DISCUSSING THE LEGALITY OF 'TARGETED KILLINGS'

The intention of this article is to provide an introduction to the question whether and under what circumstances 'targeted killings' in the Philippines can be regarded as legal. Therefore, the question will be discussed from a perspective of international law. The review of this matter is important in order to assess the widespread problematic of extrajudicial killings in the Philippines. Several other important questions connected with this problem are beyond the scope of this article.[1]

Targeted killings are "the intentional slaying, undertaken with explicit governmental approval, of a specific individual or group of individuals belonging to political, armed, or terrorist organizations" (Schmahl 2010: 233). Examples are the firing of missiles from helicopters at suspected terrorists by Israeli military forces[2] (Kendall 2002: 1077) or more recently the attacks of unmanned flying drones used by the US military in Afghanistan and Pakistan against suspected Taliban.

When discussing the question of the legality of targeted killings under international law, essentially four legal paradigms need to be distinguished: First, the law in times of peace and the law of armed conflict, secondly ius ad bellum and ius in bello, thirdly the humanitarian law in armed inter- and intra-state conflicts and fourthly combatants and non-combatants.

The Law of Peacetimes and Human Rights

First, it is important to differentiate between the application of the international law of peacetimes, which is the regular rule of law, and its exception, the law of war or more specifically the international law of armed conflict (Tomuschat 2004: 137). Thus, in times of peace, the International Covenant of Civil and Political Rights (ICCPR) from 1966, to which the Philippines are a contractual party since 1986 (UN 2010), is applicable, Art. 6 (1) ICCPR protects the inherent and non-derogable right to life of every human being against arbitrary deprivation by state authorities, allowing for the imposition of the death penalty in states that have not abolished it yet only after a fair trial and only for the most serious crimes (Art. 6 (2) ICCPR). As the Philippines are a signatory state since 2007 of the Second Optional Protocol to the ICCPR, aiming at the Abolition of the Death Penalty of 1989 the administration of capital punishment is illegal from the point of view of international law (UN 2010). In times of peace, the police are the only public organ to legally hold the monopoly of force in order to protect the life of every individual within the state's territorial boundaries. Lethal use of force in form of a "final rescue shot" (Schmahl 2010: 239) is only admissible under the rule of law as a last resort to save a police officer's own life (self-defence) or to protect the lives of innocent victims who are directly threatened by an offender (assistance in an emergency). Any use of force by state authorities exceeding these narrow conditions would constitute an act of "extrajudicial execution" (Kendall 2002: 1071) and would violate the principle of due process. Accordingly, during times of peace, targeted killings are clearly illegal under international law (Tomuschat 2004: 137). Under the law of armed conflict, however, the legal discussion becomes more complex.

IPON | Policeman or military? Uniform and equipment of the Philippine National Police are similar to that of military combatants.

The Law of Armed Conflict

Under the law of armed conflict, two spheres of law must be distinguished: ius ad bellum, the right to go to war, which aims at the prevention of interstate war, and ius in bello, the humanitarian law regulating the conduct of all parties concerned during armed conflict, which is geared towards the protection of the victims of war (Bothe 2004: 629). Therefore the question of targeted killings will have to be analysed within the realm of the law of hostilities, the ius in bello (Schmahl 2010: 249). In order to meet the criterion

1) For instance the question whether 'targeted killing' constitutes an illegal act of 'treacherous killing' or 'perfidy' (Art. 8 (2.) e) (ix) Rome Statute) or whether 'targeted killing' in anticipatory self-defence or as punitive measure, as so called 'armed reprisal' is permissible against terrorist attacks. Furthermore the balancing of military necessity and proportionality against the rights of individuals under the international law of armed conflict has not been touched and subsequently the question about civilians becoming victims of 'collateral damage' during the 'targeted killing' of combatants was omitted. Besides the question in how far are non-state actors bound by the provisions of international humanitarian law needs to be answered. Moreover the consequences of further court decisions on 'targeted killings' for the interpretation of the international law of armed conflict requires additional clarification. And last, but not least the question about the possibility of liability of the Philippines in potential cases of crimes against humanity e.g. of murder (Art. 7 (1.) (a) Rome Statute) in form of extrajudicial killings or war crimes (Art. 8 (2.) f) Rome Statute) demands an answer.

2) In 2006 the Supreme Court of Israel sitting as the High Court of Justice rendered its important 'targeted killings' decision in Public Committee against Torture in Israel v. the Government of Israel, defining the matter more precisely in cases of armed conflict on occupied territory (Cassese 2007; Eichensehr 2007; Milanovic 2007; Schondorf 2007).

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of an armed conflict, regardless whether it is an inter- or intra-state war, a certain intensity of hostilities is required (Tomuschat 2004: 137). Once this threshold of intensity is reached, humanitarian law is applied as lex specialis in relation to human rights law, which means that gaps in the system of humanitarian law can be supplemented by human rights law (Milanovic 2007: 390; Schmahl 2010: 247). In contrast, a governmental declaration of a 'war on terror' does not suffice to invoke the state of armed conflict, since it equals in terminology e.g. a 'war on drugs' (Milanovic 2007: 375-376). Humanitarian law has in most parts developed into customary international law – codified in the 1907 Hague Convention and the four Geneva Conventions (GC) from 1949 and their two Additional Protocols (AP) from 1977 (Bothe 2004: 630) – and is therefore applicable irrespective of a state being a contractual party of a treaty or not (Casey 2004: 319). The Philippines are a state party to the GC since 1952 without any reservation. They are also contractual party of the AP II, but have only signed the AP I (ICRC 2010). As a signatory state, the Philippines are at least obliged not to defeat the object and purpose of the AP (Art. 18 Vienna Convention on the Law of Treaties 1969).

Inter- and Intra-state Armed Conflict

Thirdly, when applying international humanitarian law, the treaties differentiate their applicability in armed inter- and intra-state conflicts. While the GC in general and AP I only apply to armed interstate conflicts, at least Common Art. 3 GC and AP II explicitly apply to armed conflicts within the sovereign territory of a state (Downes 2004: 286; Milanovic 2007: 381). The Philippines legally exercise control over their entire territory without any areas under an occupying regime or peoples fighting against colonial domination, which would invoke the GC for the people affected by the armed conflict on the occupied territory (Casey 2004: 318). Furthermore, the conditions of applicability of the AP II are more restrictive than those of interstate armed conflict, namely requiring organised armed groups under responsible leadership as conflict parties, groups that exercise such a control over a part of the territory of the contractual state that it enables them to conduct sustained coordinated combat operations (Bothe 2004: 665). This definition excludes insurgents without organised command structures, leadership and sufficient control over territory, and armed conflict among such groups, from the application of AP II (ibid.: 665). However, a recognition of belligerency by the state-party or the consent of insurgent groups to be bound by Common Art. 3 GC and AP II constitute ways of applying international humanitarian law to the conflict (Bothe 2004: 663). This would accord combatants and non-combatants basic protection during potential hostilities in the Philippines.

Combatants, Non-Combatants and Unlawful Combatants

A final important distinction needs to be made if Common Art. 3 and AP II are applicable: The differentiation of combatants and non-combatants, meaning civilians. While the GC primarily aim at the protection of civilians in armed conflict, they also provide certain protection of combatants in form of immunity from criminal liability for fighting and prisoner-of-war status when apprehended (Schmahl 2010: 255). AP II neither mentions the word 'combatant' nor does it provide fighters with the privileges of combatants in armed interstate conflicts (ibid.: 255). The specific protection of civilians in Art. 13 (2) AP II, however, implies a distinction of persons not involved from persons involved in hostilities, namely combatants (Tomuschat 2004: 140). In international armed conflicts, the latter are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack according to Art. 44 (3) AP I and thus should be easily recognisable as such, when applying criteria from Art. 4 A GC III. such as distinctive signs recognisable at a distance or the open carrying of arms. Implying their status as combatants in non-international armed conflicts from Art. 13 (3) AP II, they may only be legally targeted and killed when directly participating in hostilities (Tomuschat ibid.: 140), while it is illegal according to Art. 3 (1) GC to kill military personnel who have ceased to be active as a result of sickness, injury, or detention. Therefore, in a domestic armed conflict in the Philippines, such as in the bloodiest year so far 1985 with 4.508 victims according to official records (2.071 guerrilla, 1.242 members of government forces and 1.195 civilians), the killing of persons not actively participating in hostilities need to be treated humanely according to Common Art. 3 GC and AP II (Nimsdorf 1988: 178). This means that targeted killings of civilians remain illegal in times of domestic armed conflicts (Art. 13 (2) AP II).

The Status of Terrorists under International Humanitarian Law

When introducing the problem of terrorism, the terminological distinction of combatants and non-combatants becomes even more difficult, although the application of AP II to terrorist activities is not explicitly excluded (Downes 2004: 283). At least three lines of legal arguments are possible when classifying terrorists: First, terrorists may be recognised as combatants, which would invoke the GC and AP I (ibid.: 282), allowing attacks only during hostilities and not when **hors de combat** (Art. 3 (1) GC), granting the privileges of non-liability for acts committed during combat, and the prisoner-of-war status, as mentioned above. However, applying international humanitarian law of international armed conflicts in non-international armed conflicts would pose a grave interference in the sovereign liberty of states to establish public order (Bothe 2004: 663). Second, following the 'targeted killings' decision of the Supreme Court of Israel, under conditions of occupation, terrorists are defined as civilians and thus may only be attacked during 'direct participation' in armed conflict (Art. 51 (3) AP I.; Eichensehr 2007: 1875), because recognition of terrorists in practice may not be easy, since they do not wear distinctive signs or carry their arms openly as part of their attack strategy. While the Israeli Supreme Court interpreted 'direct participation' in hostilities widely including those planning and sending attackers, and even applicable during periods of rest, which are regarded as "preparation for the next hostility" (Supreme Court of Israel in ibid.: 1876), this interpretation has drawn international criticism, since the mere suspicion of a person being a terrorist would suffice to attack him or her even during days or weeks of rest, which would lead to such legal uncertainty, that it would "dangerously weaken civilians' protection" (Schmahl 2010: 260; see also Eichensehr 2007: 1873 and 1881). Third, since the introduction of the category of 'unlawful combatants' by the US Government during the **war on terror**, it claimed that terrorists could neither claim protection under international humanitarian nor under human rights law (Milanovic 2007: 386-387). This view has been rejected by the UN, the ICRC and numerous scholars (ibid.: 387-388), because "the human dignity of terrorists is to be honoured; like all human beings they enjoy, and are entitled to, protection by customary international law" (Schmahl 2010: 257). Moreover, in armed intrastate conflict the concept of lawful or unlawful combatants is non-existent, as it is not mentioned in Common Art. 3 GC and AP II (Milanovic 2007: 388).

Conclusion

In order to answer the initial question, a variety of conditions and different legal opinions and decisions determine whether and under what circumstances 'targeted killings' in the Philippines can be regarded as legal. Several issues have not been touched or answered; that would require a more detailed discussion, but exceeds the framework of this short note. In summary, in peacetimes 'targeted killings' are only legal in cases of concrete imminent threat and during combat. Common Art. 3 GC and AP II provide basic protection for civilians in non-international armed conflicts, rendering attacks against people who directly participate in hostilities legal. ■

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