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LETHAL FORCE AND DRONES: THE HUMAN RIGHTS QUESTION

*Gloria Gaggioli **

1. Introduction¹

Drones are being used – and are likely to be increasingly used – in peacetime policing. For the time being, the types of activities State authorities conduct with drones in peacetime are mainly related to surveillance. The likelihood that drones could be armed to use force domestically in order to maintain or restore public security, law and order in the near future should however not be underestimated. This is even more so if one takes into account advances in technology and the fact that, today, drones come not only in the shape of large unmanned combat air vehicles (UCAV), but may be miniature aerial – and sometimes weaponized – systems. In the multifaceted fight against terrorism, armed drones have moreover been widely used against persons extraterritorially, including outside armed conflict situations. Even in armed conflicts, drones may be used – like in peacetime – to conduct law enforcement activities (e.g. to deal with riots or other forms of civilian unrest).

The rules on the conduct of hostilities provided for in international humanitarian law (IHL) do not apply outside armed conflict situations or (in the context of an armed conflict) outside hostilities. The use of lethal force by means of drones in such cases is governed exclusively by international human rights law (HRL) and its rules and standards for the use of force (hereafter the HR law enforcement paradigm). It is thus not surprising that the international community often calls on States using armed drones to do so in a way that complies with their international legal obligations, not only under the Charter of the United Nations and under IHL, but also under HRL.²

The practical and legal consequences of this position remain, however, unexplored. While the legal and humanitarian issues posed by drone strikes have been extensively examined under the lens of IHL, the issue of the potential conformity of drone strikes with the law enforcement paradigm has been overlooked. Beyond the issue of the extraterritorial application of HRL, can the use of force by drones (ever) respect the principles of absolute necessity and proportionality? How can an escalation of force procedure be applied in such situations? These are some of the key questions this article will address.

This chapter is divided into three parts. It first explores the various contexts in which the use of force by drones in law enforcement arises. Second, it recalls the legal requirements for the use of force derived from HRL, and more precisely the prohibition of arbitrary killing. Third, it analyzes whether the use of force by drones can comply with the HR law enforcement requirements, not only regarding the use of force as such, but also regarding obligations before

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¹ I would like to thank Jelena Pejić, Senior Legal Adviser at the ICRC, for the fascinating discussions we had on this topic and for her useful, thoughtful and inspiring comments on this article.

² See, e.g., *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* A/RES/68/178 (28 January 2014) paras 1 and 6 (s). *European Parliament Resolution on the Use of Armed Drones* 2014/2567(RSP) (25 February 2014) para F.

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and after the use of force. It also tackles briefly other indirect and less “visible” legal and policy issues that might emerge if drones are used to conduct law enforcement activities.

2. When Does the Human Rights Question Arise?

2.1. In Peacetime and Situations of Violence Not Reaching the Threshold of an Armed Conflict

As highlighted by Christof Heyns, UN Special Rapporteur on extrajudicial, summary or arbitrary executions: “The use of armed drones happen[s] in conflict and counterterrorism situations, but also increasingly in ordinary policing and law enforcement.”³

In certain developed countries, drones are presently used for a number of purposes in peacetime.⁴ They can perform highly advanced surveillance and can help to detect fires, collect data on suspected offenders or for relief personnel working in areas affected by natural disasters.⁵ Drones can also do border control and security operations. For instance, they are used along the US-Mexico border to detect and track drug smugglers and human traffickers.⁶ Drones can even do crowd-control. In May 2014, a South African company created a brand new unmanned aerial system which is able to shoot pepper spray and non-lethal paintballs to mark offenders. It can also employ strobe lights and on-board speakers to send verbal warnings.⁷ It was reported that Turkey purchased this “riot drone”.⁸

Media report that some 80 countries have some kind of drone capability, even if not many States resort yet to drones in peacetime policing. As technology evolves and becomes more affordable, the day where a number of State authorities will have and use this technology for maintaining and restoring peace, law and order might come sooner than later.

It cannot be ruled out either that drones able to project lethal or potentially lethal force might be used in the future for conducting law enforcement activities in peacetime or internal

³ Human Rights Council Holds Panel on Remotely Piloted Aircraft or Armed Drones in Counterterrorism and Military Operations. Panel of the Human Rights Council on Remotely Piloted Aircraft or Armed Drones in Counterterrorism and Military Operations (22 September 2014) <http://www.unog.ch/80256EDD006B9C2E/%28httpNewsByYear_en%29/BCE56ED914A46D40C1257D5B0038393F?OpenDocument> accessed 30 September 2014 (like all other internet references in this article).

⁴ ‘Law Enforcement Agencies Using Drones List Map’ *Governing the States and Localities* (16 January 2014) <<http://www.governing.com/gov-data/safety-justice/drones-state-local-law-enforcement-agencies-license-list.html>>.

⁵ Peter Maurer (Web Interview), *The Use of Armed Drones Must Comply with Laws* (10 May 2013) <<https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>>. Dan Roberts ‘FBI Admits Using Surveillance Drones over US Soil’ *The Guardian* (Washington, 19 June 2013) <<http://www.theguardian.com/world/2013/jun/19/fbi-drones-domestic-surveillance>>.

⁶ ‘Groups Concerned Over Arming of Domestic Drones’ (n 4). Aliya Sternstein, ‘Obama Requests Drone Surge for U.S.-Mexico Border’ *Defence One* (9 July 2014) <<http://www.defenseone.com/threats/2014/07/obama-requests-drone-surge-us-mexico-border/88303/>>.

⁷ ‘Riot Control Drone Armed with Paintballs and Pepper Spray Hits Market’ *RT* (19 June 2014) <<http://rt.com/news/167168-riot-control-pepper-spray-drone/>>.

⁸ ‘Turkey Cracks Down: Skunk Riot Drone Will Fire Paint and Pepper Balls’ *WorldTribune.com* (Ankara, 27 June 2014) <<http://www.worldtribune.com/2014/06/27/turkey-buys-skunk-riot-drone-payload-including-paint-pepper-balls/>>.

disturbances and tensions.⁹ This might not be overly surprising given the amount of force that States use in internal disturbances and tensions, for instance, in the fight against criminality to combat drug cartels.¹⁰ The increasing use of combat weapons such as M-16 rifles, armored trucks, grenade launchers in the context of peacetime law enforcement has been a subject of concern for some years now.¹¹ One case in point is the widely reported event in Ferguson where demonstrators protesting the fatal police shooting of a teenager were confronted with heavily armed, militarized, police officers.¹² The acquisition by police units, such as SWAT units (Special Weapons and Tactics), of armed drones would seem to be just one further step in this worrying evolution where policemen are armed, equipped and operating like soldiers.

As highlighted by the ICRC President, Peter Maurer, it is clear that: ‘If and when drones are used in situations where there is no armed conflict, it is the relevant national law, and HRL with its standards on law enforcement, that apply, not international humanitarian law’.¹³

2.2. In Extraterritorial Counter-Terrorism Operations and Armed Conflict Situations

The human rights question related to the use of force by drones arises not only in peacetime or in situations of internal disturbances and tensions, but also in extraterritorial counter-terrorism operations (which may or may not amount to an armed conflict depending on the situation) and, in certain cases, within situations of armed conflict as well.

HRL applies at all times.¹⁴ Even if some rights can be derogated from “in time of public emergency which threatens the life of the nation”,¹⁵ this is not the case for the prohibition of arbitrary deprivation of life, which is non-derogable and from which the limits for the use of force against individuals in HRL are derived.¹⁶

2.2.1. Extraterritorial use of force in the territory of a non-belligerent State

The extraterritorial targeting of individuals by means of drones has been commonplace in the context of the war on terror. The United States of America (US) and United Kingdom, for instance, conducted a number of extraterritorial drone strikes against “Al-Qaeda, the Taliban

⁹ Conor Friedersdorf, ‘Congress Should Ban Armed Drones Before Cops in Texas Deploy One’ *The Atlantic* (24 May 2012) <<http://www.theatlantic.com/national/archive/2012/05/congress-should-ban-armed-drones-before-cops-in-texas-deploy-one/257616/>>.

¹⁰ Jane Perlez, ‘Chinese Plan to Kill Drug Lord With Drone Highlights Military Advances’ *The New York Times* (20 February 2013) <http://www.nytimes.com/2013/02/21/world/asia/chinese-plan-to-use-drone-highlights-military-advances.html?_r=0>.

¹¹ Clyde Haberman, ‘The Rise of the SWAT Team in American Policing’ *The New York Times* (7 September 2014) <http://www.nytimes.com/2014/09/08/us/the-rise-of-the-swat-team-in-american-policing.html?_r=0>.

¹² Ibid. Alcindor Yamiche and Bello Marisol, ‘Police in Ferguson Ignite Debate about Military Tactics’ *USA Today* (19 August 2014) <<http://www.usatoday.com/story/news/nation/2014/08/14/ferguson-militarized-police/14064675/>>.

¹³ Maurer (n 5).

¹⁴ There is, however, a minority view according to which human rights law (HRL) does not apply to armed conflicts. See, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports* 1996, para. 24.

¹⁵ Article 4 of the International Covenant on Civil and Political Rights (ICCPR). See also article 15 of the European Convention on Human Rights (ECHR); article 27 of the American Convention on Human Rights (ACHR). However, the African Charter on Human and Peoples’ Rights (ACHPR) does not include such a provision. No derogation is possible therefore. See: *Commission Nationale des Droits de l’Homme et des Libertés v. Chad* (ACCommHR, 1995), para 21.

¹⁶ ICCPR, article 4, para 2; ACHR, article 27, para 2. In the ECHR however the right to life is non-derogable ‘except in respect of deaths resulting from lawful acts of war’ (ECHR, article 15, para 2).

and associated forces”. In many cases, such attacks took place in the context of an acknowledged armed conflict (e.g. in Afghanistan or Iraq) and were governed by IHL. Drone strikes have also been carried out against these and other terrorist groups, including the Islamic State of Iraq and Syria (ISIS), in contexts whose legal classification is disputed (e.g. in Pakistan, Philippines, Somalia, Syria, Yemen). It is not the place here to attempt a classification of these various contexts at different points in time.¹⁷ The facts are often unclear and evolving so quickly that it is difficult to conduct an accurate legal analysis. It is sufficient to say that at least some drone strikes have allegedly been conducted outside the territory of the parties to an ongoing armed conflict, i.e. in ‘non-belligerent States’.¹⁸

There are different legal opinions as to whether the targeting of an individual **in the territory of a non-belligerent state** is governed by the conduct of hostilities under IHL or law enforcement paradigm under HRL.¹⁹ The answer to this question depends mainly on what the geographical scope of IHL is. Under one school of thought, “humanitarian law is not territorially delimited but governs the relations between the belligerents irrespective of geographical location”.²⁰ A person considered as a legitimate target in relation to an ongoing armed conflict would thus be targetable under the conduct of hostilities paradigm wherever that person is located. Pursuant to other views,²¹ which the ICRC shares,²² IHL does not apply outside the territories of the parties to an armed conflict. The use of force in a non-belligerent State must therefore comply with the rules pertaining to law enforcement. This is also the view of the author of the present contribution.

Another equally controversial issue arises and is related, this time, with the question of the geographical scope of application of HRL. A minority of States does not accept the extraterritorial application of human rights treaties.²³ Since 1995, this has been the position of the US, which emphasizes notably that article 2, paragraph 1, of the International Covenant on Civil and Political Rights provides that it applies “to all individuals within its territory *and*

¹⁷ For a discussion of the classification of these contexts, see, in this book, the contribution of Katja Schöberl.

¹⁸ Katja Schöberl (ibid.); Stuart Casey-Maslen, ‘Pandora’s box? Drone strikes under jus ad bellum, jus in bello, and international human rights law’ [2012] 94:886 IRRC at 616; Jennifer C. Daskal, ‘The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone’ (2013) 161 University of Pennsylvania Law Review 1165, at 1188.

¹⁹ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (31IC/11/5.1.2, October 2011) at 22 (ICRC Challenges Report); Jelena Pejić, ‘Extraterritorial Targeting By Means of Armed Drones: Some Legal Implications’ [2014] IRRC, forthcoming.

²⁰ Nils Melzer, *Study on the Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (European Parliament, 2013), at 21, <<http://www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=92953>>.

See also Michael N. Schmitt, ‘Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law’ [2013] 52 Columbia Journal of Transnational Law, at 99.

²¹ Pejić (n 19). See also *European Parliament Resolution on the Use of Armed Drones* (n 2), F); *Concluding observations on the fourth periodic report of the United States of America* (23 April 2014, UN Doc. CCPR/C/USA/CO/4) para 9. See also, in this book, the contribution of Katja Schöberl.

²² ICRC Challenges Report (n 19) at 22; *ICRC Statement before the Human Rights Council*, 22 September 2014 <https://www.icrc.org/sites/default/files/document/file_list/icrc_statement_to_hrc_22_sept_2014_drones_eng.pdf>.

²³ For the US, see below (n 24). For the position of Israel, see, e.g.: Human Rights Committee (HRC), *Sixty-third session. Summary Record of the 1675th meeting: Consideration of the Initial Report of Israel* (21 July 1998, UN Doc. CCPR/C/SR.1675) paras 21 and 27; HRC, *Addendum to the Second Periodic Report, Israel* (4 December 2001, UN Doc. CCPR/C/ISR/2001/2) para. 8.

subject to its jurisdiction (emphasis added)”.²⁴ This position has been widely criticized even within the US Government. In 2010, Harold H. Koh, then-Legal Advisor to the State Department, wrote a Memorandum in which he contended that (1) the strict 1995 interpretation is not compelled by either the language or the negotiating history of the Covenant; (2) that this interpretation is actually in significant tension with the treaty’s language, context and object and purpose, as well as with interpretations of important US allies, the Human Rights Committee and the ICJ, and developments in related bodies of law and (3) that in fact, the Covenant does impose certain obligations on a State Party’s extraterritorial conduct under certain circumstances.²⁵ Koh then distinguishes between, on one hand, obligations to respect Covenant rights (that he defines as “when a State is itself obligated not to violate those rights through its own actions or the actions of its agents”) which would persist extraterritorially when a state exercises authority or effective control over the person or context at issue and, on the other hand, obligations to ensure Covenant rights (that he defines as “affirmatively acting to protect individuals abroad from harm by other states or entities”) which would apply only when individuals are both within its territory and subject to its jurisdiction.²⁶ This rather original (though not very convincing) distinction is not made by the ICJ or human rights bodies; but was probably an attempt to find a middle ground that would be acceptable to the Government. The Obama Government maintained however the 1995 interpretation;²⁷ a matter of concern and regret for the Human Rights Committee (and for the international community more widely).²⁸

Contrariwise, human rights bodies and the ICJ have clearly recognized the extraterritorial application of human rights treaties at least in cases of occupation or detention.²⁹ Outside such situations, in particular when it comes to extraterritorial targeting (without control over the territory or person), the extraterritorial reach of HRL remains however a matter of ongoing legal debate. In the *Banković* case,³⁰ concerning the NATO bombing of Radio Television of Serbia in Belgrade, the European Court of Human Rights considered that the bombing’s victims did not enter into the jurisdiction of the European allied States because this notion is essentially territorial. The Court subsequently softened its position³¹ but it is unclear what the Court’s decision would be if another “Banković-type” case would arise. Other human rights

²⁴ *Statement of State Department Legal Adviser, Conrad Harper*, 53rd session, 1405th meeting of the HRC (24 April 1995, UN Doc. CCPR/C/SR 1405) para 20; U.S. Department of State, *Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, Annex 1 (21 October 2005) <<http://www.state.gov/g/drl/rls/55504.htm>>. *United States Responses to Selected Recommendations of the Human Rights Committee* (10 October 2007) at 1-2 <<http://2001-2009.state.gov/documents/organization/100845.pdf>>. For legal writings on which the US Government rely, see, e.g. Michael J. Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’, [2005] 99 AJIL, 119-141.

²⁵ Harold H. Koh, *Memorandum Opinion on the Geographical Scope of the International Covenant on Civil and Political Rights*, 19 October 2010 at 4.

²⁶ *Ibid.*

²⁷ *Fourth Periodic Report of the United States of America to the Human Rights Committee* (UN Doc CCPR/C/USA/4 and Corr. 1, 22 May 2012) at paras 504-505.

²⁸ Concluding Observations : USA (n 21) para 4.

²⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 14) paras 107-113; *General Comment no 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* [2004] (UN Doc. CCPR/C/21/Rev.1/Add.13) para 10; *Al Skeini and others v. United Kingdom* App no 55721/07 (ECHR, 7 July 2011) paras 130-150; *Al-Jedda v. United Kingdom* App no 27021/08 (ECHR, 7 July 2011) paras 74-86.

³⁰ *Banković v. Belgium and 16 other States* App no 52207/99 (ECHR, 12.12.2001) paras 54-82.

³¹ *Al-Skeini* (n 29) para 142 (use of force on occupied territory); *Jaloud v. Netherlands* App no 47708/08 (ECHR, 20 November 2014) para 152-153 (use of force at a checkpoint in Iraq).

bodies tend to accept the extraterritorial application of human rights treaties for a wider spectrum of situations.³² The ICRC (like many commentators) held the view that, in any case, customary law prohibits the arbitrary deprivation of life without territorial limitation.³³ It is furthermore often overlooked that the jurisdiction should be established not only through the State using force extraterritorially but also through the territorial State. The latter cannot evade its own HRL obligations by consenting to the intervention of a third State.

The geographical scope of application of IHL and HRL shall not be construed in a way that creates legal gaps. It is submitted that, from an international law perspective (and outside *jus ad bellum* considerations), any use of force by States must comply either with IHL or HRL.

2.2.2. Use of force in the territory of a belligerent State

The use of force by drones occurs mostly in armed conflicts on the territory of one of the belligerent parties, where the applicability of IHL is given.³⁴ Many examples exist, such as drone strikes taking place in Afghanistan, Gaza, Iraq or Libya. When drone strikes are directed against persons or objects considered as legitimate military targets under IHL, the relevant legal framework is IHL and more specifically the conduct of hostilities paradigm. The question (which is outside the scope of this chapter) then turns around whether the attack respects the IHL principles of notably distinction, proportionality and precautions.

The question here is whether there are situations in armed conflicts in which the use of armed drones would not be governed by the conduct of hostilities paradigm. In many contemporary armed conflicts, particularly in occupied territories and in non-international armed conflicts (NIAC), armed forces are increasingly expected to conduct both combat operations against the adversary and law enforcement operations to maintain or restore public security, law and order.³⁵ It is generally accepted that this latter type of operations is governed by applicable HRL rules and standards for the use of force, i.e. the HR law enforcement paradigm.

The difficulty then lies in finding the dividing line between the conduct of hostilities and law enforcement paradigms. This is a matter of ongoing legal debate and has been addressed elsewhere.³⁶ What is clear is that even in armed conflicts, there are situations – such as civilian

³² *Burgos* (n 23) paras 12.2-12.3 ; *Lilian Celiberti* (n 23) paras 10.2-10.3; *General Comment no 31* (n 29) para 10; *Ecuador v. Colombia* Report no 112/10 (IACHR, 21 October 2010), para 99; *Disabled Peoples' International v. USA* Case no 9213 (IACHR, 22 September 1987); *Salas v. USA* Case no 10.573 (IACHR, 14 October 1993) ; *Armando Alejandro, Carlos Costa, Mario de la Peña et Pablo Morales v. Cuba* Application no 11589 (IACHR, 29 September 1999).

³³ See ICRC Challenges Report (n 19) at 22. See also, Nils Melzer, *Targeted Killing in International Law* (OUP 2008) at 212.

³⁴ Ben Emmerson, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Interim Report on the Use of Remotely Piloted Aircraft in Counter-Terrorism Operations* (A/68/389, 18 September 2013) para 59 (Emmerson, *Interim Report*).

³⁵ Gloria Gaggioli, *Report of the Expert Meeting on the Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (ICRC 2013) at 1 (ICRC Report on the Use of Force).

³⁶ *Ibid*; Tristan Ferraro, *Expert Meeting Report on Occupation and Other Forms of Administration of Foreign Territory, Third Meeting of Experts: The Use of Force in Occupied Territory* (ICRC 2012); Nils Melzer, ‘Conceptual Distinction and Overlaps Between Law Enforcement and the Conduct of Hostilities’ in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP 2010) 33-49; Dieter Fleck, ‘Law Enforcement and the Conduct of Hostilities: Two Supplementing or Mutually Excluding Legal Paradigms?’ in Andreas Fischer-Lescano et al (eds), *Frieden in Freiheit Festschrift für Michael Bothe* (Nomos DIKE 2008) 391-407; David Kretzmer, Aviad Ben-Yehuda and Meirav Furth, ‘Thou Shall Not Kill: The Use of

unrest and other forms of civilian violence or criminal acts not amounting to direct participation in hostilities – that must be addressed under a law enforcement paradigm. For instance, when civilians riot in occupied territories or in a NIAC, force cannot go beyond what is authorized under a HR law enforcement paradigm. If fighters hide in the crowd, then they might be targetable under the conduct of hostilities paradigm and the two paradigms may apply in parallel. Also, when belligerents launch operations against common criminals, such as members of drug gangs or other forms of organized crime that are not a party to the armed conflict, such use of force is not governed by the conduct of hostilities, but by the HR law enforcement paradigm. Alleged criminals are civilians and remain protected against attacks under the IHL principle of distinction, unless and for such time as they directly participate in hostilities. These are just two obvious examples where the law enforcement paradigm kicks in. They are by no means meant to be exhaustive.

If drones were to be used in such situations, then they would have to comply with the law enforcement paradigm.

3. The Legal Requirements for the Use of Force under the Human Rights Law Enforcement Paradigm

The law enforcement paradigm for the use of force is not detailed in human rights treaties. The latter only guarantee the prohibition of arbitrary killings, from which the set of rules and standards framing the use of force has been derived and further elaborated in soft law documents, such as the *Code of Conduct for Law Enforcement Officials* and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* and in human rights case law³⁷. The *Basic Principles* expressly emphasize that “exceptional circumstances, such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles”.³⁸

3.1. Obligations Pertaining to the Actual Use of Force

3.1.1. Necessity

Under the law enforcement paradigm, force can be used only when ‘strictly’ or ‘absolutely’ necessary to pursue a legitimate objective.³⁹ In other words, the principle of necessity requires that force must be a last resort (*ultima ratio*). State officials must, as far as possible, apply non-violent means and may use force and firearms only if other means remain ineffective or without

Lethal Force in Non-International Armed Conflicts’ [2014] 47/02 Israel Law Review 191-224; Ken Watkin, ‘Use of Force during Occupation: Law Enforcement and Conduct of Hostilities’ [2012] 94:885 IRRC 295-296.

³⁷ UN *Code of Conduct for Law Enforcement Officials* [1979] (adopted by Resolution 34/169 of the UN General Assembly); UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* [1990] (adopted by the Eight UN Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by Resolution 45/166 of the UN General Assembly. HR bodies often mention the *UN Code of Conduct*, as well as the *UN Basic Principles*, and they adopt generally the same standards when they have to assess the use of deadly force. See, for instance, Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* [2014] (UN Doc A/HRC/26/36) para 43; *McCann and Others v. United Kingdom* App no 18984/91 (ECHR, 27 September 1995) paras 138-140; *de Oliveira v. Brazil* Case no 11.599 (IACHR, 24 February 2000) para 33; *Montero-Aranguren et al. v. Venezuela*, Series C no 150 (Inter-American Court of Human Rights (IACtHR), 5 July 2006) para 69.

³⁸ *UN Basic Principles*, *ibid.*, para 8.

³⁹ *UN Code of Conduct* (n 37), art. 3; *UN Basic Principles* (n 37), principle 4. See, e.g., *McCann* (n 37) para 149.

any promise of achieving the intended result.⁴⁰ If the use of force is unavoidable, only the smallest amount of force necessary may be applied. This implies that State officials must strive to arrest suspected criminals by using non-violent means insofar as possible (‘capture-rather-than kill’ approach); and, if force is unavoidable, there must be, as far as possible, a differentiated use of force (e.g. verbal warning, show of force, ‘less-than-lethal’ force, lethal force).⁴¹

3.1.2. Proportionality

The kind and degree of force used must, not only be necessary, but also strictly proportionate to the seriousness of the offence and the legitimate objective to be achieved.⁴² State officials must also strive to minimize damage and injury to human life.⁴³ Concretely, the principle of proportionality requires a balancing between the risks posed by the individual *versus* the potential harm to this individual as well as to bystanders. In particular, if the individual is not posing a threat of death (or serious injury), the use of lethal (or potentially lethal) force would not be considered as proportional, even if the necessity requirement were to be fulfilled. This conclusion is not clear when one reads the provisions protecting the right to life in human rights treaties. Most of them only prohibit ‘arbitrary’ deprivations of life, without providing more details.⁴⁴ This may give the false impression that it is possible to use lethal (or potentially lethal) force even if there is no threat to life or limb. The case law of human rights bodies clarifies though that the use of lethal (or potentially lethal) force can be envisaged only if there is a threat to life or limb.⁴⁵

⁴⁰ Ibid; *UN Code of Conduct* (n 37), article 3, commentary para c). See also, e.g.: *Montero-Aranguren* (n 37) paras 67-68; *Zambrano Vélez et al. v. Ecuador*, Series C no 166 (IACtHR, 4 July 2007) paras 83-84; *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Comm. 204/97 (African Commission on Human and Peoples’ Rights, 2001) para 43.

⁴¹ *UN Basic Principles* (n 37), principles 4, 5, 9, 10; *UN Code of Conduct* (n 37), article 3. For the case-law, see, for example : *Pedro Pablo Camargo v. Colombia* (« Guerrero ») [1982] (UN Doc CCPR/C/15/D/45/1979) para 13.2; *Alejandro* (n 32) para 42; *Montero-Aranguren* (n 37) para 75.

⁴² *UN Basic Principles* (n 37), principle 5a); *UN Code of Conduct* (n 37), art. 3, commentary §b). For the case-law on the proportionality principle : see *Neira Alegria v. Peru*, Series C no 20 (IACtHR, 19 January 1995) para 76. The case-law does not always distinguish clearly between necessity and proportionality. See *Pedro Pablo Camargo v. Colombia* (ibid) para 13.3; *Alejandro* (n 32) para 42; *Finca ‘La Exacta’ v. Guatemala* Case 11.382 (IACHR, 21 October 2002) para 43; *Montero-Aranguren* (n 37) paras 68 et 74; *Zambrano Vélez* (n 40) paras 84-85; *Carandiru v. Brazil* Case 11.291 (IACHR, 13 April 2000) para 91.

⁴³ *UN Basic Principles* (n 37), principle 5b); *Stewart v. United Kingdom* App no 10044/82 (ECommHR, 10 July 1984) para 19; *Wolfram v. RFA* App no 11257/84 (ECommHR, 6 October 1986) at 213. See also : *Montero-Aranguren* (n 37) paras 68.

⁴⁴ Art. 6 ICCPR ; art. 4 IACHR ; art. 4 AfCHPR. As for the European Convention on Human Rights, it allows the use of lethal (or potentially lethal) force when it is absolutely necessary (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection. See Art. 2, para 2, ECHR. Human rights bodies have interpreted the term ‘arbitrary’ in a way that is consistent with the purposes mentioned in Article 2, paragraph 2, of the ECHR. See, for instance, *Pedro Pablo Camargo* (n 41) para 13.2.

⁴⁵ Concerning art. 2, para 2 b), see, for example: *Makaratzis v. Greece* App no 50385/99 (ECHR, 20 December 2004); *Natchova and Others v. Bulgaria* App no 43577/98, 43579/98 (ECHR, 6 July 2005); *Kakoulli v. Turkey* App no 38595/97 (ECHR, 22 November 2005). Regarding art. 2 para 2 c), see, for example, *Stewart* (n 43); *Güleç v. Turkey* App no 21593/93 (ECHR, 27 July 1998). See also: *de Oliveira v. Brazil* Case no 10/00 (IACHR, 24 February 2000) para 33; *da Silva v. Brazil* Case no 11.598 (IACHR, 24 February 2000) para 34; *Finca ‘La Exacta’ v. Guatemala* (n 42) paras 41-42.

The *Basic Principles on the Use of Force and Firearms* further specify that firearms – and more generally, lethal or potentially lethal force⁴⁶ – may be permitted only if they pursue the following legitimate objectives: (1) Self-defence or defence of others against the imminent threat of death or serious injury; (2) To prevent the perpetration of a particularly serious crime involving grave threat to life and (3) To arrest a person presenting a danger of perpetrating such crimes and resisting the authority, or to prevent his or her escape.⁴⁷ The use of lethal (or potentially lethal) force while policing unlawful and violent assemblies and controlling persons in custody or detention is also limited to the previous situations.⁴⁸ Although a careful reading of these legitimate objectives raises a number of questions,⁴⁹ they help to ascertain that the use of potentially lethal force is legitimate only to protect human lives, or – in the case of self-defence at least – to avoid serious injury. In any event, *intentional* lethal use of force may only be made when strictly unavoidable in order to protect life. This is what Christof Heyns has called the ‘protect life principle’; i.e. a life may be taken intentionally only to save another life.

3.1.3. Precaution

The principle of precaution is an additional principle of the law enforcement paradigm, although it does not appear explicitly in the treaty provisions pertaining to the right to life. It has been developed in human rights case law, through the theory of positive obligations.⁵⁰

The European Court of Human Rights was the first to develop this principle in the famous *McCann v. United Kingdom* case in 1995.⁵¹ In this case, the Court held that when analyzing the right to life, it is appropriate to look not only at the actions of State officials using force, but also at the planning/organization and control of the operation.⁵² States must take all feasible precautions to minimize recourse to deadly force; the aim being always to limit damage and injury, and respect and preserve human life.⁵³ The principle of precaution has been applied systematically by the European Court in subsequent cases,⁵⁴ including in situations of armed conflict.⁵⁵ It has also been taken up, albeit more briefly, by other human rights bodies and experts, such as the Inter-American Court of Human Rights⁵⁶ and the Special Rapporteur on

⁴⁶ Heyns (n 37), para 71.

⁴⁷ *UN Basic Principles* (n 37), principle 9. See also: *UN Code of Conduct* (n 37), commentary to art. 3 (§a et §c).

⁴⁸ *UN Basic Principles* (Ibid), principles 12-16.

⁴⁹ In particular, it is not clear whether the temporal requirement of ‘imminence’ attached to the threat of death that allows the use of force in self-defence and defence of others continues to exist in the pursuance of other legitimate objectives. Strikingly, the other legitimate objectives mentioned in the *Basic Principles* do not contain any express temporal requirement. It is submitted that the principle of ‘absolute necessity’ inevitably implies a temporal requirement (‘temporal necessity’). In this sense, see Melzer, *Targeted Killing* (n 33) at 228. While the very strict requirement of imminence, i.e. ‘a matter of seconds, not hours’ (Heyns (n 37), para 59), is intrinsic in the notion of self-defence or defence of others, the temporal requirement for the use of force to pursue other legitimate aims (such as arrest or prevention of escape) might however be less stringent. For example, in the case of a person suspected of having committed a series of murders, the text of the *Basic Principles* may be read as not prohibiting the use of firearms as a last resort to arrest such a person provided that this person is held to continuously represent a ‘grave threat to life’. To avoid abuses, the likelihood that the person might commit again in the near future ‘particularly serious crimes involving grave threat to life’ should be particularly high.

⁵⁰ *General Comment n°31* (n 29) para 8.

⁵¹ *McCann* (n 37) paras 150 and 194. See also *Ergi v. Turkey* App no 23818/94 (ECHR, 28 July 1998), para 79.

⁵² *McCann* (n 37) paras 202-214.

⁵³ *UN Basic Principles* (n 37), principle 5 b).

⁵⁴ *McCann* (n 37); *Oğur v. Turkey* App no 21594/93 (ECHR, 20 May 1999), paras 83-84; *Gül v. Turkey* App no 22676/93 (ECHR, 14 December 2000), paras 84-86.

⁵⁵ *Isayeva, Yusupova and Bazayeva v. Russia* App no 57950/00 (ECHR, 24 February 2005) paras 188-201.

⁵⁶ *Neira Alegria* (n 42) para 62; *Montero-Aranguren* (n 37) para 82; *Zambrano Vélez* (n 40) para 89.

extrajudicial, summary or arbitrary executions.⁵⁷ Other human rights bodies refer more vaguely to an obligation to ‘prevent’ violations of the right to life.⁵⁸

3.2. *Obligations Before and After the Actual Use of Force*

HR treaties and case law indicate that, in addition to the aforementioned principles pertaining to the actual use of force in a specific operation, the HR law-enforcement paradigm involves obligations before and after the actual use of force.⁵⁹ These obligations can be framed as deriving from the principles of legality and accountability.

3.2.1. Legality

For the principles of necessity, proportionality and precaution to be effectively applied, the principle of legality inherent in the right to life requires governments to set an appropriate domestic legal framework (including not only proper laws but also directives such as rules of engagement). This legal framework must restrict the use of force to the maximum extent possible and stipulate the limited circumstances in which State officials can use force in accordance with international law.⁶⁰ All treaties protecting the right to life state that this right must be “protected by law”.⁶¹ The law must be published and accessible to the public to be considered as a sufficient legal basis for the use of force.⁶² In order to ensure that the law is translated into practice, Governments must provide an adequate training to their State officials, including in alternatives to the use of force and firearms (such as non-violent methods of arrest and techniques).⁶³ Governments should also equip State officials with various types of weapons and ammunition, including alternative means to firearms (such as water cannons and other “less-lethal weapons”⁶⁴). This allows a differentiated use of force and restrains the use of means capable of causing death or injury.⁶⁵ Governments should also equip State officials with self-defensive equipment (such as shields, helmets, bullet-proof vests etc.), in order to decrease the need to use weapons of any kind.⁶⁶

⁵⁷ Heyns (n 37). See also Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* [2006] (UN Doc E/CN.4/2006/53) paras 53-54.

⁵⁸ *General Comment no 6: Right to life (Article 6)* [1982] (UN Doc HRI/GEN/1/Rev.8) para 3; *Rickly Burrell v. Jamaica* [1996] (UN Doc CCPR/C/57/D/546/1993) para 9.5; *National Commission on Human Rights and Freedoms v. Chad* (AfCommHPR, 1995) para 22; *Montero-Aranguren* (n 37) para 71.

⁵⁹ For the distinction between obligations pertaining to the actual use of force and those intervening before and after the actual use of force, see : *ICRC Report on the Use of Force* (n 35) at 43.

⁶⁰ *UN Basic Principles* (n 37), principles 1 and 11.

⁶¹ Art. 6 para 1 ICCPR; 2 para 1 ECHR; 4 para 1 ACHR, art. 4 combined with Article I of the AfCHPR. See also: *General Comment No. 6* (n 58) para 3; *Makaratzis* (n 45) paras 56 to 72; *Pedro Pablo Camargo* (n 41) para 13.3; *Montero-Aranguren* (n 37) para 75; *Zambrano Vélez* (n 40) para 86.

⁶² *Natchova* (n 45) para 102; Heyns (n 37) at 10; Melzer, *Targeted Killing* (n 33) at 114.

⁶³ *UN Basic Principles* (n 37) principles 18-21. For the case-law, see, for example, *Hamiyet Kaplan and Others v. Turkey* App no 36749/97 (ECHR, 13 September 2005) para 51-55; *Rickly Burrell* (n 58) para 9.5 ; *Montero-Aranguren* (n 37) paras 77-78 ; *Zambrano Vélez* (n 40) para 87.

⁶⁴ *UN Basic Principles* (n 37) principle 3.

⁶⁵ *UN Basic Principles* (n 37) principle 2. For the case-law, see, for example, *Güleç* (n 45); *Hamiyet Kaplan* (n 63).

⁶⁶ *Ibid.*

3.2.2. Accountability

The accountability principle requires that after a particular operation where the use of force has resulted in death or injury, State officials must report the incident promptly to their superiors.⁶⁷ An effective investigation must be conducted each time a person has been killed (outside death penalty cases) or at least each time there is a credible allegation of a violation of the right to life.⁶⁸

Human rights bodies have further clarified that, to be effective, the investigation must be led expeditiously and with due diligence by an independent and impartial body. The next-of-kin must be given an opportunity to participate in the investigation process and all possible steps must be taken in order to gather evidence, including hearing witness testimony, conducting ballistic examinations, medico-legal examinations etc.⁶⁹ This obligation to conduct effective investigations into killings has not only been applied by human rights bodies in peacetime, but also in armed conflicts.⁷⁰

The criteria to consider an investigation as effective seem to be very demanding. Human rights bodies tend to recognize however that the nature and degree of the investigation may vary in different circumstances.⁷¹ For instance, the requirement of due diligence in peacetime require to gather evidence immediately after the facts while this may be impossible in armed conflicts. What “due diligence” is will therefore vary considerably depending on the circumstances. The involvement of the next-of-kin in the procedure might also be difficult depending on the context and given the amount of classified information being at stake.⁷² While in peacetime and in developed countries an autopsy is required to consider the investigation into a killing effective, this might be impossible in many situations of conflict.

In *summary*, the use of force under the HR law enforcement paradigm can be analyzed in five stages:

(1) Was the use of force made in accordance with a domestic legal framework that is suitable for securing the prohibition of arbitrary killings in accordance with international law? Were State officials adequately trained, armed and equipped to minimize the use of lethal (or potentially lethal) force? (legality)

(2) When an operation was planned, did the State seek to minimize the possibility of recourse to lethal force as well as death and injury at the initial organizational stage? (precaution)

⁶⁷ *UN Basic Principles* (n 37), principles 6 and 22; *UN Code of Conduct* (n 37), commentary (c) to article 3.

⁶⁸ See, e.g. among many others: Alston (n 57) paras 35-36; *McCann* (n 37) para 161; *Mapiripán Massacre v. Colombia*, Series C no 134 (IACtHR, 15 September 2005) paras 216-241; *Montero-Aranguren* (n 37) para 75 ; *Commission Nationale des Droits de l’Homme et des Libertés v. Chad* (n 15) para 22.

⁶⁹ For steps to be taken in order to gather evidence, see: *UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, ST/CSDHA/12,1991, III. Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions (*Minnesota Protocol*).

⁷⁰ *Isayeva v. Russia* App no 57950/00 (ECHR, 24 February 2005); *Al-Skeini* (n 29) para 161-177; Alston (n 57) para. 36. For additional case law and practice, see *ICRC Report on the Use of Force* (n 35) at 50-51.

⁷¹ Alston (n 57) para 36; *Isayeva* (ibid) para 210; *Mapiripán Massacre* (n 68) para 238.

⁷² See *The Public Commission to Examine the Maritime Incident of 31 May 2010* (January 2010) Part two, at 145-146. <<http://www.turkel-committee.com/index-eng.html>>.

(3) When force was used by State officials, was it absolutely necessary to use this kind and degree of force at the time to achieve a legitimate objective? (necessity)

(4) Was the anticipated harm caused by the law enforcement official to the suspected offender and to bystanders proportionate in comparison to the seriousness of the threat posed by the suspected offender and the legitimate objective to be achieved? (proportionality)

(5) In case of death or serious injury, did the State conduct an effective investigation after the facts? (accountability)

4. Confronting the Reality of Armed Drones with Human Rights Law Enforcement Requirements

4.1. Can Armed Drones Respect the Principles of Necessity, Proportionality and Precautions?

Given the progresses in technology and the different ways in which armed drones can be used, the answer to the question whether armed drones can ever respect the principles of necessity, proportionality and precautions should be nuanced. A distinction needs to be made between: 1) “Combat drones”. This category comprises large unmanned combat air vehicles (UCAV), such as those that are currently used for extra-territorial counter-terrorism operations but also Miniature Aerial Vehicles (MAV) that may be weaponized; 2) “Law enforcement drones” that are able to do warnings, shoot pepper spray and that might also in the near future be armed with lethal weapons.

4.1.1. “Combat Drones” for Law Enforcement?

The first time a large UCAV has allegedly been used outside the scope of the battlefield was in 2002 when the CIA killed six purported Al Qaeda members in Yemen.⁷³ Since then, it has been argued that more drone strikes against alleged terrorists in countries that are not at war or against persons who were not legitimate targets under IHL have been conducted. Until now, drone strikes have occurred in non-western countries, but persons suspected of terrorism are increasingly recruited worldwide, including in western countries by ISIS for instance.⁷⁴ It cannot be ruled out thus that in the future drone strikes be envisaged in Europe for instance if the territorial country consents to it or is otherwise unable or unwilling to remove the alleged

⁷³ See Casey-Maslen (n 18) at 616; David Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extrajudicial Executions of Legitimate Means of Defence’ [2005] 16:2 EJIL 171-212, at 171-172. At that time, it was quite clear that there were no hostilities between the Government of Yemen and Al Qaeda and that the US did not intervene in a pre-existing armed conflict on Yemeni’s soil. It is also clear that a mere drone strike does not give rise to a NIAC. It is unclear, however, whether the Government of Yemen consented in advance to that attack. If that was not the case, the drone attack would have violated *jus ad bellum* requirements and give rise to an international armed conflict. Al Qaeda would however not be considered as a party to that armed conflict and IHL could not justify the targeting of a member of Al Qaeda. An analysis under HRL would therefore still be required. In subsequent attacks on Yemeni’s soil, the Government consented to US interventions. Some contend that, in recent years, a separate NIAC emerged between the Government of Yemen and al Qaeda in the Arabian Peninsula (AQAP) and that the US has intervened in this conflict in support of the Government of Yemen and is therefore a party to that conflict. See, e.g. Benjamin R. Farley, ‘Targeting Anwar Al-Aulaqi: A Case Study in U.S. Drone Strikes and Targeted Killing’, 2 American University National Security Law Brief 57, at 71-73 (2012).

⁷⁴ ‘European jihadists: It ain’t half hot here, mum. Why and how Westerners go to fight in Syria and Iraq’ *The Economist* (Cairo, 30 August 2014) <<http://www.economist.com/news/middle-east-and-africa/21614226-why-and-how-westerners-go-fight-syria-and-iraq-it-aint-half-hot-here-mum>>.

threat posed by these persons. Contemplating this idea is disturbing, but why? Would the HR law enforcement paradigm prohibit such strikes under all circumstances?

Under the principle of *necessity*, “combat drones” may be used only if *absolutely necessary* at the time to use this kind and degree of force to reach a particular legitimate objective, which implies the application as far as possible of a graduated use of force. Because a drone strike is, by definition, an *intentionally lethal* (rather than potentially lethal) use of force,⁷⁵ it must be proven in a particular case that not only non-violent, but also potentially lethal means are ineffective or without any promise of achieving the intended result; and that the use of intentionally lethal force is *strictly unavoidable*. “Combat drones” are usually not equipped to effect warnings or to apply less than lethal or potentially lethal force. This, in and of itself gives rise to serious concerns as to the ability of these weapons to be used in a way that respects the law enforcement principle of absolute necessity. True, under certain circumstances, an escalation of force procedure might simply prove impossible and, thus, directly using potentially lethal or even intentionally lethal force may be allowed. A graduation of force must nevertheless be attempted as far as possible.

Drone strikes – as intentional lethal force – must be strictly unavoidable and aim at protecting life exclusively in order to be considered as *proportionate*.⁷⁶ It is tempting to consider persons suspected of being leaders of dangerous criminal/ ‘terrorist’ groups as necessarily constituting a threat to life. But, under the law enforcement paradigm, the threat posed by a specific individual does not depend on his/her membership to a particular group.⁷⁷ It depends on his/her actual and individual conduct. It is also questionable whether the mere fact of plotting, planning or financing a criminal group without actually being the one killing at the end of the chain is sufficient to constitute a threat to life under HRL. For instance, if a person hires a hit man in peacetime, the police would unquestionably be authorized, under certain circumstances, to use force against the hit man as a last resort to prevent the murder. But it would seem completely inappropriate for the police to use the same force against the person having hired the hit man (unless this person tries to violently evade arrest).

The person against whom force may be used must furthermore represent an imminent, or at least continuous, threat to life. This derives from the temporal requirement inherent in the principle of necessity.⁷⁸ The mere fact that a person has committed a violent crime can in no way justify the use of potentially lethal (let alone intentionally lethal) force. Past conduct can at best inform the assessment of the likelihood and seriousness of the threat a person represents. For instance, if a person is suspected of having committed a murder twenty years ago, this would definitely not be sufficient to consider using lethal or potentially lethal force in order to arrest that person. The lethal or potentially lethal use of force cannot be punitive, but only preventive.⁷⁹ In practice, the justification often used to resort to drone strikes against a person is the broad notion of self-defense and defense of others. It is unclear whether the invocation of self-defense in such contexts derives from *jus ad bellum* or law enforcement considerations or whether it is

⁷⁵ See Heyns (n 37), para 71; Melzer, *Targeted Killing* (n 33) at 424.

⁷⁶ *UN Basic Principles* (n 37), principle 9.

⁷⁷ Melzer, *Targeted Killing* (n 33) at 425.

⁷⁸ Above note 49.

⁷⁹ *Ibid* at 239.

seen as a separate basis for the use of force.⁸⁰ The legal basis and contours of self-defense remain shrouded in doubts and deserve to be clarified. This exercise goes far beyond the purpose of this article. It suffices here to say that, under HRL, self-defense requires an “imminent threat”. The notion of imminence in this context is – and must be understood as being – extremely strict; “a matter of seconds not hours”⁸¹ If a person is put on a targeting list long before the strike, it is doubtful that the criterion of imminence is fulfilled.⁸² It is also unlikely in practical terms that an extraterritorial drone strike can be ordered and conducted as a very last minute to prevent an “imminent threat of death”, although this is not altogether impossible.

The principle of *proportionality* also requires that the harm caused by the State official to the suspected offender and to bystanders is proportionate in comparison to the seriousness of the threat posed by the suspected offender and the legitimate objective to be achieved. It is a strict proportionality test and, in contradistinction with IHL, this test would not be fulfilled if there is important “collateral damage”. True, the unintentional killing of a bystander would not necessarily lead to a violation of the right to life: HR bodies have accepted limited and unforeseen casualties among bystanders in rare cases.⁸³ This exception remains nonetheless extremely narrow. The objective of any law enforcement operation must be to minimize death and injury. Given the important firepower of “combat drones”, they might cause important casualties among bystanders depending on where and how they are used. In populated areas, for instance, large UCAV will almost inevitably lead to unintended death that would most probably be considered as unauthorized under the strict HR proportionality test. If, conversely, the suspected offenders posing a threat to life are isolated, in the desert for instance, the drone strike would not cause any unintended death and the proportionality test (under that limb) might be respected. As the technology evolves, drones with more limited firepower, such as Miniature Aerial Vehicles (MAV) are being developed and can potentially improve respect for the HR principle of proportionality.

Under the principle of *precautions*, a drone strike must also be analyzed taking into account the planning and control phase of the operation. In that phase too, States must minimize the possibility of recourse to lethal force as well as minimize the risk of death and injury. The biggest problems for the conformity of drone strikes with law enforcement requirements lie here. If drone strikes are planned with the premeditated aim of killing the suspected offenders and if the possibility of arresting the person or applying a graduation of force is not even envisaged, then, the operation will be difficult to reconcile with the principle of precautions.⁸⁴ The only situation which could justify not envisaging an arrest under the law enforcement paradigm would be the total absence of control over the area where the person is by both the territorial State as well as the State sending the drone and the material impossibility to arrest that person before the threat to life posed by this person materializes. If that is not the case, it would go against the fundamentals of law enforcement not to plan the operation with the objective to arrest the person by means of a differentiated use of force. A drone strike should

⁸⁰ Pejić (n 19), at 7; Kenneth Anderson, ‘Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a “Legal Geography of War”’ in Peter Berkowitz (ed.), *Future Challenges in National Security and Law* (Hoover Institution, Stanford University 2011) at 8.

⁸¹ Heyns (n 37), para 59.

⁸² *Human Rights Council’ Panel on Armed Drones* (n 3): Shahzad Akbar.

⁸³ *Andronicou and Constantinou v. Cyprus* App no 25052/94 (ECHR, 10 September 1997) para 194; *Kerimova and Others v. Russia* App no 17170/04 (ECHR, 3 May 2011) para. 246.

⁸⁴ Alston (n 57) para 33; Melzer, *Targeted Killing* (n 33) at 425.

not be envisaged as a law enforcement operation *per se*, but rather be contemplated, in the worst-case scenarios, as the *ultima ratio* at the very end of an operation.

To conclude, one can say with Nils Melzer that: “[i]n the final analysis, the resort by States to targeted killing [drone strikes in our case] as a method of law enforcement is extremely problematic. On the one hand, it cannot be ruled out that, in extreme circumstances, the prevention of an unlawful attack against human life may exceptionally require, and justify, the intentional killing of a perpetrator. On the other hand, it cannot be ignored that the method of targeted killing involves great risks, and may easily lead to situations which are diametrically opposed to the principles and values underlying the normative paradigm of law enforcement.”⁸⁵

4.1.2. Towards “Law-enforcement drones”?

New types of drones are developed and commercialized to address situations typical of law enforcement such as riots or the fight against criminality. Some of these “law enforcement” drones, in contradistinction with “combat drones”, can employ strobe lights and on-board speakers to send verbal warnings, shoot pepper spray, solid plastic balls and non-lethal paintballs to mark offenders or transport an 80,000-volt Taser dart to zap criminals.⁸⁶ Although these drones cannot yet use lethal weapons, even “less-than-lethal” crowd-control weapons can kill. For instance, given the high number of solid plastic balls that can be shot per second or high voltage of the Tasers used, these means should be considered at least as potentially lethal weapons.⁸⁷

In the case of “law enforcement drones”, the application of the principles of necessity, proportionality and precautions gives different results compared to “combat drones”. Regarding the principle of *necessity*, the possibility of doing a graduation of force seems to exist and to be already built in some of these “law enforcement drones”. Regarding the principle of *proportionality*, it also seems that these types of drones are developed to respond to imminent threats rather than to kill preselected “targets” depending on their membership. The ability to target precisely the alleged offender is supposed to exist thanks notably to video and audio surveillance systems allowing the drone-operator to see precisely what is happening on the ground; although an on-site assessment of the situation should always be preferred.⁸⁸ In terms of *precautions*, “law enforcement drones” seem to be developed notably to minimize death and injury.

There is thus no inherent flaw in “law enforcement drones” that would necessarily lead to conclude that they violate law enforcement principles. Depending on the situation, however, the use of such means might either be lawful or unlawful. If a Taser-drone is used to arrest an offender despite the possibility of a non-violent arrest, the principle of necessity would be violated. If rubber bullets are fired by a “law enforcement drone” in a disproportionate manner

⁸⁵ Ibid. For an even stronger position against ‘combat drones’ under law enforcement, see: Alston (n 57) para 33; Emmerson, *Interim Report* (n 34) para 24; Heyns (n 37), para 136.

⁸⁶ ‘CUPID drone to “shock the world” with 80,000 volt stun gun’ *RT Question More* (8 March 2014) < <http://rt.com/usa/drone-taser-gun-security-650/> >.

⁸⁷ See, for instance, the website of one of the companies commercializing ‘riot control’ drones : < <http://www.desert-wolf.com/dw/products/unmanned-aerial-systems/skunk-riot-control-copter.html> >.

⁸⁸ Eric Brumfield, ‘Armed Drones for Law Enforcement: Why it Might be Time to Re-Examine the Current Use of Force Standard’ 46 *McGeorge Law Review* (forthcoming December 2014, on file with the author).

at a rioting crowd, then the principle of proportionality would be violated. The principle of precaution would not be respected if law enforcement operations are planned mostly or exclusively with drones although they do not allow minimizing death and injury. The fact that drones are cheaper or permit to keep law enforcement officials safe does not constitute a sufficient excuse.

“Law enforcement drones” therefore seem *prima facie* capable of respecting principles of necessity, proportionality and precautions. This does not mean that they do not pose any legal and policy issues (see Section 4.3 below).

4.2. Can Domestic Frameworks Regulating Armed Drones and Investigative Measures Render them Appropriate Means for Law Enforcement?

4.2.1. Regulating Drones

The legality requirement relates in general terms to the law enforcement framework rather than the use of specific means such as drones. Given however the peculiarities of drones in terms of opening up options for the use of force going beyond usual weapons, it could be argued that strong legal and policy frameworks governing the use of drones extraterritorially and domestically should be developed.

For instance, the US has endeavored to establish a domestic framework that governs the extraterritorial use of lethal force – by drones notably – against persons considered as terrorists.⁸⁹ Criteria for drone strikes outside the Afghanistan theatre against ‘al Qaeda and its associated forces’ have been developed. Such strikes can be conducted only when the US has no ability to capture or when the risk to US troops and bystanders is too high; when there is a continuing and imminent threat to the American people; when no other Government is able or willing to effectively stop the terrorist threat and when there is near-certainty that no civilians would be killed or injured. Interestingly, some of these criteria are common to the notion of self-defense under HRL.⁹⁰ A number of commentators criticized these criteria as being overly vague.⁹¹ The lack of transparency regarding the implementation of this policy is also problematic.⁹² The reason for this secretive approach is theoretically obvious: if this

⁸⁹ This has been done through the *Authorization for Use of Military Force Against Terrorists* (AUMF), which has been passed by Congress in 2001, a few days after the 9/11 attacks. It has been complemented in 2013 by a *Presidential Policy Guidance* that formalizes the standards and procedures for reviewing and approving operations to capture or employ lethal force against terrorist targets ‘beyond the Afghan theatre’, in countries such as Yemen or Somalia that the US qualifies as being ‘outside areas of active hostilities. See: Barack Obama, ‘Remarks by the President at the National Defence University’ (Washington, DC, 23 May 2013) < <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> >. See also: Stephen W. Preston, ‘The Framework under US Law for Current Military Operations’ (Committee on Foreign Relations, United States Senate, 21 May 2014).

⁹⁰ For the US however the international legal basis of such strikes against ‘Al Qaeda and its associated forces’ is to be found both under self-defence (as interpreted by the US) as well as under IHL even ‘outside areas of active hostilities’; and not under HRL. See: Gen. John P. Abizaid and Rosa Brooks (co-chairs of the Task Force), *Recommendations and Report of the Task Force on US Drones Policy* (Stimson 2014) at 34 (Stimson Report).

⁹¹ See, for instance: ‘Killing Americans Abroad: Is the Obama Administration Justified?’ *Al Jazeera America* (24 June 2014) < <http://america.aljazeera.com/watch/shows/inside-story/articles/2014/6/24/drones-memo-release-was-the-obama-administration-justified.html> >.

⁹² Stimson Report (n 90) at 32 ; Philip Alston, *Study on Targeted Killings, Addendum to Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (UN Doc A/HRC/14/24/Add.6, 28 May 2010) paras 87-92; Emmerson, *Interim Report* (n 34) para 41; Ben Emmerson, *Report of the Special Rapporteur on the*

counterterrorism strategy is meant to work; then the way ‘targets’ are selected, information is collected etc. has to remain classified; but it raises legitimate concerns as to possible arbitrariness of those strikes.⁹³ To increase oversight, some have suggested establishing a special court or an independent oversight board in the executive branch to evaluate and authorize in advance extraterritorial drone strikes.⁹⁴ Others recommend a less formal “non partisan independent commission” to review lethal UCAV policies.⁹⁵ These new mechanisms might bring useful solutions but they certainly do not solve the issue overall. Every precaution should be taken when attempting to regulate the use of drones to avoid the possible perverse effect of legitimizing “combat drones” outside the territory of the parties to an armed conflict. “Combat drones” are not appropriate tools for law enforcement, be it domestically or abroad. This should be the starting point of any legal and policy framework aiming at regulating the use of “combat drones” outside hostilities.

Regarding the use of “law enforcement drones”, it seems wise to suggest to strictly regulate in advance at the domestic level the use of such technology and to check the conformity of such means with international and domestic law enforcement requirements.⁹⁶ Although there is no equivalent to article 36 of Additional Protocol I for law enforcement means under HRL, States should nevertheless carefully assess if (and under which conditions) new law enforcement means can respect the HR law enforcement paradigm before allowing their use.

4.2.2. Accountability

The lack of transparency described in the previous section regarding extraterritorial drone strikes raises serious concerns under the accountability principle when those strikes are conducted outside the scope of the battlefield.⁹⁷ An investigation must be conducted each time drone strikes are conducted under the law enforcement paradigm⁹⁸ even if most of the information related to those strikes remains classified at least for a certain time.

For instance, an oversight body, such as a specific civilian or military tribunal, could review the strikes *ex post* without disclosing to the wider public the information on which it bases its analysis. Some regional human rights bodies have considered that military tribunals inherently lack the requisite independence and impartiality when investigating military personnel suspected of serious human rights violations, such as the killing of civilians in military operations.⁹⁹ There are ways, nevertheless, to ensure that the military investigative body is legally and practically separated from those who allegedly committed a violation and, therefore, independent and impartial. In a similar way, the Stimson Report has suggested, for

Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism (A/HRC/25/59, 10 March 2014), para 36. See also Concluding observations : USA (n 21) para 9.

⁹³ Stimson Report (n 90) at 32 and 36.

⁹⁴ Obama Speech (n 89). See also contributions in this book on a Drone Court. Without proposing a particular oversight body, the Human Rights Committee recommends an ‘independent supervision and oversight of the specific implementation of regulations governing the use of drone strikes’. See Concluding Observations : USA (n 21) para 9.

⁹⁵ Stimson Report (n 90) at 43.

⁹⁶ See a proposal in this sense by Eric Brumfield (n 88).

⁹⁷ See above (n 92). It is true that under IHL, there is no obligation to conduct an investigation except notably when there is an allegation of a war crime. This lower standard for investigations however does not apply outside hostilities (and allegedly outside the geographical scope of the battlefield) because the governing paradigm is law enforcement.

⁹⁸ Concluding observations : USA (n 21) para 9.

⁹⁹ *ICRC Report on the Use of Force* (n 35) at 56.

instance, the establishment in the US of a non-partisan independent commission of experts to review particular past drone strikes ‘outside of hot battlefields’.¹⁰⁰ Although this body would not be judicial in nature and, for this and other reasons, would not be considered as sufficient under the HR law enforcement requirements, this proposal points to the right direction. This same report also proposes that, in order to improve transparency and accountability towards the wider public, drone strikes should generally be acknowledged by the US after the fact.¹⁰¹ It also suggests the public release of a first report on “the approximate number and general location of targeted UAV strikes; the number of individuals known to have been killed and their organizational affiliations; the number and identities of any civilians known to be killed, and the approximate number of strikes carried out by the military versus the CIA” and of a second report detailing the “legal basis under domestic and international law for the United States conducting targeted killings”.¹⁰² These suggestions are inspiring. However, even if increasing transparency and providing for accountability mechanisms would improve the situation, this cannot alter the conclusion that “combat drones” are not appropriate law enforcement means and should be relied on only in proper hostilities.

Regarding “law enforcement drones”, they should in no way escape from regular accountability mechanisms whether they are used at home or abroad to maintain or restore public security, law and order. As any other means, they may in a particular situation be used in a way that is contrary to law enforcement principles. Accountability mechanisms are there to prevent such occurrences. Although this might not appear particularly problematic at first sight, accountability could be hampered by the possible difficulty (and sometimes) impossibility to merely attribute the use of force as discussed below.

4.3. What Are the Other Legal and Policy Issues Raised by Armed Drones?

In addition to law enforcement rules and principles, there are other legal and policy issues that should be taken into account when assessing armed drones.

1) *Attribution*: An inherent feature of all armed drones is that they are unmanned vehicles. It may thus be extremely difficult to know who is operating the drone. Is it a State, and if yes, which State? Which entity within the State (e.g. Department of Defence or intelligence)? Is it a non-state actor? Who is the individual having ordered or operated the strike? How many persons were involved? This leads to particularly difficult challenges in terms of attribution and thus also accountability.¹⁰³

2) *Proliferation*: Given the relative inexpensiveness¹⁰⁴ of armed drones and the fast evolutions in technology the risk of uncontrolled proliferation is high.¹⁰⁵ Armed drones may be purchased not only by States, but also by organized non-State armed groups. In September 2014, CNN held that Hezbollah used a “combat drone”.¹⁰⁶ The Hamas proudly claims it can now produce armed drones.¹⁰⁷ ISIS uploaded a video to YouTube that showed aerial views of a Syrian

¹⁰⁰ Stimson Report (n 90) at 43.

¹⁰¹ Ibid at 14 and 42.

¹⁰² Ibid.

¹⁰³ Stimson Report (n 90) at 33.

¹⁰⁴ Brumfield (n 88). Contra : Stimson Report (n 90) at 22.

¹⁰⁵ Ibid, at 21.

¹⁰⁶ Peter Bergen and Emily Schneider, ‘Hezbollah armed drone? Militants’ new weapon’ *CNN* (22 September 2014) < <http://edition.cnn.com/2014/09/22/opinion/bergen-schneider-armed-drone-hezbollah/> >.

¹⁰⁷ Ibid.

military base allegedly destroyed by a drone.¹⁰⁸ A South African company sold twenty-five “riot drones” to a mining company.¹⁰⁹ Individuals can acquire small drones equipped with Tasers in order to incapacitate intruders.¹¹⁰ These evolutions do require a reflection, and the possible adoption of appropriate laws and policies to prevent the harmful proliferation of armed drones.¹¹¹

3) *Violence Increase*: The use of “combat drones” has been criticized as being a factor of instability that may escalate rather than suppress violence.¹¹² Communities affected by armed drones, because of the resentment such means may comport, might become in turn more violent and a risk of escalation of violence exists. Similarly, a world where the police is far from the communities and maintains law and order through “law enforcement drones” may increase violence rather than play a deterrent role.

4) *Impact on human rights other than the right to life*: The use of lethal force by drones might challenge the presumption of innocence and the right to a fair trial as well as the right to an effective remedy for both the direct victims and their next-of-kin.¹¹³ “Law enforcement drones” can affect the right to privacy or freedom of assembly and of expression because of the fear they may stir up in the public.¹¹⁴

5) *Ethical and psychological impact*: HR experts have noted that the use of armed drones creates an atmosphere of fear in the affected communities, which live with the continuous uncertainty as to whether, when and where a strike will be performed.¹¹⁵ In a web-interview, the ICRC President acknowledged this potential psychological impact of drones and stated that it is a matter of concern for his organization.¹¹⁶ This atmosphere of fear could also exist if “law enforcement drones” were increasingly used domestically or abroad. Recent studies also demonstrated that drone operators are particularly vulnerable to post-traumatic stress as a result of prolonged observation of their “targets” and the damage caused by the strike.¹¹⁷

5. Conclusion

The use of drones has grown considerably since the early 2000s. Armed drones are used in contexts of conflicts governed by IHL. They are also used to target alleged “terrorists” extraterritorially and outside of the battlefield where the governing framework is HRL. The latter framework would also apply if armed drones were used domestically in peacetime and situations of violence not reaching the threshold of an armed conflict in order to maintain peace, security and order. A number of companies are already developing drones for law enforcement purposes. Some law enforcement agencies are eager to get this new technology which is cheaper and implies lesser risks for their staff.

¹⁰⁸ Ibid.

¹⁰⁹ ‘Riot Control Drone Armed with Paintballs and Pepper Spray Hits Market’ (n 7).

¹¹⁰ ‘CUPID drone to “shock the world” with 80,000 volt stun gun’ (n 86).

¹¹¹ Stimson Report (n 90) at 27.

¹¹² Ibid at 30.

¹¹³ Ibid at 36; Melzer, *Targeted Killing* (n 33) at 426.

¹¹⁴ ‘Riot Control Drone Armed with Paintballs and Pepper Spray Hits Market’ (n 7).

¹¹⁵ *Human Rights Council’ Panel on Armed Drones* (n 3).

¹¹⁶ Maurer (n 5).

¹¹⁷ Bumiller, Elisabeth, ‘Air Force Drone Operators Report High Levels of Stress’ *New York Times* (18 December 2011) < <http://www.nytimes.com/2011/12/19/world/asia/air-force-drone-operators-show-high-levels-of-stress.html>>.

The HR law enforcement paradigm is strict. It comports obligations for the actual use of force (necessity, proportionality and precautions) and obligations that intervene before and after the actual use of force (legality and accountability). Lethal (or potentially lethal) force may be used only as a last resort. Only the smallest amount of force necessary may be applied. The kind and degree of force used must not only be necessary but also strictly proportionate to the seriousness of the offence and the legitimate objective to be achieved. Intentional lethal force may be used only when strictly unavoidable in order to protect life. All precautions must be taken at the planning and control phase of an operation in order to avoid as much as possible the use of force and to minimize death and injury. Well before the use of force, States must put in place an appropriate legal and administrative framework in order to secure the right to life. State officials must be adequately trained and provided with various weapons, ammunitions and equipment allowing for a differentiated use of force. Each use of force by State officials must be investigated.

Large UCAV of the kind that are used in armed conflicts and counter-terrorism operations are not appropriate means for law enforcement. They cannot do any graduation of force. They comport a high risk of causing deaths among bystanders. They tend to be used against individuals because of their membership to a criminal group rather than because these persons pose an imminent threat to life. The circumstances under which the use of such means might be justified under law enforcement are thus extremely rare. “Combat drones” should therefore not be used outside armed conflict situations and hostilities.

Instead, there are new types of armed drones that are developed to maintain or restore public security, law and order. These “law enforcement drones” can do warnings and are armed with “less-than-lethal” weapons such as Tasers or rubber bullets. In contradistinction with “combat drones”, they can effect an escalation of force; the type and degree of force they apply is less violent and they are meant to avoid the use of potentially lethal force. If used in an adequate manner, these drones are presumably able to respect the HR law enforcement principles.

“Combat drones” and “law enforcement drones” are thus different and lead to different conclusions when analyzing their compliance with the HR law enforcement paradigm. They have however common features and, to that extent, raise similar issues in terms of attribution, accountability, proliferation, impact on increase in violence and ethical and psychological impacts. Informed legal and policy decisions on the use of armed drones in law enforcement should take into account all these various dimensions.