DOES THE USE OF PREDATOR DRONES TO CARRY OUT TARGETED KILLINGS IN A FOREIGN STATE’S TERRITORY IN RESPONSE TO ARMED ATTACKS BY NON-STATE ACTORS VIOLATE INTERNATIONAL LAW?

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SUMMARY

In developing the idea of the just war Hugo Grotius, develops certain natural rights, of which the most important is that it be lawful to kill him who is preparing to kill. Hugo Grotius formulation of self-defense understandable as a broad right of preemption which justifies the use of force against states that are preparing to kill. More than a century later, Emmerich de Vattel expands Grotius concept of self-defense allowing preemptive force to prevent evil. However, the Grotius and de Vattel’s statements and arguments were made before Westphalia peace (1648) when there was no sovereignty concept. Nevertheless, in a recent past there are numerous historical examples were anticipatory self-defense has been used and it’s usage recognized by international community. The lack of treaties and protocols governing the use of unmanned robots on the battlefield presents debates among international legal scholars. Therefore, it is necessary to assess whether the use of force in response against attacks promulgated by non-state actors is compatible with the principles of Ius ad bellum, such as proportionality, necessity sovereignty and liability of the entity. In recent years, the United Nations Security Council characterized international terrorism in general as one of the most serious threats to international peace and security. However, charter’s language suggests that it only regulates the use of force between states therefore an armed response to a terrorist attack will almost never meet parameters for the lawful exercise of self-defense. Instead terrorist attacks are generally treated as criminal acts because they have all the hallmarks of crimes. The drone attacks involve significant firepower—this is not the force of the police, but of the military. It is also necessary to define and to examine what actions are legal and what actions are illegal during use of force with consistency of principles of Ius in bello. Proportionality constitutes a limit to the power to choose the means and methods of warfare. The rule of distinction requires that attacks may only be directed against combatants. The Hague Conventions of 1907 and the Geneva Conventions of 1949 outline some of the rights held by illegal belligerents, such as a right to trial upon capture. Even the sophisticated cameras of a drone cannot reveal with certainty that a suspect being targeted is not a civilian. Therefore, usage of large capacity

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firearms in densely populated areas where such operations take place clearly violates principles of necessity and distinction under international law. Right to life guaranteed by the article 6(1) of the International Covenant on Civil and Political Rights is applicable even in the case of the conflict between state and non-state actors. Moreover, the duty to respect right to life is a peremptory norm of customary international law. Therefore, targeted killings should never be based solely on suspicious conduct or unverified – or unverifiable – information. Otherwise, the strike would constitute a clear case of extrajudicial (arbitrary) killing.

**KEYWORDS**


**INTRODUCTION**

Self-defense in response to armed attacks promulgated by non-state actors is undoubtedly one of the controversial and complex issues in modern international law. Highly economically and technologically developed countries for instance The United States has increasingly relied upon unmanned aerial vehicles (UAVs), or drones, to target and kill enemies in its current armed conflicts. It is of great practical relevance, as for instance, with the ongoing use of drones for the targeted killings of suspected terrorists, and has attracted a great deal of scholarly attention.

Events such as intervention into a sovereign state, targeted killings and destruction of civilian property causing enormous resonance, interest and discussions among the world’s most famous scholars in the field of international law. Moreover, the usage of unmanned aerial vehicles because of its robotic nature, which is not covered by any legal written source of International law and specific entity of non-state actors causing even more controversy.

In recent years, the UN Security Council authorized significant amount of military sanctions and interventions by approving “Global war on terror” and declaring that terrorism is the most serious threat to international peace and security. Does the respect of intervention onto states territory and states sovereignty is still fundamental in international law? Does the legal interpretation of International law sources require consent of the state where the targeted killings occurs? Hugo Grotius develops an idea of anticipatory self-defense “it be lawful to kill him who is preparing to kill”\(^2\), there is also numerous historical examples where anticipatory self-defense has been used and its usage recognized by international community, however Caroline case\(^3\) sets a test for legitimate self-defense, it has to be imminent treat for states survival. Is the anticipatory self-defense is inevitable considering sophisticated military technology or it’s just a niche for state leaders in order to achieve their goals by manipulating and artificially creating right of self-defense? Does the

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\(^3\)**United states v. Great Britain** (also known as Caroline case), (1837) [hereinafter CAROLINE].
anticipatory self-defense considering the usage of predator drones permitted under customary law and *jus ad bello*? Executing member of violent non-state organization, who is not acting as a hostile on the battlefield, but having a dinner or playing with kids in a foreign sovereign state territory is legal even if the anticipatory self-defense exists or its extrajudicial killing under Geneva Convention⁴? The lack of treaties and protocols governing the use of unmanned robots on the battlefield presents debates among international legal scholars. Unmanned weapons are used usually in places and in circumstances that do not specify as a battlefield considering international law. Does the location of the strike has to be only within recognized battlefield? Usually UAVs are operated via satellite from another corner of the world. Does it matter in the legal sense where the operator of the drone is located? Most often these robotic weapons are controlled not by military, but by civilians (i.e. Central Intelligence Agency personnel). If under UAV attack an error occurred and innocent persons were killed, who are to blame? Is it the commander, the operator, the programmer, the victims, or perhaps the machine? Predator drones has the ability to find and identify targeted persons that it seems that it should easily comply with the principle of distinction, does importance or rank in organization of targeted person has sufficient impact of justifying acceptable collateral damage? Under international law, the line between combatant and civilian is often blurry and undefined. Does the terrorist who intentionally fails to distinguish himself as a combatant obtains a protected status of a legal combatant?

Non-state actors are not new entity considering international law, in history we find many examples of international violent non-governmental organizations, or persons associated with those organizations engaged in terrorist attacks internationally such as Red brigades, Yakuza or Cosa Nostra. Nevertheless, these organizations and individuals have been treated as criminals rather than combatants or illegal belligerents, what has been changed in legal interpretation of the actions delivered by non-state actors? Or was it at all? Is it criminal acts or armed attacks?

And finally what are the rights of non-state actors if a state unlawfully uses force against them? According to Professors Paust and Printer the state has right to use force against non-state actors as legitimate self-defense and even targeted killings, because “an entity that elects to use force on the international plane should be treated as an international actor and should be bound by accepted international norms”⁵, therefore does a non-state actors has right to legitimate self-defense against states attacking them?

Many of these legal questions are still not answered, moreover, even more questions concerning drones and terrorists are so far unrevealed.

**The main aim of my article** - to identify the legal framework and sources of law applicable to the current conflicts in which drones are employed; examine whether, and if so in what circumstances state can use legitimate right of self-defense by using force

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⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 75 UNTS 31, 12 August 1949 (entered into force 21 October1950).

against other international entities. Moreover, does the usage of drones for targeting operations violates the *jus in bello* principles of proportionality, military necessity, distinction, and humanity; determine what legal limitations apply to the limitless capabilities of drone warfare; evaluate whether the law of armed conflict is adequate for dealing with the use of drones to target belligerents and terrorists in this non-traditional armed conflict and ascertain whether new rules or laws are needed to govern their use.

To achieve the aim, I’ll begin with (1) short introduction of the roots and development of international law. In determining existence of anticipatory self-defense and thus the legality of Predator drone strikes, it is necessary to (2) reveal the new legal challenges in relation to new technological sophisticated and modern warfare permissibility to use force. Further it will (3) examine laws such as United Nations Charter and other international treaties which address how and when states can initiate armed conflict, whether or not to engage in a war is permissible and (4) define what actions are legal and what actions are illegal during war by examining the Hague Convention and the Geneva Convention which regulates conduct during war. One of the crucial questions conclude by (5) proposing legal and policy guidelines for the lawful use of drones in armed conflict. Therefore it has to be (6) extinguished contradictions between UN Charters articles 2 (4) and 51, between the right of self-defense and principle of sovereignty, between civilians and illegal belligerents, and finally between criminal act and armed attack.

**BACKGROUND**

i. HISTORICAL RETRO PERSPECTIVE AND PHILOSOPHICAL APPROACH OF ANTICIPATORY SELF-DEFENSE

International law begins with its sources, of which state practice and *opinio juris* (belief of states that a practice is lawful) are the most important. In determining existence of anticipatory self-defense and thus the legality of Predator drone strikes, it is necessary to consider the origins of international law, and in particular the law of war.

The Law of War developed through five periods. The first period is the Just War Period (335 BC to 1800 AD). Hugo Grotius develops an idea of anticipatory self-defense. The second period is The War as Fact Period (1800 to 1918). War as Fact developed concepts to avoid war in the first place by implementing legal guidelines, such as treaties and policies. The third is *Jus Contra Bellum* (1918 to 1945), the main goal of this period prohibiting aggression and admitting self-defense. The fourth period is the Post World War II Period (1945 to 1946). It focused the legal situations that may occur with the use of nuclear weapons. This period also focused on the concept of “war crimes.” The last period is the United Nations Charter Period (1946 to present). 6

In developing the idea of the just war in his 1625 work The Law of War and Peace, Hugo Grotius, considered as the father of international law, develops certain natural rights,

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of which the most important is that “it be lawful to kill him who is preparing to kill.” 7 Hugo Grotius formulation of self-defense understandable as a broad right of preemption, witch justifies the use of force against states that are preparing to kill. Grotius does not limit this by a test of imminent threat, necessity or proportionality as it was developed in famous Caroline case, considering Hugo Grotius statement the act of preparing to kill is sufficient to justify the use of force in self-defense.

More than a century later, Emmerich de Vattel in his Law of Nations explained, the safest plan is to prevent evil where that is possible. “A Nation has the right to resist the injury another seeks to inflict upon it, and to use force against the aggressor”. 8 De Vattel expands Grotius concept of self-defense allowing preemptive force to prevent evil. The model of self-defense favored by these two highly recognized and first international lawyers is much wider than that developed Caroline case international lawyers. The Grotius and de Vattel’s statements and arguments are no longer relevant to twenty first century international law debates, either because they were made during a time when the use of force did not have any legal constraints or because relations of the society and in particular military conflicts strategy, tactics and military measures have so developed. But the most crucial concern about Grotius and de Vattel’s statements is at the time these states were made there was no sovereignty concept, it was found and came into power only after Westphalia peace in 1648 and thus the arguments of these two scholars of international law are no longer relevant. The Caroline case correspondence, were limiting the broad right of self-defense that Grotius and de Vattel articulated. Nevertheless, the UN Charter is clear in its unwillingness to restrict the right of self-defense: Article 51 of the Charter reassure that nothing in the present shall impair the inherent right of individual or collective self-defense. Grotius and de Vattel confirmed a natural right of preemptive self-defense, and it is still by de jure protected by Article 51 of the UN Charter. But UN charter and in particular Article 51 regulates relations only among the states, and this situation rises a serious questions when it comes to a right of self-defense against non-state actors.

There are numerous historical examples were anticipatory self-defense has been used and its usage recognized by international community.

During the 1800s, Napoleon’s armies were conquering the European continent, Great Britain learned of secret protocols to treaties signed between France and Russia under which Russia would not object to France seizing Denmark’s naval fleet. These agreements were essential to Great Britain national security. Great Britain sent British soldiers to Copenhagen and in that way maintained its control of the seas and prevented an attack from France.

A century later, after France capitulation to the Nazi Germany, British government feared that the British Royal Navy might lose control of the seas if Frances naval fleet fell under Nazi control, Prime Minister Churchill ordered the destruction of Frances naval fleet.

The Cuban Missile Crisis, began with satellite photographs showing the Soviet Union arming Cuba with nuclear missiles capable of hitting American territory. The US President

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7 See supra note 2 [GROTIIUS], p. 64.
Kennedy ordered a blockade of the Cuban island. Even though Cuba had its missiles pointed at U.S. territory. President Kennedy ordered “Bay of pigs” invasion. Nevertheless, when it comes to non-state actors there are numerous historical examples when the state leaders in order to achieve their goals manipulates and artificially creates right of self-defense.

During the night of July 18, 64 AD, fire broke out in the merchant area of the city of Rome. It is uncertain who or what actually caused the fire. According to Tacitus, some in the population held Nero responsible. To diffuse blame, Nero targeted the Christians. There were Christians who confessed to the crime, but it became known that Christians were forced to confess by means of torture. After this major event, in whole Roman Empire Christian persecution began.

In 1933 Adolf Hitler had been sworn in as Chancellor and head of the coalition government. Hitler's aim was first to acquire a National Socialist majority to secure his position and eliminate the communist opposition. On 27 February, 1933, the Reichstag caught fire. Hitler announced that it was the start of a Communist plot to take over Germany. This sent the Germans into a panic and isolated the Communists further among the civilians; additionally, thousands of Communists were imprisoned and Communist party has been banned.

Even though these examples do not have international element, we can certainly find some parallels of the events that are occurring in our days.

ii. NEW TECHNOLOGY OF MODERN WARFARE (UNMANNED AERIAL VEHICLES)

The development of the crossbow and spear, gunpowder and missile, dynamite and atomic bomb are some of the innovations that have significantly changed the concepts of war. The use of firebombs against the Japanese during World War II and the use of napalm during the Vietnam War today is considered to violate the principle of proportionality according to the current interpretation of Humanitarian law. The lack of treaties and protocols governing the use of unmanned robots on the battlefield presents debates among international legal scholars. Unmanned weapons are used usually in places and in circumstances that do not specify as a battlefield considering international law, even more, most often these robotic weapons are controlled not by military, but by civilians (i.e. Central Intelligence Agency personnel).

Unmanned aerial vehicles (UAV) or drones, aerial vehicles piloted remotely, can carry lethal ammunition. Predator MQ-1, armed with AGM-114 Hellfire missiles and the MQ-9 Reaper, can carry Hellfire bombs.⁹ Their primary purpose of UAV’s was surveillance and target acquisition, guaranteeing systematic and real time observation of the area of operations. But recently this high-tech machinery has been found a new niche. Equipped with precision ammunition, these platforms, lingering over targets for hours and then executing them if necessary. The UAV is operated by remote control and is capable of projecting vivid imagery to the operator as the system searches for its assigned target. Once

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the target is acquired, the operator may launch one of the UAV’s onboard Hellfire missiles in order to destroy the target. In the legal sense one of the difference between a normal military jet aircraft and UAV is because of unclear attribution. If under UAV attack an error occurred and innocent persons were killed, who are to blame? Blame could be placed on the commander, the operator, the programmer, the victims, or perhaps the machine.

Usually UAVs are operated via satellite from another corner of the world. Considering this it’s easier to drop a bomb on a town, it becomes easier to control drone by remote that shoots at suspected terrorist while sitting in comfort at an air force base somewhere thousand miles away. UAV’s that fire precision bombs and guided missiles allows to reduce war to a video game. How is it ethical or even legal to employ unmanned weapons that in general only makes easier to kill people? New technological development usually brings positive changes, in this case UAV’s makes military tasks easier and more effective, in most circumstances UAV’s eliminates involvement of the soldier on the battlefield and therefore retain soldiers life. But it is still unfair to state that UAV saves human life.

PERMISSIBILITY OF USE OF FORCE IN SELF-DEFENSE AGAINST NON-STATE ACTORS AND ITS COMPLIANCE WITH INTERNATIONAL LAW

Ius ad Bellum examines whether or not to engage in a war is permissible. Laws such as United Nations Charter and bilateral and multilateral international treaties address how and when states can initiate armed conflict. Additionally, these laws also determine under what circumstances the use of force is legally and morally justified.

1. (ANTICIPATORY) SELF-DEFENSE AGAINST TERRORISM

Under the UN Charter states are permitted to use force only in self-defense against an armed attack or if the Security Council authorizes a use of force as a necessary measure to restore international peace and security. ‘A state can only exercise its right to use force in self-defense under article 51 if an “armed attack occurs” against it. There is highly recognized opinion that an actual armed attack has to be carried out and that the right to attack another state on the basis of anticipatory or preemptive self-defense is not available under the UN Charter’.

In the Opinion on the Legality of the Threat or Use of Nuclear Weapons the ICJ stated: ‘The Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the UN Charter, when its survival is at stake’. Moreover the “use of force in self-defense

10 Charter of the United Nations, Article 51; [hereinafter UN CHARTER].
is permissible for the purpose of protecting the security of the state and its essential rights, in particular the rights of territorial integrity and political independence, upon which that security depends".13

However in an era of mass destruction weapons, retaliation may become impossible after the first strike, and therefore some form of anticipatory or preemptive defense is necessary and therefore legal. Its continuing permissibility under the Charter on the interpretation of article 51 permitted "interventionary" or "anticipatory" self-defense, which takes place when an armed attack is imminent and inevitable. There has been a dispute between highly recognized legal scholars, is there a right to employ anticipatory self-defense as a measure against armed attacks that did not occur yet, or even if an armed attack was executed is there a significant timing of self-defense response? “In manifesting the desire to regulate collectively and centrally the use of force between States, the members of the United Nations have delegated to the Security Council, the primary and authoritative role in the maintenance of international peace and security. The Council is fully empowered by the Charter to deal with every kind of threat that States may confront, even with military force, if necessary, for the maintenance or restoration of international peace and security.”14 By provision of Article 3915, the Security Council is entrusted with the exclusive authority to ‘determine the existence of any threat to peace, breach of the peace or act of aggression’ and upon such determination to make recommendations or to decide what enforcement measures shall be taken in accordance with Article 4116 and Article 4217 that provides for the undertaking of military action. The Council enjoys very broad discretionary powers when determining whether a particular situation or issue is a threat to international peace and security. Read together, Articles 39 and 42 allow the Security Council to authorize the use of force against threats to the peace: the concept of pre-emptive war".18

Furthermore, “The UN resolution declared under Chapter VII that the "acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations.19 United Nations Security Council passed a resolution condemning the attacks, calling upon states to combat terrorism.20 Therefore, it is clear, that in the light of global treat of terrorism paradigm of anticipatory self-defense develops to the next level and finds more and more supporters who are claiming than nothing in the UN Charter, article 51 forbids the use of pre-emptive self-defense measures. Nevertheless the self-defense is

15 UN CHARTER, Article 39.
16 UN CHARTER, Article 41.
17 UN CHARTER, Article 42.
19 Supra note 15.
consistent with International law only when a nation is under attack, only the immediate action is allowed and even necessary.\textsuperscript{21}

Therefore even if anticipatory self-defense allows for reaction when an attack is imminent\textsuperscript{22} and even if we assume that anticipatory self-defense is consistent with international law considering Predator drones strikes it is hard to imagine UAV which is located in one state, controlled in second and attacking in third state thousand miles away responding to imminent threat. Moreover considering targeting killings which is the main purpose for the usage of UAV’s, executing member of violent non-state organization, who is not acting as a hostile on the battlefield, but having a dinner or playing with kids in a foreign sovereign state territory. Considering the Naulila Case (Portugal vs. Germany)\textsuperscript{23} and UN Reports Of International Arbitral Awards 1012 such action should be defined as an illegal reprisal - "A reprisal is an act of self-help … by the injured state, responding—after an unsatisfied demand—to an act contrary to international law committed by the offending state…Its object is to effect reparation from the offending state for the offense or a return to legality by the avoidance of further offenses."\textsuperscript{24} In a case concerning military and paramilitary activities in and against Nicaragua, the Court held that even shipments of weapons did not amount to an armed attack and could not be invoked as a basis for self-defense.\textsuperscript{25} "When an armed attack has come to an end, an attacked state cannot retaliate by using armed force because such a response would then qualify as an unlawful reprisal under international law", as evinced by General Assembly (G.A.) resolutions\textsuperscript{26}, S.C. resolutions\textsuperscript{27}, and ICJ judgments.\textsuperscript{28}

The UN General Assembly in its 1970 Declaration on Principles of International Law declared, "States have a duty to refrain from acts of reprisal involving the use of force."\textsuperscript{29} Therefore the use of force is legal if and only a threat is imminent or unavoidable considering the concept of anticipatory self-defense, thus in circumstances when solely attack occur and there is no explicit danger, the use of force cannot be veiled as self-defense and should be considered as illegal reprisal under international law.


\textsuperscript{23} Portugal vs. Germany (Naulila case) Portuguese-German Arbitral Tribunal (1928).


\textsuperscript{25} Nicaragua vs United States of America (Militray and Paramilitary Activities in and Against Nicaragua), ICJ (1986), p. 14, 195, 230 [hereinafter NICARAGUA].


\textsuperscript{28} Supra note 25 [NICARAGUA]. See also A. S. SIKANDER, „War on Terrorism: Self Defence, Operation Enduring Freedom, And The Legality of U.S”, Washington University Global Studies law Review (No. 77, 201), p. 7-8.

\textsuperscript{29} See Supra note 26.
ii. THE PRINCIPLES OF NECESSITY AND PROPORTIONALITY

The right of self-defense is subject to conditions of necessity and proportionality. Necessity in the *jus ad bellum* and refers to the decision to resort to force as a last resort and that the use of major force can accomplish the purpose of defense. Proportionality requires the response to be proportional in relation to both the wrong suffered and “the nature and the amount of force employed to achieve the objective or goal.” The ICJ held in the Nuclear Weapons case —there is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. “This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.”

According to UN Charter article 25: 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity.

In General Assembly resolution A/RES/56/83 it is stated that countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. Following what was written above it must be emphasized that there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character. Thus as we can see the customary international law requirements of immediacy and necessity are inextricably linked.

According to Caroline case necessity of that self-defense must be instant, overwhelming, and leaving no choice of means, and no moment for deliberation. The test has two distinct requirements: (a) The use of force must be necessary because the threat is imminent (necessity); (b) The response must be proportionate to the threat

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30 See supra note 12 [NUCLEAR].
33 See supra note 12 [NUCLEAR].
The principle of necessity inseparable from the imminent threat, thus as it was mentioned previously, it is hard to imagine drone, which is located in one state, controlled in second and attacking in third state thousand miles away responding to imminent threat. Considering the Caroline test it is highly doubtful that Predator drone attacks even if it under specific circumstances meets the requirement of proportionality are consistent with necessity requirement which was developed in Caroline case and highly recognized by states. Necessity can only be met when alternative peaceful means of resolving the dispute have been exhausted, given the time constraints involved. Numerous ICI judgments, as in Military and Paramilitary Activities (Nicaragua v. United States)\(^\text{38}\), Oil Platforms\(^\text{39}\), and the advisory opinion on the Legality of the Threat or Use of Nuclear Weapons\(^\text{40}\), have recognized the requirements of necessity and proportionality as limits on the right of self-defense.

The International Law Association’s Committee on the Use of Force issued a report in 2008 confirming the basic characteristics of all armed conflict: 1) the presence of organized armed groups that are 2) engaged in intense inter-group fighting.\(^\text{41}\) The fighting or hostilities of an armed conflict occurs within limited zones, referred to as combat or conflict zones. It is only in such zones that killing enemy combatants or those taking a direct part in hostilities is permissible. Moreover, armed conflict requires certain intensity of fighting\(^\text{42}\), bearing in mind that in this paper, we analyze the states response to the attacks by non-state actors, in view of what has been presented above, there is a reasonable doubt that in most of the circumstances non-state actors actions in general can be defined as an armed attacks under international law. Moreover, even if the responding state would fight against non-state actors within a defined territory, it is clear that under international law when armed attack has come to an end, an attacked state cannot retaliate by using armed force. To continue, target killing might be lawful only if the lethal force is: a) proportionate and b) necessary.\(^\text{43}\) R. Higgins observes that in International Human Rights Law proportionality only “…operates where a restriction upon a right is permitted, to control that restriction”\(^\text{44}\). As regards necessity, it “…means necessity, and not convenience or desirability”\(^\text{45}\). Thus, the mere convenience of firing the missiles form a secure place instead of fighting in a battlefield cannot be treated as necessary.

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\(^\text{38}\) See supra note 3 [CAROLINE].
\(^\text{39}\) See supra note 25 [NICARAGUA].
\(^\text{40}\) Iran v. U.S., (Oil Platforms), ICI (Nov. 6, 2003) [hereinafter OIL PLATFORMS].
\(^\text{42}\) See supra note 31 [O’CONNELL], p. 4.
\(^\text{43}\) UNHRC Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (28 May 2010) para. 32.
iii. SOVEREIGNTY OF THE STATE

In 1648 after thirty years war Westphalia peace (treaty) was signed in which the major European countries agreed to respect the principle of territorial integrity. Even though sovereignty doctrine is slowly melting by facing phenomenon of globalization, so far territorial integrity principle is followed by most of the states. Today sovereignty of the state is protected by the United Nations Charter and customary law. The rule requiring a State’s consent in respect of any intervention onto its territory is fundamental in international law.

Nevertheless, recently some states do not avoid infringement of sovereignty of other states. For instance in 1985 the Security Council defined Israel’s acts against Tunisia as an act of aggression. The attacks on Angola performed by South Africa were labeled as an act of aggression by the SC. Moreover, “... the attack by Iraq on Kuwait in 1990 was ... a breach of Article 2(4) of the UN Charter, ... and thus amounted to an aggression”. It is widely believed that violation of sovereign state territorial integrity is criminalized under international law. Recently the House of Lords unanimously decided that aggression is criminalized under international law. A. Cassese emphasizes “...that it would be fallacious to hold the view that, since no general agreement has been reached in the world community on a treaty definition of aggression, perpetrators of this crime may not be prosecuted and punished”. Lord Brigham of Cornhill referred to Nuremberg tribunal by stating that “…it is unhistorical to suppose that the elements of the crime were clear in 1945 but have since become in any way obscure.” Therefore, the responding State cannot simply breach foreign states sovereignty and to intervene into its territorial integrity and political independency.

However, according to United Nations Declaration on Principles of International Law, concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations all states ha as duty “to refrain from organizing, instigating, assisting or participating in ... terrorist acts in another State.” That means that sovereignty of the state is not absolute under international law.

The ICJ has expressly reserved its position on whether Article 51 requires attribution of the armed attack to a state, nevertheless in Congo v. Uganda case, in descent opinions “Judges Kooijmans and Simma recognized that self-defense can be permissible against

46 UN Charter, Article 2, para 4.
49 UNSC Res 577 (6 December 1985) [Res 577].
51 R. v Jones, House of Lords (29 March 2006) at [CASSESE], supra note 50, p. 153 [hereinafter JONES].
52 Supra note 50, p. 155 [CASSESE].
53 Supra note 51 [JONES], at [CASSESE], supra note 50, p. 153.
55 United Kingdom v. Albania, (The Corfu Channel Case), ICJ (1949) [hereinafter CORFU].
non-state actor armed attacks whether or not the state from whose territory an attack emanates is involved."56 In Corfu Channel, ICJ stated general principle that every State has an “obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.57 Some of the legal scholars go even further "Nothing in the language of Article 51 of the United Nations Charter or in customary international law reflected therein requires consent of the state from which a non-state actor armed attack is emanating and on whose territory a self-defense action takes place against the non-state actor. With respect to permissible measures of self-defense under Article 51, a form of consent of each member of the United Nations already exists in advance by treaty."58

In recent years, the UN Security Council characterized international terrorism in general as one of the most serious threats to international peace and security. In 1992, the Council has frequently condemned acts of terrorism as well as specific cases of state support for terrorism or state failure to prevent terrorist activities as a threat to international peace and security. The Council has often authorized military and non-military sanctions under Chapter VII, inter alia against Libya, Sudan, and Afghanistan. After the 11 September 2001 attacks, the Council members unanimously determined in their resolution 1373 (2001) that these attacks, like all acts of international terrorism, constitute a threat to international peace and security.59 However, the UN Security Council authorizes the use of force to often and mainly in questionable circumstances, it has to be developed strict scrutiny principle as a high standard of judicial review before authorizing the use of force.

In most of the cases, the attacks developed by non-state actors were planned, prepared and sometimes even executed from the territory of foreign sovereign state, or even several states, most often members of violent non-state organizations who are directly participating in a process of an armed attacks traverse in and out of one state to another, therefore the state that suffered such attacks, by taking measures of self-defense are executing military operations directed against members of non-state organizations on the territory of such foreign sovereign state where the attackers are domiciled or even just temporary visiting. The issue of the described situation is the rights of such foreign sovereign state where the members of non-state organization operate. This situation have raised a question, whether the response of the attacked state by using military measures in the territory of foreign state without consent of that state against the attacks developed by non-state actors, violating the sovereignty of the state where the responsible members of non-state organization take place? By explaining the particular legal issue I will take US actions in response to events of 9/11. First the prohibition on the use of force in international law, as set out in Article 2(4) of the UN Charter, operates exclusively between states. If, instead of from Afghanistan, Al-Qaeda operated from and launched the 9/11 attacks against the United

56 Congo v. Uganda (Armed Activities on the Territory of the Congo) ICJ (Dec. 19, 2005), See (Kooijmans, J., separate opinion), paras. 26-30; ID. (Simma, J., separate opinion), para. 7-12. Also see PAUST supra note 5, p. 5.
58 See supra note 5, p. 14 [PAUST].
59 See supra note 18, p. 29 [SVARC].
States from high seas or Antarctica the *jus ad bellum* would not in any way limit the US response to the armed attack. It is only if in responding to the attack the US has to encroach on the sovereignty of some other state that Article 2(4) is engaged. Article 51 requires that the ‘armed attack’ be attributable to a state, thereby engaging its responsibility. Therefore, the 9/11 attacks must have been attributable to the state of Afghanistan. However, the general rules of attribution of acts of non-state actors to states, as articulated by the International law commission in its Articles on State Responsibility and by the ICJ in the Nicaragua and Congo cases, do not allow for a reasonable interpretation that would attribute the 9/11 attacks to Afghanistan, because they require proof that Afghanistan either (a) had complete control over Al-Qaeda, rendering it a de facto state organ; or (b) that Afghanistan had effective control over Al-Qaeda’s conduct in question, i.e. the 9/11 attacks. Since there is no proof the 9/11 attacks cannot be attributed to Afghanistan under the general rules.

Considering all that was stated previously the attacks invoked by self-defense in foreign sovereign state territory can be permissible under International law if a state engages in legitimate self-defense against non-state actors that are preparing, directing or executing ongoing armed attacks, such responsive targeting are not an attack on the state in which the non-state actors are located, such a defensive use of force will not create a state of war or an armed conflict of any duration between the state engaged in self-defense and the state on whose territory the self-defense targeting take place.

However, legitimate self-defense against non-state actors in a sovereign state territory without a particular state consent, only if: (a) the territorial state was actively supporting the non-state actor in its armed attack; (b) the territorial state did not do all that it could reasonably have done to prevent the non-state actor from using its territory to exercise an armed attack against another state, or is not doing all it can to prevent further attacks; (c) the territorial state may have exercised due diligence, but it was nonetheless unable to prevent the attack, or to prevent further attacks.

**iv. NON-STATE ACTORS – TARGETED KILLINGS V. CRIMINAL LIABILITY**

According to the Professor Printer opinion “[t]he language of Article 51 does not restrict against whom the inherent right of self-defense may be exercised”. Moreover, Printer has stated that “[a]n entity that elects to use force on the international plane should be treated as an international actor and should be bound by accepted international norms. It would be inconsistent with the purpose of the Charter which is the maintenance of international peace and security-to allow terrorist groups that engage in transnational armed conflict against a state to fall outside the Charter.” Furthermore if terrorists “intentionally obfuscates the identity and status of its members, it should bear the responsibility for any

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60 32nd session of the International Law Commission (1980) - State responsibility for internationally wrongful acts (part 1).
61 UN Charter art. 51. Also see [PAUST] supra note 5, p. 351.
62 UN Charter art. 1, para. 1. Also see [PAUST] supra note 5, p. 346.
errors in identification." 63 Moreover, according to the opinion of Professor Paust - Targeted Killings and Captures during Self-Defense engaged in during self-defense, measures of legitimate self-defense can include the targeting of what would be lawful military targets during war, like the head of a non-state entity or the head of a state directly participating in on-going processes of armed attack.

However, there is an opposing opinion „Charter’s [c]harter’s language suggests that it only regulates the use of force between states” 64. the use of armed force against terrorists is impermissible in that any use of force not sanctioned by the Charter is unauthorized. An armed response to a terrorist attack will almost never meet parameters for the lawful exercise of self-defense. Insted „,[t]errorist attacks are generally treated as criminal acts because they have all the hallmarks of crimes, not armed attacks that can give rise to the right of self-defense. Terrorist attacks are usually sporadic and are rarely the responsibility of the state where the perpetrators are located". 65 Additionally targeting particular members of suspected terrorists is assassination and violation of the laws of war. 66 There is no reason to believe that the ordinary criminal justice system of foreign sovereign state cannot handle crimes that are of a terrorist nature. However, any person of any status who violates the laws of war is subject to prosecution in any country as a war criminal.

Moreover, if according to Professors Paust and Printer the state has right to use force against non-state actors as legitimate self-defense and even targeted killings, because “an entity that elects to use force on the international plane should be treated as an international actor and should be bound by accepted international norms” 67, therefore, it seems that a non-state actors has right to legitimate self-defense against states attacking them. In a hypothetical scenario, if a tribe would be severely attacked by U.S. armed forces using drones, then according to the principle that there is no rights without obligations and vice versa and considering the arguments of Professors Paust and Printer, a non-state actor has a right to execute targeted killing of the President of the United States.

Members of al Qaeda or other terrorist groups are active in Canada, France, Germany, Indonesia, Morocco, Saudi Arabia, Spain, the United Kingdom, Yemen and elsewhere. Still, these countries do not consider themselves in a war with al Qaeda. 68 Moreover, the British Judge on the International Court of Justice, Sir Christopher Greenwood stated: „In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of

63 See [PAUST] supra note 5, p. 25.
65 See supra note 64, p 14.
67 See [PRINTER] supra note 20, p. 25.
68 See [O’CONNELL] supra note 64, p. 4.
criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy. 69

In history we find many examples of international non-governmental organizations, or persons associated with those organizations engaged in terrorist attacks internationally. Nevertheless, these organizations and individuals have been treated as criminals rather than combatants or illegal belligerents.

After the Civil War, on December 24, 1865, Confederate veterans created the Ku Klux Klan (KKK). 70 The KKK used violence, lynching, murder and acts of intimidation such as cross burning to terrorize African Americans. 71 The KKK has at times been politically powerful, and at various times controlled the governments of several U.S. states. Ilich Ramirez Sanchez, better known as Carlos the Jackal, in 1970, become a member of the Popular Front for the Liberation of Palestine (PFLP), which was known for notorious airline hijackings. After several bungled bombings in 1975 he organized a raid on the OPEC headquarters in Vienna, which killed three people. For many years he was among the most wanted international fugitives. 72 Carlos the Jackal was captured and was found guilty and sentenced to life imprisonment. Red Brigades or Brigade Rose was a Marxist-Leninist terrorist group based in Italy and committed a number of political assassinations. In September 1974, Red Brigades founders Renato Curcio and Alberto Franceschini were arrested and sentenced to 18 years in prison, nevertheless the organization is still active and widely held as a terrorist organization. 73 ETA is an armed Basque nationalist and separatist organization. The group was founded in 1959 and has since considered as paramilitary group with the goal of gaining independence for the Greater Basque Country. Since 1968, ETA has been blamed for killing 829 individuals, injured thousands. The European Union and the United States list ETA as a terrorist organization in their relevant watch lists. 74 And there is plenty of more, not to mention criminal organizations which are active on international ground such as Cosa Nostra, Yacuza, Somali Pirates, Medellin Drug Cartel etc. The law enforcement structures were used to capture these international terrorists and bring them to face a fair trial, instead of using armed force or targeted killings executed by predator drones. The drone attacks involve significant firepower—this is not the force of the police, but of the military. Moreover, the police use lethal force only in situations of necessity. Terrorism is crime, actions of most of the states are generally consistent with its long-term policies of separating acts of terrorism from armed conflict. Therefore, targeted killings without a trial are assassination. And because these persons were killed, by

69 See supra note 64, p. 4, also see CH. GREENWOOD, War, Terrorism and International Law, (56 CURR. LEG. PROBS. 505, 529, 2004).
significant firepower disposed by UAV’s, it is impossible to verify their identity and to definitively ascertain their status under the Ius in bello.

THE USE OF PREDATOR DRONES IN ACCORDANCE WITH THE FUNDAMENTAL PRINCIPLES OF ARMED CONFLICT.

Jus in Bello regulates conduct during war. It defines what actions are legal and what actions are illegal during war. The Hague Convention and the Geneva Convention are international protocols that regulate conduct during war. The Hague Convention defines belligerents, methods of engaging the enemy with proportionate force.

i. THE PRINCIPLE OF PROPORTIONALITY

In State practice the requirement of proportionality is widely admitted. Proportionality constitutes a limit “…to the power to choose the means and methods of warfare”. 75 Moreover, humanitarian law insists “…that attacks be directed only at military objectives and even then that they should not cause disproportionate civilian casualties”. 76 Higgins claims that “the substantive law of jus in bello is largely based on the concept of proportionality”. 77 To continue, “…the rules on armed conflict fully subsume the doctrine of proportionality”. 78 As a result, if one fails to act in conformity with a particular rule of jus in bello such an act cannot be justified as still proportionate. 79 Proportionality demands that force is used in a manner to minimize the collateral damage to civilian persons and property. „A state by using predator drones must take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”. 80 „According to the Israeli human rights organization B’Tselem, since November 2000, the Israel Defense Forces (IDF) killed more than 300 Palestinians in targeted operations, more than 130 of whom were bystanders. In 2004, Sheikh Ahmed Yassin, the leader of Hamas, was killed in Gaza by a missile fired from an Israeli helicopter, together with seven other persons. In the air strike against Salah Shehadeh, the leader of Hamas’ military wing Iz Adin al-Kassam, sixteen civilians died”. 81 UN Additional Protocol I prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the

77 See supra note 44 [HIGGINS].
78 Ibid., p. 234.
79 Ibid., p. 232.
80 Ibid., p. 233.
81 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I, 8 June 1977), [hereinafter AP I], Art. 57.
The rule of distinction requires that attacks may only be directed against combatants, where “combatant” indicates “persons who do not enjoy the protection against attack accorded to civilians”.84 In addition the UN Report states: “targeted killing is only lawful when the target is a “combatant” or “fighter” or, in the case of a civilian, only for such time as the person “directly participates in hostilities.”85 As affirmed by the International Court of Justice in 1986 in case Nicaragua v. United States of America86, the provisions of common Article 3 reflect customary international law and represent a minimum standard from which the parties to any type of armed conflict must not depart. The basic rule in Article 48 of the additional Protocol I87 states, that in order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 51 (4) expressly states, that “Indiscriminate attacks are prohibited”88 and 51 (5) (b) details that “…an attack which may be expected to cause incidental loss of civilian life”89 should be “…considered as indiscriminate”90. These provisions refer to principle of distinction, which is a customary rule. Principle requires: “…to distinguish between combatants and military objectives on one hand, and non-combatants and civilian objects on the other, and to direct their attacks only against the former”.91 Moreover, Article 57 of Additional Protocol I sets forth the requirements: “2. With respect to attacks, the following

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83 See supra note 82.
84 See supra note 64, p. 10 [O’CONNELL].
86 See supra note 23.
87 See supra note 25 [NICARAGUA].
88 See supra note 81 [AP I].
89 AP I, art 51 (4).
90 AP I, art 51 (5) (b).
91 AP I, art 51 (5).
precautions shall be taken: (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; 3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects”.

Article 57 sets out a list of precautionary rules which include an obligation to verify that targets are military objectives give effective advance warnings of attacks to the civilian population “unless circumstances do not permit”, take all feasible precautions in the choice of means and methods of attack and refrain from launching or cancel attacks which may be expected to cause harm excessive to the military advantage anticipated. In relation to feasibility, the rule sets that “[t]he technology available to an attacker determines whether an action is feasible […] as well as when choice is possible”.

Military necessity requires that force may only be used against persons or objects contributing to an opponent’s war effort, whose total or partial destruction is expected to contribute to the successful conclusion of hostilities. Moreover, “necessity in International humanitarian law requires it to evaluate whether an operation will achieve the goals of the military operation and is consistent with the other rules of IHL”. The damage caused to civilians and civilian objects in attacks must be proportionate to the direct and concrete military advantage anticipated. Furthermore, in assessing collateral damage a military commander is "entitled to take account of factors such as stocks of different weapons and likely future demands, the timelines of attack and risks to his owns forces".

To continue, “…the killing must be militarily necessary; the use of force must be proportionate.” In addition to a lawful basis in the Charter, states using force must show that force is necessary to achieve a defensive purpose. „If a state can make the necessity showing, it must also show that the method of force used will not result in disproportionate loss of life and destruction compared to the value of the objective. Therefore fail to protect

92 See supra note 76, p. 36.
93 See supra note 81 [AP I].
94 Ibid.
97 AP I Articles 51(5)(b) 57(1)(a)(iii).
99 See UNHRC Report, supra note 96, p. 10.
civilians in most of the cases constitutes violation of international law. In particular it would be violation under articles 51 (1), 51 (4), 51 (5) (b) and 57 (2) of the Additional Protocol I (AP I)\textsuperscript{100} which are customary rules.

According to article 51 (1): “The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”\textsuperscript{101} Article 51 (4) expressly states, that “[i]ndiscriminate attacks are prohibited”\textsuperscript{102} and 51 (5) (b) details that “...an attack which may be expected to cause incidental loss of civilian life”\textsuperscript{103} should be “...considered as indiscriminate.”\textsuperscript{104} However, attacks causing civilian deaths can still be proportionate, e.g., according to the Prosecutor’s comments on NATO bombing of the Serbian Radio and TV station with estimated 10 to 17 civilian casualties\textsuperscript{105}: “assuming the station was a legitimate objective, the civilian casualties were unfortunately high but do not appear to be clearly disproportionate.”.\textsuperscript{106} Moreover, according to the International Committee of the Red Cross (ICRC), “members of organized armed groups belonging to a non-state party to the conflict cease to be civilians for as long as they remain members by virtue of the fulfillment of their continuous combat function”.\textsuperscript{107} ICRC explains, that individuals, “whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.”.\textsuperscript{108} The view that such a category exists is supported by commentators.\textsuperscript{109} Therefore civilians are legitimate targets of attacks as long as they are taking a direct or active part in hostilities.\textsuperscript{110} „Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity occurs.”.\textsuperscript{111} Taking a direct part in hostilities extends the temporal scope of the loss of immunity from attacks for the whole duration of the hostilities. In this case civilians become illegal belligerents. This position has support from commentators\textsuperscript{112} and has been upheld by the Israeli Supreme Court in the \textit{Targeted Killings case}.\textsuperscript{113} Moreover, such interpretation of the doctrine would provide a solution to

\textsuperscript{100} See supra note 81 [AP I].
\textsuperscript{101} AP I, art 51 (1).
\textsuperscript{102} AP I, art 51 (4).
\textsuperscript{103} AP I, art 51 (5) (b).
\textsuperscript{104} AP I, art 51 (5).
\textsuperscript{105} Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia para 71, 75.
\textsuperscript{106} Id. para 77.
\textsuperscript{107} N. MEZLER, „Interprettive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law”, \textit{International Committee of the Red Cross} (2009), [hereinafter MELZER].
\textsuperscript{108} Ibid.
\textsuperscript{109} See supra note 35, p. 147 [LUBELL].
\textsuperscript{110} AP I, art 51(3), AP II, art 13.
\textsuperscript{112} Y. DINSTEN, „The Conduct of Hostilities under the Law of International armed conflict”, \textit{Cambridge University Press} (2004); Also see supra note 107, p. 510 [MELZER].
\textsuperscript{113} The Public Committee Against Torture in Israel v. The Government of Israel (2006, HCJ 769/02 76902 ).
the “revolving doors” problem.\textsuperscript{114} Participation in a terrorist group and especially assuming the leadership therefore does have a direct causal relationship between the activity engaged in and the harm done by the terrorists. Thus it would seem that the terrorists are legal targets despite of what they do at the moment of attack of responding state, if they were active in their actions contributed to the attacks directed against a particular state.

However, the Hague Conventions of 1907 and the Geneva Conventions of 1949 outline some of the rights held by illegal belligerents, such as a right to trial upon capture.\textsuperscript{115} In the ICRC study of customary international humanitarian law, distinction is the first rule: Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. Additional Protocol I of 1977 to the 1949 Geneva Conventions: Article 51(3) Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.\textsuperscript{116} Suspected terrorist leaders wear civilian clothes. Even the sophisticated cameras of a drone cannot reveal with certainty that a suspect being targeted is not a civilian. The ICRC Interpretative Guidance on Direct Participation in Hostilities points out that in just such a situation, international humanitarian law gives a presumption to civilian status: in case of doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not amount to direct participation in hostilities. The presumption of civilian protection applies, \textit{a fortiori}, in case of doubt as to whether a person has become a member of an organized armed group belonging to a party to the conflict. Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal proceedings but rather must reflect the level of certainty that can reasonably be achieved in the circumstances.\textsuperscript{117}

In the legal sense it is also important to determine who is considered to be a lawful combatant considering deploy of UAV’s — the Air Force pilot operating predator drone and “pushing the trigger” by launching hellfire missile and executing target from thousands of miles away of the battlefield, or the civilian contractor servicing it in Afghanistan? Furthermore, only members of armed forces have the combatant’s privilege to use lethal force and they must be the subject to the military chain of command. Considering that in most of the operations where UAV’s were used to locate and to kill terrorists, the planers, organizers and executers were the personnel of CIA.\textsuperscript{118} The CIA agents are non-combatants. Only members of armed forces have the combatant’s privilege to use lethal force, they are not subject to the military chain of command.

\textsuperscript{114} See supra note 35, p. 142 [LUBELL].
\textsuperscript{116} See supra note 81 [AP I]; Also see Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (1125 U.N.T.S. 609, 1979).
\textsuperscript{117} ICRC Guidance on DPH.
\textsuperscript{118} J. MAVER, “The Predator War, What are the Risks of the C.I.A.’s Covert Drone Program?”, \textit{The New Yorker} (Oct. 26, 2009).
UAV’s are extremely sophisticated war machines equipped with precision surveillance which include electromagnetic spectrum sensors, biological sensors, and chemical sensors. With that kind of technology UAV’s can identify even the face of the target, therefore it seems that UAV’s should easily meet the distinction requirement set in Geneva convention.\textsuperscript{119} However collateral damage in the use of such sophisticated machines is one of their main constraints. Moreover, even though in theory targeted killings of an high ranked organization members are consistent with military necessity principle, considering reports above and usage of large capacity firearms in densely populated areas where such operations take place clearly violates principles of necessity and distinction under international law.

iii. **THE PRINCIPLE OF HUMANITY**

According to Geneva Convention: (1) attackers must be capable of distinguishing from the civilian population and combatants. Neither the civilian population as whole nor individual civilians will be attacked. (2) Attacks are to be made solely on military targets. Individuals who can no longer take part in hostilities are entitled to respect from their attackers. (3) It is strictly forbidden to kill or wound an adversary who surrenders. (4) Weapons or methods of warfare that inflict unnecessary suffering or destruction are forbidden. (5) Wounded combatants and the sick combatants must be cared for as soon as possible. (6) Combatants must be able to distinguish the universal Red Cross or Red Crescent on a white background. All combatants are forbidden to engage objects thus marked. (7) Captured combatants and civilians must be protected against all acts of violence. Article 2 of Fourth Geneva Convention\textsuperscript{120} states that signatories are bound by the convention both in war, armed conflicts where war has not been declared and in an occupation of another country’s territory. Article 3\textsuperscript{121} states that even where there is not a conflict of international character the parties must as a minimum adhere to minimal protections described as: noncombatants, members of armed forces who have laid down their arms, and combatants who are hors de combat (out of the fight) due to wounds, detention, or any other cause shall in all circumstances be treated humanely, with the prohibition of “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.

Right to life guaranteed by the article 6(1) of the ICCPR is applicable even in the case of the conflict between state and non-state actors. ICJ plainly rejected the theory that the ICCPR ceases to apply only in the times of war: “…the protection of the (ICCPR) does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision”.\textsuperscript{122} Thus, the idea that in the battlefield the

\textsuperscript{119}See supra note 81 [AP I].
\textsuperscript{120}Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), (75 UNTS 287, 12 August 1949).
\textsuperscript{121}Ibid.
\textsuperscript{122}See supra note 12 [NUCLEAR].
prevailing law is law of war was abandoned. Nowadays such an approach is upheld by many scholars. Moreover, the UNGA emphasized that non-derogable human rights “...continue to apply fully in situations of armed conflict.” To sum up, even if the responding state considers themselves at war with non-state actors, it has to act in conformity with its obligations under article 6(1).

Moreover, the duty to respect right to life is a peremptory norm of customary international law, therefore “...right to life is (...) binding upon all states, regardless of whether they are party to any particular treaty.” The right is established in international treaties as well as in the Article 6(1) of the ICCPR: “…No one shall be arbitrarily deprived of his life”. The UN Human Rights Committee stated that “arbitrary” includes inappropriateness, injustice and lack of predictability. The test for an arbitrary deprivation of life in the context of an armed conflict “falls to be determined by the applicable ex specialis, namely, the law applicable in armed conflict”. An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. Therefore, there are two criteria to be met for a conflict to be organized as an armed conflict: (i) the intensity of the conflict and (ii) the organization of the parties to the conflict. An armed group is considered organized if it has “some hierarchical structure” and its leadership requires “the capacity to exert authority of its members” and “the ability to exercise some control over its members so that basic obligations of Common Article 3 of the Geneva Conventions may be implemented”. This approach can also be read from Human Rights instruments and has been upheld by

124 Ibid.
125 UNGA Res 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflicts (9 December 1970), [Res 2675].
126 International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976 (999 UNTS 171, art 6(1)) [hereinafter ICCPR].
127 See supra note 123, p. 185 [KRETZMER].
128 See supra note 35, p. 170 [LUBELL].
129 The 1948 Universal Declaration of Human Rights [UDHR].
130 See supra note 126, art 6(1) [ICCPR].
131 See supra note 35, p. 171 [LUBELL].
132 See supra note 12 [NUCLEAR]; Also see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (2004 para 106) [hereinafter WALL].
133 Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (ICTY, 2 October 1995).
134 Prosecutor v. Boskoski and Tarculovski, Appeal Judgment, ICTY (19 May 2010, IT-04-82-A) [hereinafter BOSKOSKI].
135 Ibid.
136 Ibid.
137 Ibid.
Human Rights bodies. Therefore, intelligence gathering and sharing arrangements must include procedures for reliably vetting targets, and adequately verifying information. Targeted killings should never be based solely on “suspicious” conduct or unverified – or unverifiable – information. Otherwise the strike would constitute a clear case of extrajudicial (arbitrary) killing. Thus terrorists are suspects, therefore they are illegal targets. Moreover, when it comes to targeting killing it is clear that the purpose of operation (eliminate), highly ranked terrorist leader (if we presume that terrorist is a combatant), leaves him no option of surrendering when he is under attack by UAV firing Hellfire missiles in his direction.

**CONCLUSIONS AND PROPOSALS**

1. Under the UN Charter, states are permitted to use force only in self-defense against an armed attack or if the Security Council authorizes a use of force as a necessary measure to restore international peace and security. The UN declared that the acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and thus these actions are treats to international peace and security. It is widely admitted that the state has right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake. Moreover, in an era of mass destruction weapons, retaliation may become impossible after the first strike, and therefore it is clear that some form of anticipatory or preemptive defense is necessary and therefore legal. However, according to Caroline test in order to use anticipatory self-defense, an armed attack must be imminent and inevitable. Moreover, considering Predator drones strike in most of the circumstances UAV located in one state, controlled in second and attacking in third state would not qualify as a response to imminent threat. When an armed attack has come to an end, an attacked state cannot retaliate by using armed force because such a response would then qualify as an unlawful reprisal under international law.

2. The ICJ held that proportionality requires the response to be proportional in relation to both the wrong suffered and the nature and the amount of force employed to achieve the objective or goal. The other crucial principle of *Ius ad bellum* is necessity, it can only be met when alternative peaceful means of resolving the dispute have been exhausted, given the time constraints involved. Under these general principles, self-defense must be instant, overwhelming, and leaving no choice of means, and no moment for deliberation. Even though the UN Security Council recognized that terrorist attacks, can be defined as an armed attack, however, by systematically analyzing international law sources it is unlikely that non-state actors actions in general can be defined as an armed attacks under international law. Moreover, even if the responding state would fight against non-state actors within a defined territory, the use of force would be legal if and only a threat is

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140 P. ALSTON, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions”, UNGA (A/HRC/14/24/Add.6), p. 28.
imminent or unavoidable considering the concept of anticipatory self-defense, thus in circumstances when solely attack occur and there is no explicit danger, the use of force cannot be veiled as self-defense and yet again should be considered as illegal reprisal under international law.

3. Sovereignty of the state is protected by the United Nations Charter and customary law. The rule requiring a State’s consent in respect of any intervention onto its territory is fundamental in international law. United Nations declared that all states have duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State. That means that sovereignty of the state is not absolute under international law. If a state engages in self-defense against non-state actors that are preparing, directing or executing on going „armed attacks“, such responsive targeting are not an attack on the state in which the non-state actors are located. Such a defensive use of force will not create a state of war or an armed conflict of any duration between the state engaged in self-defense and the state on whose territory the self-defense targeting take place until both states has an agreement. However, the attacks invoked by self-defense in foreign sovereign state territory can be permissible under International law even without consent if the territorial state did not do all that it could reasonably have done to prevent the non-state actor from using its territory to exercise an armed attack against another state, or is not doing all it can to prevent further attacks or the territorial state may have exercised due diligence, but it was nonetheless unable to prevent the attack, or to prevent further attacks.

4. UN Charter’s language suggests that it only regulates the use of force between states, the use of armed force against terrorists is impermissible in that any use of force not sanctioned by the Charter is unauthorized. Terrorist attacks are generally treated as criminal acts because they have all the hallmarks of crimes. Targeted killings without a trial are assassination. Moreover, in most of the operations where UAV’s were used to locate and to kill terrorists, the planners, organizers and executers were the personnel of CIA. Under international law only members of armed forces have the combatant’s privilege to use lethal force in the armed conflict. However it does not matter from where is pulled the trigger until the attack is consistent with laws of war.

5. In State practice the requirement of proportionality of military actions is widely admitted. Necessity in International humanitarian law requires it to evaluate whether an operation will achieve the goals of the military operation and is consistent with the other rules of IHL. Proportionality constitutes a limit to the power to choose the means and methods of warfare. However, UN Additional Protocols nor other international treaties does not require parties to fight with equal strength or ability, it does not by itself violate the principle of proportionality it requires only equal compliance with rules set in these international protocols and treaties. In theory UAV’s is consistent with international humanitarian law, but planners and executers of operations usually do not avoid attacks near bystanders or highly populated areas by civilians and because of high capacity weapons deployed by UAV’s collateral damage is disproportional and unnecessary.

6. The principle of distinction under Ius in bellum requires that attacks may only be directed against combatants, where combatant indicates persons who do not enjoy the protection against attack accorded to civilians. Targeted killing is only lawful when the target is a “combatant” or “fighter” or, in the case of a civilian, only for such time as the
person who directly participates in hostilities. The killing must be militarily necessary the use of force must be proportionate. Therefore fail to protect civilians in most of the cases constitutes violation of international law. Taking a direct part in hostilities extends the temporal scope of the loss of immunity from attacks for the whole duration of the hostilities. In this case civilians become illegal belligerents. Furthermore, even though in theory targeted killings of a high ranked organization members are consistent with military necessity principle, considering usage of large capacity firearms in densely populated areas where such operations take place clearly violates principles of distinction under international law. Moreover, even the sophisticated cameras of a drone cannot reveal with certainty that a suspect being targeted is not a civilian. In such a situation, international humanitarian law gives a presumption to civilian status.

7. Terrorists in most of the cases defined as criminals, but even if in specific circumstances they become belligerents, Hague Conventions and Geneva Conventions outline the rights held by illegal belligerents, such as a right to trial upon capture, *hore de combat*, surrendering. In all circumstances they should be treated humanely, with the prohibition of executions without judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Right to life guaranteed under international law and applicable even in the case of the conflict between state and non-state actors. There is no evidence that drones cause more injury or suffering than traditional bombs or highly explosive firearms, but nevertheless, drones are unable to except surrender or call back strikes not to mention the trial. Therefore, targeted killings carried out by predator drones are a clear violation of the principle of humanity.

There are several international legal instruments that are able to remove the contradictions considering non-state actors and the usage of predator drones against them:

1. Decision of International Court of Justice - however the decision of the ICJ is binding only for the parties of the dispute, moreover there is no *stare decisis* principle, thus there is no obligation to respect the precedents established by the previous decisions, therefore there is no consistency.

2. *Ius Congens (opinio juris + state practice)* – It is already clear that there is some existence of state practice considering the usage of predator drones against non-state actors, however, it is likely that such practice is influenced by the economically and politically powerful states which are the main users of predator drones, moreover, *Ius Congens* also requires a second element which is belief by significant number of states that such practice is legal, it is hardly believable that such consent could be developed.

3. Supplement of the existing international norms and the creation of new regulations – In my opinion this is most realistic and fastest way to resolve contradictions in international law, my proposals are following:

3.1. Present international law and norms governing the use of force has been primarily written in the context of the state, therefore there always will be disputes and different interpretations considering non-state actor, in order to eliminate uncertainty further amendments of conventions and resolutions should be in the context of “entity” instead of “nation-state”.

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3.2. Under current international law the line between combatant and civilian is often blurry and undefined, to avoid controversy between principle of humanity, distinction and permissibility of collateral damage international humanitarian law considering non-state actor should give the protection of civilians and the rights of combatant.

3.3. The modern warfare is one of the fastest developing area, thus international law is left behind, for instance Geneva convention is 60 years old, there is no specific treaty or regulation considering the usage of predator drones. Therefore, in order to eliminate contradictions it is necessary to pass resolution considering the usage of robotic weaponry.

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SANTRAUKA

AR NEPILOTUOJAMŲ LĖKTUVŲ NAUDOJIMAS UŽSIENIO ŠALIŲ TERITORIJOJE, KAIP ATSAKAS Į NEVALSTYBINIŲ SUBJEKTŲ GINKLUOTAS ATAKAS, PRIEŠTARAUJA TARPTAUTINEI TEISEI?

Julius Čiegis, „Does the use of predator drones to carry out targeted killings in a foreign state’s territory in response to armed attacks by non-state actors violate international law?“

Teisės apžvalga Law review No. 1 (8), 2012, p. 25-56

veiksmuose. Tokiais atvejais, tai yra, kai kyla abejonių dėl subjekto statuso tarptautinė teisė vadovaujasi prezumpcija, kad asmuo yra civilis. Taip pat, pareiga gerbti teisę į gyvybę yra imperatyvi norma kylanči iš paprotinės tarptautinės teisės, todėl tiksliniai kovotojų nužudymai niekada neturėtų būti grindžiami vien įtarimais ar nepatvirtinta informacija.

REIKŠMINIAI ŽODŽIAI

Tarptautinė viešoji teisė, suverenitetas, prevencinė savigyva, Ius ad bellum, Ius in bello, nepilotuojami lėktuvai, savavališki nužudymai, nevalstybiniai subjektai.