

The human rights implications of targeted killings

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I would like to look at the current issue – targeted killings – from a general point of view. While it is true that a specific country is at the forefront of recent developments in this regard - and I will therefore make some references to the United States - the more enduring question is, how does the international legal system, developed over the years, view the situation when states single out people, invariably in other countries, whom they then eliminate through raids or drones?

More pertinently: are we ready to accept major structural changes in the international system that underlies what historians call the 'long peace' – the period since the Second World War, during which major threats such as nuclear standoffs and various forms of terrorism have been endured? Some states with the necessary capabilities clearly find targeted killing hugely attractive today; others will no doubt feel the same pull in the future. The precedents for the future are set by what we accept today.

I want to look at this issue specifically from the perspective of my mandate, which focuses on preventing and addressing unlawful killings under international human rights law, as well as international humanitarian law. In other words, the aim is to ensure respect for every individual's right not to be arbitrarily deprived of his or her life. It is undisputed that the right to life is part of international customary law, and as such it imposes duties on states irrespective of the ratification of specific treaties. It is non-derogable, including in times of war. Some see it as 'the supreme right', and the protection of life has been described as a rule of *jus cogens*.

The current rise in the use of targeted killings by a small number of states presents major challenges to the systematic protection of the right to life. The paradigm of a global war on terror raises the spectre of Hobbes's 'war of all against all', where states – and possibly non-state actors as well - will feel little constraint in 'taking out their enemies' wherever they may find themselves.

The basic principles are well known. Where there is no armed conflict, international human rights law applies, and a very high level of protection is afforded to the right to life: it may only intentionally be abrogated where necessary to protect life. In the exceptional situation of armed conflict, the *lex specialis* rules of IHL also apply, and any killings must satisfy the principles of proportionality, distinction, necessity, and humanity.

The basic point of departure is therefore the question whether an armed conflict exists. In this regard there is little point in talking about a 'hot' or a 'cold' battlefield – either the killing is done in a conflict zone or not. The criteria whether an armed conflict exists are objective, and not merely the subjective considerations of the parties involved.

Killing may be lawful in an armed conflict, where the rules of IHL are met. But many targeted killings take place in circumstances that are both far from any recognised area of armed conflict, where the legal threshold of 'armed conflict' are not met, and against actors who have unclear (if any) links to any of the parties to a recognised armed conflict. Unless the requirements of an armed conflict are met, international human rights law should strictly apply – and many targeted killings appear to violate the standards of human rights law.

To turn briefly to international law in general: Operations in the territory of other countries potentially violate the rules concerning the inter-state use of force and state sovereignty, and can as such be seen as acts of aggression, although these are not primarily human rights or humanitarian law issues, and I will not address them.

The justification of self-defence has been advanced. However, the established legal confines of self-defence are often exceeded in targeted killing. Self-defence (and the use of force on another state's territory) is only justified in response to an 'armed attack'. The threshold for 'armed attack' is high, and there must, of course, be a direct link between the 'armed attack' and the subsequent use of force in self-defence. And, as a general rule, self-defence may only justify force in response to attacks that have already occurred.

It is very difficult in most cases to see how any targeted killings carried out in 2012 can be justified as a self-defence response to the September 2001 terrorist attacks. This difficulty is only increased as attacks take place in more

and more countries and against more and more groups with little, if any, link to those responsible for 9/11.

What about new threats? While it is agreed that states may engage in self-defence against truly 'imminent' attacks, it is a huge stretch to say that many of those targeted by drone attacks meet this requirement of imminence, or the requirement of 'armed attack'. As a result, more permissive standards of 'pre-emptive strikes', without a clear basis in the UN Charter, are advanced in support of what would normally be regarded as aggression.

However, what should be clear is that no justification of inter-state force can obviate the need for the further enquiry as to whether the demands of international human rights or international humanitarian law have been met in the particular use of force – these are two separate, consequential and not alternative enquiries.

If it is a situation of armed conflict, triggering IHL as the applicable framework, the question arises whether a particular person may lawfully be targeted. It is hard to imagine how someone who is driving through a desert in Yemen can be a Direct Participant in Hostilities against a country halfway around the world, or be exercising a Continuous Combat Function as part of a group that might be inspired by, but is not part of, any "group" that is a party to an armed conflict.

Reference should be made to a study earlier this year by the Bureau of Investigative Journalism, which contains reports of many civilian deaths from drone attacks and of secondary drone strikes on 'rescuers' shortly after a first strike. Civilian casualty reports raise serious questions about whether the principles of distinction and proportionality are being satisfied. If civilian 'rescuers' are indeed being intentionally targeted in a situation of armed conflict, there is no doubt about the law: those strikes are war crimes.

Similar concerns have been raised about the method of identifying civilians in drone attacks according to a widely-read recent NYT article, where 'anonymous' sources stated that adult males were generally counted as 'militants' if they were in the surroundings of others deemed to be terrorists. Especially given the failures to provide transparency about these strikes, it is important that journalists and NGOs investigate these issues.

In the last place – and I want to elaborate on and stress the importance of this – the requirements of **transparency** and **accountability** apply under international human rights law as well as IHL. The ‘first line of defence’ is indeed the national legal systems level, but if violations of the right to life are not dealt with on that level, the position of the state in question becomes a matter of legitimate international concern. This is the kind of accountability that the Human Rights Council deals with on a regular basis – for example now in respect of Syria, and earlier with regard to Sri Lanka.

Accountability for violations of the right to life is not a matter of choice, or policy; it is a duty under both domestic and international law. Without transparency, accountability cannot take place.

In the context of armed conflict, states are required by common article 1 of the Geneva Conventions to ‘ensure respect’ for the Conventions, which is understood to also include the obligation to induce transgressor states to comply. The ‘grave breaches’ provisions of the Fourth Convention, dealing with ‘wilful killing’, requires that effective provisions be in place to punish transgressors. To give meaning to these provisions, states are required to disclose the measures they have put into place to ensure respect for their obligations, investigate alleged violations, and ensure prosecution.

The recognition of the right to life as a customary rule of international human rights law likewise requires states to investigate, prosecute and punish violations.

The question of transparency and accountability is complicated by the fact that reports indicate drones are often operated by intelligence agencies, which fall outside democratic restraints on the military, and which, by their very nature, are opaque institutions.

Given all of the questions that I have raised about targeted killings, clarity on the following is urgently demanded: transparency concerning the general question about the legal basis of any targeted killing that takes place, but also transparency about the facts that make a full legal assessment possible, including: who has been killed; what was the factual basis for targeting them; were there civilian casualties; how does the process work by which decisions

are made? Only on this basis can questions of individual and collective responsibility be determined, compensation paid where necessary, etc.

We have been given some minimal information on the above through occasional anonymous 'leaks' to journalists. These leaks raise more questions than they answer, and their content raises serious concerns about the targeted killing program's compliance with international law. One does not know whether the information provided is correct, and there is no official responsibility for the information that is provided.

To conclude:

The term 'targeted killing' is misleading in the context of drone strikes, in that it creates the impression that little violence occurs and only the so-called 'target' is affected. Yes, the specific target may in theory be identified with greater precision, and collateral damage in a particular case may be reduced (when compared with aerial bombardments). But because drones eliminate all risk to the soldiers of the state using it, it can be used much more often and as such increases the risk also to civilians. Those living in areas where strikes occur live in a constant state of fear for their lives.

Moreover, the strikes are only as accurate as the intelligence information underlying them, and information gathered over such a long distance can be inaccurate, and lead to irreversible decisions. So-called 'signature strikes' (a better name would be 'profile strikes'), in which targets are chosen based on patterns of behaviour, raise especially serious concerns in that context.

Some states appear to want to invent new law, or stretch existing law beyond long-accepted understanding, in an attempt to justify extraordinary and often unlawful practices that are carried out in an attempt to meet short term goals. Individuals and states have always faced security threats. The existing legal frameworks were developed to balance legitimate security concerns with respect for territorial integrity, state sovereignty, the rule of law, due process, and individual rights. Current targeted killings practices weaken the rule of law, and radically disrupt settled restraints on the use of force. They also set dangerous precedents for the future. The international community should act to uphold and restore the integrity on the international rule of law, and the protections guaranteed by human rights.

It has been said – correctly in my view – that before technology develops, it is difficult to foresee its consequences; but once it has happened, it is often too late to regulate.

Beyond the horizon lie many new developments – such as the domestic proliferation of police surveillance drones and police drones equipped with less-lethal or lethal weapons. The prospect of domestic police drones needs urgent attention from civil society and governments. On the horizon is also lethal *automated* robotics. Drones may in future be programmed to autonomously – that is, on their own – carry out killings, and decide who should live and who should die. The international community needs to confront squarely the dangers posed by these technologies before it is too late.

Let us fast forward five or ten years. Do we want to live in a world where governments around the world have secret programmes to eliminate their enemies in other countries, wherever they are? If not, we should not let the genie out of the bottle.