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# TARGETING WESTPHALIAN SOVEREIGNTY: THE USE OF ARMED DRONES IN NON- CONFLICT AREAS

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‘The laws of war protect enemies of the same race, class, and culture. The laws of war leave the foreign and the alien without protection. When is one allowed to wage war against savages and barbarians? Answer: always. What is permissible in wars against savages and barbarians? Answer: anything.’<sup>1</sup>

‘We may never have the kind of evidence that can stand up in an American court of law,” he said. “But we cannot allow ourselves to become the Hamlet of nations, worrying endlessly over whether and how to respond.’<sup>2</sup>

## Abstract

Sovereignty has long been a core concept of the Westphalian international legal order. The basic idea is simple: In the international arena, all states are formally considered equal and possessed of the right to control their own internal affairs free of interference from other states. That’s what we call the principle of non-intervention — and it means, among other things, that it’s generally a big international law no-no for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state’s invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter, or in self-defense “in the event of an armed attack.” The principle of sovereignty might appear to pose substantial problems

<sup>1</sup> Sven Lindqvist, *A History of Bombing* (The New Press, 2003); quoted in Frédéric Megret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other,’” in *International Law and Its “Others,”* ed. Anne Orford (Cambridge: Cambridge University Press, 2006).

<sup>1 2</sup> Speech by George P. Schultz at the Park Avenue Synagogue in Manhattan in 1984, quoted in Markus Gunneflo, *Targeted Killing: A Legal and Political History* (Cambridge University Press, 2016).

for U.S. drone policy: How can the United States lawfully use force to kill suspected terrorists inside Pakistan, or Somalia, or Yemen, or — hypothetically — in other states in the future? Obviously, the United States does not have Security Council authorization for drone strikes in those states, so the justification has to rest either on consent or on some theory of self-defense. Thus, the U.S. Department of Justice white paper blithely asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted."

**Keywords:** Drones, Intervention, Human Rights, Westphalia, UN Charter,

## 1. Introduction

This paper aims to analyse how Unmanned Aerial Vehicles (UAVs) popularly known as drones, impact the Westphalian sovereignty of those states in which the strikes are carried out. More broadly, the paper will investigate the wider implications drones have for an international system organised and based around the pillars of a Westphalian system of international relations. Territorial integrity and exclusion of external actors from a specific polity coupled with a monopoly of violence inside a certain territory are seen as the *sine qua non* elements of internal and external sovereignty and may be put into disarray by the continuous employment of drones in non-active conflict areas.

Analysing Westphalian sovereignty through the drone lens is important not just because of the increasing proliferation of drones around the world, but more importantly because the drone could act as a fundamental vehicle to analyse the state of affairs of the international system, in particular of those norms which are becoming less and less accepted amongst the members of the international society and for which there is no replacement in sight which has been accepted or could be accepted by a large majority of nations. These declining norms are mirrored by a state of affairs in international law for which law paradigms have become part of highly polarised discussions on the applicability of specific paradigms during drone operations.

The analysis conducted points to the drone as being the catalyst at the same time for a weakening and strengthening of the Westphalian state: a weakening for the states in which the strikes are carried out, and a strengthening for those states with UAVs capabilities which have dramatically expanded their reach to protect their citizens and project power in the international realm. A

projection of power which reflects or reinforces a view of the international system divided amongst the have and the have-nots, a schism created by the possession of drone capabilities. It is a situation which could, to some extent, be compared with the nuclear proliferation of the post-World-Wars, with the fundamental difference that acquiring drones requires less scientific and economical efforts and are therefore more easily available to state and non-state actors with implications yet unknown to the international realm at large.

## 2. Literature Review and Research Methods

In contemporary academic literature, few arguments have been eviscerated more than the use of UAVs outside an active combat area, since their inception in the public and political imagination with the first known strike carried out in Yemen in November 2002.<sup>3</sup> The use of drones sits at the intersection of several interrelated disciplines such as international law, international human rights law, military ethics, the revolution in military affairs, and different approaches<sup>4</sup> to counterinsurgency.<sup>5</sup> Thus, drones should be seen, not just as a technical innovation, which has become available to political and military leaders in the last 15-20 years, but as a prism, with its different facets helping to shed light on the changes that both international relations and international law underwent in this period. Concepts such as the distinction between the applicability of International Humanitarian Law<sup>6</sup> and International Human Rights Law<sup>7</sup> in a particular theatre of operations and the fundamental idea of a Westphalian sovereignty based on the concepts of territoriality and the exclusion of external actors from domestic authority structures<sup>8</sup> have all been extensively questioned by the use of drones, in particular in non-conflict areas. This sense of crisis of the 'old order' is reinforced by the lack of new norms and guidance, which can replace those norms created for a world of nation-states, as also highlighted by Article 2 of the United Nations Charter.<sup>9</sup>

International law scholars were amongst the first to analyse the changes brought about by the use

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<sup>3</sup> Peter L Bergen and Daniel Rothenberg, *Drone Wars: Transforming Conflict, Law, and Policy* (Cambridge University Press, 2014), 130. See also <http://news.bbc.co.uk/2/hi/2402479.stm>

<sup>4</sup> For two opposing views on leadership decapitation see Bryan C Price, "Targeting Top Terrorists: How Leadership Decapitation Contributes to Counterterrorism," *International Security* 36, no. 4 (2012): 9–46. and Jenna Jordan, "Attacking the Leader, Missing the Mark," *International Security* 38, no. 4 (2014): 7–38, doi:10.1162/ISEC\_a\_00157.

<sup>5</sup> From now on also referred to with the acronym COIN

<sup>6</sup> From now on also referred to with the acronym IHL

<sup>7</sup> From now on also referred to with the acronym IHRL

<sup>8</sup> Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999).

<sup>9</sup> In particular Art. 2 (United Nations, "Charter of the United Nations," 1945, <http://www.unwebsite.com/charter>).

of drones in non-conflict areas. Since the beginning, their analysis has outlined two different schools of thought on the legal frameworks applicable on their use outside active conflict areas. The first one sees drone strikes outside active conflict areas as falling under the IHRL paradigm which regulates the use of force in peaceful situations,<sup>10</sup> which has to meet the principles of necessity, precaution and proportionality.<sup>11</sup> If those principles are strictly adhered to

‘lethal remotely piloted aircraft attacks will rarely be lawful outside a situation of armed conflict, because only in the most exceptional of circumstances would it be permissible under international human rights law for killing to be the sole or primary objective of an operation’.<sup>12</sup>

The second view of the legal paradigms applicable to drone strikes outside conflict areas is one which has been adopted mainly by US administrations post 9/11, namely that in the case of Al-Qaeda and Taliban operatives<sup>13</sup> targeted by drone strikes outside conflict areas, it is International Humanitarian Law that applies rather than the IHRL.<sup>14</sup> IHL is the legal framework which applies in situations of conflicts as a balance between the ‘“necessities of war” on the one hand and the “requirements of humanity” on the other’.<sup>15</sup> At the core of this position reiterated by academics<sup>16</sup> and several officials serving in the Bush and Obama’s administrations is the idea that the US is at war with an unconventional enemy, and that the President is empowered to protect the nation from imminent attacks and not constrained by geographical limits.<sup>17</sup> A position that has been sharply

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<sup>10</sup> For instance, law enforcement operations in nations have to respect International Human Rights Law. See for instance International Committee of the Red Cross (ICRC), “The Use of Force in Law Enforcement Operations,” 2015, <https://www.icrc.org/en/document/use-force-law-enforcement-operations>

<sup>11</sup> The United Nations Office for Disarmament Affairs (UNODA), “Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters” (New York, NY, 2015), 27, <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>.

<sup>12</sup> Ben Emmerson, “Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Ben Emmerson” (2013), para. 60, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/478/77/PDF/N1347877.pdf?OpenElement>.

<sup>13</sup> Or in more recent years for suspected members of the so-called ‘Islamic State’.

<sup>14</sup> For applying IHRL on targeting in non-belligerent states see for instance Nils Melzer, “Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare,” 2013, 99, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI\\_ET\(2013\)410220\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET(2013)410220_EN.pdf). quoted in Jelena Pejic, “Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications,” *International Review of the Red Cross* 96, no. 893 (2014): 31.

<sup>15</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight quoted in The United Nations Office for Disarmament Affairs (UNODA), “Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters,” para. 25.

<sup>16</sup> See for instance Kenneth Anderson, “Targeted Killing in U.S. Counterterrorism Strategy and Law,” 2009, <https://www.brookings.edu/research/targeted-killing-in-u-s-counterterrorism-strategy-and-law/>.

<sup>17</sup> Eric Holder, “Attorney General Eric Holder Speaks at Northwestern University School of Law,” 2012, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>.

criticised by several prominent legal scholars and United Nations rapporteurs who have questioned the adoption of the humanitarian law framework in non-conflict zones<sup>18</sup> as it could lead to the acceptance of the concept of a 'global battlefield'.<sup>19</sup>

Of particular importance in the context of the legal and political history of US targeted killings is the scholarly work of Markus Gunneflo,<sup>20</sup> who has shown how the current wave of targeted killings as part of the US foreign and security policy is not caused by the 9/11, but is instead the end product of the 'active defense against terrorism' initiated during the Reagan presidency with Secretary of State George P. Schultz. Targeted killings and the active defence against terrorism are deeply connected with the relationship between sovereign authority and lawful violence underpinning the modern state.<sup>21</sup> In his *Leviathan*, Hobbes was one of the first to identify protection as 'the defining characteristic of sovereignty'.<sup>22</sup> Therefore, there is a double bind between authority and force,<sup>23</sup> which results in a state protection involving 'violence against violence in order to control violence'.<sup>24</sup> And yet, in the era of the liberal rule of law the sovereign 'decisionism' is regarded with suspicions and tensions, extensively analysed by Carl Schmitt and Walter Benjamin who both tried to understand how a state can protect its subjects inside the boundaries set by the rule of law.<sup>25</sup>

Along with protection as being the *raison d'être* of the modern state, it is important to consider briefly also the literature which has been written on the relationship between democracies and their use of drones as opposed to other types of military actions such as full-scale invasion<sup>26</sup> and

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<sup>18</sup> Philip Alston, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. Study on Targeted Killings," 2010, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

<sup>19</sup> Pejic, "Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications," 36. As Pejic points out, this concept is also rebuked by the European Union which stresses a 'criminal justice approach' to the fight against terrorism.

<sup>20</sup> Markus Gunneflo, *Targeted Killing: A Legal and Political History* (Cambridge University Press, 2016).

<sup>21</sup> Gunneflo, *Targeted Killing: A Legal and Political History*, 1.

<sup>22</sup> *Ibid.*, 6.

<sup>23</sup> Jens Bartelson, "Double Binds: Sovereignty and the Just War Tradition," *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, 2010. quoted in Gunneflo, *Targeted Killing: A Legal and Political History*, 7.

<sup>24</sup> Roberto Esposito, *Immunitas: The Protection and Negation of Life (Zakiya Hanafi Tr.)* (Cambridge: Polity Press, 2011); quoted in Gunneflo, *Targeted Killing: A Legal and Political History*, 7.

<sup>25</sup> *Ibid.*, 10.

<sup>26</sup> The Iraq and Afghanistan wars as examples of this.

special forces operations.<sup>27</sup> Frank Sauer and Niklas Schörnig<sup>28</sup> find that the motives which lead democracies to operate drones are the same which undergird democratic peacefulness, namely reducing costs, avoiding casualties and uphold specific normative values,<sup>29</sup> which bring policymakers to adopt risk-transfer paths such as relying on private military companies, air-power and local soldiers to limit exposure of one's own troops and the replacement of labour with technology.<sup>30</sup>

What it is noticeable in a large part of the academic literature on drones is the focus on the states carrying out the strikes<sup>31</sup> rather than focusing on those states *where* the strikes are carried out. A welcome exception is the work of Michael Boyle,<sup>32</sup> who has analysed the strategic impact of drone strikes, finding how often their effectiveness is only measured on the basis of the low risks for US personnel; what he finds is lacking in the existing body of literature is an analysis of the implications that drone strikes have on those states in which they are carried out, elements such as the perceived competence and legitimacy of those nations' governments. Furthermore, the blowback effects from drone strikes are often overlooked in favour of a Western cost-effect analysis, mirrored also in the British press coverage of drone strikes in Pakistan.<sup>33</sup>

As the object of this research is that of showing the impact that drone strikes have on the Westphalian sovereignty of those states in which they are carried out, it is necessary to look briefly at the literature which has been written on sovereignty. In his seminal book, *Sovereignty: Organized Hypocrisy*,<sup>34</sup> Stephan Krasner distinguishes between four different types of

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<sup>27</sup> The killing of Osama Bin-Laden for instance, Peter Baker, Helene Cooper, and Mark Mazzetti, "Bin Laden Is Dead, Obama Says," *The New York Times*, May 1, 2011, <http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html>.

<sup>28</sup> Frank Sauer and Niklas Schörnig, "Killer Drones: The 'silver Bullet' of Democratic Warfare?," *Security Dialogue* 43, no. 4 (2012): 363–80.

<sup>29</sup> Such as international law and the human rights regime.

<sup>30</sup> These tendencies have been highlighted in several instances by scholars of Private Military Security Companies (PMSCs), see for instance Eugenio Cusumano, "Policy Prospects for Regulating Private Military and Security Companies," in *War by Contract. Human Rights, Humanitarian Law and Private Contractors*, ed. F. Francioni and N. Ronzitti (Oxford: Oxford University Press Oxford, 2012) and Peter W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security*, Revised Ed (Ithaca: Cornell University Press, 2007).

<sup>31</sup> For instance, Plaw and Fricker have examined the strategic wisdom of the US Predator drone campaign. See Avery Plaw and Matthew S Fricker, "Tracking the Predators: Evaluating the US Drone Campaign in Pakistan," *International Studies Perspectives* 13, no. 4 (2012): 344–65.

<sup>32</sup> Michael J Boyle, "The Costs and Consequences of Drone Warfare," *International Affairs* 89, no. 1 (2013): 1–29, doi:10.1111/1468-2346.12002.

<sup>33</sup> Mark Pope, "Reporting beyond the Pale: UK News Discourse on Drones in Pakistan," *Critical Studies on Terrorism* 10, no. 1 (2016), 1–24.

<sup>34</sup> Krasner, *Sovereignty: Organized Hypocrisy*.

sovereignty,<sup>35</sup> before exploring how Westphalian Sovereignty, the fundamental pillar of the international system has been repeatedly breached either by consent or coercion leading to sovereignty as being a glaring example of ‘organized hypocrisy’.<sup>36</sup> Max Byrne<sup>37</sup> has analysed the ‘intervention by invitation’ by looking at the cases of Yemen, Somalia and Pakistan finding that, whilst the consent implicitly<sup>38</sup> or explicitly<sup>39</sup> given renders the drone strikes legal, this consent remains nonetheless highly problematic and fails to live up to its status as ‘trump card’ for the extraterritorial use of armed drones.

At the basis of this literature there are two elements, which will also be fundamental in this paper, namely the non-geographical constraints of the US ‘active defense’ and its relationship with the terrorist, who has become, through the adoption of the law of war framework, an ‘unlawful combatant’. Both elements have been sharply criticised by authors critical of the US approach to counterterrorism. In a well-written polemic against the drone,<sup>40</sup> the French philosopher Grégoire Chamayou argues that the planet has become a ‘hunting ground’.<sup>41</sup> This strikingly follows the logic expressed by the US Commission on 9/11 of the planet as being the American homeland.<sup>42</sup>

The ‘hunting ground’ approach also reflected in the confusion surrounding the difference between law enforcement and warfare when dealing with terrorism at home and abroad. These two categories, once well-defined with clear rules of engagement and applicability in a determined situation have now being put in the same cauldron, with the risk of blurring the distinction between criminal and enemy, a distinction which as Paul Kahn says, defines our political community. A blurring which is reflected in what in this paper has been termed as a ‘war enforcement model’, the employment of law enforcement techniques coupled with the use of tools and weapons traditionally associated with warfare.

The rise of the ‘war enforcement model’ is mirrored by the changing law paradigm which has

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<sup>35</sup> International Legal Sovereignty, Westphalian Sovereignty, Domestic Sovereignty and Interdependence Sovereignty

<sup>36</sup> Ibid.

<sup>37</sup> Max Byrne, “Consent and the Use of Force: An Examination of ‘intervention by Invitation’ as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen,” *Journal on the Use of Force and International Law* 3, no. 1 (2016): 97–125.

<sup>38</sup> As in the case of the Pakistani government

<sup>39</sup> The cases of Yemen and Somalia

<sup>40</sup> Grégoire Chamayou, *Drone Theory*, ed. Janet Lloyd (London : Penguin Books, 2015).

<sup>41</sup> Chamayou, *Drone Theory*, 74.

<sup>42</sup> National Commission on Terrorist Attacks Upon the United States, “The 9/11 Commission Report,” 2004, 362, <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

been applied to terrorists following 9/11. In this respect, it is useful to look at the work of critical scholars in international law and international relations. For instance, Paul Kahn<sup>43</sup> has argued how the use of drones blurs the distinction between criminal and enemy and ‘represents statecraft as the administration of death.’<sup>44</sup> In the same line of thought, Frédéric Mégret<sup>45</sup> posits that the current treatment of terrorists in international law is an example of the colonial roots of International Humanitarian Law and of its exclusion of non-Western ways of conducting warfare.

Despite the majority of the available literature focusing its attention on states carrying out drone strikes in non-belligerent states there are nonetheless some notable exceptions. For instance, both the Open Society Foundations<sup>46</sup> and the Stanford and NYU Law Schools<sup>47</sup> have conducted extensive studies on the impact of drone strikes on Pakistani civilians and have also looked at the responsibilities of those who strike as well as the need for legal redress.

Mahmood Ahmad has published a series of articles which have analysed in depth the legal<sup>48</sup> and ethical<sup>49</sup> issues of the use of drones in the FATA region in Pakistan. His evidence points to the strikes being a cause for the diminishing legitimacy of the Pakistani government and an increase in state instability and animosity towards the US.<sup>50</sup> Furthermore the author finds that US drone strikes result in a moral ambiguity and a blurring between law enforcement and warfare, an element which is recurrent in large parts of the critical literature on drones and will also form part of the current research.

Finally, the International Crisis Group, a Brussels-based think tank has produced a report<sup>51</sup> which

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<sup>43</sup> Paul W Kahn, “Imagining Warfare,” *European Journal of International Law* 24, no. 1 (2013): 199–226.

<sup>44</sup> *Ibid.*, 226.

<sup>45</sup> Mégret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other.’”

<sup>46</sup> Open Society Foundations, “After the Dead Are Counted: U.S. and Pakistani Responsibilities to Victims of Drone Strikes,” 2014, <https://www.OPENSOCIETYFOUNDATIONS.org/sites/default/files/after-dead-are-counted-20141120.pdf>.

<sup>47</sup> International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), “Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan,” *International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law*, 2012, <http://chrgj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf>.

<sup>48</sup> Mahmood Ahmad, “The Legality of Unmanned Aerial Vehicles Outside the Combat Zone: A Case Study of the Federally Administered Tribal Areas of Pakistan,” *Defense & Security Analysis* 30, no. 3 (2014): 245–53.

<sup>49</sup> Mahmood Ahmad, “The Use of Drones in Pakistan: An Inquiry into the Ethical and Legal Issues,” *The Political Quarterly* 85, no. 1 (2014): 65–74.

<sup>50</sup> Ahmad, “The Legality of Unmanned Aerial Vehicles Outside the Combat Zone: A Case Study of the Federally Administered Tribal Areas of Pakistan.”

<sup>51</sup> International Crisis Group, “Drones: Myths and Reality in Pakistan,” 2013, <https://d2071andvip0wj.cloudfront.net/drones-myths-and-reality-in-pakistan.pdf>.

also looks at the neglected issue of the Pakistani responsibility towards its citizens living in the border regions of the FATA who are denied basic rights and protections leading to a failure in their protection from jihadi and other criminal groups.

While there has been a large focus on states carrying out drone strikes in non-conflict areas (mostly the US) what seems to be lacking in the current body of literature is a study of the theoretical implications that the use of drones outside an openly declared conflict has on fundamental theoretical pillars of international relations such as the concept of Westphalian sovereignty.

To address the shortcomings in the literature the current paper will try to answer the following research question:

How does the use of drones in non-conflict areas affect the fundamental theoretical pillars of

International Relations, the central concept of Westphalian sovereignty?

## **2.1 Research Methods**

To answer the question, the paper will first analyse what constitutes a state for political and international relations theory. Looking in particular at the fundamental difference between *de jure* and *de facto* sovereignty, and their relations with the realist school of international relations. Having done that, the paper will look at what role protection plays both as a fundamental element of internal sovereignty and as the main reason allowing a particular entity in a polity to claim the mantle of sovereignty and at the same time to claim the monopoly of violence as a way of affirming or re-affirming its power and establish or sustain the law. Having established the theoretical basis of the discussion, the paper will then analyse the historical origins of targeted killings, looking in particular at the history of political assassination, with the rise and fall of the norm which prohibits political assassination, and how the fall is connected with the Cold War and non-conventional methods of warfare. Having done this, the paper will analyse the rise of the American 'active defense against terrorism' as a good example of how the elements described above have been used to build a political and legal justification for a more proactive role against terrorism. This analysis is conducted in order to demonstrate how the employment of drones as a counter-terrorism tool is only novel in the sense of the technological innovation which it

represents but it does not amount to a total novelty in relation to how states in the international system conduct their foreign policy actions. The concluding part is dedicated to analyse the erosion caused by the employment of drones both on a geographical and legal level. The conclusion of the paper points to a drone as being the catalyst for the strengthening and weakening at the same time of the Westphalian state depending on whether a state possesses UAVs capabilities and is able and willing to employ them to punish those who threaten the homeland or its citizens.

### 3. Sovereignty and Protection

Having briefly outlined the literature which has been written on UCAVs and their relation with both international law, democracies and counter-terrorism, the following section will outline all those elements in classical political and philosophical theory considered to be pivotal in our view of the state. Therefore, the present section will analyse the concept of sovereignty, the role that protection plays in the social contract upon which sovereignty is built, before looking at the role that violence (legitimate and illegitimate) plays in achieving and sustaining that protection. These theoretical pillars will be used in the next section in order to consider how they have been employed as part of the justifications for the use of UAVs in non-conflict areas.

#### 3.1 *De Facto* and *De Jure* Sovereignty

It is important from the outset to spell out the fundamental distinction in international relations theory between *de jure* and *de facto* sovereignty. It is around this dichotomy that political thinkers have tried to understand what sovereignty entails and how sovereignty should function both in normal and exceptional circumstances. This difference creates an insurmountable schism between the realist and the liberal schools of thought in international relations.<sup>52</sup> This division is important as the main argument in this research will revolve around the division between an international system based on a *de jure* sovereignty, built on international law and norms and a *de facto* sovereignty, built upon the pillars of power, judgement, and enforcement.<sup>53</sup>

If we are to look at the realist school's view of sovereignty, we can see a thread going from Thomas Hobbes to Hans Morgenthau, to the scholars opposing the Responsibility to Protect

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<sup>52</sup> Jeremy Moses, "Sovereignty as Irresponsibility? A Realist Critique of the Responsibility to Protect," *Review of International Studies* 39, no. 1 (2013): 113–35.

<sup>53</sup> Moses, "Sovereignty as Irresponsibility? A Realist Critique of the Responsibility to Protect", 119.

doctrine: a belief that the *jure sovereignty* is constructed inside those confines established by the *de facto* sovereignty;<sup>54</sup> or as Stephan D. Krasner would say the logic of appropriateness follows the logic of consequences.<sup>55</sup> All of these thinkers share the idea that part of the benefits of being a sovereign is the possibility of not being constrained in using this power, a ‘sovereignty as irresponsibility’.<sup>56</sup> Particularly important in this discussion of the realist view of sovereignty is the state of exception, analysed in depth by Carl Schmitt who came to define the sovereign as ‘he who decides on the exception’.<sup>57</sup> Schmitt puts the emergency centre-stage in his definition of sovereignty, as he believes that whilst in normal situations we might have ‘normative’ expressions of sovereignty, *de facto* sovereignty would arise again in exceptional situations.<sup>58</sup> As expressed by Jeremy Moses

‘while *de jure* theories of sovereignty find meaning for the term in shared understanding ... *de facto* theories find sovereignty in the opposite: at points of crisis ... in the (forceful) resolution of these intense political conflicts’<sup>59</sup>

This sovereign’s prerogative is also expressed by his ability in deciding whether an individual is a criminal or an enemy which marks the distinction between law and exception.<sup>60</sup>

### 3.2 A Double Bind of Protection and Use of Force

As Hobbes outlines in the *Leviathan*, at the core of sovereignty is a ‘mutual relation of protection and obedience’.<sup>61</sup> It is the offer of protection which allows to decide amongst competing powers in a polity which one should be declared the sovereign<sup>62</sup> and it is protection which brings into being a tacit social contract between government and its subjects in which ‘the acceptance of the latter hinges on the ability of the former to provide peace and social order.’<sup>63</sup> This protection also entails a ‘double bind’ of authority and force as Jens Bartelson<sup>64</sup> puts it, and it is the use of force

<sup>54</sup> Moses, “Sovereignty as Irresponsibility? A Realist Critique of the Responsibility to Protect.”

<sup>55</sup> Krasner, *Sovereignty: Organized Hypocrisy*.

<sup>56</sup> Moses, “Sovereignty as Irresponsibility? A Realist Critique of the Responsibility to Protect,” 120.

<sup>57</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 1985), 5.

<sup>58</sup> Moses, “Sovereignty as Irresponsibility? A Realist Critique of the Responsibility to Protect,” 123.

<sup>59</sup> *Ibid.*, 125.

<sup>60</sup> Kahn, “Imagining Warfare,” 208.

<sup>61</sup> Thomas Hobbes, *Leviathan*, ed. J. C. A. Gaskin (Oxford: Oxford University Press, 2006). quoted in Moses, “Sovereignty as Irresponsibility? A Realist Critique of the Responsibility to Protect.”

<sup>62</sup> Jonathan Wolff, *An Introduction to Political Philosophy*, [2nd] rev. (Oxford etc. : Oxford University Press, 2006).

<sup>63</sup> Bartelson, “Double Binds: Sovereignty and the Just War Tradition,” 83.

<sup>64</sup> Bartelson, “Double Binds: Sovereignty and the Just War Tradition.”

by states, as the next subsection shows, that constitutes the state and at the same time is at heart of the critiques against it.

### 3.3 The Monopoly of Force and the Constituting Power of Violence

Important in the present discussion is also to discuss briefly the role that the monopoly of violence plays in affirming or reaffirming the power of a specific subject or constitution in society. As famously expressed by Max Weber, a state is a state only when it is able to successfully claim the monopoly of the legitimate use of force over a certain territory.<sup>65</sup> Or as more forcefully explained by Trotsky 'Every state is founded on force'.<sup>66</sup>

The force on which the state is founded<sup>67</sup> has, according to Walter Benjamin, an intimate relationship with the law. Not only a state is founded on a monopoly of the legitimate use of force, but this force has to be justified inside the boundaries of the law as 'violence outside the law threatens the law itself.'<sup>68</sup> This 'legal' violence so to speak, will be fundamental when one considers the legal arguments which have been built to justify the use of drones as part of an 'active defense against terrorism'.

Before delving into the role that protection played in the development of the current legal justification for drone strikes it is necessary to briefly consider also the role that borders play as a 'definer' of a specific political community. Border control has long been a core state activity.<sup>69</sup> Since the end of the Cold War, border control priorities have been redefined with a shift in emphasis, going from a militarisation of the border, to one where an economic liberalisation goes hand in hand with increasing law enforcement efforts.<sup>70</sup> These efforts reflect the increasing focus on transnational law evaders<sup>71</sup> which offsets the borderless world created through an ever-increasing globalisation. Significantly, for some scholars, borders are an instance of a 'living state of exception', a situation which is outside the law and yet, at the same time part of it,<sup>72</sup> a place

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<sup>65</sup> Max Weber, *From Max Weber: Essays in Sociology*, ed. Hans H 1908- 1908-1978 Gerth and C.Wright 1916-1962 Mills, [2nd] new (London : Routledge, 1991), 78.

<sup>66</sup> Trotsky quoted in Ibid.

<sup>67</sup> To adopt Trotsky's phrase

<sup>68</sup> Verena Erlenbusch, "Notes on Violence: Walter Benjamin's Relevance for the Study of Terrorism," *Journal of Global Ethics* 6, no. 2 (2010): 168.

<sup>69</sup> Anderson Malcolm, "Frontiers, Territory and State Formation in the Modern World," *Cambridge: Polity*, 1996; quoted in Peter Andreas, "Redrawing the Line: Borders and Security in the Twenty-First Century," *International Security* 28, no. (2003): 78.

<sup>70</sup> Andreas, "Redrawing the Line: Borders and Security in the Twenty-First Century,"

<sup>71</sup> Ibid. Andreas gives as a good example of this tendency the US and EU approach to border policing.

<sup>72</sup> Nick Vaughan-Williams, *Border Politics: The Limits of Sovereign Power* (Edinburgh University Press, 2009), 70.

where the violent and lawless foundations of the state are revealed.<sup>73</sup>

It is these three pillars of protection, state violence and borders that the current research uses as a basis for discussing drone strikes in relation to the Westphalian sovereignty. As Kahn points out<sup>74</sup> the social contract and the narrative of the borders constitute the basic structure of the social imaginary of the state. All these elements described above, are fundamental yet contested concepts in international relations and political theory, they illustrate the divisive nature of concepts which are nonetheless fundamental for our understanding of international relations.

#### 4. Targeted Killings: Assassination in an historical context

Before delving into the bind between state protection and the American 'active defense' it is important to analyse the practice of targeted killings in historical context. Assassination, 'the killing of an individual for political purposes'<sup>75</sup> has always been part and accepted as a state activity, even by early international law scholars.<sup>76</sup> This general acceptance of the practice was reflected by its presence in treaties which formed the basis of the new (at the time) field of international law.<sup>77</sup> This tendency began to change in the eighteenth century when the term assassination began to be associated with a 'murder by treachery'.<sup>78</sup> The prohibition of the practice was codified into international law with the Hague Convention in 1907<sup>79</sup> and reflected the rise in the international realm of a norm which prohibits this practice in peace time.<sup>80</sup> In the US the prohibition of assassinating foreign leaders was clearly expressed through subsequent Executive Orders following the so-called Church Committee which revealed the role played by the CIA in plots to kill at least eight foreign leaders.<sup>81</sup> Significantly, the decision to use an Executive Order to prohibit assassinations instead of a law passed by Congress offered and still offer US executives the possibility of overriding them in cases whereby the US administration in power retains this as

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<sup>73</sup> Carl Levy, "Refugees, Europe, Camps/state of Exception: 'into the Zone', the European Union and Extraterritorial Processing of Migrants, Refugees, and Asylum-Seekers (Theories and Practice)," *Refugee Survey Quarterly* 29, no. 1 (2010): 92–119.

<sup>74</sup> Kahn, "Imagining Warfare."

<sup>75</sup> W Hays Parks, "Memorandum of Law: Executive Order 12333 and Assassination," *Army Law*, 1989, 4; quoted in Mark V Vlasic, "Assassination & Targeted Killing-A Historical and Post-Bin Laden Legal Analysis," *Geo. J. Int'l L.* 43 (2011): 189.

<sup>76</sup> Vlasic referred to Grotius and Gentili as an example of this belief held amongst law scholars.

<sup>77</sup> Ward Thomas, "Norms and Security: The Case of International Assassination," *International Security* 25, no. 1 (2000): 110.

<sup>78</sup> Thomas refers to the Swiss jurist Vattel and his idea of treachery as constituting an assassination. For more see Thomas, "Norms and Security: The Case of International Assassination."

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> Vlasic, "Assassination & Targeted Killing-A Historical and Post-Bin Laden Legal Analysis."

necessary.<sup>82</sup> Nonetheless, the Executive Order prohibiting assassinations was criticised during the 1980s by lawyers working in the Reagan administration as they felt it was restricting too much its options against terrorism.<sup>83</sup> This despite legal opinion of the Executive Order 12333 allowing US administrations to kill individuals during wartime or peacetime if they present an imminent danger.<sup>84</sup> In the second half of the twentieth century, it is possible to note a decline in the general acceptance of the norm banning assassinations, which, in the opinion of Thomas,<sup>85</sup> reflects a change in the international system structure, for which the norm does not fit in it anymore. This was caused, by the employment of non-traditional modes of violence, such as terrorism<sup>86</sup> and of the increasing destructive nature of modern conflicts. These developments, together with the continuous tensions between the two blocs during the Cold War, led to a situation in which every option was on the table, as the several attempts on Fidel Castro's life demonstrate. The rise of the 'active defense' and the subsequent adoption of armed drones could be said to derive from this political and legal milieu for which the killings of foreign political leaders and terrorists was no longer a forbidden assassination, but then became a 'targeted killing' a new term which denotes the acceptance of a new way of stopping unconventional threats for which standard approaches were deemed to be insufficient.

## **5. The Bind between State Protection and the American 'Active Defense against Terrorism'**

This section will look at the rise of the active defense against terrorism with the scope of showing how the elements described above played a pivotal role in the rise of the 'active defense', which constitute the political and legal basis for the subsequent employment of drones as part of the US counter-terrorism toolbox.

As highlighted by Gunneflo, and Benjamin and Schmitt before him, it is impossible to discuss state protection of the last two centuries without considering the legal justifications that have been created by state authorities in order to 'bring back' within the limits set by national and

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<sup>82</sup> Gunneflo, *Targeted Killing: A Legal and Political History*.

<sup>83</sup> Ibid.

<sup>84</sup> Both Vlastic and Banks, Raven-Hansen offer an informative legal analysis of the Executive Orders prohibiting assassinations. For more see Ibid.; and William C Banks and Peter Raven-Hansen, "Targeted Killing and Assassination: The US Legal Framework," *U. Rich. L. Rev.* 37 (2002): 667.

<sup>85</sup> Thomas, "Norms and Security: The Case of International Assassination."

<sup>86</sup> As Thomas remarks 'The tentative killing of Pancho Villa by the US in 1916 was an example of a conventional response to stop an unconventional threat'

international law, those measures, including the use of force, which states have adopted to protect their citizens and the homeland. This liberal era of the law coincides with what Foucault has termed 'biopolitics' in which the security and welfare of the population became the main preoccupation and object of the sovereign power.<sup>87</sup> This model, which for opposing reasons is criticised by both Schmitt and Benjamin, is nonetheless pivotal in order to understand how the history of targeted killings and of drone strikes in particular cannot be separated from the history of the legal and political justifications that have been adopted to defend the employment of the drone as a 'humane'<sup>88</sup> counter-terrorism tool. A tool which had to be included into the law realm to avoid the risks explained by Benjamin of violence outside the law threatening the law itself.

In the US, it is possible to trace the origins of the 'active defense' against terrorism to the 1980s and the political and legal work carried out by George P. Schultz and Abraham D. Sofaer, who as Secretary of State and Legal Adviser to the Department of State and in the context of the Cold War, respectively built the political and legal justifications to conduct a war against 'an unspecified terrorist foe, to be fought at an unknown place and time with weapons yet to be chosen'.<sup>89</sup> In their justifications it is already possible to highlight those elements which will be later fundamental for the justification of drone strikes, namely the wider and unknown members of the list of terrorists, (think of the so-called Obama's 'kill-list') the non-geographical constraints of the US counter-terrorism operations, and the wide spectrum of weapons at their disposal.

The first element of the 'active defense' was the National Security Directive 138<sup>90</sup> signed by President Reagan in 1984 that shifted the policy focus from passive to active defence measures<sup>91</sup> allowing the president to declare war against an unspecified terrorist foe.<sup>92</sup> The directive represented the opening salvo of a legal and political shift aimed at unshackling the American might against a yet unknown terrorist foe. In order to understand the shift, focus will now be given to the political and legal changes that the US administration pushed forward in those years. On the political side, it is possible to see how Secretary Schultz was clearly concerned by the lack of legal justifications to sustain a more active role against terrorism, and yet he did not want the lack

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<sup>87</sup> Michael Foucault quoted in Gunneflo, *Targeted Killing: A Legal and Political History*.

<sup>88</sup> Chamayou, *Drone Theory*.

<sup>89</sup> Brian M Jenkins, "International Terrorism: The Other World War" (DTIC Document, 1985); quoted in Gunneflo, *Targeted Killing: A Legal and Political History*.

<sup>90</sup> The directive remained largely classified until 2010. For more see Ibid.

<sup>91</sup> Robert McFarlane quoted in Ibid., 110.

<sup>92</sup> Ibid., 114.

of a legal justification to cause the US to become a ‘Hamlet of nations, worrying endlessly over whether and how to respond’.<sup>93</sup> At the same time, the willingness of not becoming a ‘Hamlet’ had to be matched with a legal reasoning which would allow for a more proactive role. This willingness of adopting a more proactive role against international terrorism was also as a result of a belief held amongst US policy makers, journalists, and military leaders of a clear connection between international terrorism and the Soviet Union. A connection exposed for instance in the writings of the American journalist Claire Sterling.<sup>94</sup> A theory, subsequently discredited,<sup>95</sup> but which at the time was influential in the high echelons of the US foreign policy circles in creating a single thread going from what President Reagan termed the ‘Evil Empire’ to the rise of terrorism on the international stage.

In 1989, Abraham D Sofaer, at the time the Legal Adviser at the US State Department, made a speech<sup>96</sup> which shed light on the legal reasoning behind the ‘active defense’ against terrorism and outlined some of the themes which in his opinion were excessively restraining the actions available to nations against terrorists as the ‘law must not be allowed to interfere with legitimate national security measures’.<sup>97</sup> During the speech he outlined the main areas which were improperly interfering with national security objectives. Amongst them he listed a narrow view of self-defence which would hinder the possibility of reactions by a nation victim of an attack, be it a conventional or unconventional one; the limitations imposed following the approval of the Executive Order prohibiting assassination, which as noted above, restricted the options available to the executive in pursuing any policy and military option deemed necessary;<sup>98</sup> a narrow view of ‘armed attack’ which only considered traditional military attacks as the ones which could be considered an attack on a state and thus justifying a response under Art. 51 of the UN Charter. Finally, Sofaer argued against an absolute deference to the principle of territorial integrity,

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<sup>93</sup> George P. Schultz quoted in *Ibid.*, 125.

<sup>94</sup> See for instance Claire Sterling *“The terror network: the secret war of international terrorism.”* (London: Weidenfeld and Nicolson, 1981.)

<sup>95</sup> Edward S. Herman and Frank Brodhead *“The rise and fall of the Bulgarian connection.”* (New York: Sheridan Square Publications, 1986.)

<sup>96</sup> Abraham D Sofaer, “The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense,” *Mil. L. Rev.* 126 (1989): 89. For a wider analysis of the speech and its implications see Gunneflo, *Targeted Killing: A Legal and Political History*, 131.

<sup>97</sup> Sofaer, “The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense,” 90.

<sup>98</sup> As we have seen, legal scholars have argued against this view of the assassination ban sustaining how it does not restrict the options available to the US administration, some of them argues that the ban muddles the water around the ban creating legal uncertainty. For more see Vlasic, “Assassination & Targeted Killing-A Historical and Post-Bin Laden Legal Analysis.”

particularly relevant for states said to harbouring terrorists.

The public pronouncements<sup>99</sup> during the 1980s by Schultz and Sofaer demonstrate how, already in the 1980s the US administration was concerned with a strict view of those principles around which the international system has been organised following the World Wars. These concerns were viewed as an impediment to the adoption of more forceful and supposed effective methods against terrorism.

While the present research is devoted to the analysis of the implications that the use of drones has on the concept of Westphalian sovereignty, it was necessary to show the rise of the ‘active defense against terrorism’ for mainly two reasons: first it identifies the political and legal origins of justifications for targeted killing by the use of drones. Secondly, as the next section will show, the aspects outlined by Sofaer in his speech are also the aspects which drones have greatly called into question: territorial integrity, self-defence, the concept of armed attack and the adoption of a law enforcement model outside of a state’s own borders are all elements, which will be considered in the next section and will allow for a much fuller picture of the seismic changes brought about by the use of drones.

## **6. How the drones impact Westphalian sovereignty**

Having outlined in the previous sections, the classical elements in international relations theory which form the basis of our social imaginary of the state, and having briefly shown how in the US the drone represents just the latest example of the rise of an ‘active defense against terrorism’ initiated during the Reagan’s administration, the paper will now consider how drones impact all those elements including territorial integrity, exclusion of external actors from a specific polity, coupled with a monopoly of violence inside of it, which have been traditionally considered to be the fundamental pillars of IR theory. This will be followed by an analysis of the implications for the Westphalian model of IR.

### **6.1 Drones and a double erosion of sovereignty**

When one considers *de jure* and *de facto* sovereignty it is impossible to overlook the fundamental

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<sup>99</sup> Particularly important in this context are the abovementioned speech by Sofaer, and the speech by George P. Schultz at the Park Avenue Synagogue in Manhattan in 1984. For more see Gunneflo, *Targeted Killing: A Legal and Political History*.

shift caused by drones in international relation theory in regards to the concepts of *de jure* and *de facto* sovereignty.

As explained above, it is fundamental when discussing sovereignty to distinguish between *de jure* and *de facto* sovereignty, and from this considers how UAVs impact these two different concepts of sovereignty. While *de jure* sovereignty impacts the way in which a particular political community is perceived in the international realm, *de facto* sovereignty refers to the control that an entity has on a particular territory and its population. It is possible to affirm that while *de jure* sovereignty reflects sovereignty ‘on paper’, *de facto* sovereignty reflects sovereignty ‘on the ground’ and as explained above *de facto* sovereignty is deeply connected with the realist school of IR for which norms were not, until recently a determinant in states’ behaviour.<sup>100</sup> Drones attacks carried out on the territory of third states have the potential of impacting both *de jure* and *de facto* sovereignty and this double impact has the capacity of diminishing a state’s sovereignty both on paper and on the ground. The reason for this double diminishment of sovereignty is that on a *de jure* level, its fundamental elements of territoriality and exclusion of external actors are completely ignored when an attack is carried out on a specific state. And this has profound implications not just for the standing of a specific state in the international realm, but more significantly it impacts its *de facto* sovereignty. In fact, when an attack is carried out on the territory of a third state, it diminishes the control that a government has on its territory, leading to a double erosion of territoriality and exclusion of external actors, fundamentally impacting the concept of Westphalian sovereignty. This erosion also happens when governments consent to the carrying out of the strikes in their territory. In fact, even if from a legal point of view, the state authorising the strikes renders them legal,<sup>101</sup> from a political theory point of view, the authorisation to carry out the strikes still violates, through invitation,<sup>102</sup> their Westphalian sovereignty. In the case of strikes in the FATA region in Pakistan, it is possible to observe how, the authorisation to the strikes given by the Pakistani government and its military to the US in private, while vehemently denied in public creates a situation of confusion surrounding the government authority in the area<sup>103</sup> and a diminishment of the protection of the fundamental rights of their citizens living in the FATA region. While it can be rightly argued that UAVs attacks are

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<sup>100</sup> Thomas, “Norms and Security: The Case of International Assassination.”

<sup>101</sup> Max Byrne, “Consent and the Use of Force: An Examination of ‘intervention by Invitation’ as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen,”

<sup>102</sup> Krasner, *Sovereignty: Organized Hypocrisy*.

<sup>103</sup> International Crisis Group, “Drones: Myths and Reality in Pakistan,”

not the only form of incursion into a third state's territory,<sup>104</sup> there are two reasons why they represent a bigger challenge than other types of actions in a third party's territory. First there are lower political and electoral cost connected with the employment of drones as opposed to 'boots on the ground' or raids by special forces.<sup>105</sup>

The second reason connected to this one is how drones allow policymakers and military leaders to carry out a constant deployment without geographical or time limits, in which, as it has been pointed out by several scholars, military operations follow more and more a law enforcement model, in which patrolling and targeting are constantly carried out, based not only on specific actions of the individual targeted but also on patterns of behaviour,<sup>106</sup> which has been extensively criticised by human rights groups and lawyers. This brief analysis of drone strikes in relation to sovereignty demonstrates that such strikes have the ability of targeting those two conceptions of sovereignty at the same time, in fact in a single strike they diminish the standing of a state in the international realm whilst at the same time diminishing also the protection that a state can offer to its citizens. And it is to the issue of protection seen from both sides (the state carrying out the strikes and the state enduring them) that the next section will be dedicated.

## 6.2 State Protection and its Role in Drone Strikes

Protection as explained above, is the *sine qua non* element of sovereignty, it is protection which confers a particular entity able to protect its citizens the possibility of being the sovereign and it is this offer of protection which provides the sovereign with the possibility of being the only one legitimately able to employ violence to achieve the protection of its citizens and as Benjamin would point out, also to employ violence to, first establish the law, and then suppress all the violence which threatens the law itself.

Considering protection from a double angle of 'perpetrator' and 'victim' allows for a better understanding of the role that protection has played both as one of the main drivers behind the American 'active defense' and as one of the elements which is mostly affected when a drone

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<sup>104</sup> It is easy to think about a raid by special forces (the Bin-Laden's raid a case in point), a limited ground invasion (first Gulf War) and other cases

<sup>105</sup> For instance, the raid which went wrong in Yemen at the beginning of the Trump's presidency. For more see here: <https://www.nytimes.com/2017/02/01/world/middleeast/donald-trump-yemen-commando-raid-questions.html? r=0>

<sup>106</sup> The so-called 'signature strikes'. The website "The Intercept" released a series of leaked documents detailing the bureaucracy behind drones strikes. For more see here: Jeremy Scahill, "The Assassination Complex," *The Intercept*, October 15, 2015, <https://theintercept.com/drone-papers/the-assassination-complex/>.

attack is carried out.

In the case of the US, the development and subsequent employment of drones in counterterrorism operations rest on the pivotal role that protection played in the creation in the political and legal arena of the 'active defense'. As the section on the 'active defense' has shown, protection for American citizens at home and abroad was what motivated US policymakers and military leaders in designing the policy and building the legal justifications which could be used subsequently in proactively fighting terrorists without being considered of acting outside the limits set by national and international law. This was a reflection of American policymakers' beliefs for which

Territoriality and space are less of a guide to America's security interests than more amorphous values and psychological perception. Globalism became the dominant working theory of American statecraft<sup>107</sup>

In the case of Pakistan or other nations targeted by drone strikes outside conflict areas, it is clear how the result of a global American homeland, is a situation in which the protection that they can offer to their citizens is greatly diminished by the ability by nations which possess drone capabilities in targeting citizens inside their territory. Whilst it is important to make clear that the circumstances surrounding drone strikes in these nations are influenced by several issues including the tacit consent or active cooperation of state authorities,<sup>108</sup> or governmental instability,<sup>109</sup> a theoretical analysis should look at what the employment of drones means for the protection guarantee (in theory) to their citizens by those nations which have to endure the drone strikes.

Based on this analysis, it is clear how drones represent a further impediment to the protection that those nations can provide to their citizens. In fact, whilst nations such as the US can pre-emptively defend its citizens at home and abroad by employing drones, those nations in which the strikes are carried out lose on the protection of their citizens in two respects: first they cannot, as the US does pre-emptively, defend their homeland and secondly, and most importantly, they cannot

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<sup>107</sup> Patrick Porter, *The Global Village Myth: Distance, War, and the Limits of Power* (Georgetown University Press, 2015), 94; quoted in Gunneflo, *Targeted Killing: A Legal and Political History*, 120.

<sup>108</sup> For more see for instance the International Crisis Group, "Drones: Myths and Reality in Pakistan."

<sup>109</sup> Yemen and Somalia for instance

defend their own citizens and their territory from drone strikes which may not only kill suspected terrorists but also civilians, who may become ‘collateral damage’ of the attacks. This diminished protection has a double negative effect on the Westphalian model of sovereignty: first, it establishes or at least reinforces a two-tiers international system in which the discriminating factor between this two tiers is to possess UAVs capabilities. And from this capability or the lack of it, there is also an increasing difficulty in establishing or maintaining a monopoly of violence in a certain territory. As said above, it is quite clear how often this monopoly is mostly held on paper rather than on the ground, nonetheless drones may represent a further impediment to establishing or maintaining a control which is so fundamental in laying the foundations of a successful political community.

## 7. Drones erosion

Having looked at what constitute a state for international relations and political theory, this section will consider the consequences that the use of drones has on the Westphalian sovereignty and all those elements which are considered to be the pillars of this view of the international system.

### 7.1 Legal erosion

From a legal point of view, the analysis conducted by several legal scholars, as well as in this paper, show how drones are eroding fundamental principles of international law, epitomised by the confusion surrounding the applicability of the law paradigms applicable in conflict and peace situations. Following the Bush administration’s definition of ‘War on Terror’ and their belief of fighting an armed conflict against terrorist organisations, there has been a widespread debate amongst legal scholars in relation to the correctness of this view. An approach which has created a schism amongst law scholars mirrored by the diminishment of the protections offered to individuals suspected of being terrorists who cannot count on the protections of IHRL, nor on the protections of IHL as enemy combatant, but became instead ‘unlawful combatants’, a legal limbo which leaves the US with large discretionary powers to decide what protections should be offered to these individuals. Fundamentally, this lack of consensus on the position of suspected terrorists in international law has several fundamental implications for the current model of international law. First, it puts into disarray the consensus around international law and previously shared and accepted norms, such as the ban on assassination or on de-nationalisation policies.<sup>110</sup> These

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<sup>110</sup> Audrey Macklin and Rainer Baubock, “The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?,” *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 14* (2015).

changes are accompanied by a mixing of the ‘criminal’ and ‘enemy’ category, which, as Kahn so well puts it, define our political community.<sup>111</sup> A political community which does not know any longer if it is punishing a criminal or fighting an enemy. A confusion mirrored by a lack of clarity on how nations around the world consider counter-terrorism: is it a law enforcement problem? Or warfare, requiring therefore a military solution? The Bush and Obama administrations’ conduct seems to point to the latter approach with elements typical of the former, blending these two approaches so different both for methods of fighting and law paradigm applicable. The drones offer the possibility of conducting ‘war enforcement operations’ on a global scale with methods typically associated with law enforcement<sup>112</sup> and tools and weapons typically associated with warfare.

## 7.2 Geographical erosion

This global enforcement model is strictly interconnected with a constant decline of the ‘hard border’ as it has been historically structured in international relations. A border which is so fundamental for the general theoretical conception of the state and yet, it has become less and less respected by either foreign powers using UAVs or non-state actors conducting attacks on foreign soil. At the same time, borders have become for the most powerful nations in the international system a symbol, like fortresses impenetrable to clandestine transnational actors<sup>113</sup> accompanied by a public rhetoric and practice which promotes the free movement of (certain) people across nations as one of the largest benefits of globalisation.

## 8. Effects of the drone on the Westphalian state

The theoretical analysis of this paper has demonstrated how the drone has a double effect on the current conception and view of the Westphalian state, in fact whilst, on one hand it greatly diminishes the control of a territory by a certain entity, restricting the protection that they can offer to their citizen and eroding their monopoly of violence, on the other hand, the drone also acts as a catalyst for increasing state power. This power is derived from the ability by state possessing drone capabilities of launching drone strikes to protect their citizens and punish those whom they deem responsible across the world with no safe haven for suspected terrorists. This has four fundamental implications: first it reinforces the role of the state as the only legitimate

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<sup>111</sup> Kahn, “Imagining Warfare.”

<sup>112</sup> Ibid.

<sup>113</sup> Andreas, “Redrawing the Line: Borders and Security in the Twenty-First Century.”

actor in the international system authorised to use force.<sup>114</sup> Secondly, drones create a fundamental schism in the international realm, one which distinguishes members based on them possessing drone capabilities. It is a situation which could be compared with the nuclear proliferation following World War II, with a fundamental difference: nations and non-state actors could acquire drone capabilities in less time and scientific effort and at a cheaper cost than nuclear weapons. Thirdly, drones further put into disarray the norms around which the international system is based and organised. Fourthly, norms, such as the ban on assassination which were thought to have been long considered accepted and respected by the international community, are once again up for discussion with the concrete risk of seeing a re-emergence of a more anarchical situation whereby the consensus needed to promulgate and sustain a norm is no longer present in the international realm. As well expressed by Thomas<sup>115</sup>, a norm needs both moral principles and an historical and cultural context in order to be accepted by the international community. The rise of the drone risks to fundamentally alter the historical and moral context that sustains the norms ‘carrying’ the Westphalian system.

## 9. Conclusion

The research conducted in this paper demonstrates how UAVs are a useful vehicle to study the changes in the norms regulating the international system. Whilst drones represent a technological innovation which allows nations to enforce a global law enforcement model, its more momentous impact lays in how it is redrawing those norms which are the pillars of the international system.

From a theoretical point of view the more useful way of analysing drones should be in the way in which they are, together with other issues such as asymmetric warfare and terrorism, eroding the historical and moral context which sustains the norms upon which the international system has been organised following the World Wars.

More research is needed to comprehensively assess the real impact that drones have on those norms, but an important fact is already clear following the analysis conducted in this paper: seeing the drone as a complete new tool from a technological and policy making point of view obscures the fact that the drone is instead the result of a legal and political milieu which since the second

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<sup>114</sup> Megret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other.’”

<sup>115</sup> Thomas, “Norms and Security: The Case of International Assassination.”

half of the twentieth century has slowly undermined the pillars of an international system organised around a Westphalian view of the state.

It is important for the theoretical debate to consider how the erosion described above would impact the consensus on the norms carrying this particular view of the state. Along with this impact, a thorough theoretical analysis need to be conducted on other elements which contribute to this erosion.<sup>116</sup> This should be followed by a theoretical study, aimed at understanding the current historical and moral context and how it has changed from the one which formed the bases of the Westphalian view of the state. This should be done in order to understand what norms could be accepted by the largest number of members of the international community, and by how these newly created norms would affect the current system.

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<sup>116</sup> Asymmetric warfare and technological innovation being the two briefly analysed in this manuscript.

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