

# Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives

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ICCT Research Paper

April 2015

This ICCT Research Paper 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 a Common EU position on the use of armed drones and a legal framework for counterterrorism-related uses of force. The paper 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 paper 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 paper's conclusion, the authors summarize the findings and provide concrete recommendations toward a cohesive European position on targeted killings and drone use in counterterrorism.

## Executive Summary

### Introduction

On 23 May 2013, United States (US) President Obama, for the very first time, comprehensively addressed drones in a speech at the National Defense University.<sup>1</sup> The speech made clear that the US sees itself in a just armed conflict against al Qaeda, the Taliban, and their associated forces, which legally justifies the drone 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 Qaeda 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”<sup>2</sup> and when there is “near certainty that no civilians will be killed or injured”.<sup>3</sup>

Human rights organisations cautiously welcomed Obama’s apparent efforts to bring the secretive US drone policy more into the open, but also remained vigilant. However, European Union (EU) Member States remained rather quiet. Anthony Dworkin, whose seminal paper is examined in more detail in the Research Paper, remarked in this context:

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].<sup>4</sup>

Indeed, the relative silence from the 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 (criticised) US’ use of armed drones and targeted killings, hence giving it more legitimacy.

The Research Paper gauges the extent to which EU governments share the US’ position on armed drones and targeted killing. 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]xpress[ed] its grave concern over the use of armed drones outside the international legal framework”<sup>5</sup> 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”.<sup>6</sup>

The paper includes the results of a questionnaire sent to the Ministries of Foreign Affairs, Defense, Justice and intelligence services of all 28 EU Member States (see the annex of the Research

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<sup>1</sup> The White House, Office of the Press Secretary, “Remarks by the President at the National Defense University”, National Defense University, Fort McNair, Washington, D.C., 23 May 2013, <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> A. Dworkin, “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](http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf), p. 2.

<sup>5</sup> The joint motion for a resolution on the use of armed drones (2014/2567 (RSP)), dated 25 February 2014, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P7-RC-2014-0201+0+DOC+PDF+V0//EN>, was adopted two days later by 534 votes to 49 with 10 abstentions, see <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1340215&t=e&l=en>.

<sup>6</sup> *Ibid.*

Paper). 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 Research Paper explores more normative pronouncements from entities other than states, including international organisations, 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 remainder of this Executive Summary, one will find the conclusions with respect to the questionnaire and the publicly available information on this topic, the authors' own view and finally concrete recommendations toward a cohesive European position on targeted killings and drone use in counterterrorism.

## **Conclusions**

The first conclusion the authors can draw is that the quantitative results from the questionnaire are disappointing, with only five (Czech Republic, the Netherlands and three anonymous responses) of 28 EU Member States (eighteen percent) filling in (most of) the questionnaire. 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. Only a few findings will be presented in this Executive Summary. The rest, especially the more technical ones, can be found in Section 2.4 of the Research Paper.

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

- Whereas the completed questionnaires from some EU Member States, in particular the Netherlands, were very clear, others seemingly contradicted themselves.
- 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". The Netherlands offered a slightly different version, namely that in a situation where only international human rights law (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 a non-state actor (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.

- Two EU Member States (the Netherlands and the third anonymous respondent) indicated that a non-international armed conflict (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.
- 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 hadn't called for more transparency and the first and third anonymous respondent 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 (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 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.

### **Authors’ own view**

When responding to Dworkin’s outline of a possible EU Common Position, see the second bullet point on page two of this Executive Summary, 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 minimise 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, 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.

What the EU should do is keep stressing the importance of transparency, oversight and accountability and respect for international law, including international humanitarian law (IHL) and IHRL while countering terrorism. It should also resolutely reconfirm 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”.<sup>7</sup> Also very important in this context is the resolute rejection of the notion of a global battlefield without clear geographical boundaries.<sup>8</sup>

The authors realise that the Research Paper is just the first brick they are laying in a long-term project, and they hope it serves 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 also would like to encourage the Netherlands in following-up on the statements of former Dutch Minister of Foreign Affairs Timmermans as well as those of the Dutch representative to the Human Rights Council debate in September 2014 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 this questionnaire, 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.

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 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.

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 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, 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 and the subsequent speeches made by administrative officials.

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<sup>7</sup> A. Dworkin, “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](http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf), p. 10.

<sup>8</sup> See *ibid.*, p. 7.

The US has often been criticised 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.

## **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 in the rule of law. Unlawful acts “undermine the concept of rule of law, which is a key element in the fight against terrorism”. 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.
- An EU Common Position should be clear about having a two-step legal justification for using armed drones; one concerning the legal basis (consent, mandate UN Security Council and self-defense), and one concerning the applicable legal framework (IHL (in armed conflict situations) and IHRL (always)).
- An EU Common Position should recognise that the current international law is fully capable of addressing legal issues arising with 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 recognising 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 authorisation 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 the 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.
- 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),<sup>9</sup> but not at the cost of diluting or re-interpreting 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.

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<sup>9</sup> See *ibid.*, p. 8.



## About the Authors

**Jessica Dorsey** is an ICCT Research Fellow and a Researcher at the T.M.C. Asser Institute in the areas of International Humanitarian Law, International Human Rights Law and International Criminal Law. Originally from the United States, she received her J.D. in 2008 while concentrating on international and comparative law (with distinction), before completing her LL.M. (cum laude) in public international law writing her thesis on the responsibility to protect at Utrecht University School of Law in 2010. After her studies, she worked on various legal research projects as well as on a human rights initiative for the Municipality of Utrecht. In 2011, she was a junior lecturer at the Utrecht University School of Law, where she taught general international law and comparative human rights. She also teaches international humanitarian law and international criminal law during a summer field studies program with Duke University in the US. Jessica is a member of several research networks, the Editorial Assistant for the Yearbook of International Humanitarian Law, an Assistant Editor for the international law weblog *Opinio Juris* and is currently collaborating on a project for the United Nations Special Rapporteur on Human Rights and Counter Terrorism investigating the civilian impact of the use of drones.

**Dr. Christophe Paulussen** is an ICCT Research Fellow and a senior researcher international humanitarian law/international criminal law at the T.M.C. Asser Instituut, coordinator of the inter-faculty research platform 'International Humanitarian and Criminal Law Platform' and Research Fellow at the International Centre for Counter-Terrorism – The Hague. After a propedeuse Dutch law (cum laude), a doctoraal International and European Law (with distinction) and a research master (cum laude), he started working as a PhD candidate at the Department of European and International Public Law of Tilburg University in 2005. On 24 September 2010, Christophe defended his PhD thesis 'Male captus bene detentus? Surrendering suspects to the International Criminal Court'. Inspiration for the subject of his PhD thesis was drawn from the (more or less homonymic) thesis of his doctoraal studies which won not only the Tilburg University Thesis Prize 2004 but also the first prize for master's theses in the framework of the Max Van Der Stoel Human Rights Award 2004. On 9 December 2011, Christophe's PhD received an honorable mention from the jury of the Max van der Stoel Human Rights Award. After his PhD defence, and before moving to The Hague, Christophe worked as an assistant professor at Tilburg University.

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