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ARMED DRONES: A HUMANITARIAN WEAPON?
TARGETED KILLINGS BY U.S. DRONES
AND THE ROLE OF ITALY

ABSTRACT. This paper aims at illustrating how the arming of drones – in particular by the United States – changed the dynamics of international armed conflicts but also of other contexts, thereby bringing a sense of urgency to the international debate on the lawfulness of targeted killings. Attention will be drawn to the current international trend whereby the responsibility of third States that facilitate U.S. drone operations is being brought into scrutiny, before showing how this trend opens the door to Italy being held liable for the drone operations conducted from the military base in Sigonella.

CONTENT. 1. The arming of drones in the international context, with specific reference to the United States – 2. The international debate on targeted killings by means of drones – 3. Transparency, control, accountability – 4. The responsibility of Third States: Italy and the military base in Sigonella – 5. Concluding remarks

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1. The arming of drones in the international context, with specific reference to the United States

As part of the “Global war on Terrorism” launched by the United States (U.S.) in the wake of 9/11, the use of Unmanned Aerial Vehicles (UAVs), also known as drones, has gained an ever-increasing strategic relevance in surveillance and combat operations.¹ Drones are aircrafts without a human pilot on board that can be controlled by an operator on the ground or follow prearranged flight plans along specific GPS coordinates.

Initially, drones have been – and continue to be – used for security and intelligence activities by various government agencies. However, over time, States have been using this technology in military operations, mainly in the context of armed conflicts, but not limited to them.

Indeed, drones have been armed and used to commit targeted killings as part of armed conflicts, international police and counter-terrorism operations, in particular by the U.S.² The expression “Targeted killings” refers to the deliberate use of lethal force by a subject of international law (not necessarily a State) against another subject that has been pre-identified as a target.

While it is true that the United States are the country with the greatest number of armed drones, numerous other States possess such weapons or plan to acquire them. The reason is that the characteristics of this technology make it very appealing for use in military and international police operations.³ Due to unprecedented capacities in terms of autonomy, range and persistence, drones are capable of operating on the battlefield better than humans and, most of all, in their stead. Operations are, in fact, entirely managed from military bases miles away from the site of the attack, in another

1 For example, according to Jane’s Markets Forecast, the 10 countries that spend the most on drones were expected to spend a total of \$ 8 billion on combat drones in 2019, <www.theguardian.com/news/2019/nov/18/killer-drones-how-many-uav-predator-reaper>.

2 C. MELONI, *Sulla (il)legittimità degli omicidi mirati mediante i droni e i possibili ricorsi alle corti*, in *Droni Militari: Proliferazione o controllo?*, Research Report, Istituto di Ricerche Istituzionali IRIAD, Roma, volume 4, 2017.

3 For further developments, see F. FLAMINI, *La corsa agli armamenti. L’uso della forza e i droni armati. Il rapporto Italia-NATO*, IRIAD Review, volume 6, 2018.

country. There are other advantages as well: drones are lighter and more agile than traditional combat aircrafts and can fly over an area for long periods of time in search of a suspected terrorist, for example. Their built-in camera allows operators to identify their target before striking it and allows for a more accurate understanding of the situation on the ground, at least in theory. By removing the need for a human to directly engage in the act of killing, it is therefore easy to understand how this technology completely changes the dynamics of targeted killings. Due to their numerous advantages, above all precisely the absence of risk for the military personnel involved and the efficiency of those attacks, some proponents of the use of drones in counterterrorism operations have even gone as far as to call them “humanitarian weapons”.⁴

2. The international debate on targeted killings by means of drones

Despite the above considerations, the use of armed drones – in particular by the U.S. – in order to commit targeted killings is at the center of a heated global debate, which spans political, moral and legal dimensions. The last one is the most relevant to this essay.

The concept of targeted killing is not new in the field of criminal law; it predates the use of drones. Nevertheless, the use of armed drones has significantly decreased the human and economic cost of such operations, therefore facilitating their multiplication. The impact of drones on the concept of targeted killings can therefore be said to be more quantitative than qualitative and made it more urgent to debate the legitimacy of targeted killings, as they have long been the object of international case law and doctrine that have sought to delineate, as precisely as possible, strict margins of legitimacy for those operations.

From the legal point of view, the use made by the U.S. of armed drones in counterterrorism operations poses several problems. In fact, these operations are attacks based on an extreme personalization of the enemy, due to the fact that they are conducted on the basis of kill lists personally approved by the President of the United

4 See G. CHAMAYOU, *A Theory of the Drone*, New York, The New Press, 2015, pp. 135-139.

States. Targeted killings are conducted in heterogeneous contexts (Afghanistan, Pakistan, Syria, Yemen, Somalia, Iraq, Libya) that range from fully fledged armed conflicts to situations of grave internal instability as well as situations that fall outside armed conflicts such as international police or counterterrorism operations.

The militarization of terrorist activity has seen American doctrine qualify terrorist attacks as “acts of war”, allowing the legality of counterterrorism operations to be assessed in light of international humanitarian law (IHL) rules (which allow for greater freedom in the use of force). However, this qualification has been, and continues to be, widely criticized from a doctrinal perspective, almost unanimously. Yet, if IHL does not apply, then in operations where the U.S. drone conducts a drone strike in another country outside the context of armed conflict, its legality must be assessed against criminal law and international human rights law.⁵ What is legal in wartime may not be so in peacetime. Moreover, an important element to note is that counterterrorism operations involving drone strikes are often conducted by intelligence services, particularly the CIA, which is not part of the military. This makes a crucial difference as such bodies are not recognized as combatants by IHL. In any case, targeted killings by means of armed drones, if they were already hardly compatible with the law of armed conflicts (under certain conditions), are also highly questionable from the point of view of Human Rights law.⁶

Outside the context of armed conflicts, the criteria for a targeted killing to be lawful are set by Human Rights law, which poses stringent conditions for States to use lethal force in a deliberate and premeditated way: the operation needs to have a punitive goal, its objective needs to be the protection of human lives and it needs to be used as last resort.

On the other hand, in the case of armed conflicts, such targeted killings nonetheless raise doubts as regards their legitimacy. Indeed, it is necessary to assess

5 C. MELONI, *Sulla (il)legittimità degli omicidi mirati mediante i droni e i possibili ricorsi alle corti*, in *Droni Militari: Proliferazione o controllo?*, 2017.

6 JOINT COMMITTEE ON HUMAN RIGHTS, *The Government's policy on the use of drones for targeted killing*, HC 574, HL Paper 141, 10 May 2016; J. DEHN, *Targeted Killing, Human Rights and Ungoverned Spaces: Considering Territorial State Human Rights Obligations*, *Harv. Int'l L.J.*, 84, 2013.

whether they respect the principles of distinction, military necessity and proportion. Above all, as strongly stated by the European Court of Human Rights, the protection of Human Rights (*in primis* the right to life) does not cease in wartime. Breaches of the abovementioned principles of international law and large-scale violations of Human Rights can even make targeted killings qualify as war crimes or crimes against humanity, provided that the conditions are met. This sheds some light on the reasons why an almost unanimous international doctrine considers targeted killings through the use of armed drones as unlawful, *tout court*, under IHL, international human rights law and international criminal law.⁷ This thesis has been further confirmed by the UN Human Rights Committee.

One could affirm that the problem is less about armed drones than about targeted killings and, incidentally, shooting a missile with a drone would be equivalent, from the legal point of view, to shooting it from any other type of aircraft,⁸ at least in theory. However, targeted killings by the means of armed drones present peculiarities susceptible to generate greater general concern.⁹ First of all, drones can generate a so-called “PlayStation Mentality” (detachment from remotely controlled actions) as well as an “all or nothing” logic because, when using a drone, one can only shoot – and kill – the target; one cannot capture it. Above all, one of the greatest problems with such operations is that «the idea of hyper-precision air strikes that only kill terrorist militants and enemy fighters is an illusion».¹⁰

Indeed, numerous civilians have been killed in supposedly targeted drone strikes

7 For further developments, see P. HAMILL, *Is it murder? The ethics and legality of drone strikes*, *Learned Friends Conference*, 16 September 2015; M. RAMSDEN, *Assessing U.S. Targeted Killings Under An International Human Rights Law Framework*, *Groningen Journal of International Law*, 1/1, 2013; F. ROSEN, *Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility*, *Journal of Conflict & Security Law*, Oxford University Press, 2013.

8 P. ALSTON, *Addendum-Study on targeted killings*, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, United Nations Human Rights Council, 28 maggio 2010, UN Doc. A/HRC/14/ 24/Add.6, paragraph 79 («[...] a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles»).

9 For further developments, see M. DE GROOF, *Death from the Sky: International Legal and Practical Issues on the Use of Armed Drones*, in A. ZAVRŠNIK, *Drones and Unmanned Aerial Systems*, Springer International Publishing, 2016, pp. 131-156.

10 C. WOODS, *Director at Airwars*, UK, <<http://www.youtube.com/watch?v=MYWwFnaFVOM>>.

to the point where some consider that they were not just *collateral damage* but *the overwhelming proportion of drone strike victims*.¹¹ As demonstrated by the hundreds of civilian victims in recent years, targeted killings executed by armed drones are more vulnerable to errors. From the data made publicly available by the White House, it appears that, on average, one civilian is killed every seven drone strikes committed by the CIA. Among those civilian victims, there is also an Italian: Giovanni Lo Porto was killed by a U.S. drone in an attack on the Afghanistan-Pakistan border, as part of a counterterrorism operation.¹²

Lo Porto was an Italian humanitarian worker for *Welt Hunger Hilfe*, a German NGO with activities in Pakistan. In 2012, a few weeks after his arrival in Pakistan, he was kidnapped by a jihadist cell and was held captive for almost three years. During this long period, the Italian authorities on the field tried to obtain his liberation. But just while they were reassuring his family, he was killed in a lethal strike by a U.S. drone targeting Al-Qaeda officials. This event came to light only in April 2015 during a press conference where the then-President of the United States, Barack Obama, officially recognized the responsibility of the U.S. The Lo Porto family managed to obtain an unofficial meeting with the U.S. diplomatic representatives, where they were handed the report of an internal investigation conducted by an *ad hoc* team. This report confirmed and validated the operation excluding any failure to comply with the Rules of Engagement and other norms regulating drone operations.

3. Transparency, control, accountability

This contribution will not delve further into the legitimacy of the practice of targeted killings by means of drones. Nevertheless, there appears to be a clear need to assess the (un)lawfulness of such operations, at least on a case by case basis, and to be able to determine who can potentially be held liable for them. What is lacking, though,

11 For further developments, see S. AKBAR, “Drones: Beyond the myths of precision and legality” in ECCHR, *Litigating drone strikes: Challenging the Global Network of Remote Killing*, ECCHR report, Berlin, May 2017.

12 ECCHR, *US drone strikes: The killing of Giovanni Lo Porto in Pakistan*, ECCHR Case Report, May 2018; C. CUCCO-D. MAURI, *Omicidi mirati a mezzo drone: brevi riflessioni a margine del caso “Lo Porto” tra diritto penale e diritto internazionale*, *Diritto penale contemporaneo*, 5/2018.

is the formal acknowledgement of such unlawfulness by a judicial authority. Despite various attempts by researchers, lawyers and activists – in particular the Berlin-based European Center for Constitutional and Human Rights (ECCHR) – these cases have not seen the scrutiny of national courts. Indeed, the numerous legal and practical difficulties in ensuring the effective enforcement of international and criminal law in those cases leaves, in fact, many irreconcilable doubts, and, so far, the matter has remained confined to doctrinal debate only. In several States, it has emerged clearly how the civilian victims of drone strikes are completely deprived from any recourse, both at the civil and criminal levels¹³ and, in this context of “denial of justice,” international doctrine continues to maintain the necessity for domestic courts to exercise their jurisdiction over such operations.

Unsuccessful attempts have been made to prosecute targeted killings in the U.S.¹⁴ and Israel. The sole exception is the High Court of Peshawar, Pakistan,¹⁵ which condemned the targeted killings by drones in tribal areas as crimes by the United States and as violations of Pakistan’s sovereignty, therefore considering those actions as breaches of international law and its principles on the use of force. Following this decision, the Court ordered the State of Pakistan to immediately take measures to safeguard the right to life of Pakistani citizens and every person situated in that area. Other unsuccessful attempts have also been made before the Italian and German courts. In addition, an appeal before the European Court of Human Rights (ECHR) did not bear fruit either. Indeed, the U.S. are not party to the Convention and the ECHR case law is very restrictive as regards the extraterritorial application of the Charter.

An analysis of these unsuccessful attempts reveals several obstacles in bringing targeted killing cases before national courts. First of all, the details of international police and counterterrorism operations are often considered state secrets, which limits the

13 For further developments, see N. COLACINO, *Impiego di droni armati nella lotta al terrorismo e accesso alla giustizia da parte delle vittime*, *Rivista di diritto dei media*, 2/2018, Media Laws.

14 See for example R. ROSEN, “Drones and the US Courts”, *Journal of the National Security Forum*, 37/5, 2011.

15 Peshawar High Court, 11 April 2013, Writ Petition n. 1551-P/2012, <www.peshawarhighcourt.gov.pk/image_bank/Mr_Justice_Dost_Muhammad_Khan/wp1551-12.pdf>.

possibilities to ascertain the facts and build the case. A second major challenge relates to determining the competent jurisdiction. It is almost impossible to conduct prosecutions in countries other than the ones where the attacks take place. However, as previously mentioned, those countries often suffer from grave instability and are therefore hardly able to carry out justice effectively. Moreover, in Italy as well as in other countries, the general criterion that determines jurisdiction is territoriality, even though it is moderated by other specific criteria, such as the so-called “passive subject criterion”, which was used in the Lo Porto case. Nevertheless, according to the Italian legislation, a crime committed against an Italian citizen in a third country falls within the jurisdiction of Italy only if very strict conditions are met. To sum up, barring the application of universal jurisdiction (which in limited situations provides courts with jurisdiction over crimes regardless of where they were committed, by whom, and against whom), the chance of activating the national criminal justice apparatus in cases of drone strikes in third countries remains tenuous.

In addition to the issues of transparency and jurisdiction, further difficulties are encountered when it comes to ascertain the individual liability of the numerous subjects that participate in such operations: we are talking about a type of technology that requires the theoretical and practical participation of many individuals, from the top commander who authorizes the operation to the people responsible for collecting data on the target (and confirming that it can be attacked), the officer giving the specific order to engage, the operator who materially pilots the drone and pushes the “fire” button, etc. In the case of the drone strike that killed Giovanni Lo Porto, for example, it was only possible to precisely identify one responsible individual: the head of the CIA, responsible for authorizing drone operations. The Prosecutor’s Office of Rome, after two years of investigation, decided to drop the homicide charges, simply acknowledging that a military operation had been conducted by the U.S. in the context of an armed conflict and that the death of Giovanni Lo Porto was obviously due to a mistake. Therefore, the prosecutor concluded that no liability, even *in abstracto*, could arise from the death of Giovanni Lo Porto.

4. The responsibility of Third States: Italy and the military base in Sigonella

Considering the great difficulty of ensuring judicial control over the responsibility of individual participants to drone operations, international doctrine has been exploring, as an alternative, the possible liability of third States that assist, through various means, the U.S. in committing targeted killings.¹⁶ The United Kingdom, Germany, the Netherlands, Denmark and Italy are reportedly involved in the U.S. drone program.¹⁷

In 2016, three Yemeni citizens, whose partners had been killed by a U.S. drone bombing, lodged a complaint in the Administrative Tribunal of Cologne, Germany. This legal action aimed to hold the German government partially liable due to its participation in the lethal strikes program conducted in Yemen by means of drones taking off from the Ramstein base. The Tribunal considered the case as admissible and acknowledged the role played by the Ramstein base in the U.S. targeted killings program. At the same time, it excluded that the German government had any obligation to prevent the use of the base for drone operations. The plaintiffs then filed an appeal before the Superior Administrative Tribunal of Münster, currently still pending.

The Italian State would be well-advised to follow the developments of the German case, being indirectly – or perhaps even directly – concerned by the legal problem at hand, due to the Italian-American military base in Sigonella, Sicily. This base occupies a strategic position at the heart of the Mediterranean Sea, on the Eastern part of Sicily, within reach of the North African and Near Eastern regions. While the presence of drones in Sigonella can be retraced to 2013,¹⁸ in February 2016, the Wall Street Journal¹⁹ spread the news about an agreement – without further specification –

16 For further developments, see C. MELONI, *State and Individual Responsibility for Targeted Killings by Drones*, in F. Santoni de Sio and E. Di Nucci (eds.), *Drones and Responsibility: Legal, Philosophical and Socio-technical Perspectives on the Use of Remotely Controlled Weapons*, 2016, pp. 47-64; G.-J.A. KNOOPS, *Drones at Trial. State and Individual (Criminal) Liabilities for Drone Attacks*, *International Criminal Law Review*, 14, 2014, pp. 42-81.

17 ECCHR case report on US airbase Sigonella, <www.ecchr.eu/fileadmin/Fallbeschreibungen/Drones_US_Italy_Sigonella_Case_Report_en.pdf>.

18 F. TOSATO, *Impiego di velivoli 'Global Hawk' presso la base militare di Sigonella*, *Osservatorio di Politica Internazionale*, May 2013.

19 The article is available at <www.wsj.com/articles/italy-quietly-agrees-to-armed-u-s-drone-missions-over-libya-1456163730>.

between Rome and Washington about the arming of U.S. drones in the Sigonella base. Nevertheless, since then, the terms of the agreement have not been published²⁰ and the growing use of this technology is not met by equal attention from neither the political sphere nor public opinion.

For this reason, in March 2017, the ECCHR filed three requests on the basis of the 2016 Freedom of Information Act, in order to access information on the legal framework regulating the stationing and use of U.S. drones in Sigonella. The public administration denied the request on grounds of state secrets as well as national and security interests. The ECCHR then filed a complaint to the *Tribunale Amministrativo Regionale* (TAR) in Rome. However, the judge found the complaint to be inadmissible because the U.S. Government had not been notified while it had a counter-interest in the request. In March 2018, the ECCHR appealed this decision before the *Consiglio di Stato*, which is Italy's highest administrative jurisdiction, and argued against the TAR's interpretation concerning the need to notify the counterpart in FOIA litigations. Another of the ECCHR's central arguments is that the State cannot prescind from transparency for such crucial decisions that influence the government's policy on fundamental rights (including the right to life and the limits of lawful recourse to lethal force). At the time of writing, this procedure is still pending.

A potential disclosure of the agreement would provide interesting elements for a legal analysis of the Sigonella drones case. Given that the formal involvement of the Ramstein base in the execution of targeted killing missions was recognized, it is not completely unrealistic to think that, in the near future, the question of the responsibility of the Italian State would be brought before domestic jurisdictions, in particular administrative courts.

Indeed, Sigonella is a so-called joint-combined base, meaning that it is managed by NATO, Italy and the USA. According to the 2006 Technical Arrangement regulating its functioning, the base is under Italian command, leaving however the U.S. Commander fully in charge of military control over U.S. personnel, equipment and

20 Some exponents of the Italian Government – including the then-Minister of Foreign Affairs Gentiloni, the then-Minister of Defence Pinotti and the then-Prime Minister Renzi – have declared that Italy had indeed authorized punctual operations involving armed drones to purely defensive ends.

operations. Notwithstanding this, the U.S. Commander has the obligation to notify the Italian Commander of “all significant U.S. activities”, which would reasonably include international operations involving armed drones. On his side, the Italian Commander must notify the U.S. Commander if the planned activities breach applicable Italian law. This could potentially constitute a basis to hold the Italian State liable for the U.S. drone strikes carried out from Sigonella in Libya and North Africa.²¹

5. Concluding remarks

In front of the “state secrets” argument used to deny requests for information, one question comes to mind: *quis custodiet ipsos custodes?* Notwithstanding various opinions as to the legitimacy of the killings, the idea that they cannot be completely exempt from any consideration of legality seems shared. It cannot be possible for drone strikes to avoid scrutiny *a priori* (due to the lack of transparency in their authorization) but also *a posteriori* (due to jurisdictional issues). In the specific case of Italy, where operations involving armed drones are still being conducted from Sigonella, a potential solution might lie in the use of the territoriality criterion. Indeed, since the conduct originates from the Sicilian military base, it would fall under the jurisdiction of the Italian courts. Alternatively, the Italian concept of territorial jurisdiction could be re-evaluated in the light of the so-called “universal jurisdiction”. On that note, as shown by the doctrine, Italian criminal law has long been expanding its jurisdictional reach to the point where some authors, *de jure condendo*, no longer talk about the criterion of “tempered territoriality” but of “tempered universality”.

In this fast-changing legal landscape, observing the evolutions of case law will be crucial, with particular attention to the Freedom of Information Act request for the Sigonella operations. Moreover, cases before the European Court of Human Rights also have the potential for breakthroughs in the field. Indeed, there currently are pending cases relating to the possibility of investigating “extraterritorial” violations of the rights

21 D. MAURI, *Quali responsabilità italiane per le operazioni dei droni armati a Sigonella?* in C. MELONI, *Armed drones in Italy and Europe: problems and perspectives*, *Diritto Penale contemporaneo*, 2017, <archiviodpc.diritto penaleuomo.org/d/6399-droni-armati-in-italia-e-in-europa-problemi-e-prospettive>.

guaranteed by the Convention (*i.e.*, violations committed by non-signatory States). Should the Court soften its – traditionally very conservative – stance on the extraterritorial application of the Convention, this would allow it to decide upon the legality of targeted killings by means of armed drones. In this regard, a plausible doctrine states that at least the negative obligations to protect Human Rights should apply regardless of whether a State has control over a territory or an individual, and the obligation to refrain from taking lives arbitrarily would fall into that category. There are thus strong arguments in favor of extending the extraterritorial application of the Convention to drone operations.²²

In the case where the drone operations in Sigonella fell under the jurisdiction of Italian courts, there would still be important questions in need of further in-depth research. First of all, given the peculiar nature of the military base, the judge would need to consider the distinction between military and “regular” criminal law, as well as the functional immunity of Italian and U.S. military officers. In this respect as well, case law is of fundamental importance. In particular, the Italian Constitutional Court stated the following:

«The Italian judge’s obligation to refuse jurisdiction in the case of requests for civil damages for crimes against humanity committed *iure imperii* by a foreign State on Italian territory, when there are provided no other forms of judicial reparation for such violations of fundamental rights, is [...] contrary to the fundamental principle of judicial protection of fundamental rights, as outlined in articles 2 and 24 of the Italian Constitution. [...]

The total sacrifice of one of the supreme principles of the Italian legal order, which include, without a doubt, the right to access to a judge who protects inviolable rights stemming from the joint reading of articles 2 and 24 of the Constitution of the Italian Republic, on the basis of the immunity granted to a foreign State on Italian soil, cannot be justified nor tolerated when it comes to protecting the illegitimate exertion of

22 M. PERTILE, *Droni armati e diritto internazionale*, in C. MELONI, *Armed drones in Italy and Europe: problems and perspectives*, *Diritto Penale contemporaneo*, 2017.

that State's power, particularly when this exertion results in acts considered as war crimes and crimes against humanity, which breach individuals' inviolable rights».²³

Would the classic instruments of Italian criminal law be appropriate to assess the criminal liability of the operations described in this article? In particular, this could bring new developments regarding key concepts such as the *dolo eventuale* (as recently interpreted in the *Tyssenkrupp* judgement) applied to the collateral victims, the concept of "error" (particularly the *error in persona*) or even guilt by association and joint participation in the commission of an offence, given the involvement of numerous individuals in conducting even one drone strike. Another prominent issue would be the liability of subordinates and the legal effects of executing a legitimate order.

Eventually, as shown at the European Union level, where the Council was asked to adopt a position, one might wonder whether the current legal landscape is not missing an important piece to properly address armed drones, as is true every time where the law has not yet caught up with the emergence of a new technology.

This would call for the elaboration of a common legal framework on the matter, bearing in mind that only the transparency of public authorities allows for judicial oversight; only judicial oversight guarantees accountability; and only by guaranteeing accountability the protection of the Rule of Law is ensured.

23 Corte Costituzionale, 22 October 2014, n. 238, <www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238>.
