

Chapter 2

Towards an EU Position on Armed Drones and Targeted Killing?

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Abstract This chapter gauges the extent to which European Union (EU) governments share the United States' position on armed drones and targeted killing. In doing so, it aims to assist in distilling an EU Common Position on the use of armed drones and a legal framework for counterterrorism-related uses of force. The chapter includes the results of a questionnaire sent to the Ministries of Foreign Affairs, Defense, Justice and intelligence services of all 28 EU Member States. The authors also parsed other relevant sources that could evince governments' official positions (e.g., public statements, policy documents, etc.). In addition to this, the chapter explores more normative pronouncements from entities other than states, including international organizations, advisory committees and commentators, who have articulated how the issue of armed drones and targeted killing *should* be approached within the European context. In the chapter's

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conclusion, the authors summarize the findings and provide concrete recommendations toward a cohesive European position on targeted killings and drone use in counterterrorism.

Keywords Drones • Targeted killing • European Union • United States • International law • Human rights • Counterterrorism • Self-defense • Use of force • *Jus ad bellum* • *Jus in bello*

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2.1 Introduction

2.1.1 *US Policy on the Use of Armed Drones and Targeted Killing*

On 23 May 2013, United States (US) President Obama, for the very first time, comprehensively addressed drones¹ in a speech, which *The New York Times*' Editorial called 'the most important statement on counterterrorism policy since the

¹With the term 'drones', the authors mean remotely piloted air systems (RPAS) or unmanned aerial vehicles (UAV).

2001 attacks, a momentous turning point in post-9/11 America'.² In his speech, Obama noted that 'this new technology raises profound questions about who is targeted and why, about civilian casualties and the risk of creating new enemies, about the legality of such strikes under U.S. and international law, about accountability and morality'.³ After stating that drone strikes are 'effective',⁴ and 'have saved lives',⁵ Obama turned to their legality, explaining that these strikes take place in the context of 'a just war [against al-Qaida, the Taliban, and their associated forces], a war waged proportionally, in last resort and in self-defense'.⁶

As to the question in which cases it is wise or moral to execute those—according to the US, legally justified—strikes, Obama explained that in the Afghan war theater, 'we will continue to take strikes against high-value al-Qaida targets, but also against forces that are massing to support attacks on coalition forces', whereas

[b]eyond the Afghan theater, we only target al-Qaida and its associated forces, and even then the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists. Our preference is always to detain, interrogate and prosecute them. America cannot take strikes wherever we choose. Our actions are bound by consultations with partners and respect for state sovereignty. America does not take strikes to punish individuals. We act against terrorists who pose a continuing and imminent threat to the American people and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near certainty that no civilians will be killed or injured, the highest standard we can set.⁷

In short, the US sees itself in a just armed conflict against al-Qaida, the Taliban, and their associated forces, which legally justifies the strikes, and these strikes, outside of a 'hot battlefield' (but still within the US armed conflict paradigm), will be targeted, *as a matter of policy*, against al-Qaida and its associated forces when capture is not feasible, whenever they 'pose a continuing and imminent threat to the American people and when there are no other governments capable of effectively addressing the threat', and when there is 'near certainty that no civilians will be killed or injured'.

²'The End of the Perpetual War', *The New York Times*, 23 May 2013. www.nytimes.com/2013/05/24/opinion/obama-vows-to-end-of-the-perpetual-war.html?pagewanted=all&_r=0. Accessed 13 July 2015.

³The White House, Office of the Press Secretary, 'Remarks by the President at the National Defense University', National Defense University, Fort McNair, Washington, DC, 23 May 2013. www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university. Accessed 13 July 2015.

⁴Ibid.

⁵Ibid.

⁶Ibid.

⁷Ibid.

2.1.2 *Initial Reactions to US Policy*

Human rights organizations and others cautiously welcomed Obama's apparent efforts to bring the secretive US drone policy more into the open, but also remained vigilant. Greenwald for example noted that even though 'Obama's explicit discussion of the "ultimate" ending of the war on terror can be reasonably viewed as positive [...] it signals nothing about what he actually will do.'⁸ Indeed, on 11 December 2013, a wedding convoy in Yemen was hit by a drone strike, killing 14 persons⁹ and prompting Kenneth Roth, Executive Director of Human Rights Watch, to tweet: 'So much for Obama's promise that drones wouldn't be used unless there's a "near certainty" of no civilian casualties.'¹⁰

It can be argued that whereas the US may have made a (welcome) *public* move to bring the US drone policy more out of the shadows, how the US is *actually, in practice*, employing armed drones and executing targeted killings still raises serious international legal questions.¹¹

2.1.3 *Possible Consequences of Public Silence from EU Member States*

And while all of this is happening, it remains rather silent on the other side of the pond.¹² Anthony Dworkin, whose seminal paper will be examined in more detail later in this chapter, remarked in this context:

Although some European officials have made their disagreement with the legal claims underlying US policies clear in closed-door dialogues and bilateral meetings, EU member

⁸G. Greenwald, 'Obama's terrorism speech: seeing what you want to see', *The Guardian*, 27 May 2013. www.theguardian.com/commentisfree/2013/may/27/obama-war-on-terror-speech. Accessed 13 July 2015.

⁹See H. Almasmari, 'Yemen says U.S. drone struck a wedding convoy, killing 14', *CNN*, 13 December 2013. <http://edition.cnn.com/2013/12/12/world/meast/yemen-u-s-drone-wedding/>. Accessed 13 July 2015.

¹⁰<https://twitter.com/KenRoth/status/411710276573351936>. Accessed 13 July 2015.

¹¹See Dorsey and Paulussen 2015, pp. 2–4. One example has already been explained elsewhere (see Paulussen and Tibori-Szabó 2014) and concerns the US' imminence standard. The current authors agree with Hernández when he notes: '[T]he elasticity of these terms raises serious questions, not least about the self-judging aspect of "imminence", but also raises the curious question as to how something can be simultaneously imminent and continuing. Prior statements (and the leaked DOJ White Paper of 4 February 2013) suggest that the United States has embraced an "elongated" concept of imminence that has attracted criticism for its inconsistency with the international law on anticipatory self-defence.' (Hernández 2013.)

¹²See L. Tayler, 'EU should press Obama on drone secrecy', *Human Rights Watch*, 27 March 2014. www.hrw.org/news/2014/03/27/eu-should-press-obama-drone-secrecy. Accessed 13 July 2015. 'EU states often deplore legally questionable actions by foreign governments. Yet they have hesitated to do the same when it comes to their close ally, the United States.'

state representatives have said almost nothing in public about US drone strikes. The EU has so far failed to set out any vision of its own about when the use of lethal force against designated individuals is legitimate. Nor is there any indication that European states have made a serious effort to influence the development of US policy or to begin discussions on formulating common standards for the kinds of military operations that UAVs facilitate. Torn between an evident reluctance to accuse Obama of breaking international law and an unwillingness to endorse his policies, divided in part among themselves and in some cases bound by close intelligence relationships to the US, European countries have remained essentially disengaged as the era of drone warfare has dawned. Yet, as drones proliferate, such a stance seems increasingly untenable [original footnotes omitted].¹³

Indeed, the relative silence from the European Union (EU), one of strongest allies of the US, could be more problematic than one might initially think. It might give the impression that European states may be implicitly consenting to the (criticized) US' use of armed drones and targeted killings, hence giving it more legitimacy.¹⁴ In theory, it could thus even lead to the formation of customary international law, 'as evidence of a general practice accepted as law'.¹⁵ This concept of international custom entails two elements, namely 1) state practice, that is: how states behave in practice, and 2) *opinio juris*, namely 'the belief by a state that behaved in a certain way that it was *under a legal obligation* to act that way [emphasis added]'.¹⁶ Abstention of protest could also assist in the process of law-making. In the words of Shaw:

Generally, where states are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate. Some writers have maintained that acquiescence can amount to consent to a customary rule and that the absence of protest implies agreement. In other words where a state or states take action which they declare to be legal, the silence of other states can be used as an expression of *opinio juris* or concurrence in the new legal rule. This means that actual protests are called for to break the legitimising process [original footnotes omitted].¹⁷

While not necessarily agreeing with this—as silence can have other origins as well—it is important for EU Member States to understand that silence from their side *might* have a contributing effect to legitimizing a certain practice and thus that it is important to speak up, if they believe a certain practice or a specific incident is problematic.

¹³Dworkin 2013, p. 2.

¹⁴See also *ibid.*, p. 4: 'As one former Obama administration official put it, the US government is subject to few domestic checks on its interpretation of international law in this area, so the reaction of allies is "the main test and constraint for the administration [...] if other states don't object, the conclusion is that they are not concerned"' [original footnote omitted].

¹⁵See Article 38, para 1(b) of the Statute of the International Court of Justice.

¹⁶Shaw 2014, p. 53.

¹⁷*Ibid.*, pp. 63–64. Cf. also Aronsson 2014.

Dworkin assumed in the statement quoted above that European states are unwilling to endorse Obama's policies. The current authors disagree on this point. We simply do not know this, given the lack of information on the European stance. However, what we do know is that there is a risk that European states may indeed be unwilling to endorse the policies, but, by being silent, give the impression of acquiescing to the policies nonetheless.

2.1.4 Purpose and Outline of This Chapter

Therefore, the purpose of this chapter is to find (indications for) a certain position from the side of EU Member States. In the end, this could assist in distilling an EU Common Position on the use of armed drones, which the European Parliament called for in February 2014, when it '[e]xpresse[d] its grave concern over the use of armed drones outside the international legal framework'¹⁸ and when it 'urge[d] the EU to develop an appropriate policy response at both European and global level which upholds human rights and international humanitarian law'.¹⁹

Section 2.2 of this chapter will summarize the results of a questionnaire the authors sent to the Ministries of Foreign Affairs, Defense, Justice and intelligence services of all 28 EU Member States.²⁰ In addition, it will incorporate the findings of an examination by the authors of other relevant sources that could evince governments' official positions (e.g., public statements, policy documents, etc.).

The next section—Sect. 2.3—explores more normative pronouncements from other entities than states, including international organizations, advisory committees and commentators, which have articulated how the issue of armed drones and targeted killing *should* be approached within the European context.

Finally, in Sect. 2.4, the authors will conclude this chapter by providing their own view and concrete recommendations toward a cohesive European position on targeted killings and drone use in counterterrorism.

¹⁸The joint motion for a resolution on the use of armed drones (2014/2567 (RSP)), dated 25 February 2014, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P7-RC-2014-0201+0+DOC+PDF+V0//EN. Accessed 13 July 2015, was adopted 2 days later by 534 votes to 49 with 10 abstentions, www.europarl.europa.eu/oeil/popups/summary.do?id=1340215&t=e&l=en. Accessed 13 July 2015.

¹⁹*Ibid.*

²⁰See Dorsey and Paulussen 2015, Annex 1: The Questionnaire.

2.2 The Position of EU Member States on the Use of Armed Drones and Targeted Killing

2.2.1 Methodology and Content of the Questionnaire

On 12 November 2014, the authors sent an e-mail to various ministries of all 28 EU Member States,²¹ containing a detailed questionnaire, with both multiple choice and open questions. The aim of the questionnaire was to obtain more clarity on the position that various EU Member States take vis-à-vis the use of armed drones, as well as on countries' positions concerning more general pertinent international law questions. The survey questions encapsulated unresolved issues garnered from a number of sources, including the authors' first Research Paper on this topic,²² reports written by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson,²³ the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns,²⁴ the European Council on Foreign Relations,²⁵ Amnesty International,²⁶ Human Rights Watch²⁷ and other

²¹This e-mail was sent to 200 e-mail addresses, with eight failed deliveries. All e-mail addresses are on file with the authors. A response was received the day after, indicating that another state organ was competent to deal with this question. That particular state organ was contacted on the same day (on 13 November). On 18 November, another response followed, indicating that another contact person was to be contacted. This happened later. On 21 November, the authors received a response from another state organ, indicating they had not received a readable version of the questionnaire, after which a new version was sent on 25 November.

²²See Dorsey and Paulussen 2013.

²³The interim report can be found on the UNGA website: 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', A/68/389, 18 September 2013. www.un.org/Docs/journal/asp/ws.asp?m=A/68/389. Accessed 13 July 2015. The Special Rapporteur's final report can be found on the Human Rights Council's website: 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson', A/HRC/25/59, 11 March 2014. www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx. Accessed 13 July 2015.

²⁴UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', A/68/382, 13 September 2013. www.un.org/en/ga/search/view_doc.asp?symbol=A/68/382. Accessed 13 July 2015.

²⁵Dworkin 2013.

²⁶Amnesty International, "'Will I be next?' US drone strikes in Pakistan'. www.amnestyusa.org/sites/default/files/asa330132013en.pdf. Accessed 13 July 2015.

²⁷See Human Rights Watch, "'Between a Drone and Al-Qaeda". The Civilian Cost of US Targeted Killings in Yemen'. www.hrw.org/sites/default/files/reports/yemen1013_ForUpload_1.pdf. Accessed 13 July 2015. Human Rights Watch admitted that '[w]hile the attacks detailed in this report predate Obama's speech', it also noted that 'the White House said on the day he disclosed the policies that they were "either already in place or will be transitioned into place over time."' (ibid., p. 2). For more on drone strikes and Yemen, the Open Society Justice Initiative published 'Death by Drone: Civilian Harm Caused by US Drone Strikes in Yemen', www.opensocietyfoundations.org/reports/death-drone. Accessed 13 July 2015.

sources.²⁸ The addressees were requested to submit their completed questionnaire by 1 February 2015. On 15 January 2015, a first reminder was sent,²⁹ and on 6 February 2015, a final reminder was communicated,³⁰ in which it was explained that the authors could not incorporate feedback after 1 March 2015.

2.2.2 Statistical Results of the Questionnaire

Unfortunately, the EU Member States were not very forthcoming in their responses, although a few countries completed most of the questionnaire, which showed that there was adequate time for representatives to fill in the answers. In more detail, e-mail responses were received from 14 different countries (50 % of the total EU Member States). Two ministries submitted a report seemingly on behalf of the entire country. The authors received one response from the national police, two responses from intelligence services, three responses from ministries of justice, two responses from ministries of foreign affairs and six responses from ministries of defense. However, of those 14 responses, nine (32 % of the total EU Member States) indicated they did not have or could not fill in the required information and only five (18 % of the total EU Member States) filled in (most of) the questionnaire. Additionally, one EU Member State provided a brief substantive answer in an e-mail to the authors, but did not fill in the questionnaire.

²⁸See e.g., American Civil Liberties Union, Amnesty International, Center for Human Rights & Global Justice, and the Global Justice Clinic, NYU School of Law, Center for Civilians in Conflict, Center for Constitutional Rights, Human Rights Clinic, Columbia Law School, Human Rights First, Human Rights Watch, International Commission of Jurists, Open Society Foundations, 'Joint Letter to the UN Human Rights Council on Targeted Killings and the Use of Armed Drones', 18 September 2014. www.hrw.org/news/2014/09/18/joint-letter-un-human-rights-council-targeted-killings-and-use-armed-drones. Accessed 13 July 2015.

²⁹This e-mail was sent to 199 e-mail addresses (some initial e-mail addresses were replaced), with five failed deliveries. Of these five, two failed in the first round as well. The other three were new failures as compared to the first round. Obviously, the authors did try to find the correct e-mail addresses, but this was not always possible.

³⁰This e-mail was sent to 166 e-mail addresses (excluding those ministries/services that had already reacted positively, saying that the response would come, or those explaining that they did not have or could not find the requested information), with six failed deliveries. Of these six, four also failed in the second round. One e-mail address failed in the third round only (and not in the first and second round).

2.2.3 *Substantive Results of the Questionnaire and the Position of EU Member States*³¹

As mentioned, the first conclusion is that the quantitative results from the questionnaire were disappointing, with only five of the 28 EU Member States (18 %) filling in (most of) the questionnaire.³² Therefore, the results of this questionnaire clearly do not constitute the final say on this matter, as many more reactions are needed to create a valid and representative picture. Nonetheless, the comprehensive and detailed way in which a few countries reacted, coupled with the publicly available information, led to some important conclusions worth mentioning. The following only consists of a selection of findings. More information can be derived from the authors' ICCT Research Paper.

Specific findings regarding the five questionnaires that were returned (the Czech Republic, the Netherlands and three anonymous responses):

- Whereas the completed questionnaires from some EU Member States, in particular the Netherlands, were very clear, others seemingly contradicted themselves.
- Four EU Member States believed that self-defense against an autonomous Non-State Actor (NSA) is possible. Conversely, the third anonymous respondent indicated that self-defense would only be possible if the actions of the NSA could be attributed to a state. Nevertheless, this last state indicated that attribution could be achieved via a state's being unable or unwilling to respond to the threat posed by the NSA, a factor which was also relevant for, e.g., the Netherlands (but then only as a factor to consider using force in self-defense against an autonomous NSA).³³
- Three EU Member States (all three anonymous respondents) indicated that the unwilling or unable criterion forms part of the customary international law requirement of necessity. The Czech Republic was not sure about this and the Netherlands did not explicitly comment on this, although it did view the unable/unwilling criterion to be relevant in assessing whether a state can use force in self-defense against an autonomous NSA (see also the previous point).

³¹The authors would like to thank Ms. Lisa Klingenberg, Independent Consultant for the Open Society European Policy Institute, for her invaluable research assistance pertaining to a number of State positions researched.

³²The authors very much appreciate that certain states have taken the time to fill in the questionnaire. The states in question are hereby thanked once again.

³³See Chap. 4 of this book, by Dr. Kinga Tibori-Szabó, for more information about the 'unwilling or unable' test.

- Two EU Member States (the Netherlands and the third anonymous respondent) believed that self-defense is possible in anticipation of an imminent armed attack (and also that the law on self-defense is sufficient), whereas two EU Member States were of the opinion that this is only possible if an armed attack occurs (the Czech Republic (which also noted that the current law on self-defense is not sufficient) and the second anonymous respondent), although that latter country stated later that individuals or entities developing hostile activities that pose a *threat* to combatants and civilians would be targetable outside of an armed conflict. One state remarked that there is no correct answer to this and that it would depend on the situation (first anonymous respondent).
- Four EU Member States saw a role for international human rights law (IHRL) in armed conflict situations (although some uncertainty was observed as regards the correlation between international humanitarian law (IHL) and IHRL when both are applicable), the exception being the third anonymous respondent.
- Four EU Member States recognized the extraterritorial application of human rights treaties, although a lack of clarity was noted regarding the exact criteria/extent of this application (the Czech Republic and the third anonymous respondent). The Netherlands was more hesitant, remarking that '[t]he question of extraterritorial application of IHRL is one that is not completely crystallised'.
- Three EU Member States (the Czech Republic, the second and the third anonymous respondents) agreed with the statement of Dworkin that 'European and US officials might be able to agree that the deliberate killing of terrorist suspects outside zones of conventional hostilities is only permissible when they pose a serious and imminent threat to innocent life that cannot be deflected in any less harmful way.'³⁴ The Netherlands offered a slightly different version, namely that in a situation where only IHRL is applicable, deadly use of force is only permissible when the person forms a direct, serious threat to the lives of others and there is no alternative available. Interestingly, the first anonymous respondent did not want to comment on Dworkin's suggestion. This person was very outspoken about the illegality under international law of targeting people outside of an armed conflict, but stated later that under domestic law, a deliberate killing may be permissible, leaving the reader in doubt as regards the lawfulness under international law of that national act.
- Two EU Member States (the Netherlands and the third anonymous respondent) stated that it is not possible to be in a general armed conflict with an NSA unless specifics on the ground are accounted for, whereas the Czech Republic argued this was possible. The first and second anonymous respondents did not address this question.

³⁴See notes 102 and 106.

- About whether the *Tadić* criterion regarding the intensity of hostilities³⁵ necessitates an assessment of frequency and gravity within a geographically confined territory, two EU Member States (the second and third anonymous respondents) did not agree. The Czech Republic noted that '[d]efinitely the test applies within a geographically confined territory', but 'this test should [also] be applicable to address the acts of [an] NSA that [does] not limit itself [to] one geographical area'. The Netherlands and the first anonymous respondent did not address this question.
- Two EU Member States (the Czech Republic and the third anonymous respondent) agreed that an aggregation of armed attacks taking place in geographically varied locations can satisfy the intensity threshold so as to amount to a Non-International Armed Conflict (NIAC), whereas the second anonymous respondent did not agree. The Netherlands and the first anonymous respondent did not address this question.
- Two EU Member States (the Netherlands and the third anonymous respondent) indicated that a NIAC without finite geographical boundaries is not possible, whereas one EU Member State (the second anonymous respondent) felt this was actually possible. The Czech Republic noted that this is potentially possible and the first anonymous respondent did not address this question.
- Three EU Member States were of the opinion that the International Committee of the Red Cross (ICRC)'s test of 'continuous combat function' (CCF)³⁶ in a NIAC does not reflect customary international law (the Czech Republic, the second and third anonymous respondent), whereas one EU Member State thought this was the case (the first anonymous respondent). The Netherlands noted that its statement regarding the customary international law status of the ICRC's Direct Participation in Hostilities (DPH) study (see below)³⁷ holds true for the ICRC's CCF test as well.
- As to the ICRC's DPH study, two EU Member States thought this study does not reflect customary international law (the Czech Republic and the third anonymous respondent). The Netherlands broadly supported the outcomes of the ICRC's DPH study, but also noted it had 'no complete overview of state practice such as to be able to conclude that the study is part of customary

³⁵See International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Duško Tadić a/k/a "Dule"*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", Case No. IT-94-1-AR72, 2 October 1995. www.icty.org/x/cases/tadic/acdec/en/51002.htm. Accessed 13 July 2015, para 70: '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'. These two criteria, those of the intensity of fighting and the level of organization of the armed group, have come to be known as the "Tadić Criteria" for the classification of non-international armed conflict.

³⁶For more information, see ICRC, Resource Centre, 'Direct participation in hostilities: questions & answers', 2 June 2006. <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>. Accessed 13 July 2015.

³⁷*Ibid.*

international law.’ The first and second anonymous respondents did not address this question.

- Four EU Member States were of the opinion that there is no obligation to capture rather than kill in IHL (unless the person in question is *hors de combat*, see the third anonymous respondent), although capture may be the preferred (policy) option. One EU Member State (the second anonymous respondents) was less clear, but argued that ‘killing the target is to be avoided in all cases except when such a behavior poses a real threat to life.’
- The Netherlands and the Czech Republic thought that more transparency was necessary regarding the use of armed drones (the latter with respect to drones and targeted killing outside armed conflicts), but the third anonymous respondent felt this was not necessary. The first and second anonymous respondent did not address this question.
- The Netherlands was the only EU Member State that had called for greater transparency before. The Czech Republic and the second anonymous respondent indicated they had not called for more transparency and the first and third anonymous respondents did not address this question.
- The first and second anonymous respondents found that drones can, in principle, be effective weapons and that generally, the current use of drones is in conformity with international law. The Czech Republic noted that ‘[t]he question is not about whether using drones is an effective measure but about the context in which and how drones are used. [...] [What poses d]ifficulty in our view [is the] use of drones outside of any norms of international law, such as for extrajudicial killing purposes.’ The Netherlands noted that ‘[t]he legitimacy of the current use of drones is not easily evaluated in general. Whether or not the use of armed drones is in conformity with international law has to be appraised on a case-by-case basis, considering all the facts and circumstances of the case.’ Finally, the third anonymous respondent did not address these matters.
- Three EU Member States noted explicitly that public silence on the issue of drone use by other states may not necessarily signify acquiescence or consent (the Czech Republic, the Netherlands and the second anonymous respondent). The first and third anonymous respondents did not address this.
- Two EU Member States concluded that drones, in their opinion, would not lead to a lower threshold in using force (the Czech Republic and the third anonymous respondent). The other EU Member States did not address this question.

More general findings:

- Only the UK currently uses armed drones, but twenty EU Member States own unarmed drones for, e.g., surveillance purposes. These might be armed in the future.
- Seventeen EU Member States are actively involved in the development of drones.
- As most EU Member States currently do not have armed drones, they also might not have a specific policy for the use of armed drones (see the Czech Republic, the second anonymous respondent and Poland).

- In general, EU Member States find that drones as such are not illegal, but that their use may be.
- It seems that EU Member States more generally agree that current international law is suitable to deal with drones (see, e.g., Ireland, the Netherlands, Sweden and the UK). No new rules are needed, but there must be better compliance with the existing system. (See, e.g., Denmark.) However, the Czech Republic mentioned that the current international law on self-defense was not sufficient and that ‘sometimes ambiguous case-law does not help to ease current challenges.’
- That IHRL has a role to play in armed conflict (see the specific findings regarding the five questionnaires that were returned) was also confirmed by the publicly available sources from six EU Member States, with Ireland explicitly recognizing that IHRL is directly applicable to all situations.
- That more transparency is needed in the context of drones and targeted killings (see the specific findings regarding the five questionnaires that were returned) was also confirmed by Germany and Ireland.
- Five EU Member States call for a further discussion on the use of drones and their compliance with international law (Austria, Ireland, the Netherlands, Portugal and the UK).
- One state called for the identification of potential best practices (Ireland).
- That public silence on the issue of drone use by other states may not necessarily signify acquiescence or consent (see the specific findings regarding the five questionnaires that were returned) was also confirmed by the publicly available information, see, e.g., Germany and Sweden. The silence may also have to do with a lack of precise knowledge of a specific attack or there may be diplomatic discussions occurring outside the public eye.
- The internal coordination within EU Member States did not appear to be entirely flawless, with some agencies not knowing (exactly) which ministry/service of their own country would be in the best position to complete the questionnaire.

2.3 Normative Pronouncements from Other Entities Than States

2.3.1 Introduction

After having summarized the various positions taken by EU Member States on the use of armed drones and targeted killings, this chapter now turns to the normative dimension. It will consider various statements from other entities than states, which have pronounced themselves on the question of how EU Member States *should* deal with the use of armed drones and targeted killings. This chapter will focus on statements from international and regional organizations and institutions (Sect. 2.3.2) and the Dutch Advisory Committee on Issues of Public International Law’s (CAVV) Advisory Report on Armed Drones, to the knowledge of the

authors the only advisory opinion in Europe addressing this topic in such detail (2.3.3). After that, the seminal European Council on Foreign Relations paper of Dworkin, the first commentator having outlined a proposal for an EU common stance, will be examined (2.3.4). Where useful, the different sections will also contain references to other experts, including civil society staff members and other commentators.

2.3.2 International and Regional Organizations and Institutions

Council of Europe, Parliamentary Assembly:

In April 2013, the Parliamentary Assembly of the Council of Europe Committee on Legal Affairs and Human Rights put forth a motion for a resolution expressing concern about the widening use of armed drones used to carry out strikes in a counterterrorism framework, specifically executed by the US (which has Observer status to the Council of Europe).³⁸ Additionally, the Committee expressed its concern about the development of combat drones by several Member States, the fact that the killings may violate IHL, and the fact that some killings were occurring outside of the geographic scope of recognized armed conflicts. The Committee was concerned about the alarming increase in collateral damage from such attacks, calling into question whether principles of IHL were being fulfilled. Finally, concern was raised that killings occurring in the framework of law enforcement could potentially be violating fundamental rights protected by the European Convention on Human Rights (ECHR) or other treaties. The conclusion of the motion was to examine more closely issues raised in connection with armed drones implicating human rights or other legal obligations.³⁹

As a follow-up to this call for a closer examination, the Committee hosted an expert meeting in Strasbourg on 30 September 2014.⁴⁰ This expert meeting heard statements from UN Special Rapporteur Ben Emmerson; Head of Strategic Litigation Programme, Polish Helsinki Foundation for Human Rights, Warsaw, Irmina Pacheco; and Associate Professor, School of Law, University of Miami, Florida, USA, Markus Wagner.

³⁸See Motion for a Resolution, Doc. 13200, Drones and targeted killings: the need to uphold human rights, 29 April 2013. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19732&lang=en>. Accessed 13 July 2015. Note that this motion was not discussed in the Assembly, and therefore is only a commitment with respect to the twenty members who signed it.

³⁹Ibid.

⁴⁰Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Declassified Minutes of the hearing on 'Drones and targeted killings: the need to uphold human rights', held in Strasbourg (Palais de l'Europe) on 30 September 2014 (on file with authors).

Ms. Pachó noted that due to the proliferation of drone technology, and the acquisition of drones by several European states, the European Court of Human Rights might be called upon in the future to assess the Convention's compatibility with drone operations, given that 'Council of Europe member States would possibly—or even probably—use drones for overseas targeted killing operations, for instance within the framework of a NATO operation.'⁴¹

Mr. Wagner urged caution in any publicly available data or information, given that 'the oftentimes secretive nature of targeted killings did not allow for definitive statements regarding the extent to which drones were used either as intelligence, surveillance, targeting and reconnaissance (ISTR) platforms or as weapons' platforms'.⁴² He also reiterated the problematic nature of 'the extent to which the existing rules had been interpreted to allow for the use of targeted killing through the extension of the battlespace and the expansive interpretation of the principles of distinction and proportionality'.⁴³ With specific reference to President Obama's speech of May 2013, Mr. Wagner further commented on the expansiveness of the US position in urging the Council of Europe to diverge from the US position. The US' interpretation of the concept of 'imminence' in international law was rather broad, 'encompassing "considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks"'. This stretches too far, according to Mr. Wagner, as 'it would allow attacks on individuals as a deterrent on or punishment of those that had engaged in prior attacks, but were not in the process of carrying out renewed attacks. All other signatures would fail either the proportionality or the necessity test' outlined in IHL.⁴⁴

Though the US had been using such an expansive interpretation, Ms. Pachó pointed out that European countries would not be allowed such an expansive interpretation given their obligations under the European Court of Human Rights, specifically with respect to the findings regarding the extraterritorial application of human rights (Mr. Emmerson pointed out that the extraterritorial application of human rights obligations was a concept the US government did not accept, notwithstanding the UN High Commissioner for Human Rights' stating that human rights law was applicable in such circumstances).⁴⁵

On the subject of targeting, the legal framework was crucial to determining states' obligations. Ms. Pachó pointed out that the creation of a 'kill-list' would be contrary to obligations under the ECHR in times of peace, but it was context-specific within armed conflict what the obligations might be.⁴⁶

⁴¹Ibid., p. 3.

⁴²Ibid.

⁴³Ibid.

⁴⁴Ibid., p. 4.

⁴⁵Ibid., p. 2.

⁴⁶Ibid., p. 5.

After hosting several debates before the Committee, a resolution was adopted unanimously on 27 January 2015 recognizing several legal issues still needing to be addressed with respect to the use of armed drones.⁴⁷ The Parliamentary Assembly called on States to undertake several obligations in order to bring about more clarity and conformity with legal questions raised by the use of armed drones.

The legal issues that the Assembly identified were: national sovereignty and the respect for territorial integrity with respect to military interventions without consent⁴⁸ where only combatants are targetable (and force must be necessary and proportionate, with precautions taken) to minimize harm to civilians;⁴⁹ under IHRL, targeted killing is only legal in narrow instances in protecting human life, and in situations where there is no other option;⁵⁰ under Article 2 of the ECHR (right to life), the strict requirement stands of absolute necessity when deciding to deprive one of his life;⁵¹ and the fact that some countries have used an extended interpretation of NIAC to encapsulate a larger ‘battlespace’ and to justify a wider use of targeted killings, which ‘threatens to blur the line between armed conflict and law enforcement, to the detriment of the protection of human rights’.⁵²

Therefore, the Assembly called on States to respect the limits under international law on targeted killing (including both IHL and IHRL); establish clear procedures for the authorization of strikes (and stated they must be subject to a supervisory high-level court as well as evaluation in an ex-post investigation by an independent body); avoid expanding the established notion of non-international armed conflict (including organization and intensity criteria); investigate all deaths

⁴⁷See Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Drones and Targeted Killings: the need to uphold human rights and international law, Report. <http://website-pace.net/documents/19838/1085720/20150127-TargetedKillings-EN.pdf/6b637090-5af9-4d08-b9d4-7dc45dd09d2f>. Accessed 13 July 2015.

⁴⁸The pertinent text from the resolution is: ‘National sovereignty and the respect for territorial integrity under international law forbid military interventions of any kind on the territory of another state without valid authorisation by the legitimate representatives of the State concerned. Military or intelligence officials of the state concerned tolerating or even authorising such interventions without the approval or against the will of the state’s representatives (in particular the national parliament) cannot legitimise an attack; exceptions from the duty to respect national sovereignty can arise from the principle of the “responsibility to protect” (e.g. in the fight against ISIS).’ Section 6.1 of the resolution, see *ibid*.

⁴⁹*Ibid.*, Section 6.2.

⁵⁰*Ibid.*, Section 6.3.

⁵¹*Ibid.*, Section 6.4, with the pertinent text reading: ‘In particular, under Article 2 of the European Convention on Human Rights (the Convention) as interpreted by the European Court of Human Rights (the Court), the deprivation of the right to life must be absolutely necessary for the safeguarding of the lives of others or protection of others from unlawful violence. Article 2 also requires timely, full and effective investigations to hold to account those responsible for any wrongdoing.’

⁵²*Ibid.*, Section 6.5.

caused by drone strikes for accountability purposes and for compensation to victims' relatives; openly publish procedures used for targeting (and the investigations mentioned above); not use intelligence for targeting based on communication pattern of the suspect, including for so-called 'signature strikes' (pattern of behavior monitoring), except in armed conflict, and to avoid so-called 'double-tap strikes' involving 'a second strike targeting first responders'.⁵³

Additionally, the Committee would in essence remain seized of the matter by calling for a thorough study on the lawfulness of combat drone use.⁵⁴

European Commission and European Council:

On 4 February 2014, the former High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission (HRVP) Catherine Ashton stated:

The EU raises these matters in its regular consultations with the US on human rights, and will continue to do so in forthcoming consultations, including as regards information on facts and legal basis and on possible investigations. The EU stresses that the use of drones has to conform to international law, including the law of armed conflict when applicable. The international legal framework regarding the use of drones is also addressed in the informal dialogue among EU and US legal advisers.⁵⁵

Likewise, on 26 February 2014, Dimitrios Kourkoulas, President-in-Office of the European Council, made a statement during the European Parliament's Plenary Session in Strasbourg on behalf of Catherine Ashton and remarked:

The use of drones has raised some concerns on respect for human rights and international law. Their use in countering terrorism has already been raised and questioned by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental

⁵³Ibid., Section 8.

⁵⁴The resolution concludes with the following: 'The Assembly, referring to Resolution *** (2014), invites the Committee of Ministers to undertake a thorough study of the lawfulness of the use of combat drones for targeted killings and, if need be, develop guidelines for member states on targeted killings, with a special reference to those carried out by combat drones. These guidelines should reflect the states' duties under international humanitarian and human rights law, in particular the standards laid down in the European Convention on Human Rights as interpreted by the European Court of Human Rights.' Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Drones and Targeted Killings: The need to uphold human rights and international law, Report. <http://website-pace.net/documents/19838/1085720/20150127-TargetedKillings-EN.pdf/6b637090-5af9-4d08-b9d4-7dc45dd09d2f>. Accessed 15 July 2015. The resolution itself is not binding, as no resolution coming from the Parliamentary Assembly is, but it does carry significant weight in influencing matters with specific relation to human rights and democracy. Furthermore, '[t]he Committee on Legal Affairs and Human Rights promotes the rule of law and defends human rights. It is also responsible for a whole variety of activities that make it, de facto, the Assembly's legal adviser'. See Council of Europe, Parliamentary Assembly, Legal Affairs and Human Rights. <http://assembly.coe.int/nw/Committees/as-jur/as-jur-main-EN.asp>. Accessed 15 July 2015.

⁵⁵See European Parliament, Parliamentary questions, 'Answer given by High Representative/Vice-President Ashton on behalf of the Commission', 4 February 2014. www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-012201&language=EN. Accessed 13 July 2015.

Freedoms. Our position is very clear: we have to ensure that any use will be consistent with both European and international law. It is not the technology, but rather its use, that is key.⁵⁶

EU Counter-Terrorism Coordinator Gilles De Kerchove and his advisor Christiane Höhn therefore concluded that '[t]he EU's position is that RPAS, or drones, have to be used in full respect of international law, but there is no EU position on the interpretation of international law related to RPAS.'⁵⁷

Kourkoulas's statement was referred to on 9 February 2015 by the current HRVP Federica Mogherini, who added that

the HRVP and her services take a keen interest in developments in these fields, and notably the EU Delegation and Member States who are also members of the UN Human Rights Council participated in a Panel in Geneva in September 2014 which discussed the following resolution: 'Ensuring use of armed drones in counter-terrorism & military operations in accordance with international law including international human rights and humanitarian law'.⁵⁸

This panel discussion will be addressed in more detail below.

European Parliament:

In May 2013, the Directorate-General for External Policies of the European Union published the study *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, which was written by Nils Melzer at the request of the European Parliament's Subcommittee on Human Rights. Although the disclaimer of the report clarifies that '[a]ny opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament', it is still interesting to mention a few normative statements on how the EU should engage on this topic according to Melzer, author of the award-winning book *Targeted Killing in International Law* and one of the most renowned scholars on this subject.⁵⁹

Melzer notes that legal controversies, such as the threshold requirements for an armed conflict or the concept of imminence,

have resulted in a general sense of uncertainty as to the applicable legal standards. In conjunction with the rapid development and proliferation of drone technology and the perceived lack of transparency and accountability of current policies, this legal uncertainty

⁵⁶European Parliament, Debates, Wednesday, 26 February 2014, Strasbourg, 15. Use of armed drones (debate), Dimitrios Kourkoulas. www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140226+ITEM-015+DOC+XML+V0//EN. Accessed 13 July 2015.

⁵⁷De Kerchove and Höhn 2015, p. 291.

⁵⁸European Parliament, Parliamentary questions, Answer given by Vice-President Mogherini on behalf of the Commission, 9 February 2015. www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-008989&language=EN. Accessed 13 July 2015.

⁵⁹Directorate-General for External Policies of the Union, Directorate B, Policy Department, Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare, May 2013. www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET%282013%29410220_EN.pdf. Accessed 13 July 2015.

has the potential of polarizing the international community, undermining the rule of law and, ultimately, of destabilizing the international security environment as a whole.⁶⁰

However, in his view, this also leads to possibilities for the EU to promote transparency, accountability and the rule of law. As a result, he proposes the following policy recommendations for the EU:

1. First, the EU should make the promotion of the rule of law in relation to the development, proliferation and use of unmanned weapons systems a declared priority of European foreign policy. 2. In parallel, the EU should launch a broad inter-governmental policy dialogue aiming to achieve international consensus: (a) on the legal standards governing the use of currently operational unmanned weapon systems, and (b) on the legal constraints and/or ethical reservations which may apply with regard to the future development, proliferation and use of increasingly autonomous weapon systems. 3. Based on the resulting international consensus, the EU should work towards the adoption of a binding international agreement, or a non-binding code of conduct, aiming to restrict the development, proliferation or use of certain unmanned weapon systems in line with the legal consensus achieved.⁶¹

With respect to the law on drone attacks outside military hostilities, Melzer explains that the principles of necessity, proportionality and precaution must be observed.⁶² He notes that although these principles may be open to interpretation, ‘they can in no case be derogated from so as to allow the use of force which is not necessary, which is likely to cause disproportionate harm, or which reasonably could have been avoided by feasible precautionary measures’.⁶³ In more detail:

[A]rmed drone attacks directed against persons other than legitimate military targets can be permissible only in very exceptional circumstances, namely where they fulfil the following cumulative conditions: (a) they must aim at preventing an unlawful threat to human life; (b) they must be strictly necessary for achieving this purpose; (c) they must be planned, prepared and conducted so as to minimize, to the greatest extent possible, the use of lethal force. Moreover, national law must regulate such operations in line with international law.⁶⁴

He therefore concludes that the bar is set ‘extremely high’.⁶⁵

Not only will it be difficult to prove that the targeted person actually does pose a threat to human life requiring immediate action, but also that this threat is sufficiently serious to justify both the killing of the targeted person and the near certain infliction of incidental death, injury and destruction on innocent bystanders. As a result, the use of armed drones and other robotic weapons outside military hostilities may not be categorically prohibited, but their international lawfulness is certainly confined to very exceptional circumstances.⁶⁶

⁶⁰*Ibid.*, p. 44.

⁶¹*Ibid.*, p. 1 (abstract).

⁶²*Ibid.*, p. 30.

⁶³*Ibid.*

⁶⁴*Ibid.*, p. 36.

⁶⁵*Ibid.*

⁶⁶*Ibid.*

On 27 February 2014, the European Parliament adopted its already-mentioned resolution on the use of armed drones.⁶⁷ In it, the Parliament called on the High Representative for Foreign Affairs and Security Policy, the Member States and the Council to, among other things: ‘include armed drones in relevant European and international disarmament and arms control regimes’. It also ‘call[ed] on the EU to promote greater transparency and accountability on the part of third countries in the use of armed drones with regard to the legal basis for their use and to operational responsibility, to allow for judicial review of drone strikes and to ensure that victims of unlawful drone strikes have effective access to remedies’.

Human Rights Council:

On 28 March 2014, the UN Human Rights Council voted to approve a Pakistan-sponsored resolution (A/HRC/25/L.32) entitled, ‘Ensuring use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law.’⁶⁸ It passed with 27 states in favor, 6 against, and 14 abstentions.⁶⁹ One of the most important substantive elements in the Resolution is a provision on transparency and investigations, which

[c]alls upon States to ensure transparency in their records on the use of remotely piloted aircraft or armed drones and to conduct prompt, independent and impartial investigations whenever there are indications of a violation to international law caused by their use.

And one particular procedural element of note was a decision by the Council ‘to organize an interactive panel discussion of experts at its twenty-seventh session’ on the issue of armed drones in September 2014.

As a follow-up to the resolution in March, in September 2014 the Human Rights Council indeed hosted a panel discussion on the use of armed drones.

The panel was convened as part of the Human Rights Council’s 27th regular session, and took the form of a discussion among a panel of experts, members of the Human Rights Council and observers. The panelists were Christof Heyns, UN Special Rapporteur on extrajudicial, summary or arbitrary executions; Ben Emmerson, UN Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism; Shahzad Akbar, Legal Director,

⁶⁷See note 18.

⁶⁸The resolution (A/HRC/25/L.32, 24 March 2014) is available at: www.un.org/ga/search/view_doc.asp?symbol=A/HRC/25/L.32. Accessed 30 May 2015.

⁶⁹Breakdown by States voting, with EU countries highlighted in bold. States voting in favor (27): Algeria, Argentina, Botswana, Brazil, Chile, China, Congo, Costa Rica, Cuba, Gabon, Indonesia, **Ireland**, Kazakhstan, Kenya, Kuwait, Maldives, Mexico, Morocco, Pakistan, Peru, Philippines, Russian Federation, Saudi Arabia, Sierra Leone, South Africa, Venezuela and Vietnam. States voting against (6): **France**, Japan, Republic of Korea, The former Yugoslav Republic of Macedonia, **United Kingdom**, and United States of America. States abstaining (14): **Austria**, Benin, Burkina Faso, Côte d’Ivoire, **Czech Republic**, **Estonia**, Ethiopia, **Germany**, India, **Italy**, Montenegro, Namibia, **Romania**, and United Arab Emirates.

Foundation for Fundamental Rights; Alex Conte, Director of International Law and Protection Programmes, International Commission of Jurists; Dapo Akande, Professor of Public International Law at Oxford University; and Pardiss Kebriaei, Senior Attorney, Centre for Constitutional Rights. Flavia Pansieri, the UN's Deputy High Commissioner for Human Rights, moderated. Not only did the experts exchange ideas, but more than twenty states also spoke. The relevant EU Member States' statements have been included in Sect. 2.3 of the authors' ICCT Research Paper. Additionally, the ICRC intervened as well.⁷⁰

Issues covered related to targeted killings in counterterrorism and other operations. There was particular interest in considering the applicable legal framework regulating the use of armed drones with much focus on the applicability and interplay of IHRL and IHL. Panelist Dapo Akande summarized:

In this context there was discussion of the substantive legal issues relating to the determination of the applicable legal framework – such as the classification of situations of violence (for the purpose of determining the applicability of IHL) and the extraterritorial application of the right to life. However, perhaps the most significant disagreement between states related to the question of institutional competence for discussing and monitoring compliance with the law. In a divide which appeared to mirror the range of views as to whether norms of human rights or IHL constitute part of, or the main applicable legal framework, some states (like the US, the UK and France) insisted that the Human Rights Council was not an appropriate forum for discussion of the use of armed drones whereas many other states, observers and panellists insisted that the Council was such a forum.⁷¹

Discussion ensued regarding the right to life with respect to the regulation of armed drones; IHL targeting principles; and other relevant human rights (such as the right to a remedy).⁷² A major part of the discussion centered on accountability and transparency in the use of drones, and all panelists addressed state obligations (IHL and IHRL)

to conduct investigations in cases where there was a credible allegation of violations, as well as the obligations relating to transparency with respect to drone operations. This

⁷⁰ICRC, Panel discussion on 'Ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law', 22 September 2014. https://www.icrc.org/en/download/file/1385/icrc_statement_to_hrc_22_sept_2014_drones_eng.pdf. Accessed 30 May 2015. The intervention is quite dense with relevant information, but one particular quote is of particular relevance: 'In practice, many legal questions surrounding drone strikes have arisen when a person participates directly in hostilities from the territory of a non-belligerent State, or moves into such territory after taking part in an ongoing armed conflict. The issue is whether lethal force may be lawfully used against such a person and under what legal framework. As is well known, opinions differ. The ICRC is of the view that in this particular scenario IHL would not be applicable, meaning that such an individual should not be considered a lawful target under IHL.'

⁷¹Akande 2014.

⁷²Ibid.

issue was also raised by a number of states with some seeking examples of best practices that may be employed with respect to disclosure of data relating to drone operations.⁷³

The Office of the High Commissioner for Human Rights plans to submit a finalized report⁷⁴ on this panel discussion to the Human Rights Council's 28th regular session sometime in early 2015.

2.3.3 Dutch Advisory Committee on Issues of Public International Law Report

On 16 July 2013, the Dutch Advisory Committee on Issues of Public International Law (*Commissie van Advies Inzake Volkenrechtelijke Vraagstukken* or CAVV), an independent body that advises the government, the House of Representatives and the Senate of the Netherlands on international law issues, published its advisory report no. 23 on armed drones.⁷⁵ Although there is no mention of a European stance in this report (the only references to Europe deal with case law from the European Court of Human Rights), the report is very relevant, not only for its detailed explanation of the law, but also because the Dutch Cabinet (almost, see below) fully endorsed the report, thus providing a detailed explanation of the Netherlands' stance towards armed drones. To the knowledge of the authors, it is also the only report of its kind in Europe that systematically addresses the international legal framework in the context of armed drones.

The CAVV concluded, among other things, that '[a]rmed drones are not prohibited weapons',⁷⁶ that '[a] state may use armed drones outside its own territory to attack enemy combatants in an armed conflict, provided there is a recognised legal basis for doing so',⁷⁷ and that

[a]rmed drones may also be deployed in exercise of the right of self-defence within the meaning of article 51 of the UN Charter, provided the conditions for the lawful exercise of

⁷³Ibid.

⁷⁴The draft report from 15 December 2014, is available at: www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_38_ENG.doc. Accessed 13 July 2015.

⁷⁵Commissie van Advies Inzake Volkenrechtelijke Vraagstukken, Advies Inzake Bewapende Drones, 16 July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_ADVIES_BEWAPENDE_DRONES%281%29.pdf. Accessed 30 May 2015. The English translation of this report is available at: http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_%28English_translation_-_final%29_%282%29.pdf. Accessed 13 July 2015, and the main conclusions are available at: http://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones%281%29.pdf. Accessed 13 July 2015.

⁷⁶Advisory Committee on Issues of Public International Law, Main Conclusions of Advice on Armed Drones, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones%281%29.pdf. Accessed 15 July 2015, p. 1.

⁷⁷Ibid.

this right have been satisfied. Self-defence is permitted only in response to an armed attack (or the imminent threat of such an attack) and must be exercised in accordance with the requirements of necessity and proportionality as laid down in customary international law.⁷⁸

The CAVV also concluded that in addition to this legal basis, any use of force must comply with the applicable legal regime, which is IHL and/or IHRL, depending on the situation on the ground. It was (only) with respect to the interaction between these two legal regimes—when both are applicable—that the Dutch Cabinet offered a different view than the CAVV.⁷⁹

After commenting on such issues as the concept of Direct Participation in Hostilities, signature strikes, and the legality of drone strikes under IHL, the CAVV turned to arguably one of the most interesting points for the purpose of this chapter, namely the legality of drone strikes under IHRL (outside of an armed conflict). On this topic, the CAVV provided the following conclusion reminiscent of Melzer's observations (see above, under European Parliament):

The targeted killing of an individual outside the context of an armed conflict is prohibited in all but the most exceptional situations and is subject to strict conditions. These situations are limited to the defence of one's own person or a third person from a direct and immediate threat of serious violence, the prevention of the escape of a person who is suspected or has been convicted of a particularly serious offence, or the suppression of a violent uprising where it is strictly necessary to employ these means (i.e. targeted killing) in order to maintain or restore public order and public safety and security. In situations of this kind, lethal force is always a last resort which may be used if there are no alternatives and only for as long and in so far as strictly necessary and proportionate. There must be a legal basis in national law and any indication of a violation of the right to life by the security services or other state organs must be investigated at the national level.^[80] The deployment of an armed drone in a law enforcement situation will hardly ever constitute a

⁷⁸Ibid., p. 2.

⁷⁹See Dorsey and Paulussen 2015, Sect. 2.3: 'According to the CAVV, IHL prevails over other applicable legal regimes wherever their provisions conflict, as IHL is specifically designed for the conduct of hostilities and thus forms the "lex specialis". The Cabinet is of the opinion that in such [a] case, it is determining which provision relates more specifically to the particular case. In certain circumstances, this could also be a provision from another legal regime than IHL'. See Kabinetsreactie op advies nr. 23 van de Commissie van advies inzake volkenrechtelijke vraagstukken (CAVV) over bewapende drones (Tweede Kamer, vergaderjaar 2013–2014, 33 750 X, nr. 4). <https://zoek.officielebekendmakingen.nl/kst-33750-X-4.pdf>. Accessed 26 July 2015, p. 3.

⁸⁰In more detail, the CAVV noted on this topic: 'In all situations where lethal force is or may be used, both in and outside the context of an armed conflict, IHRL, in addition to national law, requires that adequate, transparent and independent reporting and monitoring procedures be set in motion to ensure that the action is in accordance with all the legal requirements and, where necessary, to act adequately and expeditiously to prevent violations of the applicable law or investigate and prosecute violations. IHL includes the duty to investigate alleged violations and prosecute the perpetrators, or take measures to prevent any recurrence.' Advisory Committee on Issues of Public International Law, Advisory Report on Armed Drones, Translation, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_%28English_translation_-_final%29_%282%29.pdf. Accessed 13 July 2015, pp. 20–21.

legal use of force. The principle of proportionality as it applies within the human rights regime is considerably stricter than under tIHL [sic], in particular to prevent innocent people falling victim to such attacks.⁸¹

The CAVV explained in more detail on this latter point that ‘injuring or killing third persons when using force is in principle prohibited under IHRL, other than in exceptional situations, and then only to the extent that this is strictly necessary and proportionate, subject to the aforementioned precautionary principle.’⁸² To concretize that under IHRL, targeted killing—which involves the use of deliberate, planned lethal force—is hard to reconcile with this precautionary principle, the CAVV provided as conceivable examples ‘hostage rescues, perhaps the arrest of armed, highly dangerous suspects posing a high level of risk to the arrest team or third persons, or the shooting-down of a “renegade” aircraft that has been taken over by terrorists and may be about to be used as a flying bomb.’⁸³ In this context, the CAVV also noted:

It has been suggested that the requirement of an ‘immediate’ threat of serious violence should be interpreted differently in the case of extraterritorial antiterrorist operations, since in such situations there is usually no available alternative to arrest by the operating state. The suggestion is then to exceptionally permit targeted killing if there is a very high risk of the person being directly involved in serious future terrorist activities [original footnote omitted].⁸⁴

However, the CAVV was of the opinion that

[i]n most such scenarios, [...] the deployment of a military weapon such as an armed drone would be a suitable method only in highly exceptional cases. [...] [T]he use of such a relatively heavy military weapon for attacks on ground targets outside the context of an armed conflict would in most cases almost automatically conflict with the strict requirements of necessity and proportionality that apply under IHRL – especially if there were a risk that innocent civilians would also be victims of the drone attack.⁸⁵

⁸¹Advisory Committee on Issues of Public International Law, Main Conclusions of Advice on Armed Drones, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones%281%29.pdf. Accessed 13 July 2015, p. 4.

⁸²The precautionary principle has been formulated in international case law and ‘requires that the question of whether lethal force is strictly necessary must be considered at each moment of the action. The necessity principle has qualitative, quantitative and temporal dimensions. Qualitatively, the force must be strictly necessary in relation to the objective to be attained. Quantitatively, the force used must not be excessive. Temporally, the use of force must still be necessary at the time of the action. The proportionality principle prescribes that use of force be justified in the light of the nature and seriousness of the threat.’ Advisory Committee on Issues of Public International Law, Advisory Report on Armed Drones, Translation, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_%28English_translation_-_final%29_%282%29.pdf. Accessed 15 July 2015, p. 23.

⁸³Ibid.

⁸⁴Ibid., pp. 23–24.

⁸⁵Ibid., p. 24.

Interestingly, and directly relevant for this topic of this chapter, the CAVV also discussed the responsibility of third states and noted that '[i]n very specific circumstances, third states that assist [in] armed drone operations that contravene international law may be held responsible for their part in the operations concerned'.⁸⁶ Although '[t]he mere fact that a third state takes part in a multinational military operation in which another state uses armed drones unlawfully does not suffice to render that state responsible',⁸⁷ this may be different for 'third states consent[ing] to the use of their air bases for the launch of unlawful armed drone attacks'⁸⁸ (if all the strict requirements of Article 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts⁸⁹ have been satisfied, including prior knowledge of the unlawfulness of the attacks), and with respect to '[t]he sharing of secret information about individuals by a third state [...] if the information is used to carry out an unlawful targeted attack on a person'.⁹⁰ In that case, however, '[t]he information-sharing state must be aware of the fact that the operating state is pursuing a policy of targeted killing that contravenes international law and the shared information must make a significant contribution to the unlawful attack'.⁹¹

The CAVV concluded, like other EU Member States did in the questionnaire, that 'from an international law perspective, new law is not necessary to specifically regulate the use of armed drones'⁹² as '[c]urrent international law is adequate and capable of fully regulating operations of this kind'.⁹³ But the committee also remarked that this does not mean that there are no general international law questions that are also relevant for the drone discussion and that still need further clarification, such as 'the right to self-defence against non-state actors, the requirements relating to consent for the deployment of weapons on the territory of another state and the extraterritorial applicability of human rights law'.⁹⁴

⁸⁶Advisory Committee on Issues of Public International Law, Main Conclusions of Advice on Armed Drones, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones%281%29.pdf. Accessed 13 July 2015, p. 4.

⁸⁷*Ibid.*, p. 5.

⁸⁸*Ibid.*

⁸⁹This provision, entitled 'Aid or assistance in the commission of an internationally wrongful act', reads: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.' See International Law Commission, 'Responsibility of States for Internationally Wrongful Acts', 2001. http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf. Accessed 15 July 2015.

⁹⁰Advisory Committee on Issues of Public International Law, Main Conclusions of Advice on Armed Drones, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones%281%29.pdf. Accessed 13 July 2015, p. 5.

⁹¹*Ibid.*

⁹²*Ibid.*

⁹³*Ibid.*

⁹⁴*Ibid.*

The CAVV concluded its advisory report saying that

Unmanned aircraft may be reasonably sophisticated, but they are not the exclusive domain of a handful of states, and the necessary technology is not so exotic or expensive as to prevent other states from developing their own capability in this area. To avoid setting precedents that could be used by other states or entities in the fairly near future, it is vital that the existing international legal framework for the deployment of such a weapons system be consistently and strictly complied with. States need to be as clear as possible about the legal bases invoked when deploying armed drones. There must also be sufficient procedural safeguards for assessing the selection of targets and the proportionality of attacks, allowing lessons to be learned for future interventions.⁹⁵

2.3.4 *European Council on Foreign Relations Paper*

Arguably the most interesting article on the European position on armed drones written so far is by Anthony Dworkin in July 2013. In his aforementioned European Council on Foreign Relations (ECFR) policy paper ‘Drones and Targeted Killing: Defining a European Position’,⁹⁶ Dworkin notes the already mentioned⁹⁷ ‘muted and largely passive way’ in which European leaders and officials have responded to the US’ use of drones and how such a response is increasingly untenable as the era of drone warfare has dawned. Dworkin also correctly points to the danger of precedent, when he notes:

Perhaps the strongest reason for the EU to define a clearer position on drones and targeted killing is to prevent the expansive and opaque policies followed by the US until now from setting an unchallenged global precedent. [...] The US assertion that it can lawfully target members of a group with whom it declares itself to be at war, even outside battlefield conditions, could become a reference point for these and other countries. It will be difficult for the EU to condemn such use of drones if it fails to define its own position more clearly at this point.⁹⁸

Another reason why Europe should speak up now according to Dworkin is the evolution of US policy—and here, he of course refers to, among other things, Obama’s May 2013 speech. Because of this, there may now be a greater scope for a productive dialogue with the US.⁹⁹ Dworkin therefore sketches the outline of a common European position, ‘rooted in the idea that outside zones of conventional

⁹⁵Advisory Committee on Issues of Public International Law, Advisory Report on Armed Drones, Translation, July 2013, available at: http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_%28English_translation_-_final%29_%282%29.pdf. Accessed 13 July 2015, pp. 27–28.

⁹⁶Dworkin 2013.

⁹⁷See Sect. 2.1.3 of this chapter.

⁹⁸Dworkin 2013, p. 3.

⁹⁹Ibid., p. 2.

hostilities, the deliberate taking of human life must be justified on an individual basis according to the imperative necessity of acting in order to prevent either the loss of other lives or serious harm to the life of the nation'.¹⁰⁰

In more detail, Dworkin explains that the European stance would include the rejection of the global war paradigm¹⁰¹ and that outside of an armed conflict,

the threat of terrorism should be confronted within a law enforcement framework. This framework would not absolutely prohibit the deliberate killing of individuals, but it would set an extremely high threshold for its use – for example, it might be permitted where strictly necessary to prevent an imminent threat to human life or a particularly serious crime involving a grave threat to life. Where the threat was sufficiently serious, the state's response might legitimately include the use of military force, but every use of lethal force would have to be justified as a necessary and proportionate response to an imminent threat. In any action that involved the deliberate taking of human life, there would have to be a rigorous and impartial post-strike assessment, with the government disclosing the justification for its action. Finally, EU states might perhaps agree that in the face of an armed attack or an imminent armed attack, states can use force on the territory of another state without its consent, if that state is unable or unwilling to act effectively to restrain the attack.¹⁰²

The authors will come back to Dworkin's piece when offering their own opinion on this matter in the now following and final Sect. 2.4.

2.4 Conclusion

2.4.1 Authors' Response

The authors agree with much of what Dworkin argues and he should be praised for initiating the discussion as to how a European stance on drones should look. Dworkin is clearly taking the momentum of the US seemingly abandoning its old

¹⁰⁰Ibid.

¹⁰¹In more detail: 'The foundation of this common vision would be the rejection of the notion of a de-territorialised global armed conflict between the US and al-Qaeda. Across the EU there would be agreement that the confrontation between a state and a non-state group only rises to the level of an armed conflict if the non-state group meets a threshold for organisation, and if there are intense hostilities between the two parties. The consensus view within the EU would be that these conditions require that fighting be concentrated within a specific zone (or zones) of hostilities. Instead of a global war, Europeans would tend to see a series of discrete situations, each of which needs to be evaluated on its own merits to decide whether it qualifies as an armed conflict.' (Ibid., p. 7.)

¹⁰²Ibid., pp. 7–8. See also *ibid.*, p. 10: 'At the heart of the EU position is the belief that the use of lethal force outside zones of active hostilities is an exceptional measure that can only be justified on the basis of a serious and imminent threat to human life.' (Ibid., p. 8.) See also the following statement, which was also used in the authors' questionnaire: 'Under current circumstances, European and US officials might be able to agree that the deliberate killing of terrorist suspects outside zones of conventional hostilities is only permissible when they pose a serious and imminent threat to innocent life that cannot be deflected in any less harmful way.' (Ibid., p. 10)

war paradigm to present this potential EU position. With the rapid proliferation of drone technology, it is indeed high time that the EU actively engages in the discussion, if it does not want certain standards and conduct to be possibly interpreted as an (implicit) acceptance of the US position by other members of the international community. However, and while stressing that the authors are aware of Dworkin's careful steps in this process, they wish to point out that there is also a risk. Although Dworkin sides with the CAVV and Melzer that the threshold of using drones in law enforcement settings is extremely high, one cannot escape the feeling that Dworkin's test is a bit lower. This feeling is not only engendered by Dworkin's test itself, which will be discussed below, but also by Dworkin's constant stressing that this is the moment to break the deadlock between the transatlantic partners.¹⁰³ Because of that, one gets the impression he wants to seize the moment and approach the US position to a certain extent (though it would go too far to say he wants to meet the US halfway), thus necessitating a slight easing of the strict requirements of the current law enforcement paradigm. This will be addressed in greater detail below.

It must also be pointed out that the exact contours of Dworkin's test are not too clear, as the paper presents different versions. In the summary on page 1, the test speaks of lethal force 'against individuals posing a serious and imminent threat to innocent life'. However, on page 2, one can read that 'the deliberate taking of human life must be justified on an individual basis according to the imperative necessity of acting in order to prevent either the loss of other lives or serious harm to the life of the nation.' By adding the words 'or serious harm to the life of the nation', Dworkin appears to mix self-defense arguments for states with self-defense arguments for the law enforcement officials executing the strike in one streamlined test.

The authors side with the view from the CAVV that one needs both a legal basis for using force on the territory of another state (consent, a mandate from the UN Security Council or self-defense) and a lawful strike pursuant to the applicable legal framework, which, outside of an armed conflict, would be IHRL. Hence, if a State wants to use force on the territory of another state when there is neither consent nor a UN Security Council approval, that state would first have to comply with the requirements of self-defense, which allows a response to an armed attack. However, if this use of force takes place outside an armed conflict situation, the strike itself must also comply with all the requirements under IHRL. As explained earlier, this entails compliance with the (stricter) IHRL principles of necessity, proportionality and precaution.

In addition to this possible conflation, and as 'announced' above, Dworkin's test under the IHRL framework—which should encompass the strict requirements of necessity, proportionality and precaution (see also the reports by Melzer and the

¹⁰³See *ibid.*, summary and pp. 2, 4, 7 and 10.

CAVV)—seems less stringent; the element of proportionality is only explicitly mentioned once¹⁰⁴—the focus is clearly on necessity—and the element of precaution is not mentioned at all.

There is thus a danger that Dworkin's well-intentioned and constructive move runs the risk of watering down well-established principles and standards of international law.

The authors stress that it would be better to strictly follow the current law—both the legal basis for the use of force and the specific requirements of the applicable legal regime—rather than following what seems to be a slightly different version of existing standards and a conflation of different fields, apparently suggested to find a compromise to bring both the US and EU together. Not only because this will lead to more confusion about concepts, during a time when clarity on these fundamental issues is needed more than ever, but also—and more importantly—because concepts such as imminence should arguably be as strictly interpreted as possible so as to minimize the incidence of ever-expanding battlefields (something that Dworkin also and rightly warns about) and the increased risk of harm to civilians. A very worrisome US interpretation of the concept of imminence has already been disclosed (see footnote 11), and one must be careful that this broad interpretation does not find its way into other legal frameworks. The authors feel that the existing legal principles are simply too important to dilute 'just' for the sake of finding global policy norms/international legal principles. Drone technology is only one step in the development of weapons and technology, but the principles of law will remain. Watered-down standards may henceforth also be applied to weapons after drones, such as fully autonomous weapons systems, or to conflicts in cyberspace. One has to be aware that 'negotiating' principles now will have a longer-lasting impact than one may now be able to foresee, and which requires the utmost attention and care. Dworkin correctly points out this danger as well,¹⁰⁵ but then notes that

it is at least worth exploring whether the notion of self-defence might provide the foundation for a meaningful degree of convergence between European and US views. Under current circumstances, European and US officials might be able to agree that the deliberate killing of terrorist suspects outside zones of conventional hostilities is only permissible when they pose a serious and imminent threat to innocent life that cannot be deflected in any less harmful way. However, much more discussion will be necessary to flesh out the terms of this statement [...].¹⁰⁶

The authors believe that such a convergence, which again seems to focus much more on an inter-state concept of self-defense, and which pushes the *additional* and

¹⁰⁴See *ibid.*, p. 8: 'Where the threat was sufficiently serious, the state's response might legitimately include the use of military force, but every use of lethal force would have to be justified as a necessary and proportionate response to an imminent threat.'

¹⁰⁵See *ibid.*, p. 10: 'Some EU member states may be wary of searching for an agreement with the US that might lead to a weakening of what they regard as a clear legal framework based on a firm differentiation between armed conflict and law enforcement.'

¹⁰⁶*Ibid.*

very strict IHRL requirements of necessity, proportionality and precaution to the background, should not be pursued. The authors might not rule out the exceptional situation that a person be lawfully targeted in the context of the law enforcement paradigm, but this would be an extremely rare exception. However, even though there may be fewer US strikes outside of hot battlefields than before, the authors would not be surprised, given the practice of the past few years, if such strikes continue to occur on a rather structural basis.¹⁰⁷ They predict that even if not as frequent as in the past, they would still occur more often than under the exceptionally high standard prescribed by the law enforcement model. Therefore, the chance is considerable that the US practice of targeting, which seems particularly linked to the target's alleged past unlawful behavior or the target's alleged future involvement in possible attacks (and less so to the imminent and concrete threat that that person constitutes *at that particular moment*)—this is linked to the already-discussed and worrisome US interpretation of the concept of imminence, to which Dworkin also rightly pays considerable attention¹⁰⁸—would never fit the law enforcement model.¹⁰⁹ Not the 'traditional' and strict (and arguably only correct) model, but probably also not the slightly more lenient version proposed by Dworkin. If that guess is correct, then there is also no need for Dworkin to suggest looking for a compromise in the first place, however well-intentioned that move may be.

¹⁰⁷See for the latest data on drone strikes the website of The Bureau of Investigative Journalism. www.thebureauinvestigates.com/category/projects/drones/drones-graphs/. Accessed 13 July 2015.

¹⁰⁸Dworkin 2013, p. 7. See also this statement from Human Rights Watch: 'International human rights law provides every person with the inherent right to life. It permits the use of lethal force outside of armed conflict situations only if it is strictly and directly necessary to save human life. In particular, the use of lethal force is lawful only where there is an imminent threat to life and less extreme means, such as capture or non-lethal incapacitation, are insufficient to address that threat. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that the "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life." This standard permits using firearms only in self-defense or defense of others "against the imminent threat of death or serious injury" or "to prevent the perpetration of a particularly serious crime involving grave threat to life" and "only when less extreme means are insufficient to achieve these objectives." Under this standard, individuals cannot be targeted for lethal attack merely because of past unlawful behavior, but only for imminent or other grave threats to life when arrest is not a reasonable possibility. If the United States targets individuals based on overly elastic interpretations of the imminent threat to life that they pose, these killings may amount to an extrajudicial execution, a violation of the right to life and basic due process [original footnotes omitted].' (Human Rights Watch, "'Between a Drone and Al-Qaeda'. The Civilian Cost of US Targeted Killings in Yemen', 2013. www.hrw.org/sites/default/files/reports/yemen1013_ForUpload_1.pdf. Accessed 13 July 2015, pp. 87–88.) For the UN Basic Principles, see: UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 112 (1990). www1.umn.edu/humanrts/instree/i2bpuff.htm. Accessed 13 July 2015.

¹⁰⁹*Ibid.*, p. 10: 'The shift in US policy towards a greater reliance on self-defence as an operational principle seems to offer an opening for further discussion. But US practice remains very far from what Europeans would like to see and its legal justification continues to rely on premises that most Europeans reject.'

Additionally, it should be stressed again—and this point was correctly observed by Dworkin as well¹¹⁰—that it is still not certain whether the US is *really* making a move towards Europe with respect to its legal framework. Obama's new line is merely about policy, and does not constitute the final say about the US' view on the legal borders in using armed drones.

2.4.2 *Looking Ahead*

What the EU should do is keep stressing the importance of transparency, oversight and accountability and respect for international law, including IHL and IHRL, while countering terrorism. It should also resolutely reconfirm, as some states and the CAVV have done, that the international legal framework is suitable to address issues that arise with drones, that there must be a legal basis for drone strikes, that drone strikes in the context of an armed conflict must fully comply with IHL and IHRL, and that drone strikes outside of armed conflict situations must be governed by the law enforcement paradigm, IHRL and the requirements of necessity, proportionality and precaution, which will almost *never* lead to a lawful targeted killing/use of armed drones. In that respect, we *do* fully agree with Dworkin when he writes: 'Committed as it is to the international rule of law, the EU must do what it can to reverse the tide of US drone strikes before it sets a new benchmark for the international acceptability of killing alleged enemies of the state.'¹¹¹ Also very important in this context is the resolute rejection of the notion of a global battlefield without clear geographical boundaries.¹¹²

The authors realize that this chapter, and the ICCT Research Paper on which it is based, are just the first bricks they are laying in a long-term project, and they hope they serve as a jumping-off point for interested parties to work together to advance the discussion on the EU position on armed drones and targeted killing, including assisting in making the EU Member State positions as comprehensive as possible. They would also like to encourage the Netherlands in following up on the statements of former Dutch Minister of Foreign Affairs Timmermans¹¹³ as well as those of the Dutch representative to the Human Rights Council debate in

¹¹⁰Ibid., p. 7.

¹¹¹Ibid., p. 10.

¹¹²See *ibid.*, p. 7.

¹¹³See Dorsey and Paulussen 2015, p. 37: 'he [Timmermans] stated he would use all relevant fora for that and take initiatives himself as well, and noted that the Netherlands, in his opinion, could actually play a leading role in this process'.

September 2014¹¹⁴ that the Netherlands ought to play a (leading) role in this process. As a firm EU *and* transatlantic partner, and as host of the city of The Hague, the legal capital of the world, and finally as a country having a clear interest in this topic—not only evidenced by the clear way in which it filled in the questionnaire, see the authors' ICCT Research Paper, but also by the various statements by country representatives to that effect—this EU Member State would be ideally suited to facilitate the discussion on the international legal aspects of the use of armed drones and targeted killings.

Looking to the future with respect to the acquisition of armed drone technology, the US has recently opened up the sale and export of its military technology to friendly countries interested. Within the policy released on 17 February 2015 by the US State Department, the guidelines for purchase include the following requirements:

- Recipients are to use these systems in accordance with international law, including international humanitarian law and international human rights law, as applicable;
- Armed and other advanced UAS are to be used in operations involving the use of force only when there is a lawful basis for use of force under international law, such as national self-defense;
- Recipients are not to use military UAS to conduct unlawful surveillance or use unlawful force against their domestic populations; and
- As appropriate, recipients shall provide UAS operators technical and doctrinal training on the use of these systems to reduce the risk of unintended injury or damage.¹¹⁵

Given that at this moment there is no consensus about the applicable framework of international law with respect to the use of armed drones, especially outside of recognized armed conflicts, it is very difficult to know if countries purchasing drones from the US are adhering to standards prescribed by international law. Additionally, given that the US' interpretation of concepts such as imminence, the boundaries of self-defense or the interplay of IHRL and IHL¹¹⁶ within armed

¹¹⁴Dutch intervention, United Nations Office at Geneva, 'Human Rights Council holds panel on remotely piloted aircraft or armed drones in counterterrorism and military options', 22 September 2014. www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/BCE56ED914A46D40C1257D5B0038393F?OpenDocument. Accessed 13 July 2015. '[The] Netherlands underlined the importance of maximum transparency in the use of armed drones, and supported holding an international dialogue to clarify the interplay between human rights and international humanitarian law.'

¹¹⁵U.S. Export Policy for Unmanned Aerial Systems, US State Department, 17 February 2015. www.state.gov/r/pa/prs/ps/2015/02/237541.htm. Accessed 30 May 2015.

¹¹⁶This point seems particularly relevant. It was mentioned often in this chapter and it was also the only point where the Dutch Cabinet had a slightly different opinion than the CAVV, see note 79. The authors realize that the case law on this topic is currently in full development as well and may not have been entirely crystallized, which may assist in the current lack of clarity. Cf. Hill-Cawthorne 2014.

conflicts differ from some outlined by EU Member States, the authors are of the opinion that prior to a wide-scale proliferation and deployment of the technology, heeding the call of several relevant bodies outlined above to come to a common understanding of the relevant legal framework is imperative. This is not only relevant to the acquisition of drone technology, but also to the continued development toward more autonomous systems in the future.

Another facet of the discussion that the authors think needs to be brought to the forefront is the role of EU Member States in their intelligence-sharing programs with the US. At this point, at least four EU Member States (Denmark, Germany, the Netherlands and the United Kingdom) have reportedly provided information to the US that has assisted the US in its carrying out of targeted killings in various stadia.¹¹⁷ This is problematic under various legal obligations, not the least of which is the ECHR. More research needs to go into the extent to which EU countries are sharing intelligence that is being used for extralegal action as well as to the role of private military contractors in service to EU Member States in this matter.¹¹⁸

Additionally, matters raised by the Parliamentary Assembly of the Council of Europe in its 27 January 2015 resolution (see Sect. 2.3.2) must be considered top priority with respect to fleshing out a common European position.

To conclude, it is only possible to say that a unified EU voice is still elusive with respect to drones and targeted killings, a fact that can be viewed as unsurprising, given the nature of the topic, the varying state positions on the acquisition and use of drones in varying fora, but an interesting conclusion nonetheless when starting with the assumption that the ‘Europeans’ diverge greatly from the ‘Americans’ on this topic.

¹¹⁷For example, Denmark (see A. Singh and J. Scholes, Denmark, the CIA, and the Killing of Anwar al-Awlaki, Open Society Foundations, 30 April 2014. www.opensocietyfoundations.org/voices/denmark-cia-and-killing-anwar-al-awlaki. Accessed 13 July 2015, Germany (see Spying Together: Germany’s Deep Cooperation with the NSA, Part 2: German Aid for US Drone Attacks?, Spiegel Online, 18 June 2014. www.spiegel.de/international/germany/the-german-bnd-and-american-nsacooperate-more-closely-than-thought-a-975445-2.html. Accessed 13 July 2015, the Netherlands (see S. Derix and H. Modderkolk, The secret role of the Dutch in the American war on terror, NRC Handelsblad, 5 March 2014. www.nrc.nl/nieuws/2014/03/05/the-secret-role-of-the-dutch-in-the-american-war-on-terror/. Accessed 13 July 2015, but Dutch cooperation in drone strikes is officially denied, see: Dutch do not take part in armed drone attacks, minister says, Dutchnews, 24 April 2014. www.dutchnews.nl/news/archives/2014/04/dutch_do_not_take_part_in_arme/. Accessed 15 July 2015, and the United Kingdom (see J. Serle, UK complicity in US drone strikes is ‘inevitable’, Emmerson tells parliament, The Bureau of Investigative Journalism, 5 December 2013. www.thebureauinvestigates.com/2013/12/05/uk-complicity-in-us-drone-strikes-is-inevitable-emmerson-tells-parliament/. Accessed 13 July 2015.

¹¹⁸For a background, see G. Zappalà, ‘Target killing and global surveillance: understanding the European role in drone warfare’, paper for the Drones and International Security: A European Perspective Conference, hosted by Aarhus University, Denmark, 5–6 March 2015, on file with authors. <http://ps.au.dk/aktuelt/arrangementer/arrangement/artikel/drones-and-international-security-a-european-perspective/>. Accessed 15 July 2015. Author J. Dorsey presented the provisional conclusions of the authors at the conference.

It may also be very difficult to achieve this unified EU voice in the future. The EU rarely speaks with one voice in the context of foreign policy, security and defense, and the issue of the use of armed drones is perhaps even more sensitive than many other topics in this context. Moreover, the responses to this questionnaire have shown that there is still a lack of agreement among EU Member States concerning, for instance, the customary international law status or scope of certain concepts.

Notwithstanding this observation, the authors are convinced that it is worthwhile to strive toward as much of a consensus within the EU as possible. A solid EU position based on the rule of law is necessary as a counterweight against the current US position, which still raises serious questions under international law. The EU will be stronger in its criticism of the US if it speaks with a unified voice. Several EU Member States have already critiqued the US' approach (e.g., Sweden, the UK, the Netherlands, and Denmark) which can be helpful in elucidating their positions, but in order to be most effective in engagement with the US, additionally, a single EU voice, or at least a chorus of a larger number of EU Member States, is preferable. The authors understand that whereas criticism about a specific incident may be very difficult and even impossible to convey in view of the lack of access to information, it is not difficult to respond to general and public policies, such as those outlined in Obama's May 2013 speech.

The US has often been criticized for various aspects of its foreign policy. However, the fact that the US seems to participate (in some respect) in the drone discussion is something to be welcomed, and something EU Member States should do now as well despite any differences in perspective.

2.4.3 Concrete Recommendations

When formulating an EU Common Position on the use of armed drones, which will require more public debate, discussion and official statements from Member States on the use of armed drones and targeted killing, the EU Member States should include the following elements:

- An EU Common Position should be first and foremost based on the rule of law. Unlawful acts 'undermine the concept of rule of law, which is a key element in the fight against terrorism'.¹¹⁹ It should thus fully respect international law, including IHL and IHRL. This includes respect for another state's sovereignty. Targeting under the IHRL paradigm moreover requires strict compliance with the principles of necessity, proportionality and precaution, which will almost *never* lead to a lawful targeted killing/use of armed drones.

¹¹⁹Statement by Deputy Eamon Gilmore, Parliamentary Debates, Vol. 808, No. 2, 26 June 2013. [http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/%28\\$VLookuPByConstructedKey%29/dail~20130626/\\$File/Daily%20Book%20Unrevised.pdf?openelement](http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/%28$VLookuPByConstructedKey%29/dail~20130626/$File/Daily%20Book%20Unrevised.pdf?openelement). Accessed 13 July 2015, p. 497.

- An EU Common Position should be clear about having a two-step legal justification for using armed drones; one concerning the legal basis (consent, UN Security Council mandate and self-defense), and one concerning the applicable legal framework (IHL (in armed conflict situations) and IHRL (always)).
- An EU Common Position should recognize that the current international law is fully capable of addressing legal issues arising from armed drones and targeted killing and that new law is not necessary. Therefore, an EU Common Position should first of all focus on a better enforcement of the existing international law.
- An EU Common Position should admit, however, that more consensus should be achieved when it comes to the interpretation and application of the existing law to situations on the ground. Where interpretation is possible, the EU should follow the most restricted reading, so that the use of force is restrained as much as possible (an example relates to the concept of imminence).
- An EU Common Position should clearly outline the relationship and interplay between IHRL and IHL in situations of armed conflict, while recognizing that both fields of law co-apply in these situations.
- An EU Common Position should resolutely reject the idea of a global battlefield without finite geographical borders.
- An EU Common Position should stress the importance of transparency, oversight and accountability. Unlawful drone strikes should be followed by proper and independent investigations, with victims of such strikes having access to effective remedies. There is also a need for clear procedures regarding the authorization of drone strikes.
- An EU Common Position should also address the responsibility of third States for unlawful drone attacks by another State, including addressing/reconsidering current positions on:
 - (a) Consent to use their air bases for the launch of unlawful attacks.
 - (b) Sharing of secret information where in the past this has contributed to extra-judicial killings.

In addition to these elements, the authors recommend the following:

- Individual EU Member States are urged to clarify their positions and contribute to the debate and discussion. Very concretely, states should respond to this chapter and the authors' ICCT Research Paper with confirmations, clarifications, revisions, corrections and any additional information that can assist in clarifying the EU position on armed drones.
- EU State Members are also urged to discuss these matters and their positions in all relevant fora. This would entail cooperation with the two relevant UN Special Rapporteurs, as well as cooperation with the Human Rights Council. It must be stressed again that IHRL is always applicable, also in times of armed conflict, and thus that discussion within this latter forum is fitting (see the (contrasting) UK position on this topic).
- The Netherlands should take a leading role, also within the context of the EU, in the discussion on the international legal aspects of armed drone use and targeted

killing. In the context of this discussion, best practices could be formulated, see also the call for such principles by Ireland.

- The EU should be willing to discuss potential avenues of cooperation and agreement with the US on counterterrorism principles (especially to establish more clarity on the US views on such concepts as ‘associated forces’ and the definition of a ‘continuing and imminent’ threat),¹²⁰ but not at the cost of diluting or reinterpreting long-standing legal rules or principles as applicable under international law. International consensus should not be a goal *coûte que coûte*.
- More clarity is desired on the outcomes of the informal US-EU Legal Advisors dialogue.¹²¹

References

- Akande D (2014) UN human rights council panel on drones. EJIL: Talk!, 1 October 2014. <http://www.ejiltalk.org/un-human-rights-council-panel-discussion-on-drones/>. Accessed 8 June 2015
- Aronsson M (2014) Remote law-making? American drone strikes and the development of jus ad bellum. J Use Force Int Law 1(2):273–298
- De Kerchove G, Höhn C (2015) Counter-terrorism and international law since 9/11, including in the EU-US context. In: Gill TD et al. (eds) Yearbook of international humanitarian law, vol 16, 2013. T.M.C. Asser Press, The Hague, pp 267–295
- Dorsey J, Paulussen C (2013) The boundaries of the battlefield: a critical look at the legal paradigms and rules in countering terrorism. ICCT research paper, April 2013. http://www.icct.nl/download/file/ICCT-Dorsey-Paulussen-Boundaries-of-the-Battlefield-Report-April-2013_docx.pdf. Accessed 8 June 2015
- Dorsey J, Paulussen C (2015) Towards a European position on armed drones and targeted killing: surveying EU counterterrorism perspectives. ICCT research paper, 24 April 2015. <http://clients.takhleeqhq.com/icct/wp-content/uploads/2015/05/ICCT-Dorsey-Paulussen-Towards-A-European-Position-On-Armed-Drones-And-Targeted-Killing-Surveying-EU-Counterterrorism-Perspectives.pdf>. Accessed 8 June 2015
- Dworkin A (2013) Drones and targeted killing: defining a European position. European Council on Foreign Relations Policy Brief, July 2013. http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf. Accessed 8 June 2015
- Hernández G (2013) Obama’s counter-terrorism speech: a turning point or more of the same? EJIL: Talk!, 27 May 2013. <http://www.ejiltalk.org/obamas-counter-terrorism-speech-a-turning-point-or-more-of-the-same/>. Accessed 8 June 2015
- Hill-Cawthorne L (2014) The Grand Chamber judgment in Hassan v UK. EJIL: Talk!, 16 September 2014. <http://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/>. Accessed 8 June 2015
- Paulussen C, Tibori-Szabó K (2014) Testing the validity of US self-defence arguments against the Khorasan group in Syria. ICCT commentary, 9 October 2014. <http://icct.nl/publication/testing-the-validity-of-us-self-defence-arguments-against-the-khorasan-group-in-syria/>. Accessed 8 June 2015
- Shaw MN (2014) International law, 7th edn. Cambridge University Press, Cambridge

¹²⁰See also Dworkin 2013, p. 8.

¹²¹See note 55 and accompanying text.

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