who may

³² Ibidem.

³³ Susan B. Epstein and K. Alan Kronstadt, “Pakistan: US Foreign Assistance”, *cit.*

³⁴ Seth G. Jones, Martin C. Libicki, *How Terrorist Groups End. Lessons for Countering Al Qa’ida*, Santa Monica, Rand Corporation, 2008, p. xvi, <http://www.rand.org/pubs/monographs/MG741-1.html>.

³⁵ Richard Murphy and Afsheen John Radsan, “Due Process and Targeted Killing of Terrorists”, *cit.*

³⁶ Jane Mayer, *The Dark Side. The Inside Story of How the War on Terror Turned Into a War on American Ideals*, New York, Doubleday, 2008. Dana Priest and William M. Arkin, *Top Secret America. The Rise of the New American Security State*, New York [etc.], Little Brown, 2011.

³⁷ Adam Entous, Siobhan Gorman and Julian E. Barnes, “US Tightens Drone Rules”, *cit.*

be killed in personality strikes, a targeting list is prepared by the CIA, which is signed by the president. This list has however not been disclosed, nor has the CIA shed light on the criteria upon which it relies to put certain individuals on the list.³⁸ For signature strikes, no permission is requested at all. Not much has changed after the handover of power from the Bush to the Obama administration regarding the CIA's role in carrying out the attacks.³⁹

3.2. Main legal issues

Even though the Obama administration, in the person of State Department legal advisor Harold Hongju Koh, has stated that the US's targeted killing practice complies with all applicable law⁴⁰, there is a lively debate in the academic world whether that statement is true. An overview of the main controversial issues is given below. One problem concerns the definition of the status of terrorists and the framing of the conflict, which relates to the issue whether or not suspected terrorists are lawful targets. There is also the problem of sovereignty and the violation of the territorial integrity of the countries where the targeted killing takes place. And lastly there is the problem of the covert role of the CIA.

3.2.1. Framework and status of terrorists

The most complex and discussed issue concerns the framing of the context in which the use of targeted killing is advocated as necessary and lawful. How the conflict is framed matters a great deal for legitimacy. On 20 September 2001 US President Bush introduced the concept of a "war on terror" in response to the 11 September attacks, thereby framing actions of and against terrorists in a war paradigm.⁴¹ His administration referred to terrorists as "enemy combatants", a term loosely related to the concept of combatants in International Humanitarian Law (IHL). According to IHL there are no constraints in a war against combatants except those stemming from IHL. There is no need to establish whether the combatants have engaged in harmful conduct before killing them; the association with the enemy is enough.⁴² When the Bush administration introduced the status of "enemy combatant", it took over part of the IHL interpretation of combatant, in which terrorists would not be prosecuted for their crimes, but killed as combatants. Yet making them "enemy" combatants was a justification for the Bush administration to deny terrorists Prisoner of War (POW) status and other rights to which combatants are entitled.

³⁸ Greg Bruno, "US Drone Activities in Pakistan", in *CFR Backgrounders*, 19 July 2009, <http://www.cfr.org/pakistan/us-drone-activities-pakistan/p22659>.

³⁹ Jane Mayer, "The Predator War. What Are the Risks of the CIA's Covert Drone Programme?", in *The New Yorker*, 26 October 2009, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

⁴⁰ Harold Hongju Koh, legal adviser of US Department of State, *The Obama Administration and International Law*, speech at the annual meeting of the American Society of International Law, Washington, 25 March 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm>.

⁴¹ George W. Bush, *Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11*, 20 September 2001, <http://www.presidency.ucsb.edu/ws/index.php?pid=64731>.

⁴² Jonathan Schonsheck, "Determining Moral Rectitude in Thwarting Suicide Terrorist Attacks: Moral Terra Incognita", in Steven P. Lee (ed.), *Intervention, Terrorism and Torture. Contemporary Challenges to Just War Theory*, Dordrecht, Springer, 2007, p. 155-170.

Both the war on terror and enemy combatants were political concepts with no legal significance. The Obama administration has stepped out of this terminology and has been careful not to use the expression “war on terror”, preferring to speak of an armed conflict with al-Qaeda, the Taliban, and associated forces.⁴³ But if “war on terror” is not a legal framework and “enemy combatant” is not a legal status, in what framework must this conflict then be placed, and what status should terrorists be ascribed according to IHL?

Since terrorist organisations cannot be considered as a party in an international armed conflict defined by IHL (such as a “war on terror”), they might be considered part of a non-international armed conflict. While al-Qaeda’s way of operating makes it debatable whether to define its members and affiliates as an armed group, the US Supreme Court, in the *Hamdan vs Rumsfeld* case, ruled that the US actually is in an armed conflict “not of an international character” with al-Qaeda in accordance with IHL.⁴⁴ The US participation in such armed conflict makes it an “internationalised non-international conflict”, arguably an awkward oxymoron, which is not officially outlined in IHL but is generally accepted in the academic world.⁴⁵

What this means for the status of terrorists in Pakistan is that they are not considered combatants under IHL, since the legal category of combatant does not apply in non-international conflicts, and they do not consequently enjoy the Prisoner of War (POW) status when captured.⁴⁶ Without the status of combatants, they should be treated as criminals for the criminal terrorist actions they execute, with a due process, but they may be targeted when they become a legitimate military threat as “Civilians Directly Participating in Hostilities” (DPH).⁴⁷ This is, incidentally, how Israeli Supreme Court President Aharon Barak ruled on the Israeli policy of targeted killing in the West Bank and Gaza Strip. He defined the targets of targeted killings as civilians directly participating in hostilities rather than combatants, meaning they cannot be targeted on the basis of membership in a terrorist organisation but must be assessed on a case-by-case basis. In this ruling, a criminal justice approach to prosecution is preferred, unless there is an immediate military threat.⁴⁸

But when does one take a direct part in hostilities? It is up to the states’ own interpretation to determine DPH, and these criteria are usually not made public.⁴⁹ As an actor driven by ideology, rather than a combatant who is no longer a legitimate military

⁴³ Harold Hongju Koh, *The Obama Administration and International Law*, cit.

⁴⁴ US Supreme Court, *Hamdan v. Rumsfeld* (548 U.S. 557), 2006, <http://www.law.cornell.edu/supct/html/05-184.ZS.html>.

⁴⁵ Hans-Peter Gasser, “Internationalized non-International Armed Conflict: Case Studies of Afghanistan, Kampuchea, and Lebanon”, in *American University Law Review*, Vol. 33, No. 145 (1983), p. 145-161, <http://www.wcl.american.edu/journal/lawrev/33/gasser.pdf>.

⁴⁶ International Committee of the Red Cross, *The Relevance of IHL in the Context of Terrorism*, 1 January 2011, <http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm>.

⁴⁷ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under IHL*, Geneva, International Committee of the Red Cross, May 2009, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

⁴⁸ Israel High Court of Justice, *The Public Committee against Torture in Israel et al. v. Government of Israel et al.* (HCJ 769/02), 11 December 2005, <http://www.icj.org/IMG/Israel-TargetedKilling.pdf>.

⁴⁹ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under IHL*, cit.

target once he takes off his uniform, a terrorist - the US might argue - is always taking a direct part in hostilities, and therefore he/she is always a legitimate target.

In 2009 the International Committee of the Red Cross (ICRC) issued an interpretive guide on "Direct Participation in Hostilities", saying that members of an armed group who have a continuous combat function may be targeted in all places at all times.⁵⁰ Even though this seems to be an expansion of the permission to target terrorists, this also means that mere membership in a terrorist group is not enough to be considered a legitimate military target. The targets must possess a combat function. Economic and political support and capacity-building are not considered criteria for direct participation in hostilities. When such criteria are not met, states must use law enforcement rather than military action. But these are just suggestions of a legally non-binding nature from the ICRC. As recalled above, states retain the right to determine DPH.⁵¹

The criteria used by the US to determine whether a terrorist is directly participating in hostilities are not known, nor is it known how the US determines who is a threat and must therefore be targeted. Apart from the list mentioned above which contains the targets for personality strikes which have most likely been properly assessed beforehand, it is not clear how the targets for signature strikes are identified. Mayer and several others speak of informants on the ground and images of spying drones as the sole basis on which the decision on whom to kill is made.⁵² In these terms, the US is highly unlikely to be able to verify the function of the terrorists before sending in a drone. There have been incidents of targeted civilians who were personal enemies of the informants, and others who did not constitute a legitimate military threat to the US.⁵³

3.2.2. Sovereignty versus self-defence

The US' use of targeted killing also generates much discussion concerning possible violations of another state's sovereignty. Military action by the US within territories such as Afghanistan or Iraq is generally recognised as armed conflict, but targeted killing operations in Pakistan lie in a grey area. Pakistan can be seen as a legitimate battlefield, since an internationalised non-international armed conflict against al-Qaeda is taking place within its borders. Yet in this type of conflict, armed attacks may be carried out only in the territory of a "neutral" state if that state has given its permission, or when the neutral state refuses to prevent belligerent forces from using its territory and acts as a safe haven.⁵⁴ Thus, in theory, the US needs Pakistan's approval to operate in its territory. While the Pakistani government is said to provide the US with unofficial assistance to carry out Predator attacks, and while it is whispered that the US and Pakistan reached a quiet agreement in 2008 to allow for more UAV strikes⁵⁵,

⁵⁰ Ibidem.

⁵¹ Ibidem.

⁵² Jane Mayer, "The Predator War. What Are the Risks of the CIA's Covert Drone Programme?", *cit.*

⁵³ Ibidem.

⁵⁴ David W. Glazier, *Rise of the Drones II: Examining the Legality of Unmanned Targeting*, Hearing before the Subcommittee on National Security and Foreign Affairs of the Committee on Oversight and Government Reform, United States House of Representatives, 28 April 2010, http://www.fas.org/irp/congress/2010_hr/drones2.pdf.

⁵⁵ K. Alan Kronstadt, "Pakistan, Key Current Issues and Developments", *cit.*

Pakistani authorities have always publicly protested against the use of drones, claiming that it amounts to a violation of their country's sovereignty.⁵⁶ They do so out of concern that the public opinion, which is very negative about American interference in Pakistan, might turn against the government.

According to Article 2(4) of the UN Charter⁵⁷, which states that UN members should refrain from the use of force against the territorial integrity or political independence of any other state, Pakistan is in its right to claim that US targeted killing operations in Pakistan amount to a sovereignty breach. Yet nations can also appeal to Article 51 of the UN Charter, granting a state the right to self-defence⁵⁸, when the neutral state fails to curb activities in its own territory directed against another state. While Article 51 surpasses Article 2(4) with the wording "Nothing in the present Charter [then, not even Article 2(4)] shall impair the inherent right of individual or collective self-defence", the validity of the right to self-defence is highly debatable in the case of "anticipatory self-defence", which is used by the US to legitimise the use of drone strikes in Pakistan. Opponents of this interpretation, following the wording of Article 51, argue that force is only lawful when an attack actually occurs, or is obviously imminent, while supporters claim that the continuing existence of a specific threat is ground enough for the use of anticipatory self-defence.⁵⁹ However that may be, an attack in anticipatory self-defence may only be launched against a legitimate military threat, meaning a combatant, or a civilian taking a direct part in hostilities⁶⁰. Here we come across the same difficulties relating to what criteria should be used to determine direct participation in hostilities, since states still have a right to decide that themselves.

3.2.3. *The role of the CIA*

A third, particularly controversial, issue concerns the role of the CIA in targeted killings. The use of combat drones by the CIA is different from the use of combat drones by the US military, since the latter is overt and governed by the laws of war. CIA agents, on the contrary, even if they are employed by the US government or are in service with the US armed forces, remain civilians. This makes them civilians participating in hostilities rather than combatants, whereby they do not abide by the laws of war.⁶¹ With these

⁵⁶ Pakistan Ministry of Foreign Affairs, *Drone Attacks are a Violation of Pakistan's Sovereignty* (PR. No. 128/2009), 27 March 2009, http://www.mofa.gov.pk/Press_Releases/2009/March/PR_128_09.htm.

⁵⁷ Article 2(4): "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

⁵⁸ Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

⁵⁹ Nils Melzer, *Targeted Killing in International Law*, *cit.*

⁶⁰ First Additional Protocol to the Geneva Conventions, Art 51 (3): "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities".

⁶¹ Philip Alston, *Study on Targeted Killings* (A/HRC/14/24/Add.6), Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions to the UN Human Rights Council, 28 May 2010, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

covert operations there are also possible violations of Human Rights in addition to violations of IHL, where the CIA may be violating the right to life.

Being government officials, their actions should be politically controlled, but Congress has nothing to say about the CIA's use of targeted killing, nor does the Executive branch discuss the details of the CIA programme and the agency's rules of engagement.⁶² There is no exact knowledge of how targeting decisions are made and what body of law the agency relies on in such an undertaking. It is nonetheless known that the CIA is obliged to inform the Senate Intelligence Committee within twenty-four hours after a strike takes place of the details of the strike, including the location, the target and the results.⁶³ Yet the Senate Committee has no authority to stop a drone strike before it is made. Actually, no congressional approval is sought - and will most likely not be required anytime soon - to authorise and supervise the drone strikes. In sum, there is no democratic deliberation on targeted killing. Under the presidential executive order 12333 of 1981, the US government is even legally entitled to deny the existence of covert operations.⁶⁴ In this way the Executive branch holds all the information and decisions and there is no supervision from the legislative and judicial branch.

From the above it is clear that the drone operations do not have public approval from democratically represented officials, and therefore lack accountability. While there is no major public outcry in the US on this tactic, several NGOs such as the American Civil Liberties Union (ACLU) are inquiring on the legality and transparency of this tactic. The CIA, for its part, neither confirms nor denies the existence of any records, recalling that this information is classified and therefore protected from disclosure.

Such a transparency deficit is no minor thing, since there is no democratic oversight that can keep the operations within legal and moral boundaries. Without transparency, the operations do not have the legitimacy necessary to make them sustainable in the long run, since US public opinion might grow tired of indefinitely accepting a highly controversial practice.⁶⁵ As mentioned above, the US is gradually letting out more information and moving towards more transparency, as with the speech of Attorney General Holder on the legal rationale behind targeting US-citizens, but this exposed only the tip of the targeted killing iceberg and did not justify the CIA's signature strikes in Pakistan.⁶⁶ In spite of the argument by Koh, the State Department legal advisor, that drone strikes do not break any applicable law⁶⁷, it would be better if these operations were supported by law, not just allowed because of the absence of an explicit prohibition.

⁶² American Civil Liberties Union, *Predator Drone FOIA-CIA Letter Refusing to Confirm or Deny Existence of Records*, 9 March 2010, <http://www.aclu.org/national-security/predator-drone-foia-cia-letter-refusing-confirm-or-deny-existence-records>.

⁶³ Greg Miller, "Under Obama an Emerging Global Apparatus for Drone Killing", in *The Washington Post*, 28 December 2011, http://www.washingtonpost.com/national/national-security/under-obama-an-emerging-global-apparatus-for-drone-killing/2011/12/13/gIqANPdILP_story.html.

⁶⁴ Executive Order 12333 of 1981, <http://www.archives.gov/federal-register/codification/executive-order/12333.html>.

⁶⁵ Daniel Byman, "Do Targeted Killings Work?", *cit.*

⁶⁶ US Dept. of Justice, *Attorney General Eric Holder Speaks at Northwestern University School of Law*, *cit.*

⁶⁷ Harold Hongju Koh, *The Obama Administration and International Law*, *cit.*

4. The EU and the US drone strike policy

In the US there is no widespread and sustained opposition to the drones strikes, nor is there any strong demand by the public opinion for clarifying the legal framework in which the strikes take place or for bringing them under democratic control. If that is the way things stand in America, what about Europe? What does the EU have to say on this controversial practice?

4.1. Targeted killing in Pakistan and the EU institutions

When the United States and the European Union committed to cooperating more closely in the fight against terrorism in 2004, they took special care to emphasise that they would act in keeping with the rule of law and international law.⁶⁸ Accordingly, the EU has an obligation in this engagement to examine those practices - including drone strikes - that raise serious concerns as to their compatibility with international law, and to ask the US for more information about the specifics of targeted killing.

Members of the European Parliament (MEPs) have reminded the European Commission of this obligation with parliamentary questions⁶⁹, requesting the EU to ask the US for the legal basis of this tactic. On 16 January 2012, a written declaration was issued by a group of MEPs urging the EU to commit to ensuring that states publish their criteria for combat drone operations, and in the event of unlawful killing, measures be taken against the perpetrators.⁷⁰

However, neither the European Commission in the form of the High Representative (who is also the Commission's Vice President) nor the Council have thus far released any statements on this subject. This is striking, as the Council has been quite vocal on the matter on other occasions, notably on the targeted killings carried out by Israel in the Occupied Palestinian Territories (OPT).

With reference to this, the Council of the European Union stated in 2004 that "The European Union has consistently opposed extra-judicial killings. [...] The EU recognises Israel's right to protect its citizens against terrorist attacks", but actions of this type are not only unlawful, they are not conducive to lowering tensions.⁷¹ It is remarkable that the word "extrajudicial killings" is used here by the EU, instead of targeted killing, even though the use of targeted killing by the US stems from the Israeli use and is very similar to it. In fact, when comparing the Israeli and the US practices, the Israeli use of targeted killing actually has more legitimacy, at least in terms of

⁶⁸ Council of the European Union, *EU-U.S. Declaration on Combating Terrorism*, cit.

⁶⁹ Nessa Childers, *Question for written answer to the Commission, Rule 117, on Drone Attacks* (E-009639/2011), 26 October 2011. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-009639+0+DOC+XML+V0//EN>.

⁷⁰ Sabine Lösing, Sonia Alfano, Ana Gomes, Rui Tavares, *Written Declaration pursuant to Rule 123 of the Rules of Procedure on the use of drones for targeted killings* (PE480.095v01-00), 16 January 2012, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2BWDECL%2BP7-DCL-2012-0002%2B0%2BDOC%2BPDF%2BV0//EN>.

⁷¹ Council of the European Union, *Council Conclusions on Assassination of Sheikh Ahmed Yassin*, 2572nd Council meeting External Relations, Brussels, 22 March 2004 (7383/04 Presse 80), <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/04/80>.

democratic control of the practice. Israeli targeted killing operations are far more exposed to public scrutiny and democratic approval than the US ones, as each case is individually authorised by public servants and even requires a preliminary attempt to capture the targeted individual, a process that seems totally absent in the US “version” of targeted killing.⁷²

When confronted with this discrepancy, EU officials vaguely reply that the European Council has been in an ongoing debate with the US about how to forge a durable framework to combat terrorism within the rule of law since 2004.⁷³ Yet, no opinions are expressed on the legality of the practice, and no statements have been made by EU officials on future developments. Apparently questions are being asked on the lack of transparency of this tactic, but no publicly known results have so far been shown.

4.2. Targeted killing in Pakistan and the member states

It is not only the EU institutions that have failed to make their voice heard on the issue of drone strikes. The member states have generally followed a similar pattern. Nonetheless, while very few words have been uttered by individual countries, the positions of at least some EU member states can be gauged by their actions.

Germany, for instance, has been refusing to provide the US with intelligence that would lead to the killing of suspected terrorists since a 2010 drone attack in Pakistan killed a German citizen, who was an Islamist but no militant. The Germans have since agreed to provide the Americans with information “for intelligence purposes only” that can be used exclusively to arrest suspects, since the German government does not want to be perceived by the public opinion as being co-responsible for US targeted killings.⁷⁴

On the opposite end to Germany, one can perhaps put the United Kingdom. Although six British nationals having been killed by US drone strikes in Pakistan, the British government has continued to provide the US military and the CIA with support and intelligence. The Foreign Office has said in the past that it was “looking into the reports” of the killings, but so far none of these deaths have been investigated by UK authorities.⁷⁵ The UK is itself using armed drones in Afghanistan. Just like the US, the UK releases little information about the way in which these drones are used.⁷⁶

Clear-cut opinions on the US’ use of targeted killing have not been voiced by any of the member states. In spite of scant evidence, it is safe to say that member states’ sensitivity towards the issue of targeted killings varies considerably. This seems to

⁷² Daniel Byman, “Do Targeted Killings Work?”, *cit.*

⁷³ Interview by the author with EU officials who requested to remain anonymous, Brussels, 9 January 2012.

⁷⁴ Holger Stark, “Germany Limits Information Exchange with US Intelligence”, in *Der Spiegel*, 17 May 2011, <http://www.spiegel.de/international/germany/0,1518,762873,00.html>.

⁷⁵ Chris Cole, “Deaths of UK Nationals Must Be Investigated”, in *Drone Wars UK*, 20 November 2011, <http://dronewarsuk.wordpress.com/2011/11/20/deaths-of-uk-nationals-in-us-drone-strikes-must-be-investigated>. Duncan Gardham, “Drone Kills White al-Qaeda Pair in Pakistan Mountains”, in *The Telegraph*, 15 December 2010, <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/8204958/Drone-kills-white-al-Qaeda-pair-in-Pakistan-mountains.html>.

⁷⁶ Chris Cole, “Drone Wars Briefing. Examining the Growing Threat of Unmanned Warfare”, in *Drone Wars UK*, January 2012, <http://dronewarsuk.files.wordpress.com/2012/01/drone-wars-briefing-final2.pdf>.

have resulted in a sort of tacit agreement not to raise the issue, not only with the US but also within the EU.

4.3. Development and use of drones by EU member states

Apart from what the EU member states and the EU are saying (or rather not saying), it is important to look at how the EU and its member states have made limited use of drones themselves, and how they are developing an increasing interest in this particular kind of weapon.

Drones have for some time now been the new must-have item for armies all over the world, and the European member states, or at least the most resourceful and ambitious ones in military terms, do not want to be left behind. Their development and purchase of UAV have primarily intelligence, surveillance and reconnaissance purposes, but most of the acquired drones are also capable of carrying arms and targeting individuals.

The United Kingdom is currently the only EU member state with armed drones. Ten Reaper drones (the more advanced version of the Predator type) have been purchased from the United States since 2006 and five are currently deployed in Afghanistan. The other five are due to be operational in 2013.⁷⁷ The UK has used its Reapers for armed strikes in Afghanistan, but just like the US, there is very little information about the circumstances of UK drone strikes in Afghanistan. In total about 200 strikes have been carried out by the UK Royal Air Force (RAF) in Afghanistan. It is known that insurgents are also targeted, but numbers of casualties are very rarely given, and the Ministry of Defence claims to hold no records of insurgent casualties.⁷⁸ In a December 2010 visit to an Afghan military base, however, Prime Minister David Cameron said that more than 124 insurgents had been killed since the start of operations in 2008.⁷⁹ In March 2011 the RAF confirmed for the first time four civilian casualties inflicted by an RAF drone strike.⁸⁰

Although targeted killings by the UK might seem as controversial as the ones carried out by the US, it is crucial to recall that the UK drone strikes take place in Afghanistan - that is, an area in which the UK military has a legal justification to act. Thus, they are more comparable to the use of drones by the US military in Afghanistan, than to the CIA's covert use in Pakistan.

In 2009 France purchased from Israel three Harfang drones and has since deployed them in Afghanistan. The French government recently ordered one more Harfang to provide its troops in Afghanistan with more advanced intelligence assets. While existing

⁷⁷ Ibidem.

⁷⁸ Emma Slater, "UK to spend half a Billion on Lethal Drones by 2015", in *The Bureau of Investigative Journalism*, 21 November 2011, <http://www.thebureauinvestigates.com/2011/11/21/britains-growing-fleet-of-deadly-drones>.

⁷⁹ Robert Winnet, "British Troops 'Could Withdraw From Afghanistan Before Next Christmas'", in *The Telegraph*, 7 December 2010, <http://www.telegraph.co.uk/news/uknews/defence/8185561/British-troops-could-withdraw-from-Afghanistan-before-next-Christmas.html>.

⁸⁰ Nick Hopkins, "Afghan Civilians Killed by RAF Drone", in *The Guardian*, 5 July 2011, <http://www.guardian.co.uk/uk/2011/jul/05/afghanistan-raf-drone-civilian-deaths>.

French drones are unarmed, the next ones are unlikely to have the sole purpose of surveillance, and in all probability will be of the armed version.⁸¹

Germany leased three Heron UAV from Israel in 2009, and has recently revealed its own drone, the Euro Hawk surveillance drone, which cannot however carry arms. The German government plans to acquire five more Euro-Hawks in the near future. It has not expressed any wish to arm the drones.⁸²

Italy has bought six Reaper drones from the US. However, the drones are unarmed, as the US has so far allowed the sale of armed Reapers to the British only. At the moment, Italy's request to arm its Reapers - a request made during the intervention in Libya - has not made headway in Congress, which has to give the green light for the transaction to take place.⁸³

To conclude, the UAV technology is the object of increasing attention in Europe. The British and French governments have made the development of a joint UAV system one of the key items of their 2010 defence agreement. Dassault and BAE Systems, the French and British defence companies, are currently working on an UAV system called Telemos. Concomitantly, the German-French defence giant EADS, in which the Spanish government also has a share, is developing a further drone typology, the Talarion.⁸⁴

4.4. Explaining the EU's (non-)policy of silence

In light of the above, there are a number of possible reasons why the EU has kept silent on the US policy of targeted killings in Pakistan.

One interpretation is that it is an "eloquent" silence, in that EU member states prefer not to bother the US by questioning a practice which, however controversial for their values, is not considered fundamentally opposed to their interests. To a certain extent, this interpretation is persuasive, and yet it does not completely explain why the EU has on other occasions expressed itself quite critically against targeted killings, most notably those operated by Israeli forces against Palestinian militants in the West Bank and Gaza Strip.

Another interpretation of the EU's silence on the American use of targeted killing points to the lack of consensus among its member states. As we have seen, Germany refuses to provide any information that can lead to a targeted killing, while the UK is apparently

⁸¹ "Apres Harfang: France's Next High-End UAVs", in *Defense Industry Daily*, 16 January 2012, <http://www.defenseindustrydaily.com/Apres-Harfang-Frances-Next-High-End-UAV-06451>.

⁸² Simone Meyer, "Gigantischer Datenstaubsauger in 20.000 Meter Höhe", in *Die Welt*, 10 Oktober 2011, <http://www.welt.de/politik/deutschland/article13652332/Gigantischer-Datenstaubsauger-in-20-000-Meter-Hoehe.html>.

⁸³ Adam Entous and Julian E. Barnes, "U.S. Pursues Sale of Armed Drones", in *The Wall Street Journal*, 15 December 2010, <http://online.wsj.com/article/SB10001424052970204844504577098583174059746.html>.

⁸⁴ Giovanni De Briganti, "BAE Systems-Dassault Aviation Telemos Revives France's UAV Wars", in *Defense-Aerospace*, 16 June 2011, <http://www.defense-aerospace.com/cgi-bin/client/modele.pl?shop=dae&modele=feature&prod=126333&cat=5>.

an advocate of the use of drones for targeted killing itself (although only in Afghanistan's territory). In such a context, where some member states are willing to consider targeted killing methods while others do not desire this evolution at all, the EU has no incentive to forge a common position on US drone strikes in Pakistan.

Another possible reason for the EU's tacit approval of the US' targeted killing in Pakistan concerns the increasing European interest in UAV seen above. The ongoing struggle for the European drone market makes it difficult for European governments to criticise the US. With France and Italy attempting to arm their drones and the UK currently already using armed drones, they have no interest in criticising a tactic that they will be employing, or in the case of UK, are already employing, although in a legally less controversial manner.

Other EU countries have actually bought their own drones from the US, arguably a powerful disincentive to criticise the American's use of their drones. The US government, for its part, is comfortable with providing its European allies with drones so as to ease the burden on its own forces in Afghanistan.⁸⁵ The US is also hoping that the use of drones by the EU countries will pave the way for global standards, allowing drones to be used in all airspace.⁸⁶

Another reason why the EU is keeping its mouth shut is because it wants the insurgency in the tribal region on the border between Afghanistan and Pakistan to end. Since European forces are present in Afghanistan within the framework of the NATO-led International Security Assistance Force (ISAF), EU countries have their own interest in condoning these tactics. In addition, since they are not involved in any such operation, they cannot be accused of playing any role in targeted killing (according to this view, the Europeans are content with letting the US do the "dirty work"). Even though the CIA's use of targeted killings in Pakistan can hardly be defined as in keeping with IHL, as long as the tactic keeps balancing on the edge of illegitimacy and there is no considerable public outcry, there is no disadvantage for the EU to remain silent.

Does the EU's silence thus flow from its vested interests, or is it a consequence of its lack of vigour and decisiveness? From the above, we can tell that one realistic interpretation is that EU member states have deliberately decided not to talk about targeted killings in Pakistan because of their multiple interests in condoning the tactic. But it is as possible that the EU is simply reluctant to start any action on the US drone strikes out of lack of moral vigour. Were it to speak up and pose unpleasant questions to the US, then it would open a potentially acrimonious dispute with the US. The lack of consensus within the EU can also be added here. In this interpretation the Union is silent not because it has decided so, but because it is unable to forge a common position.

Even though the analysis of the US' targeted killing tactic makes it clear that it is a legally and morally controversial practice, it is possible that the EU finds the

⁸⁵ Adam Entous and Julian E. Barnes, "U.S. Pursues Sale of Armed Drones", *cit.*

⁸⁶ David Cronin, "Europe Plans Spies in the Skies", in *Inter Press Service News Agency*, 16 December 2011, <http://ipsnews.net/text/news.asp?idnews=49713>.

advantages of avoiding the subject to be greater than those of living up to its moral obligation of urging the US to comply with international law. This choice might, at best, be defined as prudent, but it could also result in a backlash. Apart from moral and legal considerations, addressing the issue could in fact benefit the EU. Since the UK is also employing targeted killing and other member states such as France and Italy seem eager to join the bandwagon of using armed drones, it would be useful for the EU to establish a framework, together with the US, in which these targeted killings are transparent, legal and effective in a counterterrorism strategy. Even if these are very uncomfortable issues to discuss, there are serious hiatuses in the US' unofficial policy of targeted killing, which might set precedents for EU member states. Since it does not seem like the US is about to reduce its use of drones in Pakistan, this is an issue that must be addressed sooner or later.

Conclusion

With the CIA killing insurgents with drones in Pakistan, the US is venturing into unknown legal, moral and political territory. The US keeps these operations shrouded with secrecy, as, according to domestic law, the US government has the right to deny the existence of CIA operations and is not obliged to release information to the public. Without any democratic approval from Congress possible, and no control by elected officials to keep the operations within moral and legal boundaries, the US policy of targeted killing in Pakistan suffers from a great deal of opacity.

International Humanitarian Law is rather vague on the situation the US finds itself in Pakistan, where insurgents are being fought on another neutral state's territory. Pakistan has not given permission to the US to fly frequently into its territory to kill its inhabitants, and the US justification of self-defence is highly debatable. Moreover, according to IHL, terrorists are not combatants in a legal sense, and may not be killed simply because of their association with the enemy. Instead, they are civilians directly participating in hostilities, meaning they are only a legitimate military threat when it is determined that they are participating directly in hostilities. The criteria to which terrorists need to correspond to be DPH are determined independently by states. The US ones are classified. This means that the only source that can be relied upon in assessing whether the target of a drone strike is a terrorist is the US government, which has no interest in exposing failures in the selection of targets.

In legal terms, the least that can be said about the practice of targeted killing is that is on the edge of legitimacy. The effectiveness of targeted killing is also subject to dispute. Even though targeted killing can be considered effective as a counterterrorism tactic, it is generally agreed that it can be counterproductive in the long term, especially if it is carried out in the same theatre where counterinsurgency is taking place.

To conclude, the international debate over CIA-run targeted killing in Pakistan has not produced a generally accepted opinion that it actually breaks laws, especially since there is too little information available to judge it properly. But it is certainly problematic. Whether or not the EU should condemn this practice is a difficult question to answer, but a critical voice would not be such a bad thing. Nevertheless, the EU has its reasons to keep its mouth shut. Some possible explanations concerning the EU's silence have

been offered. These are the mutual US and European interests in fighting the insurgency and terrorist groups in Afghanistan, the growing interest in armed drones by EU members, but also the reluctance to criticise the US on what EU member states do not see as a major issue. Last but not least, the apparent lack of consensus among EU member states also plays a role. The end result is that the EU has remained indecisive towards the use of targeted killing. It is doubtful whether the EU is actually following a deliberate policy of silence. Most likely, it merely refuses to discuss the subject out of pragmatic considerations, concluding it is better to avoid the subject than to question the legal issues at large, thus taking the easy way out.

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References

Books and Articles

Peter Bergen and Katherine Tiedemann, "Washington's Phantom War", in *Foreign Affairs*, Vol. 90, No. 4 (July/August 2011), p. 12-18.

Thomas J. Billitteri, "Drone Warfare, are Strikes by Unmanned Aircraft Ethical?", in *CQ Researcher*, Vol. 20, No. 28 (August 2010), p. 653-676,
http://www.asil.org/files/CQ_DroneWarfare.pdf

Greg Bruno, "US Drone Activities in Pakistan", in *CFR Backgrounders*, 19 July 2009,
<http://www.cfr.org/pakistan/us-drone-activities-pakistan/p22659>.

Daniel Byman, "Do Targeted Killings Work?", in *Foreign Affairs*, Vol. 85, No. 2 (March/April 2006), p. 95-111.

Chris Cole, "Drone Wars Briefing. Examining the Growing Threat of Unmanned Warfare", in *Drone Wars UK*, January 2012,
<http://dronewarsuk.files.wordpress.com/2012/01/drone-wars-briefing-final2.pdf>.

Steven R. David, "Israel's Policy of Targeted Killing", in *Ethics & International Affairs*, Vol. 17, No 1 (March 2003), p. 111-126,
<http://www.ukrainianstudies.uottawa.ca/pdf/david%202003.pdf>.

Giovanni De Briganti, "BAE Systems-Dassault Aviation Telemos Revives France's UAV Wars", in *Defense-Aerospace*, 16 June 2011, <http://www.defense-aerospace.com/cgi-bin/client/modele.pl?shop=dae&modele=feature&prod=126333&cat=5>.

Michael Elliot, "Where Precision is the Aim: Locating the Targeted Killing Policies of the United States and Israel within IHL", in *Canadian Yearbook of International Law*, Vol. 48, (2009), p. 99-160.

Susan B. Epstein and K. Alan Kronstadt, "Pakistan: US Foreign Assistance", in *CRS Report for Congress*, No. R41856 (28 July 2011),
<http://www.fas.org/sgp/crs/row/R41856.pdf>.

W. Jason Fisher, "Targeted killing, Norms and International Law", in *Columbia Journal of Transnational Law*, Vol. 45, No. 3 (2007), p. 711-758.

Hans-Peter Gasser, "Internationalized non-International Armed Conflict: Case Studies of Afghanistan, Kampuchea, and Lebanon", in *American University Law Review*, Vol. 33, No. 145 (1983), p. 145-161,
<http://www.wcl.american.edu/journal/lawrev/33/gasser.pdf>.

Seth G. Jones, Martin C. Libicki, *How Terrorist Groups End. Lessons for Countering Al Qa'ida*, Santa Monica, Rand Corporation, 2008, p. 18,
<http://www.rand.org/pubs/monographs/MG741-1.html>.

K. Alan Kronstadt, "Pakistan, Key Current Issues and Developments", in *CRS Report for Congress*, No. R41307 (1 June 2010), <http://www.fas.org/sgp/crs/row/R41307.pdf>.

Jane Mayer, *The Dark Side. The Inside Story of How the War on Terror Turned Into a War on American Ideals*, New York, Doubleday, 2008.

Nils Melzer, *Targeted Killing in International Law*, Oxford, Oxford University Press, 2008.

Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under IHL*, Geneva, International Committee of the Red Cross, May 2009, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

Richard Murphy and Afsheen John Radsan, "Due Process and Targeted Killing of Terrorists", in *Cardozo Law Review*, Vol. 31, No. 2 (2009), p. 405-450.

Sean D. Murphy, "The United States and the International Court of Justice: Coping with Antinomies", in Cesare P.R. Romano (ed.), *The Sword and the Scales. The United States and International Courts and Tribunals*, Cambridge, Cambridge University Press, 2009, p. 46-110, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1000391.

Mary Ellen O'Connell, "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009", in *Notre Dame Law School Legal Studies Research Paper*, No. 09-43 (July 2010), p. 26, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144.

Hillel Ofek, "The Tortured Logic of Obama's Drone War", in *The New Atlantis*, No. 27 (Spring 2010), p. 35-44, <http://www.thenewatlantis.com/publications/the-tortured-logic-of-obamas-drone-war>.

Dana Priest and William M. Arkin, *Top Secret America. The Rise of the New American Security State*, New York [etc.], Little Brown, 2011.

Jonathan Schonsheck, "Determining Moral Rectitude in Thwarting Suicide Terrorist Attacks: Moral Terra Incognita", in Steven P. Lee (ed.), *Intervention, Terrorism and Torture. Contemporary Challenges to Just War Theory*, Dordrecht, Springer, 2007, p. 155-170.

Naveed Ahmad Shinwari, *Understanding FATA. Vol. IV: Attitudes Towards Governance, Religion & Society in Pakistan's Federally Administered Tribal Areas*, Islamabad, Community Appraisal & Motivation Programma (CAMP), 2010, <http://www.understandingfata.org/files/Understanding-FATA-Vol-IV.pdf>.

Documents

Council of the European Union, *Council Conclusions on Assassination of Sheikh Ahmed Yassin*, 2572nd Council meeting External Relations, Brussels, 22 March 2004 (7383/04 Presse 80), <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/04/80>.

Council of the European Union, *EU-U.S. Declaration on Combating Terrorism* (10760/04 Presse 205), Dromoland Castle, 26 June 2004, http://www.consilium.europa.eu/uedocs/cmsUpload/10760EU_US26.06.04.pdf.

International Committee of the Red Cross, *The Relevance of IHL in the Context of Terrorism*, 1 January 2011, <http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm>.

Israel High Court of Justice, *The Public Committee against Torture in Israel et al. v. Government of Israel et al.* (HCJ 769/02), 11 December 2005, <http://www.icj.org/IMG/Israel-TargetedKilling.pdf>.

(UN Human Rights Council) Philip Alston, *Study on Targeted Killings* (A/HRC/14/24/Add.6), Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions to the UN Human Rights Council, 28 May 2010, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

1. United States

US Congress, *Authorization for Use of Military Force* (S.J. RES. 23), 107th Congress, 18 September 2001, <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>.

(US Congress) David W. Glazier, *Rise of the Drones II: Examining the Legality of Unmanned Targeting*, Hearing before the Subcommittee on National Security and Foreign Affairs of the Committee on Oversight and Government Reform, United States House of Representatives, 28 April 2010, http://www.fas.org/irp/congress/2010_hr/drones2.pdf.

US Dept. of Justice, *Attorney General Eric Holder Speaks at Northwestern University School of Law*, Chicago, 5 March 2012, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

(US Dept. of State) Harold Hongju Koh, *The Obama Administration and International Law*, speech at the annual meeting of the American Society of International Law, Washington, 25 March 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm>.

(US Presidency) George W. Bush, *Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11*, 20 September 2001, <http://www.presidency.ucsb.edu/ws/index.php?pid=64731>.

US Presidency, *Executive Order 12333: United States intelligence activities*, 4 December 1981, www.archives.gov/federal-register/codification/executive-order/12333.html.

US Supreme Court, *Hamdan v. Rumsfeld* (548 U.S. 557), 2006, <http://www.law.cornell.edu/supct/html/05-184.ZS.html>.



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