

# Are Suspect Terrorists Legitimate Targets of ‘Signature’ Drone Strikes?

## *Challenges to the Principle of Distinction in the US ‘Global War on Terror’.*

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### ABSTRACT

The US has initiated its drone strike policy as one of the main operations in its ‘Global War on Terror’ against Al-Qaeda and its affiliates. Armed drones have been implemented in the US military deterrence to eliminate suspect terrorists. This paper analyzes the so-called ‘signature’ drone strikes that have been covert by the classified protocols of their operators: the CIA. The term ‘suspect terrorists’ joined to ‘signature’, and the secrecy of the policy has led to raising questions on the legality of the whole US practice under international humanitarian law (IHL). Specifically, the paper aims at assessing the status of the US ‘signature’ drone strikes policy vis-à-vis the principle of distinction. It will focus on understanding whether these individuals are legitimate targets in light of IHL, assuming, without questioning, the existence of a non-international armed conflict between the US and Al-Qaeda.

**Keywords** – international humanitarian law; principle of distinction; drone strikes; signature; terrorist; US practice; targeted killings.

### INTRODUCTION

Unmanned Aerial Vehicles (hereinafter drones) were first introduced for surveillance and reconnaissance purposes; however, their use has been expanded in the aftermath of the 9/11 attacks becoming a novel means and method to conduct war. On the night of October 7<sup>th</sup>, 2001, the US used for the first time the drone *Predator* to launch a *HELLFIRE* missile to kill Mullah Mohammed Omar, the supreme leader of the Taliban[1]. Ever since that, the United States has largely adopted armed drones to carry out targeted killings in several countries, such as Afghanistan, Pakistan, Yemen, Iraq, and to a lesser extent Somalia[2]. The US is at the forefront of the use of armed drones in the international scenario, defending the myth of their ‘surgical precision’ that prevents collateral damage both for the receivers of the attack but also for the attackers themselves.

Armed drones have been implemented in carrying out targeted killings defined by the UN Special Rapporteur Philip Alston as “*the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under color of law, or by an organized group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator*”[3]. These acts have been used by the US to eliminate suspect terrorists in their ‘Global War on Terror’ against Al-Qaeda and its affiliates.

The practice has distinguished two types of strikes: ‘*personality*’ or ‘*signature*’ strikes. The former refers to

those strikes involving the killing of High Profile Targets whose identity, military role, and function are well-known. The latter points to the practice of eliminating individuals based on a pattern of behavior observed and believed to be linked to terrorists under the Al-Qaeda network by the US CIA[4].

Aware of the doubtful matters relating to the geographical scope and the transnationality of the conflict argued by some scholars[5], this paper starts by accepting the controversial notion among the doctrine that the US is involved in a non-international armed conflict (NIAC) against Al-Qaeda[6]. This paper aims at analyzing the US state practice of drone strikes, specifically the ‘signature’ ones, under *jus in bello*. The paper will not question the context of the armed conflict, nor it will investigate the lawfulness of drones under international law as such. This work will attempt to unfold drone strikes *vis-à-vis* the legal requirement of distinction outlined in International Humanitarian Law (IHL). It will discuss the issues related to the legitimate targets permitted under IHL and the controversies of defining ‘suspect terrorist’ in the current body of law. Therefore, it wishes to assess whether the targets of the US practice could be considered lawful under the IHL standard of distinction.

## THE CONTROVERSIAL US DRONE STRIKES POLICY

### *Setting the Context: the US ‘Global War on Terror’*

The ‘Global War on Terror’ has spanned over the foreign policies of the Bush and Obama administrations and signaled the beginning of the use of military drones in the arsenal of the US. The drone strikes policy that was set up, has been progressively absorbed by the following administrations lasting to this day. The US has developed two separate drone programs against Al-Qaeda and its affiliates. The first one is public and run by the military forces under the State Department of Defense mainly present in active zones of conflict such as Iraq and, previously, Afghanistan. The second one is more contentious, mostly covert and run by the CIA which mainly aims at eliminating suspect terrorists around the globe, even in countries where the use of force is much more legally dubious in the first place, such as in Yemen and Pakistan[7]. The US – Al-Qaeda conflict is a debated topic among international legal scholars. The existence of a NIAC between these two parties has been contested but has progressively found reverberation in the doctrine. In cases of non-international conflicts, the threshold of violence needs to be significantly high in the matter of mutual ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.[8] When this significant threshold is achieved, IHL applies. However, IHL applies also to those blurred conflict situations in which the legitimacy of the resort to the use of force is legally puzzling. This is relevant to accomplish maximum adherence to the rules regulating the conduct of violence, i.e., *jus in bello* norms[9].

The ‘Global War on Terror’ seems to theoretically evade the dichotomy set by international humanitarian law. The hostilities between the US and Al-Qaeda represent a conflict between a state and a non-state actor. Nevertheless, the geographical scope is left unlimited by the wording and the scope of the conflict itself. ‘Global’ entails a conflict that is transnational by its very nature. The nature of the conflict has long been debated. The issue regards whether it has to be considered as an international armed conflict, or a non-international armed conflict, with transnational and extraterritorial features in both cases. Indeed, if one would accept that the US and Al-Qaeda are involved in a non-international armed conflict, one has to consider that the ongoing strikes against different non-state armed groups, such as the Taliban, Al-Qaeda, and its affiliates take place as an international armed conflict between insurgents and occupying forces. Another issue regards the legality of conducting hostilities extraterritorially, outside the territory where these non-state armed groups operate, such as it occurs in Pakistan[10]. Having no borders would mean using force indiscriminately every time a suspect terrorist is found, hence infringing the *jus ad bellum* and *jus cogens* and their respective prohibition to use force and the right of protection of life[11].

Nonetheless, the purpose of this research is not to investigate the legitimacy or existence of an armed conflict between the US and a non-state threat. The aim is to address the controversies of drone strikes against suspect terrorists, especially in the so-called ‘signature’ killings. Indeed, the resort to force *per se* would have to be subjected to an assessment under a different legal framework. In cases of blurred situations of violence, where the use of force is legally dubious, IHL is the body of international law to refer to[12]. This is the motive why this study simply assumes that a non-international armed conflict exists between the US and Al-Qaeda, to investigate the targeted killings through drones under a different lens, which is one of the IHL principle of distinction.

### ***Signature’ Drone Strikes: a Legal Assessment under the IHL Principle of Distinction***

The principle of distinction is the cornerstone of IHL and its application in the context of NIAC results puzzling. The specific legal context of the US ‘Global War on Terror’ further complicates the assessment. Article 48 of 1977 Additional Protocol I[13] asserts that the armed conflict parties must discern between civilians and combatants. Likewise, military objects must be distinguished from civilian ones. Civilian objects are forbidden targets under IHL. Military ones are subjected, instead, to the use of force to the extent of complying with the principle of proportionality of the expected military advantage that will be obtained [14].

Starting from the assumption that the US is involved in an armed conflict against Al-Qaeda, it follows that only lawful combatants can be subjected to the use of force under the drone policy of the US State practice. First, lawful combatants became illegitimate targets if they surrender, or they are *hors de combat*. [15] Lawful combatants could be members of the armed forces of a state, or militia that communicate to a chain of command. They are distinguishable due to distinctive signs or uniforms, they carry arms openly, or conduct acts complying with the laws and customs of war, as provided by Article 4 of the Geneva Convention III[16]. It follows that Al-Qaeda militants could be targeted only if they satisfy the abovementioned requirements of lawful combatants. Some scholars argue that by accepting the notion that the US is at war against Al-Qaeda, its members shall automatically be considered as such. By interpreting the Geneva Convention loosely, this conclusion could be reached on the basis that contemporary wars have different features than those that could ever be foreseen by the Conventions. For instance, it is uncommon to have distinctive uniforms or carry arms openly when we are dealing with suspect terrorists[17]. On the other hand, those advocating for a strict interpretation of the current set of IHL, believe that Al-Qaeda militants shall not be compared to armed forces combatants by law[18].

Following this line, Al-Qaeda members are to be considered civilians. The principle of distinction states that using force against civilians is forbidden unless certain individuals fall in the category of civilians ‘directly participating in hostilities’, as stated in Article 51(3) of Additional Protocol I[19] and Article 13(3) of Additional Protocol II[20]. Even if the Geneva Conventions or the Additional Protocols do not specify what directly participating in hostilities entails, a study of the International Committee of the Red Cross (ICRC) and the jurisprudence of the Supreme Court of Israel provide some requirements clarifying this notion.

Non-state armed groups taking part to conflicts usually comprehend fighting forces as well as auxiliary civilians or humanitarian contributors. The functional structure of the non-state party resembles one of the well-known armed forces. The ICRC recognized the difficulties of tackling irregularly organized groups such as Al-Qaeda.

Membership in these armed organizations bears no legal meaning under domestic law and does not possess functional integrity as it occurs with regular forces of a State. Moreover, membership is not explicitly denotative due to uniforms, distinctive signs, or any means of this sort[21]. The elusive nature of non-state

armed groups makes it difficult to assess the principle of distinction due to the fluidity of the membership concept.

However, membership shall not rest upon unaccountability, clan mentality, family ties, or any other criteria which could lead to mistakes, arbitrary decisions, or abuse of the use of force[22]. These previously listed notions are distinctive of certain cultural realities where irregular non-state armed groups originate and that are mostly ignored by the US. Rather, membership must rest on the individual acquiring constant combat function or directly participating in hostilities (possibly falling under unlawful combatants). Constant combat function does not *de jure* entitle to privileges reserved to combatants[23]. According to the ICRC, civilians acquiring constant combat function requires certain criteria: the threshold of harm, direct causation, and belligerent nexus. The individual's acts must be likely to jeopardize the other party's military operations or capabilities; or must cause death, harm, and destruction to civilian or civilian objects protected against attacks (threshold of harm). There has to be a direct relationship between the individual's conduct and the damage which could occur either from the act itself or from a military action under the coordination of a chain of command of which the individual's action is a part of (direct causation). Lastly, the individual's action must be developed to precisely induce the threshold of harm backing one party to the disadvantage of the other (belligerent nexus)[24].

On the other hand, the Israeli Supreme Court case law[25] simply focuses on investigating the function of the militants. If they perform functions conducive to the ones of combatants, then they must lose the protection privileges granted to civilians. Essentially, civilians who sporadically are involved in hostile acts are still entitled to protection as foreseen under *jus in bello*. Those that are part of the terrorist group permanently lose protection privileges and are legitimate targets of the armed conflict. Following this line, Al-Qaeda militants are lawful targets of the US. Indeed, the mere fact that they are permanent members of the non-state actor makes them lose their civilian status[26].

Some experts have perpetrated the idea that Al-Qaeda militants are unlawful combatants. This category essentially evades lawful combatants – due to the non-observance and rejection of IHL during armed attacks – and protected civilian status, since they actively perpetuate hostilities against the US. Yoram Dinstein clarified this notion by describing the impossibility of a person simultaneously wearing two caps. He states that an individual is not allowed to wear “the hat of a civilian and the helmet of a soldier[27]”. By being an unlawful combatant, an individual is a legitimate target because they are combatants, but neither do they enjoy the privileges entitled to lawful armed forces, nor can they be granted the protection of civilian status [28].

The case here at stake is even more challenging. The US has developed an increasingly aggressive drone strike policy under former President Obama, where every member, or suspected member, of the Al-Qaeda network, is considered to be a legitimate target, thus rejecting the ICRC requirement on the distinction. The rationale behind the ‘signature’ drone strikes policy of the US is that every individual suspected of terrorism is spotted and targeted based on patterns of behavior, i.e., ‘signature’[29]. It is undeniable that the US drone strike operation is legally questionable from the perspective of targets’ distinction. Striking on individuals that are presumed to be part of a non-state armed group, on the mere basis of behaviors, that do not fall in the categories of civilians acquiring ‘constant combat function’ or civilians directly participating in hostilities poses several issues[30].

### ***The US State Practice: the Indistinctiveness of Deaths***

As previously mentioned, former President Obama initiated the most controversial policy of drone strikes since the beginning of the US extraterritorial operations. The Obama administration drone activity peaked in Pakistan, to then expand to Yemen and Somalia. This initiated a brand-new original conflict, adding up to the two open conflicts the administration had inherited from Afghanistan and Iraq. The US drone strikes



protocols command CIA operators to target on assumptions. All military-aged men are to be considered legitimate targets when they are found in a specific strike zone, to the extent of intelligence proof of innocence. The US has attempted to widen the interpretation of imminency to include the mere affiliation of an individual to Al-Qaeda and making them legitimate targets for its lethal use of drones. US officials have claimed that an individual present in a known location harboring terrorism, or the nearby presence of High-Profile Targets of Al-Qaeda, signifies a threat that must be eliminated[31].

In sum, drone strikes could potentially be carried out by the US on civilian objects assuming that those are locations gathering men who are suspected to be terrorists. The official accounts of civilian casualties reported by the US are by far unmatched by the independent research on drone strikes. What has surfaced is that the remote pilots of drones shoot HELLFIRE missiles in territories they know nothing about, mostly ignoring whom they are effectively assassinating. This violation of IHL has materialized at the hand of the US in Pakistan in 2011. A permitted meeting by the Pakistani government of elders in the Federally Administered Tribal Areas (FATA) was targeted by a US strike assassinating 42 people due to the imminency of the threat that the gathering allegedly presented. This testifies that the signature drone strike *modus operandi* of the US does not comply with the principle of distinction as it is foreseen by the current body of IHL[32].

Another famous case occurred in January 2015, when former President Obama announced the killing of two innocent Western hostages in a drone strike in Pakistan against suspected affiliates of Al-Qaeda. In the same month, two American nationals, in this case, Al-Qaeda members, were killed without being previously identified. They were simply spotted, targeted, and killed. This new kind of warfare, fiercely defended as a more discriminating one, was still facing the unsureness of who was about to be killed in a conflict. An added layer of difficulty lies in the lack of access to information, which discloses the lack of transparency and accountability of the US state practice in matters of drone strikes. Most individuals targeted and killed are not designated terrorists on the US kill list, the government, the CIA, and the remote agents do not know their names, as Micah Zenko indicated[33]. What they simply do is assign a 'signature': killing on assumptions.

The abovementioned case is self-explicatory. As beforehand stated, and affirmed by the ICRC, the US must not assume membership of individuals to Al-Qaeda or other non-state armed groups on suspicions of affiliation, family ties, or mere association and gatherings. Under the sense of the principle of distinction, the criteria of membership shall be interpreted to limit abuses, arbitrariness, or errors that could lead to excessive harm and inhumanity.

Another difficulty is posed by the secrecy of the US operations. Some experts have argued that there is too little evidence to assess the legality of signature drone strikes. The pattern of behaviors that would justify the targeting activities of the US is mostly undisclosed. Information has been leaked to the press revealing that the 'signature' of a suspect terrorist comprehends a wide range of characteristics. In addition, IHL does not define the terms 'terrorist' or 'militant', which are political terms without legal meaning under *jus in bello*. The only distinguishable categories in IHL are combatant or civilian. These shortcomings of current laws render burdensome the assessment of contemporary issues of counterterrorism, such as recognizing the *stricto sensu* 'signature' of a terrorist, that does not necessarily correspond to the 'signature' of a combatant [34]. The lack of distinction in the international normative framework entails the lack of regulation on potential disproportionate losses and civilian suffering.

It is undeniable that also the US official statements are flawed. The country's administration has publicly magnified the results of drone strikes to justify the policy. The myth of surgical precision and the overestimated effects of the policy have enhanced the controversial practice[35]. The US has never corroborated its statement with proof, which underlines the lack of accountability and transparency of the 'signature' drone strike practice. Indeed, as stated, at the beginning these kinds of operations are mainly run

by CIA operators who are not part of the US armed forces, have no training in the law of armed conflicts, and keep their protocols classified. It seems exceedingly contentious to conduct a *jus in bello* analysis that is not defective or inaccurate[36].

## CONCLUSION

As this paper has tried to show, the US signature drone strike policy is highly controversial. Targeting an individual based on mere allegations is unlawful. Developing a killing protocol on behaviors intrinsically linked to Al-Qaeda or terrorist groups may result in discrimination against cultural features, reinforcing stereotypes. Besides, the US position and interpretation of international law norms have consistently been puzzling and, at times, unwholesome.

The US has been at the forefront of armed drone technologies. The tremendous pace of intrusion of technology among the means and methods of war shall not be used as an excuse to evade the current IHL that lacks *ad hoc* regulations on such novelties. Armed drones shall not entail dehumanizing armed conflict.

The personal and secret characterization of ‘signature’ by the US must not evade the rules of IHL and the clarifications of the ICRC. Ruling out the *jus in bello* principle of distinction in signature strike programs could signify disproportionate and unnecessary death of civilians, strengthened by long-lasting mental health effects caused by this constant hunt from the skies, surrounded by the fear of being wrongfully killed.

The US defends fighting a non-international armed conflict against Al-Qaeda and its affiliates. On the other hand, the US has chosen to implement the already widely explained ‘signature’ drone strike policy to conduct such conflict. These two elements seem per se in contradiction. If the US affirms to be involved in a NIAC, then it must respect IHL provisions. Devising a policy that publicly upholds the elimination of terrorists, and not the fighting of combatants, strengthens the controversy vis-à-vis the current status of international law and the lack of a global definition of terrorism, suspected terrorists, or militants under IHL. The policy has been undertheorized by the US administrations that have been fighting against Al-Qaeda. The *file rouge* connecting the various US administrations has been improvisation, dictated by a felt sense of duty in protecting world security. The American desire “to win hearts and minds” must never interfere with its compliance with international law.

There is no reason for the US to defend and preserve such a policy if it circumvents the basic aim of IHL: making something as tragic as war, as ‘human’ as possible.

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## Foot Notes

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