



THE LEGALITY OF THE PRACTICE OF TARGETED KILLINGS UNDER INTERNATIONAL LAW

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DECLARATION

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and has not previously in its entirety or in part been submitted at any other university for a degree.

Signature.....

Date.....

ACKNOWLEDGEMENTS

I would like to dedicate this paper to my parents, Prof. Francis N. Okurut & Mrs. Leah M. Okurut and my family members for the support and encouragement they have given me. I specially want to thank my supervisor Prof. C.A. Waschefort for accepting the task of supervising this paper and for the valuable input. I also acknowledge the input of friends and colleagues - you made a big difference. God bless you all.

ABSTRACT

The practice of targeted killings is not a recent phenomenon in International Law. It has been practiced over the years and has been debated. In recent times, the term was popularized by the killing of Osama bin Laden. On 2 May 2011, U.S. Special Forces conducted an operation in Pakistan in which Osama Bin Laden was killed. He was said to be the leader of the Al-Qaeda Terrorist Group that claimed responsibility for the September 9/11 attacks on the U.S. that resulted in the death of thousands. There have been several other incidents of this nature and it is important to determine the legality of such strikes in order to regulate them better.

This study comparatively examines state practice of those nations including the U.S., Israel and Russia that have carried out targeted killings while paying special attention to the justifications put forth in defense of the practice. These defenses range from national security and self-defenses. The paper goes a step further to examine some court cases that have particularly dealt with the issue of targeted killings to ascertain the judicial attitude to the practice. It also looks at the main killing techniques which include kill or capture raids and air strikes from unmanned aerial vehicles known as drones. The targeted individuals are alleged terrorists or others deemed dangerous, and their inclusion in kill/capture lists is based on undisclosed intelligence applied against secret criteria. The number of targeted killings that have been specifically carried out by the US has steadily escalated through the different presidential administrations. With reference to some prominent incidents of targeted killings, this study will present an international law perspective analyzing whether this practice can be legally justifiable.

The study also focuses on the interaction between international law and the practice of targeted killing. An examination of the pertinent principles of the two branches of international law will be necessary to determine which one is applicable and when.

TABLE OF CONTENTS

DECLARATION	i
ACKNOWLEDGEMENTS	ii
ABSTRACT	iii
TABLE OF CONTENTS	iv
1. INTRODUCTION	1
1.1. Research Question	2
1.2. Methodology	2
1.3. Motivation	2
1.4. Literature Review	3
1.5. Chapterization	6
2. DEFINITION AND NATURE TARGETED KILLINGS	8
2.1. Defining Targeted Killings.....	8
2.1.1. Secret Criteria	11
2.2. The Nature of Targeted Killings	13
2.2.1. The First Intifada	13
2.2.2. Special Operations.....	15
2.2.3. Drones.....	16
2.3. The Law and Policy of Targeted Killings	17
2.3.1. Self-Defense	19
2.3.2. Pre-Emptive Self-Defense	20
2.3.3. Is Self-Defense Tenable against a Non-State Entity?.....	23
3. THE INTERACTION BETWEEN IHRL AND IHL	27
3.1. An Overview of IHL and IHRL	27
3.1.1. International Humanitarian Law (IHL)	27
3.1.2. International Human Rights Law (IHRL).....	29
3.2. Targeted Killing and the Right to Life	30
3.3. A Question of Application.....	31
3.3.1. The <i>Lex Specialis</i> Argument	31
3.3.2. The Complementary Approach	32

3.4. Customary International Law	33
3.4.1. Elements of Custom	34
3.4.2. The Customary Status of IHL.....	35
3.4.3. Are Non-State Armed Groups Bound by IHL?.....	36
4. STATE PRACTICE ON TARGETED KILLINGS.....	38
4.1. State Practice of Targeted Killings	38
4.1.1. Israel	39
4.1.2. The United States of America	41
4.1.3. Russia.....	44
4.2. Judicial Decisions on Targeted Killings	46
4.2.1. <i>Al-Aulaqi v. Obama</i>	46
4.2.2. <i>The Public Committee against Torture in Israel v. Israel</i>	54
5. CONCLUSION	66
5.1. The Legality of Targeted Killings	67
5.2. Enforcement and Recommendations	69
BIBLIOGRAPHY.....	71
LIST OF ABBREVIATIONS.....	82

CHAPTER 1

1. INTRODUCTION

The practice of targeted killings is a contentious topic in International Law that has generated extensive debate over the years. An example of a targeted killing took place in Yemen on November 2002, when a Predator drone fired a Hellfire missile into the car carrying Abu Ali al-Harithi, a senior al-Qaeda leader. Along with him, five other men including one American were killed. More recently, on 2 May 2011, U.S. Special Forces entered into Pakistan and conducted an operation in which Osama Bin Laden was killed. Four other individuals were also killed along with Bin Laden during the raid and the attack by the U.S. government has furthered the debate. Bin Laden was said to be the leader of the Al-Qaeda Terrorist Group that claimed responsibility for the 11 September 2001 terrorist attacks on America. The death toll was recorded at approximately 3,000. This incident is a classic example of a targeted killing, out of thousands of similar incidents.

Targeted killings can be carried out at two levels namely; within the state's own borders as in the case of Israel's policy on targeted killings, or outside the territory of the targeting state. The main contention at the first level is the violation of human rights and the use of lethal force against the target(s) while the second level additionally raises the concern of extraterritorial use of force where such attacks are outside the jurisdiction of the targeting state. The main killing techniques include kill or capture raids and air strikes from both manned aircrafts and unmanned aerial vehicles (UMV's) also known as drones. The targeted individuals are usually alleged terrorists or deemed as a danger to society. Their inclusion on what are known as kill/capture lists is based on undisclosed intelligence applied against secret criteria.

The number of targeted killings attacks carried out particularly by the U.S. has significantly escalated in recent times. The U.S. however, continuously justifies this practice from a self-defense and self-preservation perspective. With reference to some prominent incidents of targeted killings, this study seeks to present an international law perspective analyzing whether this practice is legally justifiable.

1.1. Research Question

This study seeks to examine the following:

- What arguments have been put forth by targeting countries in justifying their practice of targeted killing;
- Whether such justifications can be legally sustained under international law, and;
- Whether the legal framework and contemporary state practice is accommodative of the practice of targeted killing.

1.2. Methodology

This research is library based and utilizes both primary and secondary sources which include cases, textbooks, journal articles, treaties and journalist reports. The methodology adopted is both descriptive as well as analytical. The descriptive approach is used in examining relevant incidents of targeted killings as well as providing working definitions for the various concepts that arise in the study. The analytical approach on the other hand is utilized in the examination of the case studies and the justifications put forth in their defense. The latter approach is also essential in the legal framework inquiry as to the rules, customs and norms.

1.3. Motivation

Although it appears that there is no rule of international law that specifically addresses targeted killings, states have continued to carry out the practice. The practice raises several concerns for instance the issue of collateral damage. Targeted killings may not only lead to the death of the intended target but also other innocent civilians who happened to be in the wrong place, at the wrong time. Most targeting states premise their justifications of the practice on national security and self-defense. Although the practice of targeted killing can be traced as early as World War II, international law still remains silent on its legality. This gives rise to the need for academic scholarship on the topic to inform and develop the law. Therefore, academic deliberation such as this research will greatly contribute towards the development of international law as well as inform the status quo on targeted killings.

1.4. Literature Review

An overview of the literature in this field presents divergent views as to the legality of targeted killings under international law. One of the major points of contention is the objectivity of the criteria by which targets are identified and killed. In the case of the U.S. for example, the criteria for determining who may be targeted remains secretive and “classified”.¹ The Executive branch alone has final authority to determine who is included on the “kill lists” based on undisclosed evidence and criteria. The operations of targeted killings remain a closely guarded secret² and Alston rightfully concludes that the CIA’s approach is characterized by neither transparency nor accountability.³ As such, the practice only leaves one to speculate on what might be considered in determining who may be targeted and under what circumstances. Needless to say, such speculations are of no consequence to the development of the law.

It is important to note that there are currently no rules of international law that specifically legitimize or outlaw the practice of targeted killings. However, it cannot be said conclusively that there is a lacuna in the law regarding this issue. In order to demonstrate the complexity of this issue, Blum and Heymann⁴ exemplify the problem as follows:

“...Imagine that The U.S. intelligence services obtain reliable information that a known individual is plotting a terrorist attack against the United States. The individual is outside the United States... U.S. officials can request that country to arrest the individual, but they fear that by the time the individual is located, arrested, and extradited the terror plot would be too advanced, or would already have taken place. It is also doubtful that the host government is either able or willing to perform the arrest... Should the United States be allowed to kill the suspected terrorist in the foreign territory, without first capturing, arresting, and trying him?”⁵

It is in view of such complexities that the debate on the legality of targeted killing arises from. Many stakeholders have proposed arguments that either support or disagree with the practice.

¹ Alston (2011) *NY University School of Law. Working paper Series* at 10.

² ACLU *Targeted Killings*. Available at: www.aclu.org/blog/tag/targeted-killings. (Accessed 15 Feb 2013).

³ Alston (2011) *NY University School of Law. Working paper Series* at 10.

⁴ Blum and Heymann (2010) *1 Harvard National Security Journal* at 145.

⁵ *Ibid.*

Proponents of targeted killings include the U.S. that has carried out more targeted killings than any other state. Although it cannot be conclusively determined, it is estimated that U.S. targeted killing operations have killed between 1,680 to 2,634 combatants and civilians in Northern Pakistan in the period 2004 to 2011.⁶

There has very strong support for the practice by key persons in the U.S. government. On the 16th of March 2010 for example, Attorney General Eric Holder⁷ addressed Congress informing the House that Osama Bin Laden will never face trial in the United States because he will not be captured alive. Holder compared terrorists to mass murderer Charles Manson and predicted that events would ensure that they would be reading Miranda Rights to the corpse of Osama bin Laden not to the al-Qaida leader as a captive. When further queried on that point by other Congressmen, Holder responded saying that the possibility of capturing Bin Laden alive was infinitesimal. In his opinion, Bin Laden would either be killed by U.S. troops or his own people to avoid being captured by American forces.⁸ When Bin Laden was finally located and killed, President Barrack Obama addressed the nation remarking that 'justice' had finally been done. He referred to Bin Laden as a mass murderer whose demise should be welcomed by all who believe in peace and dignity.⁹

The stance taken by Holder and Obama in their addresses above show the inclination of the U.S. to carry out targeted killings should the executive reach such a decision. This opinion is supported by the case of *Al-Aulaqi v Obama*¹⁰ in which the plaintiff sought a declaration that the U.S. Constitution and international law prohibited the Defendants from carrying out the targeted killings of U.S. citizens, including his son, except in the context of armed conflict or in circumstances where the targeted citizen presents a concrete, specific, and imminent threat to

⁶ HWR.org (2011) Q&A: US Targeted Killings and International Law. Available at: www.hrw.org. (Accessed 15 Feb 2013).

⁷ Eric Himpton Holder Jr. is the eighty-second AG of The US who has held office from 2009 to date. Holder who is the first African-American AG of the US sat as Judge of the Superior Court of the District of Columbia and a US Attorney.

⁸ Smith (2010) *The Business Insider*. Available at: www.businessinsider.com. (Accessed 15 Feb 2013).

⁹ The White House, Office of the Press Secretary (2011) *Remarks by the President on Osama Bin Laden*. At para. 13 & 17. Available at www.whitehouse.gov. (Accessed 15 Feb 2013).

¹⁰ Civil Action No. 10-1469 (JDB).

life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat.¹¹ In dismissing the motion for the declaration, Judge Bates held that the Constitution places into the hands of the President and Congress control of national security and foreign relations issues. He further held that issues of war and foreign relations “are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”¹² The learned judge further emphasized that if as Plaintiff contended that military leaders had determined that national security requires that his son be targeted for killing, the Constitution does not permit courts to re-examine that national security assessment. Moreover, courts lack both the tools and expertise to undertake such a reexamination.¹³

This demonstrates the immense power placed upon the U.S. executive. The U.S. forces have the discretion to target and kill anyone around the world under the guise of national security provided such an action is sanctioned by the Executive. Moreover, as was held in the *al-Aulaqi case*, such decisions may not be questioned in any court of law. It is from this premise that a divergence of opinions crop up regarding targeted killings. Some scholars like Blum and Heymann¹⁴ who are cautious of the practice, premise some of their arguments on the grounds that the practice of targeted killings undermines territorial sovereignty;¹⁵ it violates the rule on the prohibition against use of force;¹⁶ it does not conform to the requirements of self-defense;¹⁷ it violates basic human rights including the right to life¹⁸ and fair trial;¹⁹ and, it violates International Humanitarian Law with particular reference to whether the target is deemed a combatant at the time he/she is killed.

¹¹ *Ibid* at 2, para. 2.

¹² See also: *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) at p.589; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) at p.321 in which the Court emphasized that there is a crucial difference between domestic matters and foreign ones. Whereas the Court could intervene in matters of a domestic nature, foreign matters are reserved for the House of Congress with executive departments. As such, courts would not interfere with Executive’s decisions on matters with a foreign element.

¹³ *Ibid*.

¹⁴ Blum and Heymann (2010) 1 *Harvard National Security Journal* at 160-168.

¹⁵ Article 2(4), Charter of the United Nations.

¹⁶ *Ibid*.

¹⁷ Article 51, Charter of the United Nations.

¹⁸ Article 3, UDHR.

¹⁹ Article 11, UDHR.

Blum and Heymann further argue that an individual who is accused of an offence by law must be accorded a fair trial for him/her to contest his or her innocence²⁰ in accordance with international human rights principles.²¹ They contend that the practice of targeted killing is in essence a violation of the sacrosanct principles of human rights. The violation of such a right can never be justified. Moreover, such killing may not conform to the IHL because at the time a victim is killed, they may not pose a threat to the targeting state. Melzer argues that human rights norms are the *lex generalis*²² and considers international humanitarian law provisions on the conduct of hostilities, when they apply, to constitute a *lex specialis*²³ to human rights.²⁴ He presents an analysis by which hostilities are governed by International Humanitarian Law while law enforcement paradigm is subjugated to International Human Rights Law. It is against this disparity of views that this research builds upon to ascertain what the status quo is and what it ought to be.

1.5. Chapterization

Chapter 1

This is the introductory chapter of the study. It covers the preliminary aspects of the study and gives the reader a general impression of what to expect from this study. It lays down key definitions of some of the concepts that will recur throughout the study as well as discussing the nature of targeted killing. It further states out the research questions, motivation, methodology, literature review and finally the chapterization.

Chapter 2

This chapter will deal with the problem of defining the concept targeted killings before giving a brief history of the practice. The next part of this chapter will deal with the nature and the various mode or methods employed by states that have engaged in the practice in carrying out

²⁰ Blum and Heymann (2010) 1 *Harvard National Security Journal* at 146.

²¹ Article 11, UDHR.

²² The law that governs general matters or the law of general application.

²³ The law that governs specific subject matter.

²⁴ Melzer (2008) at 468.

these targeted killings. This chapter will examine the law and policy in an attempt to justify the practice of targeted killings. In perspective, the chapter will consider justifications that states forwarded to explain their actions of targeted killings such as self-defense, pre-emptive self-defense.

Chapter 3

This chapter will focus on the interaction between International Human Rights Law and International Humanitarian Law in light of the legality of targeted strikes. The chapter will examine the pertinent principles of the two branches of international law to determine which one is applicable and when. Lastly, this chapter will give special attention to the question of whether principles of IHL have developed into customary international law.

Chapter 4

Chapter 4 will deal with the practice of targeted killing giving particular reference to the conduct of the U.S. and Israel. To put this topic in perspective, this chapter will take an in-depth look at the two cases these being *Al-Aulaqi v Obama*²⁵ and the Israel targeted killing case (*The Public Committee against Torture in Israel v The Government of Israel*).²⁶ This chapter will capture the implications of the judgments in these two cases with regard to targeted killings.

Chapter 5

This chapter will draw a conclusion from the studies in the preceding sections with regard to the legality of the practice of targeted killings. It may also give some recommendations should the need arise.

²⁵ CA No. 1:10cv01469 (JDB).

²⁶ HCJ 769/02.

CHAPTER 2

2. DEFINITION AND NATURE TARGETED KILLINGS

This chapter deals with the challenge of defining the concept of targeted killings. After presenting the definitional challenges, it examines the nature of such strikes before touching on the law and policy of targeted killings. Under the law and policy, the two major defenses that have been raised by states which have carried out targeted killings will be examined. The defenses that will be examined are self-defense and pre-emptive self-defense.

2.1. Defining Targeted Killings

The concept of “targeted killing” is not defined under international law. It largely remains a nonconcrete concept in terms of its scope and application.²⁷ However, its role in warfare makes it a very topical issue in the world today and as such, it cannot be ignored. For example, the U.S. through their drone operations in Pakistan has caused the death of approximately 2,634 individuals in the non-international armed conflict against Al-Qaeda.²⁸ The U.S. has also carried out such strikes in other countries like Afghanistan. Given that this conflict has not come to an end, it is only logical to predict that the numbers of such strikes are likely to escalate in the near future. With such considerations in mind, it is important to define the concept of targeted killings in order to determine the scope of its operation.

Some authoritative scholars of international law like Alston have attempted to define targeted killings. He notes that some scholars and commentators have an inclination of “calling a spade a spade” in an attempt to shed light on the concept. A considerable number of them therefore, relate targeted killings to concepts like “leadership decapitation”, “extrajudicial executions” or “targeted pre-emptive actions”.²⁹ It is submitted that these comparisons may well play an

²⁷ See also: Masters (2013) *Council on Foreign Relations* at para. 2. Available at: <http://www.cfr.org/counterterrorism/targeted-killings/p9627>. (Accessed 15 Feb 2013).

²⁸ HWR.org (2011) Q&A: US Targeted Killings and International Law. Available at: www.hrw.org. (Accessed 15 Feb 2013).

²⁹ Alston (2011) *New York University School of Law Working paper Series* at 10.

important role in revealing the elements of targeted killings. However, they do very little when it comes to unraveling the true nature of targeted killings. An in-depth analysis of the practice reveals a far more complex standard which cannot be said to be identical to the aforementioned concepts although they may possess some similarities. Alston therefore defines targeted killing as the intentional killing of an individual who has been predetermined by a state, armed band or its agents. He adds that the targeted individual should not be in the custody of the party that carries out the killing and should not be reasonably apprehendable. In addition, such strikes should be accompanied with a degree of premeditation.³⁰

In his special report to the Human Rights Council, Alston further notes that the objective of targeted killing operations is to apply lethal force to the victim.³¹ This draws the necessary distinction between targeted killings and accidental deaths that may occur without premeditation. He further notes that targeted killings should be distinguished from fatalities that may arise during law enforcement. He cites an example where the police may legally take a life to avert impending harm to the public.³² Alston rightfully concludes that such incidents would not constitute targeted killings as envisioned under this research.

Melzer, who has also written extensively on the subject of targeted killings and humanitarian law, defines targeted killing as the intentional, calculated and premeditated use of lethal force by a state or an armed group against a carefully selected individual who is not in their physical custody.³³ This definition is very similar to the one proposed by Alston. The elements of targeted killings as proposed by both Alston and Melzer share the following similarities: There is an intentional killing; of a predetermined individual; who is not in the physical custody of the perpetrator; with a degree of premeditation. These elements go a long way in as far as

³⁰ Alston (2011) at 10, para. 2.

³¹ Alston (2010) *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to the Human Rights Council* at 10-11.

³² For a further discussion on the distinction of the use of lethal force during war and law enforcement, see Gross (2006) *23 Journal of Applied Philosophy* 3 at 323. Gross emphasizes that the Geneva Conventions and Additional Protocols permits legitimate combatants to use lethal force with restrictions. Likewise, under law enforcement, the police may legally resort to lethal force in tightly prescribed situations for example self-defense and in the interest of the public.

³³ Abresch (2009) *20 Eur J Int Law* at 449.

revealing the true nature of the targeted killings. However, Solis in his proposed definition of targeted killings puts more “flesh to bone” and refines the above definitions.³⁴

Solis defines targeted killing as the intentional killing of a specific civilian who cannot reasonably be apprehended, and who is taking a direct part in hostilities, the targeting done at the direction and authorization of the state in the context of an international or non-international armed conflict. He argues that for an action to be deemed a targeted killing, the following elements must be present:

- (i) there should be either an international or non-international armed conflict;
- (ii) the target must be precisely predetermined;
- (iii) the possibility of apprehending the target must be very remote;
- (iv) the targeting and consequent strike must be sanctioned by the commander-in-chief or by a top ranking official in the military, and;
- (v) the victim must either be a combatant or a civilian directly participating in hostilities.³⁵

The definition proposed by Solis not only builds on those proposed by Alston and Melzer but refines them by laying out the categories of persons who may be legitimately targeted these being combatants and civilians taking part in hostilities. Solis also introduces an important element of the lethal force being sanctioned by a top ranking officer.

However, it is submitted that the definitions fall short of an application criteria. The practice for the states that have carried out targeted killings is that an individual is added onto the kill/capture lists through an undisclosed secretive formula.³⁶ The practice therefore remains mystical to other states and the public. As such, it is impossible to determine whether the criteria applied was objective or it was motivated by ill motives like regime change. The author therefore proposes that any definition of targeted killings that is devoid of an application

³⁴ Solis (2007) *60 NWC Review 2*.

³⁵ Solis (2007) *60 NWC Review 2* at 127.

³⁶ See also: Murphy and Radsan (2009) *31 Cardozo Law Review 2* at 412 in which the authors explore the reasons as to why it is desirable that such programs are kept secret.

criterion is incomplete. However, it is noted that such information is a closely guarded secret and states are weary of making it known to the public even long after the strikes are carried out. This position has been clearly demonstrated by the United States that has repeatedly through its officials stated that such information is not meant to fall in the public domain because it is likely to jeopardize national security.³⁷

2.1.1. Secret Criteria

One of the key issues in regard to targeted killings is the fact that states are no willing to disclose the details of such operations. An example can be drawn from the U.S. that has affirmed that such information must not be made public. Goldsmith³⁸ wrote an article in which he called upon government officials to disclose the processes by which individuals are targeted to the public. In his article, he argued that:

“There are at least two separate issues about what information should be disclosed. The first concerns the legal basis for the targeted killing program... Attorney General Holder... (has) given major speeches outlining this legal basis... After Holder's speech, the nation has a general explanation of the constitutional and international law bases for the administration's actions. But the speech also shows that the legal rationale for targeted killing can be discussed without disclosing operations, targets, means of fire, or countries, and without revealing means and methods of intelligence gathering.

A second disclosure issue concerns the process by which targeting decisions are made and the factual basis for those decisions... This is the most legitimate concern of critics and even some supporters of the president's targeted killing campaign, especially when that campaign involves a U.S. citizen. There is every reason to think that the government was super careful and extra scrupulous in the process preceding the Aulaqi killing. But despite the elaborate system of deliberation, scrutiny, and legitimation supporting U.S. targeting practices, The U.S. government can and sometimes does make mistakes about its targets...

³⁷ See: Brennan (2012) The Ethics and Efficacy of the President’s Counterterrorism Strategy. A Speech Prepared for Delivery by the Assistant to the President for Homeland Security and Counterterrorism, Woodrow Wilson International Center for Scholars, Washington, DC. Available at: <http://www.lawfareblog.com/2012/04/brennanspeech/>. (Accessed 12 Nov 2012). He stated that information regarding is sensitive and will not be disclosed to the public.

³⁸ Jack Goldsmith was formerly an assistant Attorney General who served his term of office under the Bush administration.

The government needs a way to credibly convey to the public that its decisions about who is being targeted -- especially when the target is a U.S. citizen -- are sound... I can think of only two ways to improve the current arrangement. First, the government can and should tell us more about the process by which it reaches its high-value targeting decisions... The more the government tells us about the eyeballs on the issue and the robustness of the process, the more credible will be its claims about the accuracy of its factual determinations and the soundness of its legal ones. All of this information can be disclosed in some form without endangering critical intelligence... Second, the government should take advantage of the separation of powers.³⁹ [Emphasis added]

Goldsmith raised important issues regarding the disclosure of information pertaining to targeted killings. He proposed methods by which the Government could go about the disclosure process bringing about accountability to its citizens and curbing abuse of power. He cited that sometimes the government might act in error which could be redressed if there were open channels for information dissemination to the public.

In Brennan's⁴⁰ speech on *Ethics and Efficacy of the President's Counterterrorism Strategy*,⁴¹ he acknowledged Goldsmith's call for openness and transparency. However, he bluntly asserted that he would not discuss sensitive details of any operation. He emphasized that he would not and would never disclose sensitive intelligence sources and methods. In his opinion, if such information was to be divulged to the public, national security would be compromised and this could lead to the loss of lives.⁴² This position only goes to emphasize the unwillingness of states disclose their positions particularly when it comes to the process and information used in arriving at a decision on who should be targeted. This only leads to speculation as to whether the process may or may not be objective. In the face of such uncertainty, the practice cannot be reasonably ascertained so as to inform law and policy makers around the world.

³⁹ Goldsmith (2012) Fire When Ready Foreign Policy. Available at: http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready?page=0,2&hidecomments=yes. (Accessed 21 Sept 2012).

⁴⁰ Assistant to the President for Homeland Security and Counterterrorism.

⁴¹ See: <http://www.whitehouse.gov/blog/2011/06/29/national-strategy-counterterrorism> for Obama's National Strategy for Counterterrorism. (Accessed 16 Feb 2013).

⁴² Brennan (2012) The Ethics and Efficacy of the President's Counterterrorism Strategy. A Speech Prepared for Delivery by the Assistant to the President for Homeland Security and Counterterrorism, Woodrow Wilson International Center for Scholars, Washington, DC. Available at: <http://www.lawfareblog.com/2012/04/brennanspeech/>. (Accessed 12 Nov 2012).

2.2. The Nature of Targeted Killings

Targeted killings have been practiced over the years by various states and even non-state actors. As noted in the previous chapter, the concept is frequently invoked although not defined in law. It is a concept that became popularized following Israel's open policy on targeted killings as well as the U.S. "war on terror."

However, a look into history reveals that the practice of targeted killings is not a recent phenomenon. One of the earliest examples of targeted killing was the shooting down of Admiral Yamamoto's⁴³ plane on 18 April 1943 during the World War II era.⁴⁴ However, the practice of targeted killings gained popularity in 1987 with the inception of what came to be known as the first intifada.⁴⁵ This was a period characterized of gruesome atrocities and unspeakable violence that left scores of people dead and many injured or maimed. The paper will now take a close look at the events of the first intifada to appreciate the nature of early incidents of targeted killings.

2.2.1. The First Intifada

The events that would go down in history as the "first intifada" commenced on the 6th of December 1987 when an Israeli, who was shopping in the Gaza Strip, was stabbed to death. The following day, it so happened that there was an accident that claimed the lives of four Palestinians.⁴⁶ This accident was perceived as an intentional act by the Israeli to avenge the death of the shopper. These acts and the way they were perceived were a manifestation of the tension between the Palestinians and Israelis. Massive riots broke out and amidst the chaos a Palestinian boy aged 17 was gunned down by an Israeli soldier when he threw a petrol bomb at them. The act of shooting the boy dead generated serious retaliation from the Palestinians and the area was engulfed in widespread unrest.

⁴³ Admiral Yamamoto was the Commander-in-chief of the unified Japanese forces.

⁴⁴ Gross (2003) 51 *Political Studies* 2.

⁴⁵ Jewish Virtual Library: A Division of the American-Israeli Cooperative Enterprise. "The Palestine Liberation Organization (PLO)." Available at: <http://www.jewishvirtuallibrary.org/jsource/Terrorism/plo.html>. (Accessed 22 Sept 2012).

⁴⁶ Alimi (2007) 37 *British Journal of Political Science* 3.

One of the factors that fueled the crisis was rumors that spread falsified information like a wildfire. For instance, in the Gaza Strip, there were rumors that Palestinian youths who were wounded in the clashes were being transported to an Israeli army hospital facility to be “finished off.”⁴⁷ Another significant rumor was that the Israelis had poisoned the water reservoir that supplied water to some areas occupied by Palestinians. These rumors were found to be untrue and yet went a long way in instilling resentment and hatred for the Israelis. In the first four years of the conflict, more than 3,600 petrol bomb attacks and 600 gun attacks were recorded.⁴⁸ The Israelis then adopted a policy by which they targeted those individuals holding leadership positions in “terrorist” groups. They Israelis masqueraded as Arabs to gain proximity to their targets who were then killed using the new technique of suicide bombing.⁴⁹ The Israelis also used snipers to eliminate their targets from a safe distance.

During the first intifada, the Palestinian Liberation Organization (PLO)⁵⁰ played an instrumental role in the fueling of the rebellion. The PLO is one of the most famous liberation organizations in the world that was founded in 1964 to redress the issues of the Palestinians living in the Lebanon refugee camps.⁵¹ In 1967, the Organization determined that its primary objective was the elimination of nation of Israel.⁵² They then embarked on massive campaigns against Israel in furtherance of their objectives. The leaders of the PLO also constituted the majority of the Unified Leadership of the Intifada (UNLI) which co-ordinated the acts of violence, identified targets and dictated the times of waging war.

⁴⁷ Karkar (2007) *The Electronic Intifada*. Available at: <http://electronicintifada.net>. (Accessed 15 Feb 2013).

⁴⁸ Shang (2001) *3 Stanford Journal of International Relations* 1.

⁴⁹ Jewish Virtual Library: A Division of the American-Israeli Cooperative Enterprise. “The Palestine Liberation Organization (PLO).” Available at: <http://www.jewishvirtuallibrary.org/jsource/Terrorism/plo.html>. (Accessed 22 Sept 2012).

⁵⁰ The PLO was founded (1964) by joint efforts of Egypt and the Arab League. It was mainly composed of several rebel groups and political factions but dominated by Al Fatah. Yasir Arafat was leader of the PLO between 1969 and 2004. For further reading, see: <http://www.infoplease.com/encyclopedia/history/palestine-liberation-organization.html#ixzz2L5D3onjE>. (Accessed 22 Sept 2012).

⁵¹ *Ibid.*

⁵² See: Article 19, *Palestine National Charter of 1964* in which Israel was accused as the promoters of Zionism, a colonialist movement that was fascist, racist and viewed as a permanent source of tension and turmoil in the Middle East region by the Palestinians. Available at: <http://www.un.int/>. In light of this background, in May 1967, Egyptian President Gamal Nasser announced the PLO would expel all Zionists from Palestine. Nasser emphasized that the basic objective of the PLO would be the destruction of Israel and called upon all Arabs to join the struggle. (See: <http://www.mideastweb.org/israelafter1967.htm>). (Accessed 22 Sept 2012).

A large number of Palestinians met their fate by the axe, club and gun and the reasons as to why many of them were killed varied. For some of them, the mere fact that they were associated with Israelis was reason enough for them to be killed. The violence during this period escalated to peace threatening heights that the Palestinians expressed serious detest for the unrest. The PLO eventually yielded to the outcry and called for seizure of violence citing that it harmed national interest.⁵³ However, the chilling ramifications of this violent period could be felt in the death toll of over 2,000 Palestinians in the period from 1989 to 1992.⁵⁴

However, more recently, the term has been revived through several different incidents. For example, the term has used to describe the killing of al Qaeda leader Ali al-Harithi and five others in Yemen in November 2002 when a drone dropped a bomb on a car transporting them.⁵⁵ The other incident was the killing of Osama bin Laden on 2 May 2011. U.S. Special Forces zeroed in on his location in Pakistan under the cover of the night and killed him together with four others.⁵⁶ The study will now look at some of the methods utilized in such operations.

2.2.2. Special Operations

As has been pointed out in the previous sub-chapter, one of the methods that are utilized in targeted killing is the use of special operations teams comprising of highly trained and heavily armed military personnel. The aim of special operations is to kill or capture. In the U.S., the division that is charged with the mandate of running special operations is the Special Operations Command (SOCOM).⁵⁷ This division together with the Joint Special Operations Command (JSOC) is constituted to plan and carryout special operations, train personnel and research methods of executing missions.⁵⁸

⁵³ The Chosunilbo (2005) PLO Calls on Militants to End Attacks. Available at: http://english.chosun.com/site/data/html_dir/2005/01/17/2005011761009.html. (Accessed 16 Feb 2013).

⁵⁴ Bard (2006) The Intifada. Jewish Virtual Library: A Division of the American-Israeli Cooperative Enterprise. Available at: <http://www.jewishvirtuallibrary.org/jsource/History/intifada.html>. (Accessed 12 Aug 2012).

⁵⁵ Yoo (2011) 56 *N.Y. L. Sch. L. Rev.* 57 at 58.

⁵⁶ Wong (2012) 11 *Chinese JIL* 1 at 127.

⁵⁷ The joint command responsible for the worldwide use of army special operations, Navy, and Air Force.

⁵⁸ GlobalSecurity.org, Joint Special Operations Command (JSOC). Available at: <http://www.globalsecurity.org/military/agency/dod/jsoc.htm>. (Accessed 22 Sept 2012).

An example of such operation was the raid that resulted in the death of Osama bin Laden.⁵⁹ These tactical teams have been utilized by many states in the world and it is conceivable that every state has its own kind of tactical units. The author is of the view that special operations are effective because the personnel in these tactical units are trained to carry out their missions with precision. They are able to distinguish between military and non-military objectives and collateral damage may be kept at minimal level as opposed to other forms of targeted killings.

2.2.3. Drones

Unmanned aerial vehicles have also come into the spotlight for their role in targeted killings. Although drones were historically used to collect information and intelligence,⁶⁰ today they are capable of participating in military combat carrying up to 100 pounds of laser guided missiles.⁶¹ They are generally preferred because they pose no risk to the operator since they are remotely flown. As such, a number of states in the world for example America, Israel, China, Russia and France have invested in the technology including.⁶² Some of the major issues that have been raised against the use of drones are that it does not comply with the principles of proportionality and distinction⁶³ as well as the customary law prohibition against indiscriminate attacks.⁶⁴ It is contended that an explosive is not capable of distinguishing non-military objectives that are proximate to the target once it is locked and fired on a particular grid. A good example of this was the killing of Ali al-Harithi that resulted in the death of five other men in the same.⁶⁵ However, the legality of the use drones at international law remains a moot question.⁶⁶ Having discussed the nature of targeted killings, the study will now examine the justifications that have been contended by states that have carried out targeted killing in the next sub-section.

⁵⁹ Wong (2012) *11 Chinese JIL* 1 at 127-128.

⁶⁰ For further reading, see Wall and Monahan (2011) *15 Theoretical Criminology* 3.

⁶¹ Unmanned Ground, Aerial, Sea and Space Systems (2011) Predator – Unmanned Vehicles (UAV) Specifications & Data Sheet. Available at: <http://www.unmanned.co.uk/autonomous-unmanned-vehicles/uav-data-specifications-factsheets/predator-specifications/>. (Accessed 22 Sept 2012).

⁶² Rogers (2012) Drones by country: who has all the UAVs? *The Guardian*. Available at: www.theguardian.com.

⁶³ Article 48, 50 and 51 of the First Protocol to the Geneva Conventions.

⁶⁴ Paust (2012) *18 ILSA Journal of International and Comparative Law* 2 at 577.

⁶⁵ Yoo (2011) *56 N.Y. L. Sch. L. Rev.* 57 at 58.

⁶⁶ See Vogel (2011) *39 Denv. J. Int'l L. & Pol'y.* for a discussion on the legality of the use of drones/UAVs.

2.3. The Law and Policy of Targeted Killings

A number of states have in the recent past adopted laws and policies of targeted killings against their aggressors most of whom have been designated as ‘terrorists’. Such laws and policies have either been secretly carried out or openly declared. In trying to justify such attacks, state officials have offered some explanations that seek to defend their actions. However, most of these are far from satisfactory in as far as addressing questions of legality of targeted killings. In the case of the U.S., one notable attempt was made by Brennan.⁶⁷

On the issue of the legality of targeted killings in his address, Brennan noted that the President is empowered by the Constitution to make executive decisions that are in line with protecting the State from attack.⁶⁸ Some of such powers include authorizing the use of force against an individual who poses an imminent threat to the State. To support this contention, Brennan gave reference to the Authorization for Use of Military Force (AUMF Resolution)⁶⁹ passed by Congress that empowers the Head of State to authorize any necessary measures against the states, persons or organizations who a role in the 11 September 2001 terrorist attacks on America. Brennan concluded that the use of lethal force in the U.S. campaign against terrorism is backed by both domestic and international law.

Brennan further contended that the U.S. is engaged in an armed conflict with the al-Qaida terrorist group. In his opinion, the use of lethal force against al-Qaeda and its associates is consequently justifiable by virtue of the fact that they were engaged in a non-international armed conflict. He argued that international law does not prohibit the use of lethal force on targets outside of an active war zone.⁷⁰ He claimed that targeted killings were justifiable because they comply with the principles of necessity, proportionality and distinction. To emphasize the compliance of targeted killings to the principles of international humanitarian law, he noted the following:

⁶⁷ Brennan (2012) A Speech Prepared for Delivery by the Assistant to the President for Homeland Security and Counterterrorism, Woodrow Wilson International Center for Scholars, Washington, DC.

⁶⁸ Brennan (2012) at para. 34.

⁶⁹ S.J. Res. 23 (18th Sept. 2001) Public Law 107-40, 107th Congress.

⁷⁰ Brennan (2012) at para. 35.

“Targeted strikes conform to the principle of necessity—the requirement that the target have definite military value. In this armed conflict, individuals who are part of al-Qaida or its associated forces are legitimate military targets. We have the authority to target them with lethal force...

Targeted strikes conform to the principle of distinction— ...With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qaeda terrorist and innocent civilian.

Targeted strikes conform to the principle of proportionality—the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.”⁷¹ [Emphasis added]

Brennan in his address attempts to back the U.S. policy of targeted killings in both domestic and international law. However, apart from merely touching on the principles of international humanitarian law, he fails to address the interplay between IHL and IHRL. Although the conflict between the U.S. and al-Qaeda is correctly classified as a non-international armed conflict, it poses serious human rights considerations which must be addressed in determining the legality of targeted killings. However, nowhere in Brennan’s eighty-eight paragraph speech does he mention anything on human rights. The closest he comes to human rights is merely touching on the morality of targeted strikes⁷² in the concluding paragraphs which is still a far cry from the point being emphasized.

On the other hand devotes a significant part of his speech to addressing the justification of self-defense.⁷³ This not only brings into play the issue of self-defense but also the pre-emptive strikes aimed at averting imminent attacks on a state. It therefore becomes important to examine the two defenses from an international law perspective to determine their sustainability in relation to targeted killings.

⁷¹ Brennan (2012) at para. 37-39.

⁷² See para. 83, Brennan (2012).

⁷³ Brennan (2012) at para. 35.

2.3.1. Self-Defense

The notion of self-defense is best understood by examining its salient features. Firstly, under the provisions of the U.N. Charter, self-defense is described as a “right” and not an obligation.⁷⁴ This implies that when the conditions that permit self-defense are present, a state would have the discretion to determine whether or not to exercise its right under Article 51, subject to the restrictions contained therein.⁷⁵ Self-defense may be lawfully exercised in two ways and these are either individually or collectively as a pact of states under a multilateral front authorized by the Security Council.⁷⁶ Article 51 states that:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

In international law, any use of self-defence must respect the principles of necessity and proportionality.⁷⁷ With respect to necessity, resorting to force should be the sole recourse available to a State to defend itself against an attack. The principle of necessity was laid down in Daniel Webster’s letter to Lord Ashburton on 6 Aug 1842 after the *Caroline Incident* in which he stated that self-defense was to be confined to cases in which were “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁷⁸ This in turn implies that a State should have exhausted all practicable measures to avert the use of military force.⁷⁹ Such measures may include engaging in bilateral or multilateral diplomacy, imposing economic sanctions, or seeking unarmed intervention sanctioned by the Security Council.

⁷⁴ Article 51 of the U.N. Charter.

⁷⁵ Wilmshurst (2005) *Chatham House Working Paper No. 05/01* at 5-6.

⁷⁶ O’Connell (2002) *ASIL* at 13.

⁷⁷ Paust (2009) *19 Journal of Transnational Law & Policy* 2.

⁷⁸ Jennings (1938) *32 AJIL* 1 at 82.

⁷⁹ See: Anand (2006), a paper presented at the annual meeting of the International Studies Association, Town & Country Resort and Convention Centre, San Diego, California, USA.

The second underlying the notion of self-defense is the principle of proportionality which differs in meaning depending on whether it is applied in the context of *jus ad bellum*⁸⁰ or *jus in bello*.⁸¹ Under the *jus ad bellum* version, which is of concern to the present analysis, proportionality does not refer to intensity, or means of force used on the battlefield.⁸² Rather, proportionality is best understood as the degree of force strictly required to satisfy the overall self-defense objective, namely, repelling a given threat. Proportionality also requires that possibility of civilian casualties must be considered. If the loss of civilian life and property is out of proportion to the importance of the objective, the attack must be abandoned.⁸³ Should the principles proportionality and necessity be satisfied, such an attack of self-defense would fall at the discretion of a state whether or not to undertake. However, the case would be different if such act was launched in pre-emption.

2.3.2. Pre-Emptive Self-Defense

Pre-emptive self-defense on the contrary stems from a fear that in the near future, though not in any immediate sense, a state may become an armed target of an aggressor state or an armed band of individuals. The notion is to “preempt” a potentially escalating military threat that is likely to happen if nothing is done to avert it. Although the attack may in some cases be poised to launch, in any case it only remains speculative.⁸⁴ A defending State seeks to interject imminent threats that may materialize into full blown violence before they are launched. Such self-defense is still mainly defensive in character although perhaps not entirely. The danger with this kind of use of force is that it is prone to abuse.⁸⁵

⁸⁰ *Jus ad bellum* is the branch of laws that dictate when a state may justly go to war.

⁸¹ *Jus in bello* on the other hand defines the branch of law that governs how a war is to be conducted. It does not concern itself with the reasons as to why the war was entered into but comes into force once a war is declared to govern rules of engagement.

⁸² James (1981) at 4.

⁸³ See: *The Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* 1996 I.C.J Reports at 226. The Court emphasized that both the principles of necessity and proportionality must be adhered to.

⁸⁴ O’Connell M (2002) *ASIL* at 7.

⁸⁵ See also: Richter (2003) *1 Dialogue 2* at 61 in which the author explains that the broad application of pre-emptive self-defence is that it could it provide a dangerous precedent for other states and be used as an illegitimate reason for one country to attack another based on unfounded claims of aggression. As such, its application should be narrowly construed.

State practice until the early-to-mid Nineteenth Century appeared to support an even broader right than that of preemptive self-defense, because imminent danger was not always evident when military and lethal force was exercised.⁸⁶ Britain for example launched pre-emptive attacks on the Danish navy in Copenhagen in 1807 to keep the fleet from falling into the hands of Napoleon.⁸⁷ Another example of a pre-emptive strike was the Six-Day War of 10 June 1967 between Israel on one hand and Syria, Jordan and Egypt on the other. The Israelis struck as a preventative military effort to counter what they saw as an impending attack by Arab nations that surrounded it.⁸⁸ Israel believed that it was only a matter of time before the Arab states coordinated a massive attack on Israel so a pre-emptive strike was inevitable to avert the imminent danger.⁸⁹ Rather than wait to be attacked, the Israelis launched a successful military campaign against its perceived enemies and destroyed their armies and infantry.

However, it must be noted that such practice does not play a vital role in explaining the status of pre-emptive self-defense today. In this traditional era, self-defense was largely associated with the concept of necessity and self-preservation and there was no express prohibition on use of force as there is today. Today, the use of force is resolutely monitored under the U.N. regime leaving very little room for maneuver.

⁸⁶ See: Grotius (1965) *De Jure Ac Pacis* [On the Law of War and Peace] reprinted in Scott J.B. (1925) *The Classics of International Law* at 173. Grotius, one of the leading jurists in international law was of the opinion that a state could justifiably resort to force in self-defense before an attack was directed towards it. However, such attacks were not to be taken lightly and he emphasized the need for “imminent danger” as a basis for such an attack.

⁸⁷ Rivkin (2005) 5 *Chi. J. Int'l L.* 2 at 467.

⁸⁸ Sharpe (2012) *American Thinker*. Available at: <http://www.americanthinker.com>. After the 1956 Suez Crisis, the United Nations had established a presence in the Middle East, especially at sensitive border areas. The United Nations was only there with the agreement of the nations that acted as a host to it. By May 1967, the Egyptians had made it clear that the United Nations was no longer wanted in the Suez region. Gamal Nasser, leader of Egypt, ordered a concentration of Egyptian military forces in the sensitive Suez zone. This was a highly provocative act and the Israelis only viewed it one way that Egypt was preparing to attack. The Egyptians had also enforced a naval blockade which closed off the Gulf of Aqaba to Israeli shipping. The air forces of Egypt, Jordan, Syria and Iraq were all but destroyed on June 5th. By June 7th, many Egyptian tanks had been destroyed in the Sinai Desert and Israeli forces reached the Suez Canal. On the same day, the whole of the west bank of the Jordan River had been cleared of Jordanian forces.

⁸⁹ Amos (1971) 6 *ISR. L. REV.* 65 at 68. Israel initially justified its action by claiming that it was an act of self-defense taken in response to an Egyptian attack. However, when it became clear there was no factual basis to this allegation; Israel reinforced its line of argument by characterizing the Egyptian naval blockade as an act of war coupled with what appeared to be an imminent attack based on Egyptian and Syrian border deployments and the ejection of the UNEF. Significantly, Israel never expressly claimed “anticipatory” self-defense as a legal basis for its action. The thrust of its justification for launching the attack rested on an expanded notion of an actual attack (a minor border incident) to which it had reacted pursuant to Article 51.

During the early 1840s, there was a major progression in the exercise of self-defense with the development of the *Caroline standard*.⁹⁰ On the night of 29 December 1837, a small group of British and Canadians loyal to the Canadian government crossed the river to the U.S. side where the *Caroline* was moored, loosed her, set fire to her, and sent her over the falls. One American was killed in the incident. Britain defended its position claiming to have acted out of “necessity of self-defense and preservation.”⁹¹ Later in April 1841, U.S. Secretary of State Daniel Webster wrote to the British Ambassador Henry Fox setting out a standard that required:

*“Necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation. It will be for it to show, also, that the local authorities of Canada ... did nothing unreasonable or excessive, since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.”*⁹²

The true meaning of the *Caroline standard* remains a debatable matter and it has been contended that Webster’s formula set a narrower standard based on contemporaneous state practice.⁹³ The relevance of the *Caroline standard* to pre-emptive self-defense is questionable in as far as determining its application is concerned. This is because the facts of the *Caroline steamer incident* do not disclose any form of pre-emptive action. The *Caroline* was assisting the rebels before the attack so the threat it posed was not imminent and the force was directed against a non-state actor whose actions were not attributable to the U.S. Despite its weaknesses, the *Caroline standard* is considered to have evolved into a principle of customary international law.⁹⁴ Scholars also treat the formula as an accurate statement of pre-emptive self-defense to the extent that this doctrine is supported, encompassing the elements of necessity, proportionality, and imminence.⁹⁵

⁹⁰ Amy and Manooher (2004) 12 *Tul. J. Int’l & Comp. L.* at 129. In 1837 a group of men led by William Lyon Mackenzie rebelled in Upper Canada (now Ontario), demanding a more democratic government. There was much sympathy for their cause in the United States, and a small steamer, the *Caroline*, owned by U.S. citizens, carried men and supplies from The U.S. side of the Niagara River to the Canadian rebels on Navy Island just above Niagara Falls.

⁹¹ Brownlie 4th ed. (1990) at 42.

⁹² Jennings (1938) 32 *AJIL* 1 at 82.

⁹³ James (2006) 14 *Cardozo J. Int’l & Comp. L.* at 438.

⁹⁴ Patel (2004) *ASIL Insights; Nicaragua case* at para. 176; *Legality of the Threat of Nuclear Weapons* at para. 41.

⁹⁵ Van den hole (2003) 19 *AJILR* 1 at 97.

States and their citizens in the contemporary society are confronted with threats of terrorism which invariably have a negative impact on peace and stability. Suicide bombers, acts of terror, gross violations of human rights and wide spread aggression constantly affect populations in States around the world. Taking into account the undecided state of the law towards the legality of anticipatory self-defense, it would only be logical to come to the conclusion that its legality is subsumed under the inherent right of self-defense. Having come to this conclusion, the issue that needs to be addressed is whether self-defense is tenable against a non-state aggressor given that most acts of terror are conducted by non-state armed groups.

2.3.3. Is Self-Defense Tenable against a Non-State Entity?

The issue of whether self-defense can be legitimately claimed against an armed attack from a non-state actor has been largely debated. Several commentators seem to favor the argument that armed attacks by non-state entities can give rise to a legitimate claim of self-defense under *Article 51 of the Charter of the United Nations* in response to an attack even if it originates from the territory of a foreign country.⁹⁶

Authors like Paust base their arguments on the literal interpretation of *Article 51* of the Charter of the United Nations which provides for the right of states to exercise self-defense against armed attacks. Emphasis is placed on “armed attacks”. He argues that no part of *Article 51* limits a state to exercise self-defense within its territory or strictly against a state aggressor.⁹⁷

⁹⁶ See: Head J.W. “Essay: The United States and International Law after September 11.” *11 Kansas Journal of Law and Public Policy* at 3; Henkin L. “War and Terrorism: Law or Metaphor.” (2005) *45 Santa Clara Law Review* at 821; Koh H.H. “The Spirit of the Laws.” (2002) *43 Harvard International Law Journal* at 24-25; Lobel J. “The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan.” (1999) *24 Yale Journal of International Law* at 540-547; Murphy S.D. “Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the I.C.J.?” (2005) *99 American Journal of International Law* at 62-69; Murphy S.D. “Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter.” (2002) *43 Harvard International Law Journal* at 50; Paust J.J. “Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond.” (2002) *35 Cornell International Law Journal* at 534-35; Schachter O. “The Extra-Territorial Use of Force against Terrorist Bases.” (1989) *11 Houston Journal of International Law* at 311-12; Wedgwood R. “The I.C.J. Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense.” (2005) *99 American Journal of International Law* at 57-58; Wedgwood R. “Responding to Terrorism: The Strikes Against bin Laden.” (1999) *24 Yale Journal of International Law* at 564-65; Wilmshurst E. et al., “The Chatham House Principles of International Law on the Use of Force in Self-Defence.” (2006) *55 International and Comparative Law Quarterly* at 965-71; Tams C.J. “Light Treatment of a Complex Problem: The Law of Self-Defence in the *Wall* Case.” (2005) *16 European Journal of International Law* 5, pp. 963-978.

⁹⁷ Paust (2011) *19 J. of Transnational Law & Policy* 2 at 238.

Reference is also made to Security Council Resolution 1368⁹⁸ in which the U.N.S.C. begun by reaffirming the purposes of the Charter of the United Nations in an endeavor to preserve international peace and security compromised by terrorist acts. The U.N.S.C. emphasized the right to individual and collective self-defense in light of the terrorist attacks on the U.S. that took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania, before calling upon the international community to co-operate against such attacks. This resolution has been interpreted to support of the position that self-defense may legitimately be invoked against a non-state actor especially in light of the problem of terrorism.⁹⁹

However, there have been two major I.C.J. decisions, in which the Court came to the conclusion that self-defense may only be invoked against another State or a non-state actor acting under the control of another State. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,¹⁰⁰ Israel sought to justify the construction of the wall in the occupied territory of Palestine as a proper exercise of self-defense against terrorist attacks. They argued that such conduct was lawful in terms of *Article 51* of the U.N. Charter that upheld the inherent right of a state to act in self-defense¹⁰¹ and in line with Security Council resolutions 1368 (2001) and 1373 (2001).

However, the Court was of the opinion that *Article 51* upheld the inherent right of self-defense against another state actor and not armed groups. The Court reasoned that if a state was to successfully invoke self-defense against a non-state actor, it had to prove that the attack was attributable to another state.¹⁰² Given that Israel exercised sovereignty and control over the Occupied Palestinian Territory, the Court concluded that self-defense could not be successfully invoked because the threat came from within Israel itself and that those terrorist acts could not be imputed on another state.¹⁰³

⁹⁸ Security Council Resolution 1368 (2001). Adopted by the Security Council at its 4370th meeting, on 12 September 2001.

⁹⁹ Dugard (4th ed. 2011) at 505.

¹⁰⁰ 2004 I.C.J. Reports.

¹⁰¹ See: Annex 1 to the Report of the Secretary-General in the *Wall* case.

¹⁰² *Legal Consequences on the Construction of a Wall Advisory Opinion*. 2004 I.C.J. Reports at para. 138.

¹⁰³ *Ibid* at para. 139.

The interpretation of *Article 51* of the U.N. Charter adopted by the Court has been widely criticized as a misinterpretation of the law.¹⁰⁴ It has been argued that the interpretation of *Article 51* to encompass only attacks from States is fundamentally wrong. Nothing in the wording of *Article 51* seems to support such an interpretation. Secondly, nothing in the Article requires an armed attack to originate from outside the territory of the defending state.¹⁰⁵ The I.C.J. interestingly adopted a similar decision in the subsequent *Case concerning Armed Activities on the territory of the Congo*.¹⁰⁶ The Court ruled that Uganda could not plead self-defence because it was not engaging in hostilities with an armed band whose activities could be imputed upon the Democratic Republic of Congo. The aggressors were ADF rebels comprised of Ugandan guerrillas opposed to the Ugandan government.¹⁰⁷

Dugard rightfully contends that the position adopted by the Court does not reflect contemporary state practice which strongly suggests that self-defence may be exercised against a non-state actor especially in the relation to terrorism.¹⁰⁸ It is with this reasoning that Judge Simma submitted a separate opinion in which recommended as follows:

*“Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. **However, in the light of more recent developments not only in State practice but also with regard to accompanying opinio juris, it ought urgently to be reconsidered, also by the Court...** These developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the “Bush doctrine” justifying the pre-emptive use of force. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as “armed attacks” within the meaning of Article 51.”¹⁰⁹ [Emphasis added]*

¹⁰⁴ See: Dugard (2011) at 506; Wedgewood (2005) 99 *AJIL* at 58.

¹⁰⁵ Tams (2005) 16 *Eur J Int Law* 5, pp. 963-978.

¹⁰⁶ 2005 I.C.J. Reports at para. 146.

¹⁰⁷ See also: Dugard (2011) at 507.

¹⁰⁸ *Ibid* at para. 1.

¹⁰⁹ The separate opinion of Judge Simma. 2005 I.C.J. Reports 337 at para. 11.

This opinion clearly shows that there is a challenge with the prevailing interpretation of *Article 51* which needs to be reformed to reflect the state of play.¹¹⁰ The author contends that this view is true position of the law. State practice today shows an overwhelming support for the proposition that self-defence may legitimately be invoked against a non-state actor. Self-defence is in essence, the right of a state to use force in the aversion of an attack. The origin of such an attack should not constitute a reason for the limitation of the inherent right to self-defence. Based on these reasons, the author therefore concludes that current state practice permits a state to invoke self-defence against a non-state actor.

As observed earlier, the use of force whether in self-defense or pre-emptive self-defense, raises issues pertinent to both International Humanitarian Law and International Human Rights Law. Unfortunately, most of the arguments raised by states in defense of their activities particularly against terrorism have missed these crucial considerations. The author contends that any engagement in hostilities ultimately gives rise to humanitarian as well as human rights concerns which must be weighed in the balance to determine its legitimacy. It is therefore important to examine the interaction between International Human Rights Law and International Humanitarian Law in the perspective of targeted killings.

The next chapter will therefore focus on the interaction between International Human Rights Law and International Humanitarian Law with the view of determining the legitimacy of targeted strikes. The chapter will examine the applicable principles of these two branches of international law to determine which one is relevant and when. The chapter will conclude by examining whether the principles of IHL have emerged as customs which are binding on all states.

¹¹⁰ See also: Wilmshurst (2006) at 11.

CHAPTER 3

3. THE INTERACTION BETWEEN IHRL AND IHL

This chapter examines the interaction between IHRL and IHL with the view of determining the legitimacy of targeted strikes. Engagement in armed conflict raises serious concerns pertaining to human rights, the minimization of civilian casualties and the treatment of certain groups of persons for instance combatants and prisoners of war amongst many other considerations. The chapter will highlight the principles of IHL as well as IHRL and will give special consideration to whether targeted killings are prohibited by any rule of customary international law.

3.1. An Overview of IHL and IHRL

It is essential to begin by examining the nature, main principles and objectives of both International Humanitarian Law and International Human Rights Law. Such a distinction will not only aid the understanding of the applicable branch of international law but also help determine whether targeted strikes conform to international law.

3.1.1. International Humanitarian Law (IHL)

Dagard defines International Humanitarian law as a set of public-spirited regulations that aim at minimizing the negative consequences of war.¹¹¹ Its main aim is to stipulate the rules of engagement as well as protect those who are not taking part in the hostilities. IHL is also commonly referred to as the law of war because it principally applies in wartimes. IHL does not dictate whether a state may go to war. That decision rests with a State as influenced by *jus ad bellum*.¹¹² IHL is derived from customary international law and international instruments which are mainly the Geneva Conventions and the three protocols.¹¹³ Almost all nations of the world are party to these treaties or have at least signed one of the instruments.

¹¹¹ Dugard (4th ed. 2011) at 525.

¹¹² *Jus ad bellum* is a set of rules and regulations that determine whether a State may lawfully engage in war.

¹¹³ Advisory Service on International Humanitarian Law to ICRC. July 2004.

IHL draws an important distinction between international and non-international armed conflicts. In the case of *Prosecutor v. Dusko Tadic (Appeal Judgment)*,¹¹⁴ the Appeals Chamber reasoned that an “armed conflict” occurs when a state resolves to engage in armed hostilities with another state or armed group. The distinction therefore depends upon the nature of the parties to the armed conflict. If the parties are sovereign states, the conflict will be characterized as an “international armed conflict.” On the other hand, if one party is a state and the other is an armed group or non-state actor, such a conflict would be classified as a non-international armed conflict.¹¹⁵ It would therefore follow that armed conflicts between States and non-state armed groups for instance the conflict between the US and al-Qaeda constitute non-international armed conflicts.¹¹⁶

In addition to *Article 48 of Protocol 1* which requires adherence to the principle of distinction and proportionality, the other relevant regulation on non-international conflicts is common *Article 3 of the Geneva Convention (III) of 1949*.¹¹⁷ The article requires that individuals who are not actively participating in the armed conflict together with those who have laid down arms for any reason, for example, illness, injury or capture, should be treated humanely. No treatment should be based upon a discriminative criterion for instance race, color, religion or faith, sex, birth or wealth, or any other similar criteria. The Article also prohibits;

“... (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples...”

¹¹⁴ International Criminal Tribunal for the former Yugoslavia (ICTY), IT-94-1-A, 15 July 1999.

¹¹⁵ International Committee of the Red Cross Resource Centre. (ICRC) (March 2008) How is the Term "Armed Conflict" Defined in International Humanitarian Law? Opinion Paper. Available at: www.icrc.org. (Accessed 23 Feb 2013). In terms of this opinion paper, “IHL treaty law also establishes a distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Art. 1 of Additional Protocol II.”

¹¹⁶ It must be noted that although the war between al-Qaeda and the US is generally classified as a “non-international armed conflict,” some aspects of the war in the past may well have been rightfully characterized as an international conflict. These would include incidents like the war against Iraq which was connected to the war on terror. See generally, Milanovic (2007) *86 International Review of the Red Cross* 866 at 376.

¹¹⁷ Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

The conduct prohibited in the above mentioned provisions bear striking similarity with International Human Rights Standards. Most of them are actually formulated as human rights principles and in particular, those dealing with the right to dignity, life and liberty. Given this prominent similarity, there is a need to briefly examine human rights and its sacrosanct principles in order to distinguish and determine its applicability to targeted killings.

3.1.2. International Human Rights Law (IHRL)

Human rights law on the other hand deals with the basic entitlements that are accorded to an individual by virtue of being human.¹¹⁸ It means that there are no conditions attached for an individual to enjoy his or her rights and these rights are enforceable against the world at large. This in essence means that human rights are to be respected at all times except when they are expressly limited by operation of law. These rights were first affirmed by the *Universal Declaration of Human Rights (UDHR)*.¹¹⁹ In the preamble of the UDHR, the General Assembly gave special consideration to principles of human dignity, equality, freedom, world peace and justice as the basis for human rights. Some of the basic human rights that are relevant to the question at hand include the right to equal treatment, life, liberty, expression, property and dignity. The rights contained in the declaration were expounded in two covenants and the three instruments have come to be known as the “International Bill of Rights.” The two treaties are the *International Covenant on Civil and Political Rights (ICCPR)*¹²⁰ and the *International*

¹¹⁸ See: Office of the High Commissioner for Human Rights, “What are Human Rights?” Available at: <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>. There are four major principles on which human rights are founded. 1. *Human rights are universal and inalienable*: The principle of universality of human rights was first emphasized in the Universal Declaration of Human Rights of 1948. It basically states that human rights apply to everyone by virtue of them being human and they cannot be taken away except in certain stipulated circumstances for instance by the operation of the law. It was later set out as a duty of all states in the Vienna World Conference on Human Rights to promote and protect these rights without regard to any discriminatory criteria. 2. *Human Rights are Interdependent and Indivisible*: This principle holds that all rights are to be accorded the same priority. No right is superior to another and in order for a human being to get the full benefit of these rights; he/she should be accorded all these rights. In essence, the deprivation of any one right will ultimately affect the enjoyment of another. 3. *Equal and non-discriminatory*: This principle simply states that human rights should be accorded to everyone without regard to any discriminatory criteria. 4. *Operation of Rights and Obligations*: This principle recognizes the corollary of rights which are obligations. Where there is a right, the corollary is an obligation or a duty to respect that right by not infringing upon it. (Accessed 23 Feb 2013).

¹¹⁹ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

¹²⁰ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with article 49.

Covenant on Social Economic and Cultural Rights (ICESCR).¹²¹ Having briefly examined the content of the two branches of international law, the author will now discuss targeted strikes from the perspective of the right to life.

3.2. Targeted killing and the Right to Life

As discussed in the previous chapters, targeted killing is a premeditated use of lethal force directed at a pre-determined individual who is not in the custody of the targeting state.¹²² The motive in targeted strikes is to kill the target. This raises questions as to the right to life of the target. From a human rights perspective, the UDHR guarantees the inherent right to life.¹²³ This right is to be protected by law and no one may be arbitrarily deprived of his life. On the other hand, under IHL, the life of those directly participating in armed conflict may be taken without warning or attempting to arrest them.¹²⁴ In the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinions*,¹²⁵ the Court held as follows:

*“... The protection of the International Covenant on Civil and Political Rights does not cease in times of war. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life ... is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict...”*¹²⁶ [Emphasis added]

In light of the quotation above, it is vital to determine the law that governs conflicts like the “war on terror” between The U.S. and al Qaeda to ascertain whether targeted killing strikes may be permissible in the circumstances.

¹²¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27.

¹²² Solis (2007) 60 *NWC Review* 2 at 127.

¹²³ Article 3, UDHR; Article 6(1) ICCPR.

¹²⁴ IHL Primer #3 (2008) Harvard University.

¹²⁵ 1996 I.C.J. Reports.

¹²⁶ *Ibid* at para. 23-34.

3.3. A Question of Application

Dugard rightfully contends that although International Human Rights Law (HRL) and International Humanitarian Law (IHL) are considered different branches of international law, they are both based on the same ideology being the respect for human life and dignity.¹²⁷ It suffices to note that IHRL and IHL were developed citing the devastating aftermath of Second World War.¹²⁸ In light of this proximity of ideologies, there appears to be a consensus in international law that human rights considerations will continue to apply during times of war. The author will now examine the different approaches have been used by tribunals, legal practitioners and scholars to explain this interplay.

3.3.1. The *Lex Specialis*¹²⁹ Argument

Generally, IHRL is considered to be the *lex generalis* (the law of usual application) while IHL is the *lex specialis*. The issue in question is which set of regulations applies between the *lex generalis* and *lex specialis*. Can the two branches of law coexist, overlap or are they mutually exclusive? The decision of the I.C.J. in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹³⁰ is instructive. The Court was of the opinion that in the interaction of IHL and IHRL, there are three likely outcomes. Some aspects of a case may be governed by IHL exclusively, another aspect may be subject to only IHRL and yet to some aspects, both IHL and IHRL may be applicable. The Court consequently disagreed with the contention that only the *lex specialis* applied during periods of hostilities. It opined that both IHL and IHRL are applicable to armed conflicts. In applying this reasoning, the author is of the opinion that the *lex generalis* continues to coexist with the *lex specialis*. Only in instances where a contradiction arises will the *lex specialis* trump over the *lex generalis*.¹³¹ In other

¹²⁷ Dugard 4th ed. (2011) at 532.

¹²⁸ Siatitsa and Titberidze (2012) Human Right in Armed Conflict from the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to certain Hypothetical Challenges. Available at: <http://www.adh-geneva.ch/RULAC/pdf/HRL-in-AC.pdf> (accessed 23 June 2012).

¹²⁹ This maxim is full is *lex specialis derogat legi generali* which provides that a particular law will constitute an exception to the general rules under specified circumstances.

¹³⁰ 2004 I.C.J. Reports.

¹³¹ *Ibid* at para. 102-113.

words, IHRL which constitutes the *lex generalis* should continue to apply during times of war until IHL provides an exception which directly contradicts IHRL. An example of such a contradiction is the case in which IHRL prohibits arbitrary deprivation of life while the same act may be permissible under IHL during lawful combat. However, in the absence of such a contradiction, both laws continue to apply to the case.

3.3.2. The Complementary Approach

This approach was proposed by the Geneva Graduate Institute of International and Development Studies in *“The Interaction between Humanitarian Law and Human Rights Law in Armed Conflict.”*¹³² To back this approach, reference was made to the *Human Rights Committee General Comment 31* which also stated that IHRL applies in circumstances where IHL applies. They proposed that the Committee was suggesting that these two branches of international law should not be viewed in isolation but rather their co-application.¹³³

The author contends that IHL and IHRL are both founded on the ideology of protection of life and human dignity. While IHRL applies to both peacetime and armed conflict, IHL only applies in times of warfare. This argument is supported by the report of *International Commission of Inquiry on Darfur*¹³⁴ to the UN. The Commission emphasized the position that IHL and IHRL are complementary and both were applicable to the then war-torn Sudan. The Commission reaffirmed that both branches of law seek to protect life, dignity, liberty, freedom and to prohibit discrimination, torture, cruel and degrading treatment.¹³⁵ While IHRL was applicable always, IHRL only applied in war time. As such, IHL and IHRL should not be seen as opposing but complementing each other.

¹³² Available at http://www.adh-geneva.ch/RULAC/interaction_between_humanitarian_law_and_human_rights_in_armed_conflicts.ph (Accessed 24 June 2012).

¹³³ *General Comment No. 31 of the United Nations Human Rights Committee*, CPR/C/21/Rev.1/Add.13 (26 May 2004).

¹³⁴ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General in Geneva, January 25th, 2005 pursuant to Security Council Resolution 1564 of 18 September 2004. Available at: http://www.un.org/news/dh/sudan/com_inq_darfur.pdf. (Accessed 24 June 2012)

¹³⁵ *Ibid* at p.41, para. 143. The Commission further stressed the point that both IHL and IHRL aim at guaranteeing protections for persons who may be subject to criminal proceedings pursuant to their participation in armed conflict. The report concluded on this point that there was an obligation placed upon states to guarantee these protections in both peace and war times.

The author is inclined to prefer the *lex specialis* approach over the complementary approach but it should be noted that the effect of applying both approaches is likely to lead to the same result. However, the former approach precisely states that human rights law is the law of general application while humanitarian law only applies during armed conflict. As such, the author is strongly persuaded by the *lex specialis* approach.

Having come to the conclusion that IHL and IHRL both continue to apply during armed conflict, another question on the applicability of IHL is raised. As was noted earlier, most states are party to the Geneva Conventions and Protocols. However, a substantial number of states have not ratified all the three Protocols to the Geneva Convention.¹³⁶ Moreover, a considerable part of IHL is based on state practice and usages which other States do not participate in their formulation.¹³⁷ It is conceivable that the unconventional State could allege that it is not bound by IHL since it did not ratify the concerned treaties and would not have regard to them. It is therefore important to examine whether IHL treaty provision and principles have progressively developed into customary international law which is binding on all states.

3.4. Customary International Law

Custom was defined in the *Asylum Case*¹³⁸ as a usage that is constant and uniform. It therefore consists of principles derived from good practices and usages that have been observed over time by civilized societies.¹³⁹ The scope of rules of customary law was limited in the *Nuclear Weapons Case*¹⁴⁰ to actual state practice and *opinio juris*. Customary law is consequently subject to progressive change in order to accommodate contemporary global demands.¹⁴¹ It is an ever shifting paradigm whose validity is to be judged based on present-day state practice. Brierly further explains the nature of custom as follows:

¹³⁶ For the list of the States that have ratified the Geneva Conventions, see the website of the ICRC. Available at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>. (Accessed 25 Feb 2013).

¹³⁷ See also: Maybee L. (2005) Proceedings of the Conference to Mark the Publication of the ICRC Study “Customary International Humanitarian Law” held in New Delhi, 8–9 December 2005.

¹³⁸ 1950 I.C.J. Reports at 266.

¹³⁹ For further reading on customary international law, see: Henckaerts and Doswald-Beck (2009) Cambridge University Press, New York.

¹⁴⁰ 2004 I.C.J. Reports at 963.

¹⁴¹ International Military Tribunal (Nuremberg), Judgment and Sentences (1947) 41 *AJIL* at 219.

“Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction probably, or at any rate ought to, fall on the transgressor.”¹⁴²

It therefore follows that the three elements must be proved in order to satisfy that a usage has progressively developed into a rule of customary international law. These include state practice, uniformity and *opinio juris* which are discussed in the sub-section below.

3.4.1. Elements of Custom

The first requirement is a sufficient degree of generality of a given practice by States or at least evidence of passive State support for that practice.¹⁴³ Although universality of the practice is not necessary, the widespread participation of States must be “representative” to include any “States whose interests are specially affected.”¹⁴⁴ By implication, a regional practice could suffice as evidence to prove that a customary rule of international law has emerged to regulate the inter-state conduct among the concerned parties. State practice therefore, serves as a means of evidencing consent between the states. Such consent goes a long way in showing the presence of uniform and constant practice that should be general and widespread.

Secondly, there must be substantial uniformity of that practice among the participating States. The practice which is alleged to have developed into customary international law should have been applied with a substantial amount of uniformity. Although absolute consistency is not required, there should not be wide discrepancies in state practice.¹⁴⁵ Particularly in an area like self-defense in which all States share a common interest, it is critical that no individual State's practice be disregarded. The shared interest evidences itself in the fact that any state could be potentially attacked or threatened with force at any time.

¹⁴² Briery 6th ed. (1963) at 59. See also: Peterson (2007) 23 *Am. U. Int'l L. Rev.* 2, pp. 275-300 in which he discusses the various theories by which state practice may be admitted as evidencing the development of a custom. The theories discussed include: Compliance and Legitimacy; Rational Choice Approaches; and, Evaluation.

¹⁴³ See: *Article 38 (1) (b)* Statute of the International Court of Justice. This Article states that the Court (I.C.J.), which is seized with the mandate of deciding international disputes submitted to it, is bound to apply “the general principles of law recognized by civilized nations.”

¹⁴⁴ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* 1969 I.C.J. Reports at 4.

¹⁴⁵ Brownlie 4th ed. (1990) at 29; Peterson (2007) 23 *AM. U. INT'L L. REV* 2 at 300.

In addition to the two objective elements, there must be a third subjective element of *opinio juris*. States must adopt a particular practice not due to morality, convenience, courtesy, or political motivation, but genuinely out of a sense of legal obligation.¹⁴⁶ Although some courts assume *opinio juris* where a general pattern of state practice exists, it is submitted that in a matter as sensitive as the defensive use of force, such assumption is not reasonable. Furthermore, under an international legal regime which generally outlaws the use of force except in stipulated circumstances, *opinio juris* becomes a correspondingly important indicator of customary international law.

3.4.2. The Customary Status of IHL

Applying these elements to determine whether a principle has developed into customary law is no simple task. Determining *opinio juris*, for instance, can prove challenging because States do not always reveal the true motivations for their conduct. In addition, States may disagree on the length of time a given practice must have endured before it can constitute customary law. There is no fixed period for a practice to emerge as custom but it is generally agreed that the longer it has been followed, the stronger the claim.¹⁴⁷

Sassòli rightfully argues that the Geneva Conventions and Protocols have evolved into customary law.¹⁴⁸ This position was originally adopted by the I.C.J. in the case of *Nicaragua v United States of America*¹⁴⁹ in which the Court recognized that some treaties gradually develop into customary international law. Parties to an armed conflict regardless of its nature, whether international or non-international, are bound by principles of the law of nations derived from established practice and usage. Court gave particular reference to *Common Article III*¹⁵⁰ that enumerates the “elementary considerations of humanity” and concluded that its provisions had developed into rules of customary international law.¹⁵¹

¹⁴⁶ *Supra* note 58. See also: *North Sea Continental Shelf Cases*, 1969 I.C.J. at 44.

¹⁴⁷ See: *North Sea Continental Shelf Cases*, 1969 I.C.J. at 43.

¹⁴⁸ Sassòli (2006) *Harvard University Occasional Paper Series 6* at 3.

¹⁴⁹ See also: *Nicaragua v. United States of America* (Military and Paramilitary Activities in and against Nicaragua) 1986 I.C.J. Reports.

¹⁵⁰ *Convention (III) relative to the Treatment of Prisoners of War of 1949*.

¹⁵¹ *Nicaragua (Merits)*, 1986 I.C.J. Reports.at para. 218-219. See also: Separate Opinion of Judge Sette-Camara.

In conclusion therefore, the Geneva Conventions and the three Protocols have progressively developed into customary international law. IHL obligations are consequently binding upon all states regardless of whether they have ratified them or not. In addition to these instruments, other settled customs of IHL are equally binding.

Whereas wars were traditionally fought between states, empires, monarchies and kingdoms, in recent eras, most armed conflicts are fought against non-state aggressors. This is predominantly due to the rise of terrorist organizations and rebel factions which promote radical ideologies and oppose governments. While it is conventional that states are bound by principles of IHL, it is necessary to ascertain whether non-state armed groups are bound by the same principles. This stems from the concern that it cannot be expected for one party to be bound by certain rules while the opponent is not.

3.4.3. Are Non-State Armed groups Bound by IHL?

Non-state armed groups do not participate in the drafting and ratification of treaties. However, the principle of equality of belligerents which is a fundamental rule of international law, states that all parties to an armed conflict should be accorded the same rights and duties.¹⁵² The applicability of the principle of equality of belligerents is closely tied to the notion of equality due to the recognition of the role of non-state actors in armed conflict in *Common Article III*.¹⁵³ Although the principle does not appear in the Geneva Conventions,¹⁵⁴ Koutroulis argues that it is founded on both convention and custom.¹⁵⁵ The principle applies to all parties regardless of who is right¹⁵⁶ or why the parties are conflicting.¹⁵⁷ However, this does not suggest that states and non-state actors are perfect equals. Armed groups are not equipped with the resources and structures that are at the disposal of states for instance courts and parliaments.

¹⁵² Koutroulis (2012) *Leiden Journal of International Law (Forthcoming)*.

¹⁵³ Somer (2007) 89 *International Review of the Red Cross* 867, pp. 655-690. Somer also emphasizes that IHL accords equality to states and non-state actors in order to protect individuals who are affected by their actions. This would not imply that the two groups would be presumed equal under municipal law.

¹⁵⁴ Somer (2007) at 666-667.

¹⁵⁵ Koutroulis (2012) *Leiden Journal of International Law (Forthcoming)*.

¹⁵⁶ Sivakumaran (2011) 22 *Eur J Int'l L* 1 at 225.

¹⁵⁷ Greenwood (1998) 1 *Yrbk Int'l Humanitarian L.* 3 at 15.

In the *Reparations Case*,¹⁵⁸ the Court reasoned that international law accords recognition to an entity based on the necessity to determine its rights and duties. Armed groups enjoy certain rights and entitlements out of the operation of IHL. It is submitted that the corollary of a right is a duty or an obligation. Non-state armed groups therefore have a duty to respect the principles of IHL which guarantee them certain protections as well. The law has developed to grant non-state armed groups quasi legal personality in lieu of their participation in armed conflict in order to determine their rights and obligations. In conclusion therefore, non-states armed groups are bound by principles of IHL.

Having discussed the relationship between IHL and IHRL and their application to states and non-state actors, one issue that has been shown to be particularly problematic is state practice. As has been highlighted, state practice is not always uniform and many state-actions remain undisclosed. At times, states even seek to conceal the true motive of their actions. Targeted killing is no exception to this challenge especially when most actions in relation to the practice are conducted with secrecy. Information regarding such missions is usually known to a select few because of the national security considerations.

Although this may be the case, it is necessary to attempt to uncover the practice of some states that have actively carried out these strikes. The next chapter will therefore examine the state practice of the U.S., Israel and Russia regarding targeted strikes. To put this topic in perspective, this chapter will engage in a comparative analysis of the two cases these being *Al-Aulaqi v Obama* and the Israel targeted killing case (*The Public Committee against Torture in Israel v The Government of Israel*), with regard to targeted killings.

¹⁵⁸ I.C.J. Advisory Opinion 1949.

CHAPTER 4

4. STATE PRACTICE ON TARGETED KILLINGS

This chapter will focus on the practice of targeted killing giving particular reference to the conduct of the Israel, the U.S. and Russia. This chapter will also comparatively analyze the U.S. case of *Al-Aulaqi v Obama*¹⁵⁹ and the Israeli targeted killing case (*The Public Committee against Torture in Israel v The Government of Israel*).¹⁶⁰ This chapter will also consider the implications of the judgments in these two cases with regard to state practice on targeted killings.

4.1. State Practice of Targeted Killings

The practice of targeted killing has been carried out by many states throughout the years. However, the open engagement in the practice or its invocation in recent times has significantly reduced. The present-day practice of targeted killing is shrouded in veils of secrecy due to the negative attitude which the international community has adopted against the practice.¹⁶¹ In a considerable number of instances of such killings, the international community has taken a strong stand against it through condemnation.¹⁶² Despite growing international resentment, a few select states have still adopted policies that are permissive of the practice targeted killings. Some of these policies are openly pursued while others are secretive and although some states carry out targeted killings, they will not admit to the practice. The next subsection will examine the Israeli practice of targeted killings.

¹⁵⁹ CA No. 1:10cv01469 (JDB).

¹⁶⁰ HCJ 769/02.

¹⁶¹ Murphy and Radsan (2009) *31 Cardozo Law Review* 2 at 412.

¹⁶² See: David (2002) *Mideast Security and Policy Studies* No. 51 at 1. The Israeli open policy on targeted killing attracted international condemnation. Israel embarked on an open policy of targeted killing since the second Intifada of 2000. The Israeli military employed tactics by which it identified the persons considered terrorists, located them and eliminated them. They did so by use of assault helicopters, gunships, tanks, snipers and car bombs to mention but a few. A large number of Palestinians lost their lives in the course of these strikes and this prompted widespread condemnation of Israel's policy on targeted killings. This was due to the controversy surrounding the targeted strikes and it shows a clear moral progression of society with regard to the use of force by states against individuals.

4.1.1. Israel

The State of Israel until the year 2000, had vehemently denied the existence of any policy on targeted killings or actual practice carried out by its defense forces.¹⁶³ With the growing influence of “terrorist activities” against the State, Israeli officials declared an open policy that was permissive of targeted killings against such perpetrators. The biggest threat posed by the terrorists was suicide bombing.¹⁶⁴ Israel claimed that the reason for this policy was inability of Palestine to check, control and prevent such attacks. They often justified their policy alleging that it properly conformed to International Humanitarian Law. The methods that were used for carrying out targeted killings included airstrikes, assault helicopters, tactical teams and snipers.¹⁶⁵

Israel’s greatest engagement in the policy of the targeted killing occurred in the second intifada. The period that was famous for a series of violent acts is also referred to as the “al-Aqsa intifada.”¹⁶⁶ This chain of violence started in September 2000 when the opposition leader Ariel Sharon visited Temple Mount.¹⁶⁷ This visit was viewed as provocative by the Palestinians because that site which was sacred to both Muslims and the Jews was for so long an area of disputed sovereignty. Many attempts that had been made to negotiate the issue of sovereignty had proved futile and as such, his visit was not positively perceived. This raised tension in the region, finally culminating into violence. The day after the controversial visit, Muslim protestors assembled at the al-Aqsa mosque where they stoned the Jews at the western wall. The Israeli security forces responded by opening fire on them and the clash left five Palestinian protestors dead. In the period to follow, the Palestinians formed a militia that carried out

¹⁶³ Hajjar (2012) Jadaliyya.com. at para 11 cites an example of such denials in 1992 where a government spokesperson refuted the existence of any policy on targeted killings. The official was quoted to have said, “There is no policy, and there never will be a policy or a reality, of willful killings of suspects...the principle of the sanctity of life is a fundamental principle of the I.D.F. There is no change and there will not be a change in this respect.” Available at: www.jadaliyya.com. Accessed 26 Feb 2013.

¹⁶⁴ See: Byman (2006) 85 Foreign Aff., pp. 95.

¹⁶⁵ Alston (2010) *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to the Human Rights Council* at 6.

¹⁶⁶ See: Shamir and Sagiv-Schifter (2006) 27 *Political Psychology* 4, pp. 569–595 for a re-count of the events surrounding the second intifada also known as the “Al-Aqsa Intifada.”

¹⁶⁷ David (2002) *Mideast Security and Policy Studies* No. 51 at 5.

armed attacks on the Israelis, using techniques like suicide bombing.¹⁶⁸ Israel responded firstly by invading Palestinian settlements as well as setting up roadblocks and checkpoints to try and contain these attacks.¹⁶⁹ Israel then devised the plan of eliminating the key figures in the terrorist organizations to try and disband the groups. It was with this that the open policy of targeted killing was embarked upon.¹⁷⁰ It suffices to note that Israel had carried out targeted killings in the past without acknowledging them so in fact this was not a new occurrence. What was new to the operations was the openness by which it was carried out while justifying their actions under both domestic and International Humanitarian Law.

The Israeli operations left a number of prominent Palestinians dead. Some of such leaders who met their fatal endings at the hands of the Israelis include Ali Mustafa, the leader of the Popular Front for the Liberation of Palestine and his Secretary-General, Mustafa Zibri to mention but a few.¹⁷¹ The Israeli forces determined their targets through highly secretive and undisclosed criteria and sought after them with the intention of eliminating them. Although the procedure for the determination was vaguely laid out, the real basis by which such decisions were reached were deemed national security which could not be disclosed. It determined its targets through gathering military intelligence collected by spies and collaborators.¹⁷²

Israel's practice of targeted killings generated both condemnation and debate regarding its legality. Not only did it raise questions of legality but also issues of morality, human dignity and the greater concern of international peace and stability. Retired Major General Giora Eiland¹⁷³ proposed four elements that must be present in order to permit a targeted killing. These are:

¹⁶⁸ Ben-Naftali and Gross (2011) "The Second Intifada and After." *Crimes of War*. Available at: <http://www.crimesofwar.org/a-z-guide/the-second-intifada-and-after/> (Accessed 27 Sept 2012).

¹⁶⁹ Jacobson (2007) 51 *Journal of Conflict Resolution* 5, pp. 772-792.

¹⁷⁰ David (2006) 17 *Ethics & International Affairs* 1 at 117.

¹⁷¹ David (2002) *Mideast Security and Policy Studies* No. 51 at 5.

¹⁷² *Ibid* at 116. The decision by which an individual would be targeted was engineered by the Israeli intelligence. They commenced by the identification of an individual of interest whose details were probed into. Such details would include his/her history of terrorist activity, ties, rank and level of activity within the terrorist organization, their whereabouts and their level of threat to the state amongst many other considerations. After this information is gathered, it is forwarded for review by the Israel Defense Forces (IDF) and the military lawyers. The IDF and its lawyers then made a determination as to whether a targeted killing was appropriate or not.

¹⁷³ Retired Major General Giora Eiland is the former Director of National Security Council Israel.

- i) The target must not be reasonably apprehendable;
- ii) The target should pose a serious threat to the state;
- iii) The killing should not result in high collateral damage, and;
- iv) The target should be in the process of planning, facilitating or carrying out an attack against the state.¹⁷⁴

Israel held negotiations with the Palestinian Authority (PA) regarding the situation in the first months of the inception of the second intifada.¹⁷⁵ It is claimed that the Israelis often communicated names of suspected terrorists to the PA and if they were not apprehended, they would be targeted and killed. Whereas it is desirable that the criteria put forth by Major General (ret) Giora is actually applied, there is no evidence suggestive of its application or otherwise. This is due to the fact that the facts of some cases are too sensitive such that releasing them would seriously compromise national security.

4.1.2. The United States of America

The U.S. is one of the countries that have topped the list when it comes to states that have carried out targeted killings in their “counter-terrorism” campaigns. The U.S. has particularly used Unmanned Aerial Vehicles (UMV’s) commonly known as drones equipped with cutting edge technology and highly trained assault units to carry out targeted strikes all over the world. The U.S. policy against terrorism is unsurprisingly secretive as discussed in the previous chapter. The U.S. adopted a policy of targeted killings against al-Qaeda in response to the events of 9/11 but this does not imply that the threat of terrorism against the U.S. only surfaced in 2001.¹⁷⁶

¹⁷⁴ Hafez and Hatfield (2006) *29 Studies in Conflict & Terrorism* 4 at 7.

¹⁷⁵ Shamir and Sagiv-Schifter (2006) *27 Political Psychology* 4, pp. 569–595.

¹⁷⁶ Facts and Details: “al-Qaeda after the Embassy Attacks and before 9/11.” An example can be drawn from the August 1998 terrorist bombings of U.S. embassies in Tanzania and Kenya which led to the death of 224 people and left more than 5,000 injured. In response to those attacks, the Clinton Administration retaliated by launching several attacks on terrorist strongholds. Most notable amongst the attacks was the operation codenamed Infinite Reach that saw the bombing of a pharmaceutical factory in the then Sudan as well as several terrorist hideouts in Afghanistan. However, operation infinite reach was dubbed a failure because it failed to reach its target yet it cost The U.S. more than 79 million Dollars. Still, al-Qaeda continued to thrive often called on others to join them in the holy Jihad against “The West.” Available at: www.factsanddetails.com/world.php?itemid=2345&catid=58&subcatid=387. (Accessed 01 Oct 2012).

The period between 1998 and 2001 was a time of relative silence from al-Qaeda, and in 2001 they unleashed their biggest blow yet. The events of September 11th 2001 would be recorded as one of the most tragic attacks in U.S. history. It comprised of a series of carefully coordinated airline hijackings with passenger airliners being flown into some of the busiest and iconic buildings in the U.S. for example the World Trade Center towers and The Pentagon. Suspicion was initially cast upon the al-Qaeda terrorist group under the leadership of Osama Bin Laden who later claimed responsibility for the attacks.¹⁷⁷ Pursuant to the attacks on the U.S., Congress passed the Authorization for Use of Military Force (AUMF) Resolution which authorized the Head of State to:

“use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, and to deter and pre-empt any future acts of terrorism or aggression...”¹⁷⁸

This resolution became a basis for a number of invasions by the U.S. and its allies in several states around the world. The U.S. adopted a secret targeted killing policy run by the CIA particularly with the use of drones and ground assault teams.¹⁷⁹ The U.S. has two drone programs run by the CIA and the Air force. These departments are tasked with maintaining the drone fleets and co-coordinating missions. When it comes to the actual criteria employed in determining targets, such information is kept highly confidential.¹⁸⁰ Alston notes with concern that there are no express restrictions setting out the acceptable amount of the force that can be applied on a target. That decision remains at the discretion of the military officials. Nonetheless, some attempts have been made by U.S. officials to justify the U.S. drone program claiming that it conforms to IHL standards of proportionality and military necessity.¹⁸¹

¹⁷⁷ 9/11: Timeline of Events. Available at: <http://www.history.com/topics/9-11-timeline>. (Accessed 01 Oct 2012.)

¹⁷⁸ The S.J. Resolution 23 of 14th September 2001.

¹⁷⁹ Grimmett R.F., *“Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History.”* CRS Report for Congress. Available at: www.fas.org/sgp/crs/natsec/RS22357.pdf. (Accessed 01 Oct 2012).

¹⁸⁰ Alston (2010) *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to the Human Rights Council* at 8.

¹⁸¹ See: Brennan (2012) at para. 37-39.

The other method which has largely been used by the U.S. is the use of highly trained ground tactical teams. In the U.S., tactical operations are run by a division of the military known as the Special Operations Command (SOCOM). It consists of highly specialized units that include the Air Force, Navy Seals, Army Rangers and Green Berets.¹⁸² Closely associated to SOCOM is the Joint Special Operations Command (JSOC)¹⁸³ mainly constituted to carry out and closely study requirements and methods, and plan, train personnel and execute special operations. These Special Forces have been a point of contention particularly with regard to their extra-territorial operations and use of lethal force. Donald Henry Rumsfeld¹⁸⁴ was one of the chief architects of change within the Special Forces Units around 2003. One of the factors that facilitated the change was the inability to invade Afghanistan without the authorization of the CIA. In order to increase its autonomy, SOCOM's mandate was changed from a supporting division to a standalone department. SOCOM was no longer a unit that was called upon to only support other divisions' missions but it attained the capacity to draw up and execute its own missions with the approval of the Secretary of Defense or the President.¹⁸⁵

Previously, before an operation was approved, it had to run through the Regional Unified Command before it would be considered by SOCOM. The chain of command was significantly cut down by virtue of the changes such that the office of the Secretary of Defense was in direct contact with SOCOM. In so doing, the Secretary of Defense has more influence in special operations because of the narrowing of the protocol through which decisions are channeled.¹⁸⁶ This implies that SOCOM is capable of planning and carrying out operations and the only approval that is needed is that of the Secretary of Defense. The danger in such an arrangement is that missions may be planned with due consideration that would have been given had the

¹⁸² See: <http://www.americanspecialops.com> for more informational on the United States Military & Law Enforcement Special operations. (Accessed 24 June 2012).

¹⁸³ GlobalSecurity.org, "Joint Special Operations Command (JSOC)." It is largely believed that JSOC is the division that is charged with the mandate of carrying out operations under the counter terrorism campaign. These would include strikes and raids for instance those that led to Osama's killing on 2nd of May 2011. Osama was said to be the leader of the Al-Qaeda Terrorist Group that claimed responsibility for the September 9/11 attacks on America. Available at: <http://www.globalsecurity.org/military/agency/dod/jsoc.htm>. (Accessed 22 Sept 2012).

¹⁸⁴ Rumsfeld is a politician who served twice as the Secretary of Defence of America under the Gerald Ford administration from 1975 to 1977 and then the Bush administration from 2001 to 2006.

¹⁸⁵ Kibbe (2004) *83 Foreign affairs* 2 at 109.

¹⁸⁶ *Ibid* at 110.

operation been subjected to the scrutiny of the regional command. There is also a possibility of the process being tainted with irregularities driven by ill motive. To entrust the office of the Secretary of Defense with such sole discretionary powers over special operations with minimal accountability is opening the possibility of abuse of office. Although it has been cited that special operations may be prone to abuse, it is submitted that they are highly effective because trained soldiers are able to distinguish military targets from civilian objects with more precision. Having discussed the U.S. position, the study will now look at the Russian position.

4.1.3. Russia

Russia has also had a longstanding conflict against armed groups. Russia's battle against alleged acts of terror has mainly been against persons perceived to be "terrorists" from Chechnya.¹⁸⁷ Its operations that were dubbed "counter-terrorist actions" commenced in 1999.¹⁸⁸ Just like Israel and the U.S., Russia formed and trained tactical units comprised of army commandos whose mission was to locate and either apprehend or kill perceived terrorists. The Russians sought to justify these killings by alleging that they were at war against the terrorists. The major problem with this justification was that the Russians claimed that most of the people from Chechnya were terrorists. By so doing, it would be virtually impossible to distinguish a terrorist from the general population.¹⁸⁹ The Russians refused to claim responsibility for the targeted killings that took place or cooperate with any probes into the allegations.¹⁹⁰ This reaffirms the fact that states are usually secretive on such issues and will not publicly divulge

¹⁸⁷ Saradzhyan S. (2006) Russia's System to Combat Terrorism and Its Application in Chechnya, in Orttung R.W. and Makarychev A. (2006) National Counter-Terrorism Strategies: Legal, Institutional, and Public Policy Dimensions in the US, UK, France, Turkey and Russia. Volume 14 of NATO Security through Science Series - E: Human and Societal Dynamics. ISBN 978-1-58603-695-9.

¹⁸⁸ An example of such strikes against the so-called terrorists was occurred in 2006. See: BBC News (Monday, 10 July 2006) Chechen Rebel Chief Basayev Dies. Available at: <http://news.bbc.co.uk/2/hi/5165456.stm>. (Accessed 27 Feb 2013). The Federal Security Service of Russia claimed that Basayev died in a special operation. However, the rebels claimed the leader was killed along with three others when the truck filled with explosives in which he was riding accidentally detonated. Basayev is alleged to have engineered serious attacks against Russia for example the September 2004 school siege in Beslan, North Caucasus that resulted in the death of 331 people. The then U.S. President, George W. Bush reacted to the death of the rebel leader saying that if in fact he was the one responsible for the school siege that led to the death of 331 people, he deserved to die.

¹⁸⁹ Le Huerou A. and Regamey A. "Russia's War in Chechnya," in Cohen S. (2008) Democracies at War against Terrorism at 222.

¹⁹⁰ McGregor A. (14 July 2004) The Assassination Of Zelimkhan Yandarbiyev: Implications For The War On Terrorism. 2 *Terrorism Monitor* 14.

such information. A Committee of Experts on Terrorism was constituted and its work culminated into legislation in June 2006.¹⁹¹ The Act allowed for the use of armed forces of the Russian Federation to suppress terrorist activity inside and outside its territory on condition that it is sanctioned by the President.¹⁹² A possible justification for this discretion is that terrorists often seek refuge in states with weak legal regimes.¹⁹³ Parliament stressed that they were following the examples set by Israel and U.S. who had adopted policies that enabled them to carry out such strikes. However, what was peculiar about the Russian laws on counter-terrorism was that sole discretion was vested in the President alone.¹⁹⁴ This makes the process prone to abuse. Assuming the president has ill motives towards a certain individuals, he/she may tactfully use these discretionary powers to authorize their execution after all, no review is required.

The Act also adopted broad and widely permissive definitions in regard to terrorism. It defines terrorism as “an ideology of violence with the aim of creating fright in the public of any other forms of violence.”¹⁹⁵ The Act further goes on to cite conduct that constitutes acts of terror and it is no wonder that they are also as broadly listed. These include planning and supporting acts of terror; instigating acts of terror; forming of militias; putting together, training and employing terrorists; providing information to terrorists, and; spreading terrorist ideals and information.¹⁹⁶ These definitions are undoubtedly too wide as to grant the Russian authorities more leverage in determining who should be targeted and why. Such a position is undesirable at law especially when human life is concerned. The Act needed to have been more restrictive in its definitions to reflect modern perceptions of sanctity of human life and dignity.

¹⁹¹ Federal Law No. 35-FZ of 2006. Adopted by the State Duma on 26 February 2006 Endorsed by the Federation Council on 1 March 2006.

¹⁹² See Article 6 which covers the use of Armed Forces of the Russian Federation in the struggle against terrorism.

¹⁹³ See also: Alston (2010) *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to the Human Rights Council* at para. 25-26.

¹⁹⁴ Eke S. (Monday, 27 Nov 2006) Russia law on killing 'extremists' abroad. BBC News. Available at: <http://news.bbc.co.uk/2/hi/europe/6188658.stm>. (Accessed 27 Feb 2013).

¹⁹⁵ *Ibid* at Article 3.

¹⁹⁶ *Ibid* at Article 3(2)(a-f).

Further, defining terrorism as an “ideology of violence” is fundamentally wrong and is in effect a violation of International Human Rights Laws. The Universal Declaration of Human Rights expressly guarantees the right of freedom of thought, conscience and religion.¹⁹⁷ It is submitted that an individual is free to think what they may in order to develop themselves and also to aid the decision making process. Furthermore, an ideology is defined as a manner of thinking of an individual or a group of people.¹⁹⁸ The thought process is essential to human identity and development and ideologies are prone to change based on exposure to new information and situations or environments.

It would follow that to target individuals who are deemed “terrorists” based on their thought processes or the ideals they speak of is a fundamental error. It is submitted that an individual is permitted to think and talk as much violence as he/she may. However, if those thoughts are not acted upon, there is no basis for any action against them. Only until they have actually acted on those thoughts may they be held accountable. In fact, the answer to harmful ideologies is not killing such an individual because it only builds more remorse and hate which buttresses the belief. The best solution is to counter the ideology itself.

4.2. Judicial Decisions on Targeted Killings

Having examined the three different jurisdictions and their policies regarding targeted killings, it becomes important to look at some court decisions to observe the judicial attitude towards the policies on targeted killings. The study will give particular reference to the cases of *Al-Aulaqi v Obama* and the Israel targeted killing case (*The PCT in Israel v Israel*).

4.2.1. *Al-Aulaqi v. Obama*¹⁹⁹

On the 30th of August 2010, Al-Aulaqi brought an action in his representative capacity on behalf of his son against the Obama Administration. The action was founded on the grounds that the defendants had unlawfully targeted his son, Anwar Al-Aulaqi, a dual citizen of the U.S. and

¹⁹⁷ Article 18 of the UDHR.

¹⁹⁸ Mullins W. A. (1993) 26 *Journal of Political Science* 4, pp. 829-831.

¹⁹⁹ CA No. 1:10cv01469 (JDB).

Yemen by placing his name on its kill lists. He sought an injunction preventing the defendants from targeting and killing his son unless he posed a “concrete, specific and imminent threat to life” and no means other than lethal force could be utilized to avert the danger. The defendants moved a motion to dismiss the action on the following grounds that:

- i) The plaintiff lacked standing before the courts;
- ii) The claim was defeated on the political question doctrine;
- iii) The Court needed to exercise its equitable discretion;
- iv) The case did not disclose a cause of action under the Alien Tort Statute (ATS), and;
- v) The case was defeated by state secrets privilege.²⁰⁰

Before deliberating on the issues, the Court took time to reflect on the merits of the case. The Judge noted the fact that the case involved questions on the doctrine of separation of powers regarding the role of the judiciary in the governmental hierarchy, issues of national security and the use of the military as well as foreign affairs. Court posed the following questions:

“How is it that the target seeks to uphold his constitutional rights in a court of the same nation which he wages war against in the name of a holy jihad? How can courts carry out assessments regarding the issue of national security and who may be legitimately be targeted or not?”²⁰¹

By posing these questions, the Court arguably displayed its unwillingness to entertain the matter. Non-the-less, the Court went ahead to address the following issues.

The Issue of Standing

The Defendants claimed that the plaintiff, Anwar’s father, lacked standing to bring this action on behalf of his son.²⁰² They alleged that he had not proved that his son had been denied legal

²⁰⁰ See: *Al-Aulaqi v. Obama* at 2-3.

²⁰¹ *Ibid* at 2.

²⁰² See: Hough (1997) 28 *Cambrian Law Review* at 1. Hough defines the doctrine of standing as the competence of an individual (juristic or natural) to assert a claim before the courts of law. He further reasons that if no person can assert standing under public law, a government has the leeway to act in excess of its powers as long as no designated plaintiff seeks recourse from a competent court.

counsel or the opportunity to appear before court. The plaintiff countered this argument asserting that his son was hiding in Yemen fearing for his life and if he showed himself, he would be executed by the defendants. The defendants also alleged that on several occasions, the target had been assured if he willingly gave himself up to the U.S. authorities, he would not be killed. However, the target was reported to have released a video tape in May 2010 saying that he will never give himself up. He had instead mockingly commended his protégés for waging war on the U.S. and called on others to join the jihad against the West.²⁰³

Court noted that the question of standing was dependent on the issue of whether the plaintiff was entitled to have Court adjudicate the merits of his case. Court restated the test for a plaintiff to prove jurisdiction being that the plaintiff must assert:

- i) An injury as a matter of fact which must be actual and not theoretical;
- ii) That the conduct of the defendant is imputable to the harm or injury suffered, and;
- iii) That there is a possibility of redress from the decision of court.²⁰⁴

Court opined that an injury in fact is one that is suffered personally by the plaintiff. This meant that the plaintiff had to assert his own rights and no action could be based upon another party's rights.²⁰⁵ However, it was held that the prohibition on third party litigation is a prudential limitation and not a Constitutional one. It constituted the general rule for which exceptions might be legally sustainable for example, the "next friend" standing doctrine. However, according to Court, these doctrines had to be narrowly construed so as not to defeat the purpose of the general rule.²⁰⁶ The "next friend" standing doctrine was a type of action in regard to petitions for *habeas corpus*.²⁰⁷ In this action, courts authorized next friends to bring

²⁰³ *Al-Aulaqi v. Obama* at 6.

²⁰⁴ See also: *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

²⁰⁵ In *Allen v. Wright*, 468 U.S. 737, 751 (1984), the Court held that the limitation of standing to those who assert personal injury or interest has two main functions. The first function is to avoid litigation of rights before the Court on behalf of persons who may not even wish to assert such rights. The second function is to ensure that the rightful person whose rights have been infringed is present to assert them. See also: *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

²⁰⁶ *Coalition of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1160 (9th Cir. 2002).

²⁰⁷ A petition for *habeas corpus* is a writ which compels the State to bring a person who is under arrest before a court or judge. For further reading on *habeas corpus*, see: Bator (1963) 76 *Harvard Law Review* 3, pp. 441-528.

petitions on behalf of detained prisoners who could not bring an action by themselves mainly due to mental incapacity.²⁰⁸ In 1948, the doctrine was codified by Congress into statute allowing for “next friend” petitions which had to be signed and verified by the person for whom relief was sought.²⁰⁹ The Court made reference to the fact that two factors must be present in order for the doctrine to be applicable:

- i) The next friend must provide a satisfactory explanation as to why the victim cannot vindicate his rights in person for instance due to mental incapacity, and;
- ii) The next friend should have the best interest of the victim in litigating on his behalf.²¹⁰

On these issues, the Court found the plaintiff had failed to prove that Anwar did not have access to the courts and that he did not act in Anwar’s best interest. As such, the Court found that the plaintiff did not have standing and his action would fail on that fact. Nevertheless, the Court went ahead to deal with the other issues raised by the defendants in the motion to dismiss the plaintiff’s application for an injunction.

The Political Question Doctrine

The defendants alleged that although the plaintiff may have standing, his claim should be dismissed because it raises political questions that are not justiciable. It was alleged that this doctrine fell under the concept of separation of powers for which judicial review would not be allowed. It was further argued that such decisions include policy considerations and the exercise of discretion which a function exclusively entrusted to the executive.²¹¹ Political question is a doctrine that provides that a certain specific constitutional issue should be resolved by a particular political branch and not by the Supreme Court.²¹² On this point, the Court compared the judiciary to other arms of government. It noted that whereas other arms

²⁰⁸ Belk (2004) 53 *Duke Law Journal*, 1749. This article argues that such petitions may still be entertained by courts. It has been extended to accommodate cases where individual access is difficult to obtain for any reason.

²⁰⁹ Habeas Corpus Statute 28 U.S.C. § 2242.

²¹⁰ *Al-Aulaqi v. Obama* at para. 163. The Court also required some form of relationship between the next friend who brings the action in representative capacity and the rightful plaintiff. The *onus* was upon the next friend to prove the above requirements otherwise; he/she would be denied standing.

²¹¹ See also: *Baker v. Carr*, 369 U.S. 186, 217 (1962).

²¹² Choper (2005) 54 *Duke Law Journal*, at 1461.

of government were facilitated by numerous agencies, divisions and facilitators, the judiciary was not so fortunate as to have such divisions to its aid. As such, it lacks the capacity to undertake assessments regarding battlefield decisions. These decisions according to the Court entail policy considerations based on complex information and balancing of interests for which the judiciary does not have such mechanisms at its disposal.²¹³ Furthermore, Court noted that a number of the decisions are made in the battlefield based on the prevailing situation on the ground. It would be repugnant for a judge sitting in a court room to substitute his discretion for that of a commander in a warzone who is trained to make such decisions. Court concluded that matters concerning the military and foreign relations are entrusted to The Executive and such decisions are not reviewable.

The author submits that the position taken by the Court on this issue was unsafe. One of the cardinal functions of court is to protect the rights and interests of individuals who often find themselves against a strong executive. The Court should have been more alive to the role that it plays in the hierarchy of government. It interpreted the doctrine of separation of powers to mean non-interference between the arms of government. However, this is not the chief aim of the doctrine of separation of powers. The doctrine primarily seeks to create a check and balance structure between the three arms of government to ensure that power is not abused.²¹⁴ For example, this is the reason why the three arms are interdependent on each other when it comes to appointments and accountability. Therefore, the intention is not to create autonomy between the arms of government but reciprocity.²¹⁵ The Court should have put the executive to task to justify its position rather than claiming that it did not have the capacity to review such decisions. Moreover, courts have the power to subpoena any evidence or person that it deems pivotal for a particular case to be presented before it. It is submitted that the Court respectfully erred in this regard and should have been more active especially when it comes to defending the rights and liberties of citizens.

²¹³ *Al-Aulaqi v. Obama* at 844.

²¹⁴ Persson, Roland and Tabellini (1997) *112 Quarterly Journal of Economics* 4.

²¹⁵ See: *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)

The Alien Tort Statute

The plaintiff based his claim under the Alien Tort Statute (ATS)²¹⁶ in which he argued that the U.S. policy of targeted killings is a violation of norms of customary international law. Further, the ATS grants District Courts original jurisdiction in claims arising out of the breach of international law. Court held that if the claim was to suffice, the plaintiff needed to show that he suffered a legally sustainable tort which has attained the status customary international law and that the U.S. has waived its sovereign immunity to be sued regarding that tort.

The plaintiff had alleged that the tort suffered by his son was extra-judicial killing which formed part and parcel of customary international law. Furthermore, he claimed that the norm had been codified under municipal law through the Torture Victim Protection Act of 1991.²¹⁷ However, the alleged provision of the TVPA Act²¹⁸ provided for compensation arising out of and extrajudicial killing for wrongful death.²¹⁹ The Court interpreted this section to only apply in cases where the death had already occurred and not a future death. The Court also held that there was insufficient evidence to prove that extra-judicial killings constituted a norm prohibited by customary international law. The Court rightfully stated that the purpose of the ATS is not to provide redress for speculated harm but for harm that has actually ensued.²²⁰ The plaintiff did not also refer to any case or document evidencing the existence of such a norm of customary international law and the Court was of the view that his claim must be dismissed.

The Question of Sovereign Immunity

The question of sovereign immunity arose because the plaintiff grounded his claim under the ATS and the action was brought against the President, Secretary of Defense and Director of the

²¹⁶ 28 U.S.C. § 1350.

²¹⁷ H.R.2092.

²¹⁸ *Ibid* at Section 3.

²¹⁹ *See also: Enahoro v. Abubakar*, 408 F.3d 877, 884-85 (7th Cir. 2005).

²²⁰ *Sosa v. Alvarez-Machain*, 542 U.S. at 728, 732-33. Furthermore, the Supreme Court urged District Courts to exercise great caution in admitting new causes of action under the Alien Tort Statute. It reasoned that mindless adoption of new torts would open the floodgate of legal suits against the government from individuals around the world who might claim they are in fear of government activity.

CIA.²²¹ The Court was of the view that since the matter was brought against the aforementioned officials in their official capacities, the action was consequentially against the state. Their Lordships referred to the decision of *Kentucky v. Graham*²²² in which it was decided that the U.S. may not be sued without express consent otherwise the Court will not have jurisdiction. The Court noted that waivers for sovereign immunity must be expressly laid down in statute and no implications are acceptable.²²³

The Court held that if it could have been decided that the plaintiff indeed had a cause of action under the ATS, his claim would fail on the ground the ATS does not provide for a waiver of sovereign immunity. As such, the action would fail in this regard. The plaintiff argued that his claim against The U.S. could proceed because the Administrative Procedure Act (APA) waived sovereign immunity for claims seeking non-monetary relief.²²⁴ However, the Court found that the APA waiver was available to agencies of the State. The President was not an agency within the meaning of the Act and therefore, the waiver was still not available to the plaintiff.²²⁵

Military and State Secrets Privilege

Lastly, the Court examined the issue of military and state secrets privileges. The defendants alleged that the plaintiff's action should be dismissed on the ground that some of the information sought to be disclosed is sensitive and if disclosed would be detrimental to national security. State secrets privilege places an obligation on courts that in exceptional circumstances, they should prevent the disclosure of sensitive information central to national security even if it means dismissing the case.²²⁶ It was noted that there existed two doctrines governing privileged information. These are the Totten bar and Reynolds privilege.

²²¹ *United States v. Lee*, 106 U.S. 196 (1882). Sovereign immunity is an English doctrine that bars most actions against Federal or State governments. Exceptions to sovereign immunity can only be provided for under statute.

²²² 473 U.S. 159.

²²³ See also: *Lane v. Pena*, 518 U.S. 187, 192 (1996) that emphasizes that any statutory limitation to sovereign immunity must be narrowly construed. Should any uncertainty arise out of the interpretation of such a provision, Court must interpret it in favour of the sovereign.

²²⁴ 5 U.S.C. § 702.

²²⁵ See also: *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992).

²²⁶ See: *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010).

The Totten bar²²⁷ completely dismisses an action because the actual subject matter of the claim revolves completely on privileged information which may not be disclosed. Proceeding with such a matter would inevitably require the disclosure of sensitive information on which it revolves putting national security in jeopardy. On the other hand, Reynolds privilege²²⁸ which did not defeat the plaintiff's action barred him/her from using certain information in adducing evidence because it is subject to state secrecy and may not be disclosed. This doctrine does not completely defeat the claim but prevents bars the reliance on certain evidence which is considered sensitive.

The defendants did not allege that the gist of the case constituted a state secret but rather contended that in addressing the claims raised by the Plaintiff, it would be inevitable to disclose some sensitive information. There was consequently a danger of the exposure of military secrets which would inevitably jeopardize national security.²²⁹ The defendants further argued that the Court did not have to consider the claim of privilege because the matter could be decided on the issues that had already been presented. Court agreed that it was not necessary to reach the claim and decided that the matter be dismissed on the other grounds these being lack of standing, no cause of action under the ATS and sovereign immunity. Court granted the defendants' motion to dismiss the plaintiff's claim.

Implication of the Decision

The Court seemed to begin its deliberation by asking seemingly prejudging questions. The Court's deliberation only further went to show its unwillingness to probe executive decisions. The judiciary is clothed with the responsibility of protecting people's rights and ensuring justice. It should be inclined to protect an individual rather than the state because the individual stands to lose more against a powerful executive. Courts should show the public that they can have confidence in it when they seek redress. For a court to fold its hands and claim that it lacks the machinery to probe executive decisions is to abandon its role as the protector of rights. Courts

²²⁷ *Totten v. United States*, 92 U.S. 105, 107 (1876).

²²⁸ *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

²²⁹ Defendants' Memorandum at para. 46.

are equipped with power to be able to subpoena information that may be needed. It is not enough for the executive to simply allege immunity and get away with it but the judiciary should undertake that examination *in camera* to determine whether the information is indeed sensitive or not.

4.2.2. *The Public Committee against Torture in Israel v. Israel*²³⁰

In this section, the author will comparatively examine the Israeli case and The U.S. case on targeted killings to determine the Israeli judiciary's attitude is towards the practice of targeted killing and its response and state allegations or justifications. This Israeli case bore striking similarities with the American case of Al-Aulaqi. Firstly, the Courts both had to deal with the issue of targeted killing and secondly was that they were both brought against the top executive officials. The Court in the Israeli case started off by noting the fact that Israel pursued an open policy of targeted killing against those it deemed terrorists particularly in the areas of Samaria and Judea.²³¹ These strikes were aimed at exterminating the terrorists were played a role the planning, financing, coordinating and execution of attacks on the state of Israel. It was further noted that on many occasions, these strikes inevitably led to serious loss of innocent civilian lives. As such, the Court posed a question to itself as to whether Israel acts illegally by carrying out such strikes.

Background to the Conflict

Justice Barak recounted the incidents that led Israel to adopt this open policy of targeted killings. He gave mention to the gruesome incidents of the second intifada²³² which comprised of serious terrorist attacks being directed at Israel. The alleged terrorists did not have regard to who their targets were. In fact, they directed their attacks to civilian objects like schools, malls, markets and places of worship other than legitimate military objects.²³³

²³⁰ HCJ 769/02.

²³¹ Preliminary observations made Judge President (Emeritus) A. Barak.

²³² See: Shamir and Sagiv-Schifter (2006) 27 *Political Psychology* 4, pp. 569–595.

²³³ *PCT v. Israel* (judgment of President Barak) at para. 1.

Court further noted that the state employed various techniques in its war on terror. Over and above using direct assaults on terrorists, it adopted a policy by which it aims at crippling terrorist organizations and activity by eliminating its prominent members. The Petitioners adduced evidence to the fact that almost 300 terrorist leaders had been targeted and killed by the Israeli forces and close to 40 strikes had failed. In all these attacks, about 150 civilian casualties had been registered. It was with this policy and its effects in mind that the Petitioners brought this case before the Court. The study will now take a look into the arguments raised by both parties in relation to this case.²³⁴

Petitioners' Arguments

The petitioners contended that Israel's policy on targeted killings is completely unlawful and violate international law principles, the laws of Israel as well as norms of morality.²³⁵ They further argued that this practice also violated the canons of International Human Rights Law of the victims as well as civilians caught in the crossfire. They took the position that the appropriate law that should govern the conflict in the region should not be the laws of war but the laws of policing and law enforcement.²³⁶ They further contended that Israel could not exercise its right to self-defence²³⁷ because this right was only applicable when the aggressor is another state.²³⁸ In their opinion, the territories in question were occupied by belligerents and

²³⁴ *Ibid* at para. 2. The Court referred to Israel's so-called "policy of targeted frustration" of terrorist activity which revolved around crippling terrorist activity by employing selective strikes.

²³⁵ *Ibid* at para. 3.

²³⁶ *Ibid* at para. 4.

²³⁷ Article 51 of the U.N. Charter.

²³⁸ The I.C.J. jurisprudence on the issue of whether self-defence under Article 51 of the U.N. Charter can be invoked against a non-state entity indicates that the defence is only available against a state party. *See: thw Wall Case*, 2004 I.C.J. Reports at para. 138; *Case concerning Armed Activities on the Territory of the Congo*, 2005 I.C.J. Reports at para. 146. However, this interpretation of Article 51 has been widely criticised for being unnecessarily restrictive and for having no basis under the Article. (*See also: Henkin (2005) 45 Santa Clara Law Review* at 821; Koh (2002) 43 *Harvard International Law Journal* at 24-25; Lobel (1999) 24 *Yale Journal of International Law* at 540-547; Murphy (2005) 99 *American Journal of International Law* at 62-69; Murphy (2002) 43 *Harvard International Law Journal* at 50; Paust (2002) 35 *Cornell International Law Journal* at 534-35; Schachter (1989) 11 *Houston Journal of International Law* at 311-12; Wedgwood (2005) 99 *American Journal of International Law* at 57-58). The exercise of self-defense against non-state actors still continues to receive support as evident from contemporary state practice. *See also: The separate opinion of Judge Simma*. 2005 I.C.J. Reports 337 at para. 11). He called upon Court to re-think its restrictive definition of Art. 51 in light of state practice and the current challenges of terrorism.

as such Israel could not claim self-defence against its own population. The petitioners also contended that targeted killings were a violation of the right to life²³⁹ for which no justification could be acceptable. They rightfully asserted that this was a norm enshrined under customary international law.

In the alternative, the petitioners contended that even if the Court found that the applicable law governing the conflict was the laws of war, the practice of targeted killings would still violate principles of international law. According to their submissions, the laws of war only recognise two statuses of persons these being civilians and combatants. They argued that whereas combatants may be lawful targets, they enjoy certain rights thereunder. These entitlements include exemption from trial and the status of prisoner of war.²⁴⁰ On the converse, civilians may not be targeted completely.²⁴¹ They strongly argued that only these two groups of individuals are recognizable under international law and no other class of “unlawful combatants” could be justified. According to the petitioners, persons in a conflict zone are either combatants or civilians. There were no intermediates. If a civilian were to participate in hostilities, he/she would not become an unlawful combatant but a civilian involved in criminal activities for which they may be apprehended and tried under municipal laws.

Further, the petitioners contended that the applicable principle regarding such civilians who take part in hostilities is that they lose their protection for such a period as they take up arms. As soon as they lay down their arms, the civilian protection resumes and they may not be targeted. The petitioners tendered the expert opinion of Cassese,²⁴² who strongly contended that there was no such group as unlawful combatants. An individual is either a combatant or a civilian. According to the expert, the applicable rule was contained in Article 51(3) of the First Protocol which provided that when a civilian takes part in hostilities; he loses his protection for that time.

²³⁹ Article 6(1) of the ICCPR.

²⁴⁰ *See*: Article III, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

²⁴¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.

²⁴² Professor Cassese is an expert in international law and former President of the International Tribunal for the Former Yugoslavia. In his opinion, he discussed the classification of persons under international law. He directed Court’s attention to the Hague Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 in which any person who cannot fall into the class of a combatant is deemed a civilian.

The petitioners also argued that Israel's policy of targeted killings violates the principle of proportionality.²⁴³ According to this principle, it would be unlawful to carry on an attack even though it is directed at a legitimate target if that attack is likely to cause excessive injury to civilians or civilian objects.²⁴⁴ They asserted that this provision reflected the customary law position.

The policy of targeted killings did not have regard to this principle because on several counts, Israeli strikes had resulted in unwarranted deaths and wounding of civilians. To illustrate the lack of proportionality of Israel's targeted strikes, the petitioners cited the example of the killing of Salah Shehade that occurred on the 22nd of July 2002 where the Israeli forces dropped a one tonne bomb in a heavily populated residential area.²⁴⁵ The bomb's shockwaves ripped through the area killing the target, his family and twelve other people. It left a large number of other civilians injured.

They contended that just like in this example, the Israelis used methods that could not discriminate between military objects and non-military objects. Further, the state had used lethal force even when it had other means at its disposal for example when it was possible to apprehend the victim. Many arrests were made by Israeli forces in the area so this went to show that the Israelis had operational ability in the region. It was further contended that there were no reviews made by the state before and after each incident of targeted killings to examine its viability. It even was reported in one case that one man was killed under mistaken identity because he shared a name with the intended target and they both resided in the same village.²⁴⁶ All these contentions went to show that the policy of targeted killings was avoidable in some circumstances but the Israeli forces found it more convenient to simply execute the targets. The study will now examine the respondents' response to the petition.

²⁴³ Article 51(5) (b) of the First Protocol.

²⁴⁴ *PCT v. Israel* at para. 8. The petitioners also contended that the amount of force applied was excessive and the Israeli forces often resorted to targeted strikes even when other means such as arrests could be employed. They alleged that since the Israelis exercised control over the occupied territory, it was possible for them to apprehend the alleged terrorists.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

The Respondents' Response

The respondents first entered a preliminary response to the case in which they contended that in an identical petition before the Supreme Court, was rejected on the ground that the Court could not interfere with the executive discretion regarding matters of national security.²⁴⁷ The Court refused the preliminary objection and the respondents went ahead to respond to the petitioners' arguments.

On the issue of self-defence, the respondents rejected the petitioners' interpretation of Article 51 of the Charter of the United Nations that the defence was only available if the aggressor was another state. The respondents asserted that as a matter of international law, it is now recognised that a state may be legitimately at war with a non-state entity and as such a state may lawfully exercise its right of self-defence against such a group. The respondents also contended that the laws of war do not only apply in the classical definition of war but also in armed conflict whether international or non-international in character.

The respondents also argued for the recognition of a third class of "unlawful combatants" under international law.²⁴⁸ They argued that there are indeed two categories expressly recognised these being civilians and combatants however with these groups come rights, duties and responsibilities.²⁴⁹ In the respondents' assessment, terrorists were combatants who may be legitimately targeted however; they could not be afforded the privileges that follow because they did not perform their duties according to the laws of war. Some of the duties alleged include differentiating themselves from civilians by wearing uniform and bearing distinguishable emblems. As such, they claimed that since they did not adhere to the rules of

²⁴⁷ *Barakhe v. The Prime Minister*, H CJ 5872/01. In this case, the petitioners sought an order from Court to put an end to the Israeli position of targeted killing without going to trial. The Court responded in a brief judgment which stated the "choice of weaponry used by the respondents with the objective of putting to a stop to murderous terror attacks, is not among the matters that this Court sees as its authority to intervene."

²⁴⁸ *PCT v. Israel* at para. 11.

²⁴⁹ This argument also revolves around the debate of whether non-armed groups are bound by international law. Sivakumaran ((2011) 22 *Eur J Int'l L* 1 at 225) argues that international law now recognizes the role played by non-state actors in armed conflict through the recognition of non-international armed conflict. This argument is also supported by the principle of equality of belligerents that states that due to the fact that non-state armed groups derive rights out of the operation of IHL, they are bound by the obligations thereof. It would be impractical for a state to be bound by IHL regulations while a non-state entity is not.

warfare, they were better classified as “unlawful combatants” and not civilians taking part in hostilities.²⁵⁰ The state may be permitted to kill such individuals. The respondents argued in the alternative that should Court reject the existence of unlawful combatants, the terrorists would properly fall under the class of civilians taking part in hostilities who may be legitimately killed. The respondents also contended that the First Protocol did not reflect customary international law and even if it did, Israel was not party to it and therefore killing civilians who engage in hostilities or not was permissible.²⁵¹

On the point of proportionality, the respondents argued that the principle did not forbid combat in areas where civilians were likely to be harmed. The requirement only requires that any harm registered upon civilians should be proportionate to the military objective. They argued that the state adhered to the principle of proportionality and that targeted killings were carried out only as a means of last resort with the aim of preservation of life. The missions are considered by high ranking officials who take issues like collateral damage into account. If the odds of an operation are too high, the mission is cancelled.²⁵²

Judgment of the Court: The Framework

The Court began its examination by looking at the legal framework under which the conflict falls under. Court noted that Israel had been involved in an armed conflict against terrorist organizations in the area of Judea, the Gaza and Samaria right from the inception of the first intifada.²⁵³ The Court therefore had to determine the framework which governed the conflict in the region. Court rightfully noted that this issue was a fairly complex one under international law. The Court conclusively referred to Prof. Cassese’s discussion of the conflict between the state and the terrorist organizations. He was of the opinion that the conflict constituted an international armed conflict and the applicable law is humanitarian law.

²⁵⁰ *PCT v. Israel* at para. 11.

²⁵¹ *Id.*

²⁵² *PCT v. Israel* at para. 13.

²⁵³ See *Ajuri v. The Military Commander of the Judea and Samaria Area*, 56(6) PD 352, 358 (HCJ 7015/02) in which the Court noted that from the end of September 2000, there had been hostilities taking place the regions of Judea and Samaria. These hostilities could not be classified as acts of law enforcement but rather, an armed conflict.

It was affirmed that a significant part of international law that regulates hostilities form part of customary international law and therefore form part of the laws of Israel. The Court held that customary international forms part of Israeli law save where there is a statute under domestic law to the contrary.²⁵⁴ It then noted the various sources of the law of armed conflict which regulate the hostilities between Israel and its aggressors. These are the Fourth Hague Convention, the Fourth Geneva Convention and the Additional Protocol I to the Geneva Conventions.²⁵⁵ Court was of the opinion that all these aforementioned instruments have attained customary international law status and are binding on Israel.²⁵⁶

It was further noted that international law regulating armed conflicts is predominantly a process of striking a balance between two opposing ends. On one end are humanitarian considerations predominantly concerning reduction of harm to civilians while on the other end lies the consideration of military necessity.²⁵⁷ The rationale for this balance is to ensure minimum human rights during hostilities. Court noted that pivotal to the act of balancing is the principle of distinction between civilian and combatants.²⁵⁸

As such, customary international law dictates that parties to an armed conflict must be able to distinguish between military objects from civilian objects. Civilians may not be attacked except for the time in which they take an active part in hostilities. The question that had to be answered then was whether the terrorists were either combatants or civilians.

²⁵⁴ *Afu v. The Commander of IDF Forces in the West Bank*, 42(2) PD 4, 35, HCJ 785/87). The Court laid the principle regarding the application of customary principles of international law. It noted that customary international law forms part and parcel of the law of Israel subject to a contrary provision in Israeli statute. Courts were therefore bound to apply customary international law principles.

²⁵⁵ *Kawasme v. The Minister of Defense*, HCJ 698/80; Sassòli (2006) *Harvard University Occasional Paper Series 6* at 3; *Nicaragua v. United States of America* (Military and Paramilitary Activities in and against Nicaragua) 1986 I.C.J. Reports; *Nicaragua (Merits)*, 1986 I.C.J. Reports.at para. 218-219. The I.C.J. held that that certain treaties progressively develop into customary international law. Parties to an armed conflict must respect these norms as they enumerate the “elementary considerations of humanity. See also: Separate Opinion of Judge Sette-Camara.

²⁵⁶ *PCT v. Israel* at para. 20.

²⁵⁷ *PCT v. Israel* at para. 22 quoting Professor Greenwood who stated as follows: “*International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity.*” (Fleck D. (1995 ed.) *The Handbook of Humanitarian Law in Armed Conflicts* 32).

²⁵⁸ See: Henckaerts and Doswald-Beck (2009) Cambridge University Press, New York.

The Question of Combatants

To answer this question, Court referred to the Hague Regulations²⁵⁹ which gives the criteria for determination on who may be deemed a combatant. These include individuals who:

- i) Are commanded by an individual who is accountable for his juniors;
- ii) Bear a distinguishable emblem that can be noticed from a distance;
- iii) Carry weapons openly, and;
- iv) Observe the principles of humanitarian war.

The Court rightfully concluded that the terrorists waging war on Israel were not combatants for the reason that they are not arranged in hierarchical units although they carry out hostilities. They consequently cannot be accorded prisoner of war status however when apprehended, they can be prosecuted for their conduct. The issue that was to be addressed was whether these groups of individuals could consequently be classified as civilians.

The Question of Civilians

Humanitarian law prohibits the targeting of civilians during hostilities and any loss of civilian life or destruction of civilian object must conform to principles of proportionality and necessity. In the advisory opinion of *The Legality of the Threat or Use of Nuclear Weapons*,²⁶⁰ it was recommended that states must not attack civilian objects. States therefore, have a duty during hostilities by all means to keep the level of collateral damage at its minimum. The term civilian is not expressly defined in customary international law but rather implied. The ICTY in *Prosecutor v. Dusko Tadic (Appeal Judgment)*²⁶¹ was of the opinion that a civilian is an individual who is not taking part in hostilities or one who has laid down his arms either for good or temporarily. It is noticeable that this definition is negative in that that it defines a civilian by what he/she is not. However, it goes a long way in understanding what a civilian is.

²⁵⁹ Article 1, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

²⁶⁰ I.C.J. Advisory Opinion of 8 July 1996 (1996 I.C.J. Reports).

²⁶¹ IT-94-1-A, 15 July 1999.

A New Class of Individuals: Unlawful Combatants

The respondents urged the Court to give formal recognition to a third category of people these being unlawful combatants. They contended that this is a class of individuals who play an active day-to-day role in the hostilities but do not adhere to the principles of the laws of war for instance distinguishing themselves from civilians.²⁶² The Court held that international law did not support the existence of such a group and further, that there was no evidence that would support such a contention. The request was dismissed.

The Court nonetheless went on to discuss the issue of civilians who take part in hostilities. It ruled that the basic principle that the civilian loses his protection for such a time as he takes a direct part in hostilities applies. However, the protection resumes as soon as he lays down his weapon.²⁶³ The Court restated that the basic principle in Article 51(3) had attained customary international law status and formed part of Israeli law.²⁶⁴

Proportionality

The Court then deliberated on the point of proportionality. It noted that the principle of proportionality of military attacks is a principle of customary international law.²⁶⁵ It involved a careful balance between benefit and damage. Court reasoned that the principle of proportionality does not completely prohibit the death of civilians but should such a death or injury occur, its odds should not outweigh the benefit. Balancing against the two opposing sides is not a straight forward task and neither is it a mechanical application. It involves a lot of moral and ethical considerations.²⁶⁶ It must be noted that although Court emphasized the need

²⁶² See para. 26-28, *PCT v. Israel*.

²⁶³ 51(3) of *The First Protocol* ; Article 8(2)(b)(i)-(ii) of the Rome Statute of the International Criminal Court.

²⁶⁴ The ICTY also held that Article 51 of *The First Protocol* has attained customary international law status. (ICTY IT-OT-42-T-22 (2005).

²⁶⁵ Article 51(5)(b) of Additional Protocol I; Henckaerts and Doswald-Beck (2009), Rule 14 at p. 46 in which it was stated that “*Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.*” See also: *Military Junta case* (1985), in which the National Appeals Court of Argentina held that the principle of proportionality is part of customary international law. The principle still applies even in non-international armed conflicts.

²⁶⁶ *PCT v. Israel* at para. 42-46.

to weigh the proportionality of targeted killings, it refrained from pronouncing on whether in its analysis, the strikes carried out by Israel so far had been proportionate or not. The Court concluded by looking at the question of justiciability and judicial review.

The Question of Justiciability and Judicial Review

Court referred back to the preliminary arguments that were submitted by the State Attorney's Office in which they claimed that the military framework of combat is non-justiciable.²⁶⁷ The Court held that the doctrine of non-justiciability does not prevent examination on the basic right to life.²⁶⁸ The questions before the Court did not constitute policy or military questions but whether or not to carry out targeted killings. The Court reasoned that similar types of questions had been entertained by international courts and tribunals for instance the ICTY regarding the duties of armies towards civilians in times of armed conflict. It was held that there was no reason why Israel could not perform the same examination.²⁶⁹ The Court added that the examination of the conduct of armies during hostilities required an *ex post* analysis.

Such an exam had to be objective and Court held that in order to attain maximum objectivity, such assessment must be subjected to judicial review.²⁷⁰ The Court asserted that one of its roles is to review the use of discretion by military officials. It was emphasized that the role of review is not to replace to decision of the military official but to ascertain whether the discretion was exercised in a reasonable manner.²⁷¹ Reference was made to the case of *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*²⁷² in which the Court noted the following:

"Judicial review does not review the wisdom of the decision to take military action. The examination in judicial review is of the legality of the military action. Thus, we assume that the operations in Rafiah are necessary from a military standpoint. The question before us is whether these military

²⁶⁷ *Ibid* at para. 47.

²⁶⁸ *See*: Article 3 of the UDHR and Article 6(1) of the ICCPR.

²⁶⁹ *PCT v. Israel* at para.53.

²⁷⁰ *Ibid* at 53.

²⁷¹ *Ibid* at 57.

²⁷² H CJ 4764/04, 58(5) PD 385, 391.

*operations adhere to the national and international standards which determine the legality of that action. The fact that the action is necessary from a military standpoint does not mean, from the standpoint of the law, that it is legal. Indeed, we do not replace the discretion of the military commander regarding the military considerations. That is his expertise. We examine the result from the standpoint of humanitarian law. That is our expertise.*²⁷³

The Court also noted that there is a Constitutional duty vested in the Judiciary to interpret the law. The Judiciary that is composed of legal experts is the custodian of the law. They should guide officials of the other arms of the government who are usually not conversant in the law, to its proper interpretation. However, the Court cautioned the judiciary not to substitute the executive's discretion for its own. This stance taken by Court is a proactive role which is commendable.

Conclusion

Citing all the issues discussed above, the Court granted the order nisi calling upon the respondents to appear and show cause why the targeted killing policy should not be invalidated. However, the Court was careful in the language it used. It decided that such strikes are not always lawful or unlawful. It remains an objective matter to be decided on a case by case basis. In summary, the Court noted that four elements have to be complied with in order for a targeted killing to be valid:

- i) The authorities must ascertain the identity of the target and the individual must be directly participating in hostilities;
- ii) The authorities must only target and kill the individual as a means of last resort when all other means have failed;
- iii) There must a post-strike analysis into the last mission, and;
- iv) Any collateral damage caused must be proportionate to the military objects.

It is submitted that in comparison to the stance taken by the American Court, the Israeli Court is clearly more conventional of the two. The Israeli Court was more willing to take up its role as

²⁷³ *ibid* at 393.

custodian of the law and rights of vulnerable individuals. The Court even asserted that it duty bound to ensure that the executive interprets the law in the right way. The Court did not shy away from its constitutional duty of review unlike the U.S. Court that merely held that it could not review the decisions of the executive because the constitution had granted them such discretion.

The next section is the concluding chapter which will draw a conclusion from the entire study with the objective of determining the legality of the practice of targeted killings. It will also give some recommendations should the need arise.

CHAPTER 5

5. CONCLUSION

The question that was sought to be answered in undertaking this study was to establish the legality of the practice of targeted killings. In order to answer this question, the study begun by attempting to define what targeted killings actually are. After dealing with the definition and its challenges, the study then examined the nature of targeted killings and the techniques employed in carrying out these operations. At this point it became important to examine some of the policy consideration that enabled states to carry out targeted killings and the defenses suggested in defense of their actions. These were mainly self-defense, pre-emptive self-defense in furtherance of national security. The lawfulness of these defenses was also examined. It was concluded on this issue that these defenses may be legally tenable depending on the circumstances of each case.

It became important at this point to determine which branch of international law was applicable to the practice of targeted killings between humanitarian law and human rights law. It was of the essence that the major principles and aim of each branch of law were examined. After this examination, it had to be determined which law applied to the practice of targeted killings. The study considered two approaches these being the *lex specialis* and the complementary approach. It was concluded that the more desirable approach was the *lex specialis* approach although the complementary approach would lead to the same result.

The study then considered whether it could be said that the practice of targeted killings has evolved into customary international law. The study looked at the requirements for it to be concluding that a particular practice has evolved into customary international law. These considerations were state practice, uniformity and *opinion juris*. It was noted that applying the criteria may not be easy. It was further noted that states usually do not justify their positions when engaging in targeted killings because according to them, the information in the wrong hands may prove damning to national security.

Furthermore, there was no sufficient evidence of state practice that could be established to prove adequate state practice. As such, it was concluded that there was no sufficient evidence to support the development of the practice of targeted killings into customary international law.

Citing the disparity in state practice, it was necessary to examine state practice of three states that have evidently carried out targeted killings these being Israel, Russia and the U.S. This was a take on the policy considerations that have enabled states to carry out targeted killings. It looked at the reasons as to why the states declared such policies and how they utilize their legislature to validate their actions—at least according to municipal law. Two major cases were then looked at to ascertain the attitude of the judiciary in relation to these policies on targeted killings. In the American case, it was evident that the Court was over adhesive to the doctrine of separation of powers, sovereign immunity. The Court was unwilling to review the decision of even the use of discretion. However, in the case of Israel, the Court was more alive to its role of judicial review as well as interpretation of the law. The Court even asserted that it was not permitted to abdicate the aforesaid constitutional roles. It was however noted that the Court opined that it would not substitute the executive's discretion with it but it could review its exercise of its discretion. It was concluded that this is the proper operation of the principle of separation of powers in creating a proper system of checks and balances within the branches of government. The author now moves on to the issue of the legality of the practice.

5.1. The Legality of Targeted Killings

It is of the essence that a pronouncement be made regarding the legality of the practice of targeted killings through the use of drone airstrikes, Special Forces Operations and any other means. It has been concluded that conflicts between states and terrorist organizations are characterized as non-international armed conflict. In these instances, principles of both IHL and IHRL may apply. The following considerations are therefore pivotal when it comes to judging the legality of such operations. The weapons and tactics used should be proportional to the legitimate target, they should be able to distinguish between military and civilian objects and

that the considerations of human dignity, life, fair trial and prohibition of degrading, cruel and discriminative treatment are taken into consideration. As was discussed in the nature of targeted killings, airstrikes and ground assaults all involve the use of lethal force on the victim. It is definite that when lethal force is applied on a human target, fatalities are inevitably registered. This is ultimately arbitrary deprivation of life which may only be acceptable under IHL. The challenge with targeted killings is that at times the strike happens way outside of an active battlefield. In any case, the target might not even be engaging in hostilities at the time he/she is killed.

IHL under common Article 3 provides for protection of persons taking no *active part* in the hostilities. The author submits that the application of Article 3 harmonizes IHL with IHRL in the treatment of such persons. This also applies to those who have laid down their arms for whatever reason. However, humanitarian law does not completely outlaw collateral damage. It requires that such collateral damage must be minimal and proportionate to the military objects. The validity of such a strike would therefore be defendant on the actions of the target at the time he/she is killed. Ultimately, the validity of a strike remains to be applied subjectively based on a case by case basis. It is therefore concluded that targeted killings may not always be lawful and they may certainly not always be unlawful. It takes a serious balancing of policy and morality to determine the legitimacy of an attack.

The decision maker would have to consider a number of factors before authorizing a targeted killing. These would include the choice of weapons, the availability of other measures other than lethal force, the threat posed by the target and the likelihood of collateral damage amongst many considerations. As such, the author agrees with the criteria enumerated in the Israeli case which stipulates four elements that have to be complied with in order for a targeted killing to be valid:

- i) The authorities must ascertain the identity of the target and the individual must be directly participating in hostilities;

- ii) The authorities must only target and kill the individual as a means of last resort when all other means have failed;
- iii) There must a post-strike analysis into the last mission, and;
- iv) Any collateral damage caused must be proportionate to the military objects.

The next subsection proposes the appropriate course of action to ensure that states adhere to this criterion to avoid unnecessary abuse of the practice of targeted killings.

5.2. Enforcement and Recommendations

The author argues that enforcement of the criteria enumerated above is the sole responsibility of an individual state. This is because the State not owes its citizens a duty to guarantee human rights but also exercises control over the military and its operations. It would be more desirable to have the criterion exist within municipal law for better enforcement. This is because States have the necessary resources and machinery at its disposal to enforcement the criteria. It is reasoned that international laws are more easily incorporated into municipal laws.

Therefore, in order to impact municipal laws, the author contends that it is time international law recognized the concept of targeted killings in order to regulate it better. The practice has been carried out for a considerable period of time yet it remains largely upon the discretion of each individual state to adopt, interpret and apply the practice in a way that is convenient to its circumstances. Moreover, some states like Israel have defended their acts of targeted killing on the fact that the world's superpowers like the U.S. and Russia have continuously carried out the practice. The negative effects of the abuse of targeted killings are too grave for the international community to turn a blind eye to its existence. The international community under the leadership of the United Nations needs to create a regulatory framework in which the practice may lawfully be exercised.

Such a framework would have to firstly define what targeted killings entail in order to outline its scope of operation and limit abuse. The framework would have to stipulate the conditions that a state may carry out targeted killings under international law. These considerations

would necessitate conditions for instance the choice of weapons and tactics, the availability of other measures other than lethal force to neutralize the threat posed by the target and the likelihood of collateral damage. As such, it would become easier to nominate institutional framework for instance the Security Council for the monitoring and review of the utilization of the practice. These safeguards are necessary because the practice of targeted killings is a concept that can easily be manipulated especially at the hands of radical leaders. There is therefore a dire need to have it recognized and regulated.

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LIST OF ABBREVIATIONS

AJIL:	American Journal of International Law
Am. U. Int'l L. Rev.:	American University International Law Review
ASIL:	The American Society of International Law
AUILR:	American University International Law Review
AUMF Res:	Authorization for Use of Military Force Resolution
Cardozo J. Int'l & Comp. L.:	Cardozo Journal of International and Comparative Law
Chi. J. Int'l L.:	Chicago Journal of International Law
CIA:	Central Intelligence Agency
Denv. J. Int'l L. & Pol'y:	Denver Journal of International Law and Policy
Eur J Int Law:	European Journal of International Law
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Social Economic and Cultural Rights
I.C.J.:	International Court of Justice
ICTY:	International Criminal Tribunal for the former Yugoslav
JSOC:	Joint Special Operations Command
NWC:	Naval War College Review
PCT:	The Public Committee against Torture in Israel
PLO:	Palestine Liberation Organization
S.J. Res:	Senate Joint Resolution
SOCOM:	Special Operations Command
Tul. J. Int'l & Comp. L.:	Tulane Journal of International and Comparative Law
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
U.S.:	United States of America
Yrbk Int'l Humanitarian L:	Yearbook of International Humanitarian Law