

# THE LEGALITY OF TARGETED KILLING OPERATIONS IN PAKISTAN IN TERMS OF INTERNATIONAL LAW

by

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## Chapter 1

### 1. Introduction and Background

Between war and peace there is nothing.<sup>1</sup>

Cicero's words are as true today as they were during the Roman Republic - as it seems we are always either experiencing a time of war or a time of peace. To define humanity's history in such a way might seem simplistic, yet the majority of history's most significant and defining moments revolve around reflecting on wars that have passed or anticipating wars to come.

In Cicero's time it was relatively easy to determine whether a state of war or peace existed. However in recent years, with the emergence of new technology and more sophisticated tactics, it has become difficult to determine whether a specific conflict can be classified as an armed conflict and therefore constitute a war in the traditional sense. The recent events in Pakistan concerning targeted attacks by the United States against suspected terrorists, illustrates how the lines between war and peace can be blurred leaving international lawmakers to determine how such a situation should be regulated.<sup>2</sup>

War both fascinates and terrifies us, and finding solutions to the ever growing problem of the changing nature of warfare is no easy task. Although war is one of the more evil expressions of humankind, it also seems to be an inevitable one, and regulating this practice plays an integral role in managing the effects thereof.

It has become evident in the past few centuries that the face of war and warfare changes at such a pace that creating measures to regulate conduct during hostilities is now, as much as it has always been, a game of catch up.<sup>3</sup> Recent events, and especially the way in which certain states, such as the United States, are responding to new threats and acts of hostility have proven to be especially

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<sup>1</sup> Grotius, *De Jure*, BK III, ch. XXI, I, i quoting Cicero, 8 Philippian Speeches, ch. I.

<sup>2</sup> For the purpose of this study I use the term targeted killings as including drone strikes as well as other targeted attacks such as night raids. However when discussing the situation in Pakistan I mainly refer to situations involving drone strikes. It is also important to remember that not all drone strikes constitute targeted attacks an example of which would be signature strikes conducted by the CIA.

<sup>3</sup> For example see The Convention on Cluster Munitions 2008 adopted in response to the horrific effects of these inherently indiscriminate weapons in places such as Kosovo and Afghanistan. The effects of these weapons could only be gaged, and therefore their banning could only be effected, after these conflicts.

challenging for the lawmakers of international humanitarian law, international human rights law and *jus ad bellum* - as will be illustrated in this work.

Moreover, the phenomenon of war is a concept which is ever changing and always developing from one war to the next.<sup>4</sup> One example of such a case is the United States' self-proclaimed 'War on Terror', which has pushed the boundaries of conventional conflicts, whether classified as armed conflict under international humanitarian law or not.

After the September 11 attacks on the United States in 2001, President George Bush, as commander-in-chief of the armed forces of the USA, launched the pursuit of what he called a global 'War on Terror'.<sup>5</sup> He also launched a targeted killing campaign against suspected Al Qaeda members, and amongst other things authorised the military to detain and target any person who might be a threat to the United States.<sup>6</sup>

In an address to a joint session of Congress on 20 September 2001 President Bush stated: 'Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.'<sup>7</sup> Furthermore, when President Bush addressed the American people on the evening of 9/11 he stated: 'We will make no distinction between the terrorists who committed these acts and those who harbor them.'<sup>8</sup>

The Obama administration has in recent years discontinued use of the phrase 'War on Terror' and rejected the notion that the US is involved in a 'global war'. However, the Obama administration still maintains that the targeted killing policy as a

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<sup>4</sup> For instance, merely by observing how certain international humanitarian laws change from one war to the next is proof of the fact that international legal scholars are always developing new laws after the fact in order to regulate situations or trends that have developed during a specific war. This fact can be illustrated by considering the different conventions which have been developed to regulate new weapons systems and tactics for example the Biological Weapons Convention. However as will be illustrated in this study the main principles of IHL still remain applicable and providing for specific regulatory measures does not affect the overall applicable legal framework.

<sup>5</sup> The term 'War on Terror' was first used by President Bush on 20 September 2001 at a joint session of Congress see <http://www.middleeast.about.com/od/.../a/bush-war-on-terror-speech.htm> (accessed 28-05-2012 15:22pm).

<sup>6</sup> Human Rights Watch website <http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law> (accessed 12-2-12 16:58pm).

<sup>7</sup> CNN website [http://articles.cnn.com/2001/09/20/us/gen.bush.transcript\\_1\\_joint-session-national-anthem-citizens/4?\\_s=PM:US](http://articles.cnn.com/2001/09/20/us/gen.bush.transcript_1_joint-session-national-anthem-citizens/4?_s=PM:US) (accessed 20-11-2012 09:43am).

<sup>8</sup> George W Bush 'Statement by the President in his Address to the Nation' 11 September 2001 <http://edition.cnn.com/2001/US/09/11/bush.speech.text/> (accessed 05-02-2013 11:25am).

counter - terrorism measure is an integral part of the USA's foreign policy and national security.<sup>9</sup>

With regard to targeted killing operations, especially in Pakistan, it seems that the Obama administration has not only continued the targeted killing policy, but also intensified it. President Obama has stated:

'The Bush administration has not acted aggressively enough to go after Al-Qaeda leadership. I would be clear that if Pakistan cannot or will not take out Al-Qaeda leadership when we have actionable intelligence about their whereabouts, we will act to protect the American people. There can be no safe haven for Al-Qaeda terrorists who killed thousands of Americans and threaten our homeland today.'<sup>10</sup>

The 'War on Terror' and America's accompanying political policies and measures of enforcement have been greatly debated among international legal scholars.<sup>11</sup>

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<sup>9</sup> M V Vlasic 'Assassination & Targeted Killing- A Historical and Post-Bin Laden Legal Analysis' (2012) 43 *Georgetown Journal of International Law* 315 citing S Ackerman *Obama Aide Declares End to War on Terrorism* WASH. INDEP. (06-08-2009 16:10 pm) <http://washingtonindependent.com/54152/obama-aide-declares-end-to-war-on-terrorism> and D Priest *Bush's 'War' on Terror Comes to Sudden End* WASH. POST (23-01-2009) <http://www.washingtonpost.com/wp-dyn/content/article/2009/1/22/AR2009012203929.html>.

<sup>10</sup> K Anderson *Targeted Killing* Hoover Inst. (May 11, 2011) <http://www.hoover.org/publications/defining-ideas/article/5281> (last accessed on 05-02-2013 11:28am).

<sup>11</sup> A J Radsan & R Murphy 'The evolution of law and policy for CIA targeted killing' (2012) 5 *Journal of National Security Law & Policy* 440 citing 'Pub. Comm. Against Torture in Israel v. Gov't of Israel, HCJ 769/02, (Dec. 11, 2005) available at ([http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf)) (Israeli High Court decision subjecting targeted killing in armed conflict to various procedural and substantive controls suggested by human rights law). For a congressional hearing focusing on the use of drones for targeted killing, see *The Rise of the Drones II - Examining the Legality of Unmanned Targeting*, Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform, 111th Cong. 2d Sess. (2010) (including testimony from Professors Mary Ellen O'Connell, William C. Banks, David Glazier, and Kenneth Anderson). For other commentary, see N Melzer *Targeted killing in international law* (2008) 442-444 (providing a detailed survey and assessment of targeted killing under international humanitarian law, international human rights law, and the law governing interstate use of force); P Alston Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Study on Targeted Killings, U.N. Doc. A/HRC/ 14/24/Add.6 (2010) (assessing the legality of targeted killing generally, criticising, in particular, elements of the United States' CIA drone campaign against al Qaeda and the Taliban); K Anderson *Targeted killing in U.S. counterterrorism strategy and law in legislating the war on terror: An agenda for reform* 346 (Benjamin Wittes ed. 2009) (focusing on self-defence as a rationale for targeted killing of terrorists); W C Banks & P Raven-Hansen 'Targeted killing and assassination: The U.S. legal framework' (2003) 37 *University of Richmond Law Review* 667, 749 (concluding that U.S. law treats targeted killing as a 'as a permissible but tightly managed and fully accountable weapon of national self-defence'); G Blum & P Heymann 'Law and policy of targeted killing' (2010) 1 *Harvard National Security Journal* 145 (discussing difficulties of pigeonholing targeted killing of terrorists into the traditional models of armed conflict or law enforcement and suggesting limits on targeted killing should ultimately be 'respectful of the values and considerations espoused' by both models); R Chesney 'Who may be killed? Anwar al-Awlaki as a case study in the international legal regulation of lethal force' (2010) 13 *Yearbook of International Humanitarian Law* (assessing the legality of the United States targeting Anwar al-Awlaki, a dual Yemeni-American citizen, under the U.N. Charter, IHL, and IHRL regimes); W J Fisher 'Targeted killing, norms, and international law' (2007) 45 *Columbia Journal of Transnational Law* 711, 724 (predicting evolution of a legal norm permitting targeted killing in some

Although the American policy of targeted killings has gained much international attention over the past few years, the modern concept of the practice of targeted killing can perhaps be traced as far back as the 1940s. In 1943 President Franklin D Roosevelt ordered the killing of Admiral Yamamoto, the man believed to be responsible for the attack on Pearl Harbour.<sup>12</sup>

In recent times, however, the formal policy of targeted killings was first assumed by the Israeli government in the year 2000, when it started targeting alleged Palestinian terrorists in the Occupied Territories.<sup>13</sup>

The focus of this work - US targeted killing operations in Pakistan - only started in 2004 with the killing of Nek Muhammad Wazir near Wana in Pakistan.<sup>14</sup> To a large extent criticism for the US drone programme increased when the US commenced operations in areas around the border between Afghanistan and Pakistan. Many scholars argue about whether the USA has the authority under

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circumstances); A Guiora 'Targeted killing as active self-defence' (2004) 36 *Case Western Reserve Journal of International Law* 319, 334 (concluding 'targeted killing is a legitimate and effective form of active self-defence'); D Kretzmer 'Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?' (2005) 16 *European Journal of International Law* 171 (contending that IHL should borrow elements of IHRL to provide greater protection against improper targeting of suspected terrorists); R Murphy & A J Radsan 'Due process and targeted killing of terrorists' (2009) 31 *Cardozo Law Review* 405 (contending that CIA drone strikes against non-citizens located outside the United States implicate due process under the U.S. Constitution); S D Murphy 'The international legality of US military cross-border operations from Afghanistan into Pakistan' (2009) 85 *Naval War College International Law Studies* 109 (assessing the legality of U.S. incursions into Pakistan to attack al Qaeda and the Taliban); J J Paust 'Self-defence targetings of non-state actors and permissibility of U.S. use of drones in Pakistan' (2010) 19 *Journal of Transnational Law & Policy* 237 (concluding that a state may, as a matter of self-defence, legally target non-state actors directly involved in armed attacks); M E O'Connell 'The choice of law against terrorism' (2010) 4 *Journal of National Security Law & Policy* 343 (concluding that the United States is not in an armed conflict with al Qaeda and that "[p]eacetime criminal law, not the law of armed conflict is the right choice against sporadic acts of terrorist violence"); M E O'Connell 'Unlawful killing with combat drones: A case study of Pakistan 2004-2009' in S Bronitt (ed) (forthcoming) *Shooting to Kill: The Law Governing Lethal Force in Context* (concluding that CIA drone attacks in Pakistan are illegal); A J Radsan & R Murphy 'Measure twice, shoot once: Higher care for CIA targeted killing' (2011) 2011 *University of Illinois Law Review* 101 (proposing that IHL principles require the CIA to be certain of its targets beyond reasonable doubt and that CIA drone strikes should receive independent review); G Solis 'Targeted killing and the law of armed conflict' (2007) 60 *Naval War College Review* 127, 134-136 (concluding that targeted strikes against civilians are legal only if: (a) the civilian is directly participating in hostilities, and (b) the attack was authorized by a senior military commander).

<sup>12</sup> S R David 'Fatal Choices: Israel's policy of targeted killing' (2002) 51 *Mideast Security and Policy Studies* 2.

<sup>13</sup> P Alston Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on targeted killings A/HRC/14/24/Add.6 (2010) 4 (hereafter Alston report).

<sup>14</sup> M E O'Connell 'Unlawful Killing with Combat Drones A Case Study of Pakistan, 2004-2009' (2009) *Notre Dame Law School Legal Studies Research Paper No. 09-43* 5 citing <http://www.nytimes.com/2004/06/19/world/the-reach-of-war-militants-ex-fighter-for-taliban-dies-in-strike-in-pakistan.html> .

international law to conduct these operations in Pakistan. The USA claims that it has such authority, primarily based on the fact that it is engaged in an armed conflict with Al Qaeda, and, secondly, that it has the right to exercise self-defence against these forces in response to attacks by al Qaeda on the USA and its people.<sup>15</sup>

In Afghanistan for example, these arguments are valid, because of the fact that United States is involved in an armed conflict with al Qaeda in Afghanistan, and Afghanistan gave its consent to conduct these operations in its territory.<sup>16</sup> However as will be demonstrated in this work, the United States cannot make the same arguments in the case of US operations in Pakistan, as the claims of the existence of an armed conflict in this territory and of a right to self - defence cannot be made with a sufficient degree of legal certainty. The position might however be different in the Federally Administered Tribal Areas or FATA as will be discussed later in this work.

Another concern regarding targeted killing operations in Pakistan is the substantial number of unintended targets hit in the course of such operations.<sup>17</sup> In 2009 Leon Panetta, Director of the CIA, responded to the growing criticism of the drone programme stating that the strikes are 'precise' and cause 'limited collateral damage', and that 'it's the only game in town in terms of confronting and trying to disrupt the al-Qaida leadership.'<sup>18</sup>

With regard to the statistics regarding targeted strikes in Pakistan it seems that the numbers of strikes and deaths have decreased in recent years as the graphs below illustrate.<sup>19</sup>

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<sup>15</sup> See note 76 infra.

<sup>16</sup> T Rock 'Yesterday's Laws, Tomorrow's Technology: The Laws of War and Unmanned Warfare' (2011) 24 *New York International Law Review* fn 108 citing J Mayer 'The Predator War' *The New Yorker* 26 October 2009 36 (suggesting that the United States runs two drone programs, one in Afghanistan and Iraq run by the military that is an extension of conventional warfare, and one by the CIA that is not).

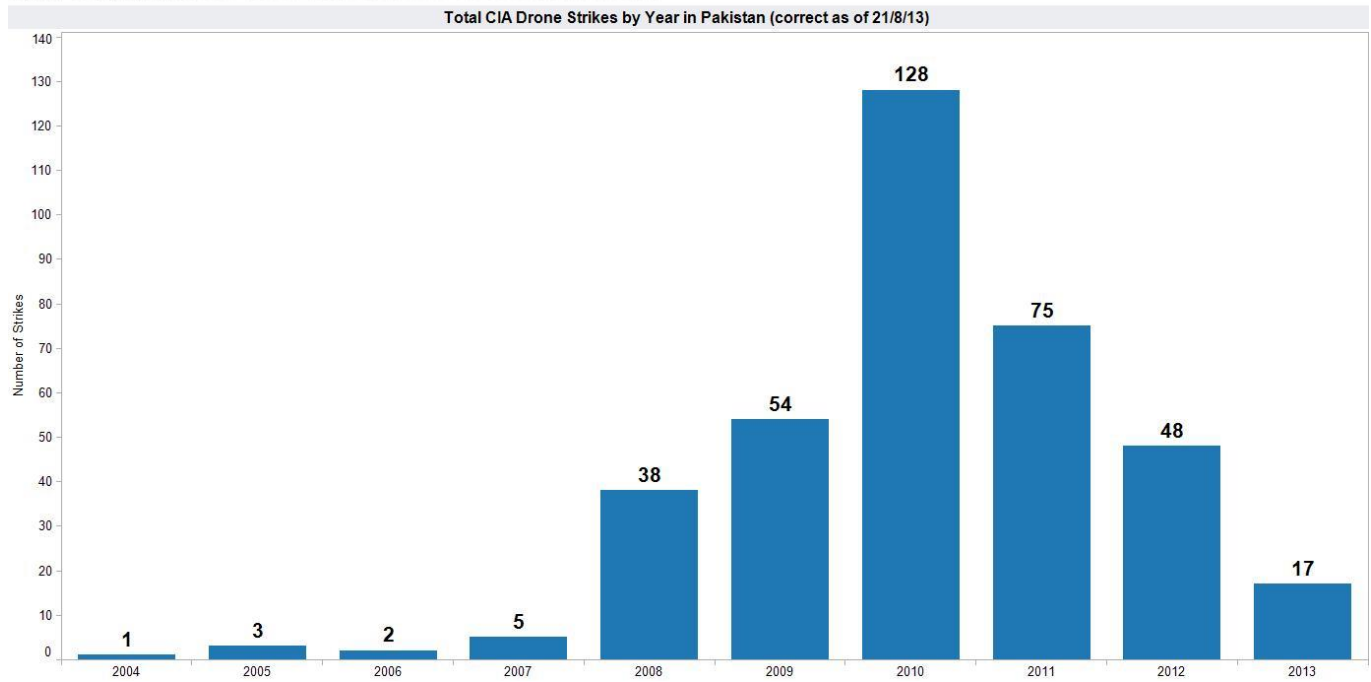
<sup>17</sup> M E O'Connell 'Unlawful killing with combat drones: A case study of Pakistan, 2004-2009' (2009) *Notre Dame Law School Legal Studies Research Paper No. 09-43 2*.

<sup>18</sup> *Id.* M L Kelly *Officials: Bin Laden Running Out of Space to Hide*, June 2009, NPR, <http://www.npr.org/templates/story/story.php?storyId=104938490>.

<sup>19</sup> The Bureau of Investigate Journalism <http://www.thebureauinvestigates.com/2012/07/02/resources-and-graphs/> (accessed 27-08-2013 at 12:45pm).

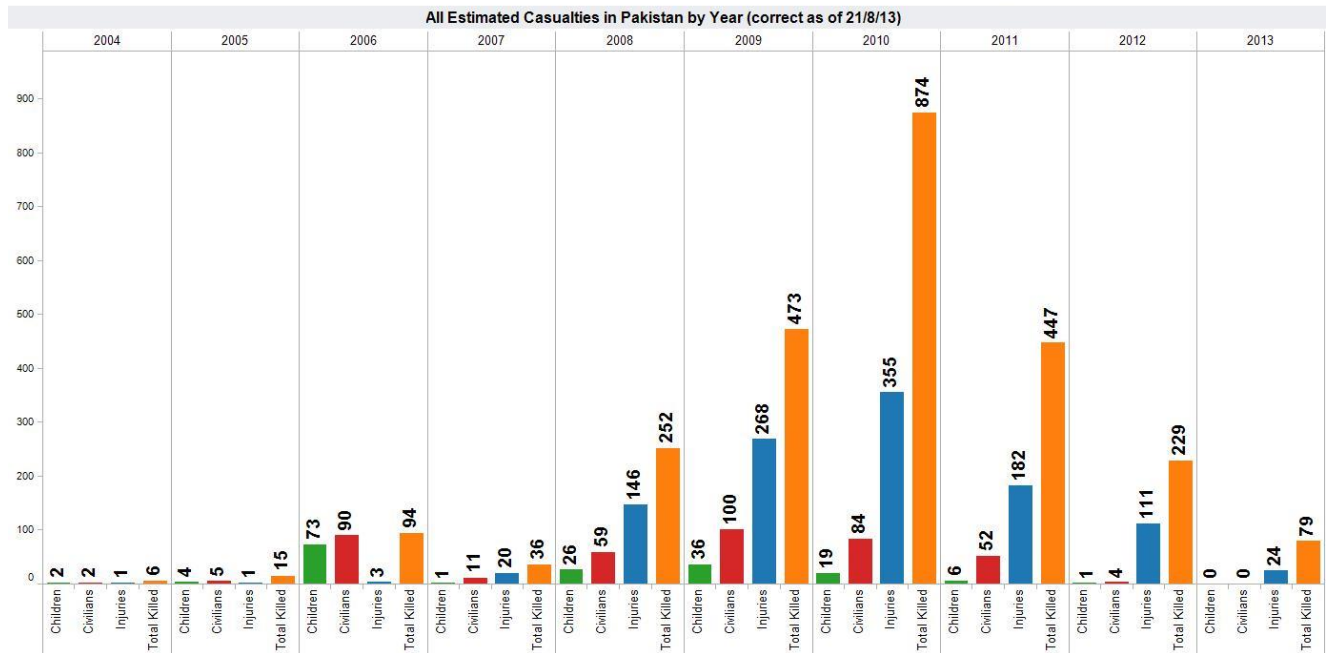


## THE BUREAU OF INVESTIGATIVE JOURNALISM



## THE BUREAU OF INVESTIGATIVE JOURNALISM

Legend: Children (Green), Civilians (Red), Injuries (Blue), Total Killed (Orange)



Eventhough we have witnessed a steady decline in strikes in Pakistan, drone operations often do not have the intended effect of deterring terrorist activities. In the case of Pakistan, they seem to lead to an increased number of military recruits for terrorist organisations, as the attacks lead to retaliation and a desire for revenge.<sup>20</sup> It seems that as one leader or member of a terrorist group is killed, several others are ready to take his place, and in fact are eager to do so with a newfound drive to avenge those members who have been killed.<sup>21</sup> In this sense the US drone operations almost become a type of 'whack-a-mole' exercise - as one leader or member is eliminated, several others pop up to take his place.<sup>22</sup>

Studies have further shown that the attacks lead to instability within the country as a result of the tension between the Pakistani people and the government due to the latter's failure to end these attacks by the US on Pakistani soil.<sup>23</sup>

## 2. Chapter Synopsis

In chapter 2, I will discuss the various legal frameworks applicable to this issue. This will include extensive research into the fields of international humanitarian law, international human rights law and *jus ad bellum*. By researching these fields one can evaluate the legality of this practice, and also discern which specific framework applies to the current policy of targeted killing in Pakistan. In this chapter I will also include a brief discussion of the definition of targeted killing.

In chapter 3, I will discuss state policy surrounding the issue of targeted killings in general, including a discussion of the US policy as well as that of Israel in this regard. I believe to focus on these two states will be illuminating for three reasons: (i) they are two predominant states at present who are engaged in targeted killing practices; (ii) they provide a good example of two very geopolitical different situations that give rise to the use of methods such as targeted killings; (iii) the way

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<sup>20</sup> M E O'Connell 'Unlawful Killing with Combat Drones A Case Study of Pakistan, 2004-2009' (2009) *Notre*

*Dame Law School Legal Studies Research Paper No. 09-43 5.*

<sup>21</sup> *Id* 11.

<sup>22</sup> See L Hajjar 'State of the Drones' *Middle East Research and Information Project* 13 February 2013 at [http://www.merip.org/newspaper\\_opeds/oped021313](http://www.merip.org/newspaper_opeds/oped021313) (accessed 09-07-2013 12:34pm).

<sup>23</sup> See note 19

in which these two states use targeted killings also differ considerably for specific reasons. At the end of this discussion one will be able to ascertain why a case could more easily be made, or perhaps defended, for the policies of one state as opposed to the other.

I will also consider the many legal justifications currently being set forth by states such as the United States to establish whether they carry any weight and could in fact legitimately be used to justify US targeted killing operations in Pakistan.

In Chapter 4 the discussion in the previous two chapters will be considered in unison, in order to apply the facts to the law and determine the legality of this practice. This is an important consideration because one has to establish the effect of such legality or illegality, and possible non-compliance with legal norms, to determine what effect, if any, it will have on the current international framework.

Chapter 5 will deal with accountability on the assumption that the practice of targeted killing is illegal under international law. In the context of US operations it is important to establish which persons or entities could be held accountable, for example, US military personnel or other US agents such as the Central Intelligence Agency (CIA).

Chapter 6 will consist of a conclusion and evaluation of the study as a whole. In the last chapter I will also provide my own opinion, in response to the research question of whether the current international framework is sufficient to regulate the practice of targeted killing.

## Chapter 2

### 1. Legal frameworks regulating the practice of targeted killings

The practice of targeted killings is a complex legal issue that raises multiple questions under international law. By mainly investigating the issue of targeted killing operations in Pakistan, it is easier to establish the relevant legal frameworks and apply them accordingly to evaluate legality. In this chapter I will identify the various relevant legal principles and, fully cognisant that specific questions with regard to this issue are highly debated, I will attempt to address these issues as thoroughly as possible.

The first question to be addressed is whether the situation in Pakistan could be classified as an armed conflict, and, if so, which category of armed conflict. I will also address issues regarding the definition of 'targeted killings' and 'assassination', taking into account that many scholars believe targeted killings could qualify as assassinations.<sup>24</sup>

Secondly, I will analyse the relationship between international humanitarian law and international human rights law to establish which one of these regimes apply, or whether they might both apply simultaneously in this instance.

Thirdly, my focus will turn to the United Nations Charter to address the issues of inter-state use of force including self-defence and anticipatory self-defence, the latter of which some legal scholars and government officials have argued could apply in cases of targeted killings.<sup>25 26</sup>

By setting out these legal principles at the outset, I will be able to apply them in later chapters, to the issue of targeted killings in Pakistan for purposes of establishing whether these operations by the United States have any sound legal basis in international law.

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<sup>24</sup> A P V Rogers & D McGoldrick 'Assassination and targeted killing: The killing of Osama Bin Laden' (2011) 60 *International and Comparative Law Quarterly* 779.

<sup>25</sup> J N Kendall 'Israeli counter-terrorism: "Targeted Killings" under international law' (2001-2002) 80 *North Carolina Law Review* 1079-1080.

<sup>26</sup> Rogers & McGoldrick 787.

## 1.1 Issue of use of force and self-defence under international law (*Jus ad Bellum*)

The United Nations Charter addresses inter-state use of force and the issue of self-defence in Article 2(4) and Article 51, respectively.

Article 2(4) provides:

‘All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations.’

Article 51 provides:

‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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...’

From the provisions in Article 51 and Article 2(4) it follows that one of the justifications by a State to use force in the territory of another State is self-defence in terms of Article 51 of the UN Charter, by consent from the other State or by authority granted by the Security Council under Chapter 7. Special authorisation by the Security Council is, however, not relevant here, since it did not in fact grant any such authority to the USA in the case of Pakistan. It has also been established that in terms of international law, an armed attack need not emanate from another State; non-State armed groups are also included within the purview of Article 51.<sup>27</sup> However the inclusion of non-state actors under this provision is controversial and some authors argue that the inclusion is against the purpose of the Charter and leads to increased attacks on a global scale against non-state actors under the guise of self-defence.<sup>28</sup>

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<sup>27</sup> M Wong ‘Targeted killings and the international legal framework with particular reference to the US operation against Osama Bin Laden’ (2012) 11 *Chinese Journal of International Law* 136 citing Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda) Judgment 19 December 2005 (2005) ICJ Reports 168, 223, para.146.

<sup>28</sup> A Masferrer (ed) *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* 2012 p.10

Another important justification for using self-defence against actors in a foreign territory is that of consent by the state in whose territory the attacks are taking place.<sup>29</sup>

The US government contends that its actions fall within the exception of self-defence under Article 51. However, if the States in which these targeted killing operations take place did not consent to the use of force within their territories, the United States' actions could constitute a *prima facie* breach of Article 2(4) of the Charter and the sovereignty of these States.<sup>30</sup>

If we consider the example of Pakistan, the US government has publicly admitted that it had not obtained, or even sought to obtain, consent from Pakistan to engage in targeted killing operations within Pakistani territory, and the former president of Pakistan has concurred.<sup>31</sup> However it seems that the Pakistani government condemns certain strikes in public yet praises them in private.<sup>32</sup>

Furthermore with regard to contentions of self-defence, one struggles to make sense of the United States' actions while claiming the right to self-defence. One would not expect a State acting in self-defence - as the United States claims to do - to deliberately seek out the threat in other countries where it has established permanent bases from which to counter such threats or so-called imminent attacks. This becomes clear when one compares the United States' actions to the conflict between Israel and Palestine, for example. In the latter case one can more easily comprehend the claim by Israel of attacks in self-defence, considering the constant threat of terrorist attacks from several sources, all in very close proximity to the State of Israel.<sup>33</sup> A closer analysis therefore seems to show that the targeted killing policy in Pakistan has become less about defending the lives of the American people than about defending the pride and status of the American government.

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<sup>29</sup> A S Deeks 'Consent to the Use of Force and International Law Supremacy' (2013) 54 (1) *Harvard International Law Journal* 10.

<sup>30</sup> Rogers & McGoldrick 787.

<sup>31</sup> *Id.*

<sup>32</sup> S Nawaz 'Drone Attacks inside Pakistan Wayang or Willing Suspension of Disbelief?' (2011) 79 *Georgetown Journal of International Affairs* 79-80.

<sup>33</sup> See global security website for all active terrorist organisations in Palestine at [http://www.globalsecurity.org/security/profiles/terrorism\\_organisation\\_home.htm](http://www.globalsecurity.org/security/profiles/terrorism_organisation_home.htm) (accessed 12-02-2013 at 20:47pm).

## 1.2 The existence of an armed conflict to which IHL applies

According to Harold Koh, former US State Legal Advisor, two justifications exist for the US policy of targeted killings: (i) the USA is engaged in an armed conflict with Al Qaeda and its associated forces; and (ii) the USA is acting in self-defence in response to attacks by Al-Qaeda against the USA and its people.<sup>34</sup>

In addition, the United States Supreme Court in the case of *Hamdan v Rumsfeld*<sup>35</sup> held that, at the very least, the treatment of suspected Al Qaeda members and Yemeni citizens apprehended in Afghanistan should be governed by common article 3 of the Geneva Conventions of 1949. This would imply a state of non-international armed conflict between the USA and Al Qaeda.<sup>36</sup> I will now consider international legal norms to evaluate if the position of the US government indeed constitutes the true state of affairs.

I will first consider international humanitarian law (IHL).

Common article 3 of the Geneva Conventions of 1949 and Additional Protocol II to the Geneva Conventions govern non-international armed conflicts. This Protocol defines non-international armed conflicts as conflicts which:<sup>37</sup>

'take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'

The Protocol also clearly states that it does not apply to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature...'<sup>38</sup>

It is the argument of the American government that its conflict with al Qaeda is governed by article 3 of the Geneva Conventions. Some scholars, however, disagree and argue that the conflict between the United States and al Qaeda is too sporadic

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<sup>34</sup> Wong 129-130. See also speech by H Koh at the Annual Meeting of the American Society of International Law, Washington DC, 25 March 2010 ([www.state.gov/s/l/releases/remarks/139119.htm](http://www.state.gov/s/l/releases/remarks/139119.htm)).

<sup>35</sup> *Hamdan v. Rumsfeld* 548 U.S. 557 (2006)

<sup>36</sup> Rogers & McGoldrick 779.

<sup>37</sup> Article 1(1) of Additional Protocol II to the Geneva Conventions

<sup>38</sup> Common Article 3 of the Geneva Conventions of 1949, Additional Protocol II to the Geneva Conventions of 1949.

and therefore fails to meet the relevant standard for a non-international armed conflict, as set forth above.<sup>39</sup> For instance in the Tadic case it was stated that for a conflict to constitute a non-international armed conflict there has to be protected violence by non-state groups and these groups have to be organised groups.<sup>40</sup>

There are also scholars who argue that the policy and subsequent practice of targeted killing are more representative of law enforcement mechanisms than acts occurring during armed conflict. The rationale behind this argument is that targeted killings, like law enforcement mechanisms, are based on individual guilt rather than the status of a person, which is critically important in an armed conflict situation where someone can be classified as either civilian or combatant, and targeted according to such status.<sup>41</sup>

However, unlike law enforcement, with targeted killings there are no guarantees of due process in the form of a fair trial or proper assessment of guilt by an objective third party.<sup>42</sup>

Scholars are also critical of IHL applying in the conflict between the United States and al Qaeda because of a certain threshold of violence not being attained. Scholars like Paulus and Vashakmadze argue that:<sup>43</sup>

‘a single act, even an attack as ferocious as those of 9/11 should not trigger a shift from a human rights regime to a humanitarian law regime and render the whole body of the law of armed conflict applicable’.

These scholars argue that the conflict between the United States government and al Qaeda has to cross a certain threshold of violence - not yet reached - before it can be classified as an armed conflict in terms of which IHL applies.

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<sup>39</sup> Rogers & McGoldrick 779. See also *Final report on the meaning of armed conflict in international law*, International Law Association Use of Force Committee (August 2010) at <http://www.ila-hq.org>.

<sup>40</sup> Qualification of armed conflicts at RULAC [http://www.geneva-academy.ch/RULAC/qualification\\_of\\_armed\\_conflict.php](http://www.geneva-academy.ch/RULAC/qualification_of_armed_conflict.php) (accessed 12-09-2013 11:29am) also see Prosecutor V. Tadic Case No. IT-94-1-A. 38 ILM 1518 (1999). International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999

<sup>41</sup> G Blum & P Heymann ‘Law and policy of targeted killings’ (2010) 1 *Harvard National Security Journal* 148.

<sup>42</sup> *Id.*

<sup>43</sup> A Paulus & M Vashakmadze ‘Asymmetrical war and the notion of armed conflict –A tentative conceptualisation’ (2009) 91(873) *International Review of the Red Cross* 95, 118.



It is generally accepted that IHL allows States greater scope to target and kill than does International Human Rights Law (IHRL). This may very well be the reason why the US government is more inclined to classify these killings as subject to IHL, which provides greater protection to a State under international law.<sup>44</sup>

I agree with the above-mentioned view of Paulus and Vashakmadze and also with the view that the conflict is too sporadic to meet the relevant requirements of a non-international armed conflict. Furthermore the events that led to this policy of targeted killing, namely the 9/11 attacks, occurred more than 10 years ago and continuing a policy in response to those events more than a decade later illustrates how a claim a self-defence cannot succeed.

### 1.3 International human rights law

If the practice of targeted killings were to be classified as a law enforcement mechanism, as opposed to an element of armed conflict, the relevant legal regime applicable would be IHRL instead of IHL.<sup>45</sup>

In law enforcement, operations governed by IHRL, one only has the authority to kill if the target poses a serious and immediate threat to the life of another person; any killing in the absence of such authority would amount to an extrajudicial killing.<sup>46</sup> Therefore, a killing in a law enforcement operation has to meet the requirements of necessity and proportionality. In terms of IHRL a targeted killing could by its very nature not be lawful because of the fact that it has, as its principal aim, deliberate killing without regard to necessity or proportionality.<sup>47</sup>

The relevant treaty provision applicable with regard to the issue of the right to life is the International Covenant on Civil and Political Rights (ICCPR), which states in Article 6(1): 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'<sup>48</sup>

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<sup>44</sup> A F Radsan & R Murphy 'The evolution of law and policy for CIA targeted killing' (2012) 5 *Journal of National Security Law & Policy* 449.

<sup>45</sup> Radsan & Murphy 448.

<sup>46</sup> *Id.*

<sup>47</sup> Alston Report par 32-33.

<sup>48</sup> Article 6(1) of the International Covenant on Civil and Political Rights.

According to article 2(1): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant ...'<sup>49</sup>

The United States government claims that the provisions of the ICCPR do not apply because the attacks are being launched outside US territory. It also claims that the ICCPR has no extraterritorial application and cannot apply together with IHL in light of the fact that the latter is the *lex specialis*.<sup>50</sup>

However, the Human Rights Committee has made clear that the ICCPR applies to any situation of armed conflict where IHL is applicable, and the two legal regimes are complementary. In this regard the following comment by the Human Rights Committee (HRC) proves to be especially insightful in light of the debate regarding extraterritorial application of the Covenant.<sup>51</sup>

The Human Rights Committee declared in General Comment 31: <sup>52</sup>

'State parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party....'

'This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory...'

According to the comment above, in order to determine the potential liability of the United States in terms of the ICCPR, one has to determine whether the targets of these operations were in the effective control of the United States or not. In the case of the killing of Osama Bin Laden, one might be able to answer this question in the affirmative, based on the facts which have already been disclosed.<sup>53</sup> However, the

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<sup>49</sup> *Id.* Article 2(1).

<sup>50</sup> Wong 158.

<sup>51</sup> Human Rights Committee General Comment 31 UN Doc CCPR/C/21/Rev. 1/Add 13 (2004) par. 10 See also M Wong 158.

<sup>52</sup> Human Rights Committee General Comment 31 UN Doc CCPR/C/21/Rev. 1/Add 13 (2004) par. 10 See also M Wong 158.

<sup>53</sup> BBC News reports that, according to US government and Navy Seal accounts Bin Laden was not armed when the Seal Team entered his room in the compound where he was hiding in Islamabad Pakistan. Reportedly there was no fire fight between Bin Laden and the Seals and the only people in the room with him were his two wives. It seems that there was no real threat from Bin Laden and that he was outnumbered by Seal Team members all heavily armed, which suggests he was indeed under

facts surrounding other targeted killing operations are not equally clear. Any information regarding these other operations can only be obtained from the US government, which seems to be less than forthcoming with such information.

#### 1.4 Air law, airspace sovereignty and the Chicago Convention of 1944

Another issue which should be discussed, albeit not in great detail for purposes of the current study, is the issue of airspace sovereignty and the applicability of the Chicago Convention.<sup>54</sup> This Convention, which applies only in peacetime, provides definite rules which can assist in determining whether the United States' current operations in Pakistan are lawful pursuant to international law. The applicable provisions of this Convention are set forth below:

Article 3(1): 'No state aircraft of a contracting State shall fly over the territory of another State or land thereon without the authorization by special agreement or otherwise, and in accordance with the terms thereof.'

Article 8: 'No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a Contracting State without special authorization by that State...'

Article 36: 'Each Contracting State may prohibit or regulate the use of photographic apparatus in aircraft over its territory.'

The conclusion which can be drawn from the relevant sections of this Convention is that the US would have had to have the express consent of the government of Pakistan to be able to justify its various targeted killing operations on Pakistani territory. As stated earlier, the United States has previously stated that it has never sought nor received consent from Pakistan to conduct such operations on their territory.<sup>55</sup>

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the United States' "effective control" see BBC News South Asia at <http://www.bbc.co.uk/news/world-south-asia-13257330> (accessed 14-02-2013 at 12:17 pm).

<sup>54</sup> The Convention on International Civil Aviation 7 December 1944.

<sup>55</sup> Rogers & McGoldrick 787.

## 1.5 Targeted killing and assassination

Many scholars have formulated definitions of targeted killing, and some of these definitions contain the same elements. From these various definitions it becomes possible to distinguish certain elements that form an integral part of what constitutes a 'targeted killing', namely the killing has to be individualised, premeditated and intentional.<sup>56</sup>

Even though most people still associate targeted killings with drones, these unmanned vehicles are merely a modern method of conducting such operations. America has since the late 1900s conducted numerous targeted killing operations. One such operation was directed at former Libyan President Muammar Gaddafi. Unfortunately his daughter was erroneously killed in this failed attempt on his life. This serves as a perfect example of how lethal these operations can be when 'civilians' get caught in the crossfire.<sup>57</sup>

The domestic regulation of assassination started with the promulgation by President Ford of an Executive Order banning assassination. This order was later incorporated into Executive Order 12333 (1981), which was eventually signed by President Ronald Reagan.<sup>58</sup>

However, the order, which remains in effect to this day, does not provide a sufficiently comprehensive definition of 'assassination'. Therefore, it could be difficult for the public in general, and US agents conducting these operations in particular, to determine whether the conduct of the United States with regard to targeted killings constitutes illegal acts or not.<sup>59</sup>

Part 2.11 of Executive Order 12333, which prohibits assassination, states as follows: 'No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.'<sup>60</sup>

As demonstrated by the wording, the Executive Order was poorly drafted as it does not provide any guidance as to which actions constitute 'assassination', leaving

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<sup>56</sup> Supra notes 10 and 12.

<sup>57</sup> Blum & Heymann 149.

<sup>58</sup> *Id.*

<sup>59</sup> N Melzer *Targeted killing in international law* Oxford University Press (2008) 45.

<sup>60</sup> [www.archives.gov/federal-register/codification/executive-order/12333.html#2.11](http://www.archives.gov/federal-register/codification/executive-order/12333.html#2.11) (accessed 25/09/2012 11:56 am).

US agents with an overly broad scope of interpretation. In fact, the provision is so ambiguously drafted that it raises the question whether it might not have been drafted ambiguously intentionally, considering that no sensible lawmaker could have conjured up such a vague definition for such an important crime.

According to other American legal doctrines, a distinction can be drawn between peacetime assassination and wartime assassination. Peacetime assassination is defined as the 'killing of a selected individual, both politically motivated and illegal'. Wartime assassination is defined as the 'treacherous killing of a selected individual belonging to the adversary'.<sup>61</sup> The definition of wartime assassination is echoed to some extent in the definition provided in US Field manual 27-10 (1956) which states: 'It is especially forbidden to kill or wound treacherously an individual belonging to the hostile nation or army'.<sup>62</sup>

The 'murder by treachery' prohibition is also contained in the Brussels Declaration (1874), article 23(b) of the Hague Regulations and the Oxford Manual on the Law of War.<sup>63</sup>

One can ultimately conclude that peacetime assassination has a political focus and is illegal. Wartime assassination involves targeting a specific individual by utilizing treacherous means, which will also amount to an illegal act.<sup>64</sup> It can therefore be said that assassination is merely one form of targeted killing, one that is illegal whether conducted in times of peace or times of war under circumstances involving treachery.

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<sup>61</sup> Melzer 46.

<sup>62</sup> Melzer 47-49.

<sup>63</sup> Vlasic citing M N Schmitt 'State-sponsored assassination in international and domestic law' (1992) 17 *Yale Journal of International Law* 629 citing *The laws of war on land* (1880) (U.K.).

<sup>64</sup> *Id.* p.280.

## 1.6 Definition of targeted killing

The notion of targeted killing is hardly a new concept in international law, yet no uniform definition of the term currently exists.<sup>65</sup> Many legal scholars, however, have provided their own definitions. In my opinion it is more sensible to consider current definitions and modify or expand them, rather than putting forth yet another definition which further complicates the issue and does not contribute to finding a more universally accepted standard. What follows are definitions suggested by three international legal scholars. Philip Alston, the previous Rapporteur on Extrajudicial, Summary or Arbitrary Executions, defines targeted killings as follows:<sup>66</sup>

The intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.

Professor Gary Solis defines targeted killing quite differently. He states:

A reasonable definition is: 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.<sup>67</sup>

Nils Melzer defines targeted killing as:

a use of lethal force by a subject of international law that is directed against an individually selected person who is not in custody and that is intentional, premeditated, and deliberate.<sup>68</sup>

While Solis provides an extensive definition of targeted killings, his definition is, in my opinion, very subjective and clearly reflects an American bias. By using the phrase: 'in the context of an international or non-international armed conflict', he presupposes that targeted killings occur only in an armed conflict situation, whether international or non-international. This statement in itself is disputed by many

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<sup>65</sup> G Solis 'Targeted killing and the law of armed conflict' (2007) 60 *Naval War College Review* 127.

<sup>66</sup> Alston Report p.3.

<sup>67</sup> Solis 127.

<sup>68</sup> N Melzer 'Targeted killing in international law' (2009) 20 *European Journal of International Law* 449.

scholars,<sup>69</sup> but not by the US government which insists that an armed conflict does exist wherever these attacks occur.<sup>70</sup>

Alston's definition, on the other hand, which is similar to Melzer's, reflects a more accurate representation of what this practice entails. It accentuates the fact that these attacks are deliberate, premeditated and directed at specific individuals, without making reference to any type of conflict which may exist.

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<sup>69</sup> See for example M E O'Connell 'Defining armed conflict' (2008) 13 *Journal of Conflict and Security Law* 394.

<sup>70</sup> See statement by H Koh, US Department of State Legal Advisor at <http://www.fed-soc.org/.../the-use-of-drones-and-targeted-killing-in-counterterrorism> (accessed 28-05-2012 15:41pm).

## Chapter 3

### 1. State policy and justifications

When evaluating state policy it seems that one has to consider what states say as well as what they do. It would be ideal if we lived in a world where statements by politicians and world leaders could be taken at face value. Unfortunately, more often than not, the underlying message to their statements is the most important one. 'Actions speak louder than words' - this adage is probably most prominent in the field of international politics. In this context I believe one could classify the practice of a state as what states actually do, and state policy as what states say they do.

In this chapter I will consider the policies of certain states currently engaged in targeted killing operations, as well as current state practice. As part of this chapter I will consider the state policies and practises of the United States, specifically regarding operations in Pakistan, as well as those of the State of Israel. Many other states and non-state actors also possess the technology to conduct targeted killing operations, including the United Kingdom, Iran, Turkey, Russia, France, Iran, India, China and non-state actor Hezbollah.<sup>71</sup> However, it seems evident that the United States and Israel are the two states that most often conduct these types of operations against suspected terrorists.<sup>72</sup>

Despite the fact that this study focuses on United States targeted killing operations in Pakistan, I find it necessary to also consider the policies of the State of Israel. By evaluating Israel's policy with regard to this practice, one can contrast these two states' circumstances regarding the implementation of this policy. Both states claim to use targeted killing operations to subdue and hopefully eliminate the terrorist threats posed against their citizens. However, in this chapter I will demonstrate that, considering its present circumstances domestically and regionally, as well as the political climate internationally, Israel is an example of a state with regard to which the case of the use of targeted killing methods against terrorist threats could seemingly still be made with reasonable conviction.

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<sup>71</sup> M O'Connell 'Remarks: The resort to drones under international law' (2010-2011) 39 *Denver Journal of International Law & Policy* 586.

<sup>72</sup> R P Barnidge Jr. 'A qualified defense of American drone attacks in northwest Pakistan under international humanitarian law' (2012) 30 *Boston University International Law Journal* 415-416.



## 1.1 The State of Israel

Israel's policy of pre-emptively striking at those who seek to murder its people is, I believe, better understood today and requires no further elaboration.<sup>73</sup>

It is evident from even a cursory review of modern history that, since its independence in 1948, Israel has had a significant number of encounters with terrorism and cross border conflicts. Some of these conflicts include the 1948 Arab-Israeli War, the Six-Day War in 1967, the Lebanon War in 1982, two Palestinian Intifadas between 1987 and 2005 and the Yom Kippur War in 1974, to name but a few.<sup>74</sup> In many of these conflicts, Israel has used drone technology, whether for surveillance or targeting purposes.<sup>75</sup>

The conflicts between Israel and state actors as well as non-state actors have led to Israel establishing a formal policy with regard to targeted killings in 2000 in order to deter and prevent present and future attacks on its territory. The event which led to this policy being formally adopted was the second Palestinian Intifada in 2000. This Intifada started after the Camp David Accord had failed and led to renewed Palestinian attacks causing the death of a substantial number of Israeli citizens. Unofficially, however, Israel has been targeting specific individuals and groups since its independence in 1948.<sup>76</sup>

Gabriella Blum and Philip Heymann, in their article *Law and Policy of Targeted Killings*,<sup>77</sup> claim that the United States and Israel's policies of targeted killing were not established with the aim of surveying terrorist behaviour, or capturing terrorists for that matter, but with the sole purpose of eliminating them.

Even though the United States originally used drone technology for reconnaissance purposes in the Vietnam War and Israel used them as decoys

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<sup>73</sup> Address by B Netanyahu to the US House of Representatives' Government Reform Committee 20 September 2001 reprinted in 'We Are All Targets' *Jerusalem Post* 24 September 2001 6 available at Lexis News Library Jerusalem Post file.

<sup>74</sup> See Israel Ministry of Foreign Affairs at <http://www.mfa.gov.il/MFA/History/Modern+History/Israel+wars/> (accessed 14-02-2013 at 14:20 pm).

<sup>75</sup> Barnidge Jr. 415 citing Report of the United Nations Fact-Finding Mission on the Gaza Conflict, Human Rights in Palestine and Other Occupied Arab Territories, P 1190, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

<sup>76</sup> David 3-7.

<sup>77</sup> Blum & Heymann 4.

during the Yom Kippur War<sup>78</sup> this technology has over time evolved into an instrument of destruction. Thus, the perception of peace or national security can be enforced in a very direct and aggressive manner by states possessing this technology. These states are now not merely surveying the Pakistani or Palestinian territories, or doing reconnaissance; most of these operations lead to the killing of suspected terrorists and innocent civilians.

In the 2006 Israeli Supreme Court case, *The Public Commission against Torture in Israel v The Government of Israel*,<sup>79</sup> the Court was faced with the issue of Israel's official policy of targeted killing, and whether or not this practice constitutes illegal action by the State. President Barak, with two other judges concurring, came to the following conclusions: Firstly, there exists a continuous armed conflict between Israel and terrorist organisations in Judea, Samaria and the Gaza Strip, and this conflict is of an international nature. Secondly, members of these terrorist organisations cannot be considered to be belligerents, but rather civilians taking a direct part in hostilities, and they therefore lose their protection under IHL to become legitimate targets. In addition, the Court decided that the law of targeted killing is determined according to customary international law (CIL), and the legality of each attack should therefore be determined in light of CIL. In sum, according to the Israeli Supreme Court, it cannot be said that targeted killing is illegal *per se*, but the analysis has to be made on a case-by-case basis.<sup>80</sup>

When one evaluates the various reasons why Israel considers targeted killings a counterterrorism measure, one has to take into account certain political and geographical factors. In Israel's case, the proximity of Palestine and the terrorist groups who operate in the region is of great significance.

In terms of international law and bringing terrorists to justice, a practice of capture and arrest would seem to be shrouded in much less legal uncertainty than execution. In Israel's case, however, capture and arrest have proven difficult in light of the fact that most surrounding Arab states have strong diplomatic ties with

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<sup>78</sup> Barnidge 12 citing D Rodman 'Unmanned aerial vehicles in the service of the Israel air force: "They will soar on wings like eagles"' (2010) 14 *Middle East Review of International Affairs* 77; A Callam 'Drone wars: armed unmanned aerial vehicles' (2010) 19 *International Affairs Review* available at <http://www.iar-gwu.org/node/144> and Barnidge 415.

<sup>79</sup> *The Public Commission against Torture in Israel v The Government of Israel* HCJ 769/02.

<sup>80</sup> See summary of Israeli Supreme Court case at <http://www.jewishvirtuallibrary.org/jsource/Politics/sctassass.html> (accessed 14-02-2013 at 16:20 pm).

Palestine. Therefore, extraditing suspected terrorists to Israel can sometimes prove to be almost impossible. The unwillingness of surrounding states to aid in the apprehension and extradition of these suspected terrorists seems to lead Israel to use targeted killings as a last resort in order to curb attacks and to serve the only justice seemingly available.<sup>81</sup>

It is well known that the United States government has often claimed that it targets certain suspected terrorists as a means of self-defence. However, it seems that Israel can more convincingly argue this point, given its close proximity to Palestine and the number of daily and on-going cross-border attacks against Israel.

When considering the question of whether these attacks do in fact have an impact on curbing or eliminating terrorist attacks, opinions vary. I believe that, for many reasons, this question could be answered in the negative, including but not limited to the following: targeted killings often lead to acts of retaliation, targeted killings complicate and halter peace processes, and it is often difficult to identify and therefore eliminate the leaders of a certain group.

Daniel Byman, in his article on Israeli targeted killing practices, makes a noteworthy observation. He states: 'If terrorism is condemned because it kills the innocent, how can one justify counterterrorist attacks that kill them too?'<sup>82</sup> Besides the moral concerns, it is evident that these attacks do not always have the intended impact or effect - and in fact they can often have the opposite effect.

The State of Israel, however, maintains that these attacks are beneficial, and that by continuing this practice and policy, it ensures continued support and faith by the Israeli people in their own government. Statistics have also shown that these attacks have led to a decreased number of deaths among Israeli soldiers and citizens, even though attacks by Hamas have increased. This seems to suggest that attacks by Hamas have lost their lethality.<sup>83</sup>

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<sup>81</sup> D Byman 'Do targeted killings work?' (2006) 85 *Foreign Affairs* 97.

<sup>82</sup> Byman 99-101.

<sup>83</sup> Byman 101-103.

## 1.2 The United States of America

'Very frankly, it's the only game in town in terms of confronting or trying to disrupt the Al Qaeda leadership.' - *Former CIA Director Leon Panetta on drone strikes by the US against members of Al Qaeda in Pakistan.*<sup>84</sup>

The USA has been using drone technology since the late 1950s, first during the Vietnam War<sup>85</sup> and later during the early 1990s in Operation Desert Shield and Desert Storm, as well as in Kosovo and Bosnia during the intervention by the North Atlantic Treaty Organisation (NATO) in the Balkans. During all of these conflicts, drones were used mainly for reconnaissance purposes.<sup>86</sup>

However, after the 9/11 attacks by Al Qaeda, the United States took a much more aggressive and direct approach to fighting terrorism, and the subsequent policy of targeted killings was evidence of that fact.

As President Bush stated in a joint session of Congress after the events of 9/11:

We will direct every resource at our command, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence and every necessary weapon of war, to the disruption and to the defeat of the global terror network.<sup>87</sup>

Since 2008, after Barack Obama took office as President of the United States, the number of drone strikes launched against suspected terrorists in Pakistan has increased dramatically.<sup>88</sup>

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<sup>84</sup> US airstrikes in Pakistan called 'very effective' CNNPolitics.com May 2009 at <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/> (accessed 25 January 2013 at 16:27pm).

<sup>85</sup> Barnidge 415 - 416.

<sup>86</sup> Barnidge 415 - 416 citing U.S. Army UAS Ctr. of Excellence, 'Eyes of the Army' U.S. Army Unmanned Aircraft Systems Roadmap 2010-2035, Army.mil, 4 (2010), <http://www-rucker.army.mil/usaace/uas/US%20Army%C20UAS%C20RoadMap%C202010%202035.pdf> at 4 and J M Beard 'Law and war in the virtual era' (2009) 103 *American Journal of International Law* 409, 417-22 at 412 n.15.

<sup>87</sup> Barnidge 416 citing George W. Bush, Address Before a Joint Session of the Congress of the United States: Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347, 1349 (Sept. 20, 2001).

<sup>88</sup> See O'Connell supra note 13 citing P Stewart & R Birsell 'Under Obama, Drone Attacks on the Rise in Pakistan' *Reuters* (Oct. 12, 2009), <http://www.reuters.com/articlePrint?articleId=USN11520882> 'There have been 39 drone strikes in Pakistan since President Obama took office not quite nine months ago, according to a Reuters tally of reports from Pakistani security officials, local government

It is very difficult to establish the exact number of strikes that have been launched, and the casualties that have been caused, in countries such as Pakistan. One of the most conservative studies, done by the New America Foundation, recorded figures from 2004 to 2010. This study showed that 114 strikes took place in this period, causing between 830 and 1 210 deaths, of which between 550 and 850 were militant deaths.<sup>89</sup> Therefore, by conservative calculations, a civilian casualty rate of 30% was recorded.<sup>90</sup> However in recent years the number of strikes has decreased drastically as was illustrated by the graphs in chapter 1 based on statistics done by the Bureau of Investigative Journalism.<sup>91</sup>

The United States government has put forth a range of justifications for these operations. Some of these justifications include the claim that an armed conflict exists between the United States and Al Qaeda, and that US operations can be justified on the basis of self-defence.

As John O Brennan, Assistant to the President for Homeland Security and Counterterrorism stated in a 2012 speech entitled 'The Ethics and Efficacy of the President's Counterterrorism Strategy'<sup>92</sup> :

The United States is in an armed conflict with al-Qa'ida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defence. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies

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officials and residents. That compares with 33 strikes in the 12 months before President Obama was sworn in on 20 January.

<sup>89</sup> S Breau & M Aronsson 'Drone attacks, international law, and the recording of civilian casualties of armed conflict' (2012) 35(2) *Suffolk Transnational Law Review* 256 citing P Bergen & K Tiedemann 'The year of the drone: An analysis of US drone strikes in Pakistan 2004-2010' *New America Foundation* 24 February 2010 1, 3, available at

<http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf> (quantifying percentage of civilian deaths caused by drone strikes); R P Barnidge 'A Qualified Defence of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law' (2012) 30 *Boston University International Law Journal*.

<sup>90</sup> Id citing 'The Bureau of Investigative Journalism estimates there have been 305 drone attacks in Pakistan with the civilian casualties running 40% more than reported casualty figures.' C Woods *Drone War Exposed: The Complete Picture of CIA Strikes in Pakistan* Bureau Investigative Journalism Aug. 10, 2011 <http://www.thebureauinvestigates.com/2011/08/10/most-complete-picture-yet-of-cia-drone-strikes/>.

<sup>91</sup> See note 18

<sup>92</sup> J Brennan *The efficacy and ethics of US counterterrorism strategy* 30 April 2012 at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> (accessed 28-01-2013).

outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.

Many questions still remain among legal scholars as to whether these arguments are legally justifiable, and many argue that more transparency and regulation are needed with regard to these operations. As President Obama has stated: 'There's a remoteness to it that makes it tempting to think that somehow we can, without any mess on our hands, solve vexing security problems.'<sup>93</sup>

During the presidential race of 2012, President Obama's office was under immense pressure to codify certain guidelines and procedures regulating targeted killing operations for the future administration, in the event the President lost the election.<sup>94</sup> It begs the question: Why was this not done earlier to ensure that the current Administration would be seen by the people as adhering to these standards? Perhaps the fear of what a new Administration would do, led the current Administration to start a process of putting certain guidelines in place that would force any new Administration to continue existing policies and procedures relating to the control of certain strikes or decisions.

However in May 2013 Obama gave a speech at the National Defense University in which he again stated that the US actions regarding drone operations are legal, although he also conceded the negative effects these operations have in countries such as Pakistan and how US and Pakistani relations are negatively affected by the policy. He further undertook to work with Congress in amending the Authorisation to use Military Force or AUMF to find a way in which the US can still fight terrorism effectively without continually being in a state of war with terrorist groups around the globe.<sup>95</sup>

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<sup>93</sup> 'Election spurred a move to codify US drone policy' *The New York Times* 24 November 2012 at [http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all&_r=0) (accessed 28-01-2-13).

<sup>94</sup> *Id.*

<sup>95</sup> Obama's Speech on Drone Policy New York Times article at [http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all&_r=0) (accessed 26-09-2013 at 13:51pm).

## Chapter 4

### 1. The legality of targeted killing operations in Pakistan

In this chapter I will apply the law to the facts. By considering the facts known, together with the applicable law and the various justifications put forth by the United States government, one can evaluate the legality of this practice. One can then delve into the issue of whether the current international legal framework is sufficient to regulate the practice of targeted killing. This will be done in the concluding chapter.

In order to evaluate legality, one has to consider not only the applicable legal norms, but also the various legal justifications advanced by the United States. These justifications have been considered in chapter 3 and they will be further discussed in this chapter. Another complicating factor is the facts surrounding these operations which seem to be very difficult to establish or confirm due to the fact that the United States, for various reasons, is not forthcoming with such information.

The question that arises is whether the facts and justifications set forth in earlier chapters hold any argumentative weight. Once the true state of affairs has been examined, one can continue to apply the relevant legal frameworks to firstly establish the legality of these operations, and subsequently also accountability.

As illustrated in the previous chapter, the main justifications by the United States for conducting targeted killing operations in Pakistan, is the contention that (i) it is engaged in an armed conflict with Al Qaeda and associated forces in Pakistan, and (ii) the United States has the right to exercise their right to self-defence against Al Qaeda forces as a response to the various terrorist attacks launched against the United States.<sup>96</sup>

When one considers the argument regarding the existence of an armed conflict, it would be difficult for the United States to argue convincingly that the events of 9/11 and subsequent terrorist attacks against it, constitute a complete shift to an armed conflict paradigm where IHL would be applicable.

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<sup>96</sup> Rogers & McGoldrick 779 see also 'US airstrikes in Pakistan called 'very effective'' *CNNPolitics.com* May 2009 at <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/> (accessed 25 January 2013 at 16:27pm).

Article 3 of the Geneva Conventions, which governs non-international armed conflicts, does not apply to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.'<sup>97</sup>

Some scholars therefore argue that terrorist attacks against the United States by al Qaeda are too sporadic to be regulated by this Convention and therefore the United States' actions in Pakistan does not constitute an armed conflict as the United States government claims.<sup>98</sup>

However institutions such as the International Committee of the Red Cross (ICRC) are of the opinion that the determination whether the US's actions constitute a NIAC, should be considered on a case to case basis. In certain instances a case could be made for the existence of a NIAC between US forces and terrorist groups where the relevant requirements of such type of conflict are met. Caution should however be exercised in this instance as certain terrorist groups that associate themselves with Al Qaeda, lack the kind of organised structure to qualify as co-belligerents if Al Qaeda in these cases would be considered as belligerents in a NIAC.<sup>99</sup>

Furthermore, the fact that 12 years have elapsed since the 9/11 terrorist attacks, and that most of Al Qaeda's senior operatives, including Bin Laden, have been eliminated by the United States, makes it even more difficult to argue convincingly that the United States has a right to conduct operations in Pakistan in self-defence.

Pursuant to IHRL norms, one can consider legality in terms of instruments such as the ICCPR.<sup>100</sup> The Human Rights Commission has stated, in General Comment 31 that if a State Party had effective control over a subject, the ICCPR

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<sup>97</sup> [www.archives.gov/federal-register/codification/executive-order/12333.html#2.11](http://www.archives.gov/federal-register/codification/executive-order/12333.html#2.11) (accessed 25/09/2012 11:56 am).

<sup>98</sup> N Melzer *Targeted Killing in International Law* (2008) 46.

<sup>99</sup> General Assembly Report A/68/150 by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Professor Christof Heyns par. 65-66 citing ICRC "International Humanitarian Law and the challenges of contemporary armed conflicts" 2011 p. 10-11.

<sup>100</sup> Human Rights Committee General Comment 31 UN Doc CCPR/C/21/Rev. 1/Add 13 (2004) par. 10. See also Wong 158 and 'Pakistan's legal fight to end the drone war' at [www.aljazeera.com/indepth/opinion/2011/12/20111213112743546541.html](http://www.aljazeera.com/indepth/opinion/2011/12/20111213112743546541.html) (accessed 05-03-2013).



would apply regardless of whether the situation occurred within a State Party's jurisdiction.<sup>101</sup>

The following statement by UN Special Rapporteurs Christof Heyns and Martin Scheinin relates to the Human Rights framework and how these acts should be dealt with in terms of IHRL:

Acts of terrorism are the antithesis of human rights, in particular the right to life. In certain exceptional cases, use of deadly force may be permissible as a measure of last resort in accordance with international standards on the use of force, in order to protect life, including in operations against terrorists. However, the norm should be that terrorists be dealt with as criminals, through legal processes of arrest, trial and judicially decided punishment.<sup>102</sup>

The former UN Special Rapporteur, Philip Alston, in a May 2010 Report stated: 'Outside the context of armed conflict, the use of drone [s] for targeted killing is almost never likely to be legal.'<sup>103</sup>

Alston has stated that the only instances, in which targeted killings could be legal in a law enforcement paradigm, would be (i) when a State acts in anticipatory self-defence against a non-state actor (ii) when the capture of a suspected terrorist is impossible.<sup>104</sup> However, this becomes a problem when States such as the United States, or possibly even other states eventually acquiring drone technology; take this notion to an extreme and launch attacks on suspected terrorists in foreign countries all over the world.<sup>105</sup>

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<sup>101</sup> Human Rights Committee General Comment 31 UN Doc CCPR/C/21/Rev. 1/Add 13 (2004) par 10. See also Wong 158.

<sup>102</sup> Osama bin Laden: Statement by the UN Special Rapporteurs on summary executions and on human rights and counter-terrorism at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E> (accessed 07-02-2013 at 14:08 pm).

<sup>103</sup> Alston Report par 85.

<sup>104</sup> Alston Report par 86.

<sup>105</sup> See Vlasic supra note 8 and 31 citing 'Drone Strikes Are Police Work, Not an Act of War?' *Reuters* 5 July 2011 <http://blogs.reuters.com/afghanistan/2011/07/05/drone-strikes-as-police-work-not-an-act-of-war/>.

These statements make it clear that the UN itself is generally not in favour of the use of targeted killing operations in armed conflict situations, especially during times of peace. This position was further confirmed by the UN Special Rapporteur on Human Rights and Counter-Terrorism, Ben Emmerson, after a three day trip to Pakistan to investigate targeted killing operations and their legal effects.<sup>106</sup>

In a statement released on 15 March 2013, Emmerson stated that US operations in Pakistan are clearly in violation of Pakistani sovereignty, and therefore illegal, considering that Pakistani governmental officials reported to him that these attacks are being conducted without Pakistan's consent. The Pakistani government also stated that the attacks are counter-productive, and that the State itself is neither unwilling nor unable to deal with the threat of terrorism; it needs only to be given the opportunity to develop and enforce strategies to deal with such threats on its territory.<sup>107</sup>

In light of this, one can now reconsider Article 51 of the UN Charter and the issue of self-defence, together with the 'unwilling or unable test'. Most states consider this test to be appropriate to determine the legality of the use of force in another state. The test states that the use of force in self-defence is only permitted without consent if the state in which force is to be used is unwilling or unable to deal with the specific threat.<sup>108</sup>

From the above-mentioned principles and the statement by Emmerson, one can conclude that Pakistan is quite willing and able to deal with this threat. Therefore, Pakistan should be provided, not only with the necessary respect for its sovereignty, but also the opportunity to deal with the threat on its own territory without any unwarranted interference by other states.

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<sup>106</sup> Pakistan: Statement by the UN Special Rapporteur on human rights and counter-terrorism at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13148&LangID=E> (accessed 10-04-2013 at 15:00pm).

<sup>107</sup> Pakistan: Statement by the UN Special Rapporteur on human rights and counter-terrorism at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13148&LangID=E> (accessed 10-04-2013 at 15:00pm).

<sup>108</sup> A S Deeks "Unwilling or Unable": Toward a normative framework for extraterritorial self-defence' (2012) 52(3) *Virginia Journal of International Law* 486.

## 1.1 The Federally Administered Tribal Areas

Another issue which poses certain legal questions is the situation in the Federally Administered Tribal Areas or FATA. This region between the borders of Afghanistan and Pakistan, acts as a kind of buffer zone between the two states. North and South Waziristan in this region is also the area where most drone strikes take place and where Al Qaeda, the Afghan Taliban and the TTP (Tehreek-e-Taliban Pakistan) have their main bases.<sup>109</sup>

The FATA, with limited influence and control by the government of Pakistan, has become a breeding ground for illegal activities and therefore is the perfect base for terrorist groups such as Al Qaeda conducting illegal activities inside FATA and the neighbouring states. Some scholars argue in defence of US actions, that FATA is an 'ungoverned territory' and US security interests are more important than the legal boundaries of 'ungoverned territories'.<sup>110</sup>

However this is a very dangerous stance to take as it could lead to all territories with questionable and unstable administration regimes, to become an uncontrolled area where foreign states exert more control over the area than would legally otherwise be allowed.

As was stated earlier it is also argued that a case for the existence of a NIAC between the United States and terrorist groups such as Al Qaeda can be made in certain cases. In my opinion such a case can possibly be made when considering the situation in FATA. The altercations between US forces and terrorist groups in FATA seem to be a result of a spill over of the conflict in Afghanistan between US forces and terrorist groups like the Taliban in that region. However some of these groups move into Pakistani territory leading to attacks on them by the US in Pakistan which the Pakistani government then denounces.

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<sup>109</sup> S Nawaz 'Drone Attacks Inside Pakistan Wayang or Willing Suspension of Disbelief?' (2011) 79 Georgetown Journal of International Affairs 80

<sup>110</sup> Id. 82-83

The Pakistani government has also concluded many ceasefire agreements with these militant groups and denounced US attacks against them in Pakistani territory.<sup>111</sup>

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<sup>111</sup> S Breau, M Aronsson, R Joyce Discussion paper 2: Drone attacks, international law and the recording of civilian casualties of armed conflict Oxford Research Group June 2011 p. 11-12

## Chapter 5

### 1. Accountability in terms of international law

[Accountability for serious violations of both IHRL and IHL] ...is not a matter of choice or policy; it is a duty under domestic and international law.<sup>112</sup>

The issue of targeted killings by United States forces in Pakistan poses some of the most difficult challenges regarding accountability for unlawful acts perpetrated in this context. In this chapter I will explore the different avenues available for holding perpetrators accountable for wrongful acts related to targeted killing practises. In light of the conclusion in Chapter 4 that the United States' conduct does not occur within an armed conflict, one can now examine accountability in terms of the IHRL framework.

An issue which makes determining accountability particularly difficult is the fact that targeted killing operations by the United States are not only conducted by military forces, but also by state actors such as the Central Intelligence Agency (CIA).<sup>113</sup> After the events of 9/11, Congress established a Commission the main task of which was to investigate these terrorist attacks and to create a possible plan of action in response. In 2004 the Commission recommended that the Department of Defence (DOD) should take 'lead responsibility for directing and executing paramilitary operations, whether clandestine or covert' in order for all legal responsibility to fall under one entity.<sup>114</sup> This was done, to ensure that domestic laws were complied with and that it would be easier for Congress to oversee operations if all responsibility and authority fell under a single entity or department.

However, the CIA currently plays a much larger role in targeting specific individuals. In fact, the only actor within the DOD still actively involved in these covert

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<sup>112</sup> Statement by the UN Secretary General's expert panel on Sri Lanka in its 2011 report. Also see P Alston 'The CIA and targeted killings beyond borders' (2011) *Public Law & Legal Theory Research Paper Series Working Paper No. 11-64 New York University School of Law* 20 citing Report of the Secretary-General's panel of experts on accountability in Sri Lanka 31 March 2011 115, 425, at [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf).

<sup>113</sup> See American Civil Liberties Union website at <http://www.aclu.org/blog/tag/drones> (accessed 22-07-2013 at 09:54am).

<sup>114</sup> Id. 2 citing *The 9/11 Commission Report* 415 (2004), at <http://www.911commission.gov/report/911Report.pdf>.

operations (along with the CIA) is the Joint Special Operations Command (JSOC). Apart from conducting covert operations such as night raids, JSOC's role and accountability are therefore limited - in contrast to that of the CIA.<sup>115</sup> It has also been stated by a former federal prosecutor and former assistant general counsel at the CIA, John Radsan, that the CIA makes all final decisions from its headquarters in Langley, Virginia on whether to launch strikes.<sup>116</sup>

The fact that these two entities do co-operate on certain missions makes it difficult to determine accountability due to the fact that they have different legal obligations and operating procedures. Some argue that this co-operation is not in fact coincidental, but deliberate, in order to confuse the issue of accountability with regard to their actions.<sup>117</sup>

Taking into account that the CIA has such seemingly extensive authority, without meaningful Congressional oversight, in launching drone attacks, it is even more alarming when considering the so-called 'signature strikes', as opposed to personality strikes, that are often conducted by the CIA. According to the system of 'signature strikes', the CIA targets 'groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren't known'.<sup>118</sup> These strikes have been described as 'heavily suspect' in a report released by Stanford University and New York University.<sup>119</sup>

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<sup>115</sup> *Id.* 2 Also with reference to Bin Laden killing, JSOC forces were responsible for the night raid operation which led to the killing of Bin Laden on 2 May 2011 in Islamabad Pakistan.

<sup>116</sup> See M E O'Connell 'Unlawful killing with combat drones: A case study of Pakistan, 2004-2009' (2009) *Notre*

*Dame Law School Legal Studies Research Paper No. 09-43* 21 citing Interview with John Radsan, Professor of Law and Director of National Security Forum, William Mitchell College of Law, in University of Notre Dame Law School (Oct. 8, 2009); see also R Murphy & A J Radsan 'Due process and targeted killing of terrorists' (2009) 31 *Cardozo Law Review* 405, 405, 412-14.

<sup>117</sup> P Alston 'The CIA and Targeted Killings Beyond Borders' (2011) *Public Law & Legal Theory Research Paper Series Working Paper No. 11-64 New York University School of Law* see discussion on page 52-54 citing P W Singer 'Double-hatting around the law: The problem with morphing warrior, spy and civilian roles' *Armed Forces Journal* 1 June 2010 at <http://www.armedforcesjournal.com/2010/06/4605658/> regarding the issue of 'double-hatting' where the lines between spy, combatant and civilian activity are blurred when one cannot establish who is doing what and therefore who should be accountable.

<sup>118</sup> K J Heller 'One hell of a killing machine: Signature strikes and international law' (2013) 11 *Journal of International Criminal Justice* 89 citing D Klaidman *Kill or Capture: The war on terror and the soul of the Obama presidency* (2012) at 41.

<sup>119</sup> *Id.* 90 citing Stanford Law School International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *Living under drones: Death, injury and trauma to civilians from US drone practices in Pakistan* September 2012 103.

The United States Congress has also voiced concerns and has requested more information. In a letter to President Obama in 2012 Congress expressed concern over the possible increase in civilian casualties and the negative image it could create surrounding US policy and practice.<sup>120</sup> According to Heller it would seem that most signature strikes are unlawful in terms of both IHL and IHRL.<sup>121</sup>

Therefore, the problem in Pakistan seems to be that the operations are conducted mainly by the CIA, and that they should rather be conducted by the DOD (if at all) - the only entity with clear guidelines and restrictions for military operations. Peter Bergen, a CNN national security analyst, stated:

US military lawyers (would) ensure that the strikes conform to the laws of war, whereas in Pakistan, whatever vetting process the CIA observes remains opaque. In Afghanistan and Iraq, the US military also tends to pay compensation for accidental civilian deaths, whereas Pakistani civilians in the tribal areas can seek little legal or material recourse from the United States when their relatives are slain.<sup>122</sup>

Recently, however, a case has arisen in which a Pakistani citizen sought to sue the CIA in a Pakistani Court for the 'wrongful death' of two of his relatives - who were not linked to the Taliban in any way - caused by a US drone strike in Pakistan. The complainant was Kareem Khan, a journalist from North Waziristan, a semi-autonomous tribal area in Pakistan. He claimed 500 million dollars in damages from the US Secretary of Defence, the Director of the CIA and the CIA station chief in Islamabad.<sup>123</sup> Assisting him in this claim is his attorney, Islamabad based lawyer Shahzad Akbar, who is also being assisted by Pakistan based NGO Foundation for Federal Rights (FFR) and UK based NGO Reprieve.

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<sup>120</sup> *Id.* Citing Letter from the Honorable D Kucinich to President Obama, 12 June 2012 available at <http://www.justforeignpolicy.org/node/1219>.

<sup>121</sup> Heller 89.

<sup>122</sup> S Birkenthal 'US drone strikes in Pakistan: A strategic analysis' (2011-2012) *Claremont McKenna College Keck Centre for International and Strategic Studies Jack Stark Fellowship in Security Studies* 6 citing P Bergen K Tiedemann 'The effects of the US drone program in Pakistan' *Foreign Affairs* July/August <http://www.foreignaffairs.com/articles/67939/peter-bergen-and-katherine-tiedemann/washingtons-phantom-war> .

<sup>123</sup> 'Pakistani man threatens to sue CIA if not compensated for relatives' death' [www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112903499.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112903499.html) (accessed 26/02/2013).

In July 2011 these two NGO's filed a motion seeking the arrest of the then CIA legal director, John Rizzo, and the then CIA station chief in Pakistan, Jonathan Banks. This led to Banks eventually fleeing Pakistan.<sup>124</sup>

David Glazier, a professor at Loyola Law School and former Navy surface warfare officer, has stated during congressional testimony in 2010 that CIA drone pilots could in theory be 'liable to prosecution under the law of any jurisdiction where attacks occur for any injuries, deaths or property damage they cause'.<sup>125</sup> However, there exist numerous challenges in bringing such a case before an American court, let alone a foreign court. Nevertheless, Khan's lawyer has taken the view that CIA officials could be prosecuted for murder in Pakistan because they are not members of the military and do not have diplomatic immunity.<sup>126</sup>

On 9 May 2013 the Peshawar High Court in Pakistan issued a ruling regarding US drone strikes on targets located in Pakistan. The Court ruled that these strikes were in violation of state sovereignty and in 'blatant violation of Basic Human Rights' and Geneva Convention provisions. The Pakistani government was ordered to ensure the end of further drone strikes, to request the Security Council or General Assembly to pass a resolution which would effectively condemn the strikes, and to request the UN Secretary General to 'constitute an independent War Crime Tribunal' to deal with this matter.<sup>127</sup>

The Court also found that drone strikes in Pakistan violate Article 2(4) of the UN Charter which prohibits 'the threat or use of force against the territorial integrity or political independence of any state...' If consent was given by the Pakistani government for the execution of these strikes, Article 2(4) would naturally not apply.

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<sup>124</sup> 'Pakistan's legal fight to end the drone war'

[www.aljazeera.com/indepth/opinion/2011/12/20111213112743546541.html](http://www.aljazeera.com/indepth/opinion/2011/12/20111213112743546541.html) (accessed 05-03-2013).

<sup>125</sup> Statement by D W Glazier, Professor of Law Loyola Law School Los Angeles, before the United States House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs, Hearing on Rise of the Drones II: Examining the legality of unmanned targeting April 28, 2010 5 found at

[https://www.fas.org/irp/congress/2010\\_hr/042810glazier.pdf](https://www.fas.org/irp/congress/2010_hr/042810glazier.pdf) (accessed 22-07-2013 at 10:32am).

<sup>126</sup> See O'Connell note 106 supra 21 citing Interview with J Radsan, Professor of Law and Director of National Security Forum, William Mitchell College of Law, in University of Notre Dame Law School 8 October 2009; see also R Murphy & A J Radsan 'Due process and targeted killing of terrorists' (2009) 31 *Cardozo Law Review* 405, 405, 412-14.

<sup>127</sup> J Horowitz & C Rogers 'Case watch: A court in Pakistan addresses US drone attacks' *Open Justice Society Initiative* 28 May 2013 at <http://www.opensocietyfoundations.org/voices/case-watch-court-pakistan-addresses-us-drone-attacks> (accessed 10-06-2013 12:43pm).



However, the Court stated that even if oral consent was given, written consent was necessary for the strikes to be lawful - and, clearly, no such consent was given.

The Court did not elaborate on the reason why written consent would be necessary, or which process was to be followed to obtain such necessary consent. Furthermore, the Court decided that the killings of civilians in Pakistan violated both IHL and IHRL, but it did not provide any specific reasons why it relied in any way on IHL to solve the legal dispute at hand. The Court also did not explain why IHRL was breached and how the duties of the United States under the ICCPR had been triggered.<sup>128</sup>

In the final analysis, the Court held that the United States had breached IHL, IHRL and Pakistani sovereignty in its operations, and ordered the United States to compensate the victims' families. It also ordered the government of Pakistan to prevent future attacks against its people.<sup>129</sup> Despite the fact that many important and valid points were made in the judgment, unfortunately the court did not provide sufficient legal bases for most of its assertions. It is therefore of scant precedential value and might come under heavy scrutiny in future.

This case - the first of its kind in Pakistan - sheds some light on the issue of accountability for drone strikes and the direction in which the accountability debate might be headed in future. Because this is such an important case relating to the ongoing US-Pakistan drone debate, it is unfortunate that the outcome was not more clear and insightful. This case could have greatly influenced and guided the current drone debate, and in my opinion it failed to provide the international community with any real insight and guidance.

Considering these developments and the fact that the US operations in Pakistan do not seem to constitute an armed conflict, it is becoming evident that parties who seek relief for attacks or seek to establish accountability will have to turn to more conventional remedies. Such remedies could include domestic prosecution, and possibly also accountability in terms of IHRL and instruments such as the ICCPR.

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

As discussed previously, a convincing case can also be made for accountability in terms of the ICCPR, regardless of whether the attacks occurred within the United States or extraterritorially.<sup>130</sup> The fact is that the United States, in numerous missions in Pakistan (such as the night raid to kill Bin Laden and several drone operations), has direct control over suspected terrorists and targets because of the unfair advantage these weapons give to those who operate them. In a situation such as this, considering the dexterity and skill of a predator drone, for example, the intended target is usually completely defenceless and at the mercy of his attacker.

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<sup>130</sup> Human Rights Committee General Comment 31 UN Doc CCPR/C/21/Rev. 1/Add 13 (2004) par. 10. See also Wong 158. See also discussion on ICCPR in chapter 2.

## Chapter 6

### 1. Conclusion

Actions taken by States in combating terrorism, especially in high profile cases, set precedents for the way in which the right to life will be treated in future instances.<sup>131</sup>

From our use of drones to the detention of terrorist suspects, the decisions we are making will define the type of nation - and world - that we leave to our children.<sup>132</sup>

Justifications for drone strikes by the United States, which have been considered in this work, have proven to be less than legally sound, to say the least. Claims by the United States that it is engaged in an armed conflict, for example, have been proven not to be based on sound legal reasoning, but rather a way in which the United States justifies acts which are often the issue of great legal scrutiny. A few of the justifications for drone attacks which have been critically discussed in previous chapters will be shortly discussed in this concluding chapter for the sake of overview and clarity.

The claim of self-defence by the United States in response to attacks by suspected terrorists has been a very controversial topic in the so-called drone debate. In previous chapters arguments have been set forth that terrorist attacks against the United States, especially in recent years, do not meet the threshold of violence to justify acts of self-defence by the United States. It also does not have the government of Pakistan's consent to conduct these attacks on their territory. Furthermore it has been argued that the attacks by the United States are too sporadic to justify an act of self-defence.

Arguments in support of the fact that targeted killing operations should fall within the IHL framework, hold no legal weight. From the analyses in previous chapters, it becomes clear that the events surrounding 9/11 were not so severe as to

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<sup>131</sup> Osama bin Laden: Statement by the UN Special Rapporteurs on summary executions and on human rights and counter-terrorism, Christof Heyns and Martin Scheinin on 6 May 2011. See OHCHR website at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E> (accessed 01-07-2013 at 12:36 pm).

<sup>132</sup> President Obama, Speech on drones at National Defence University on May 23 2013. Transcripts available at [http://www.huffingtonpost.com/2013/05/23/obama-drone-speech-transcript\\_n\\_3327332.html](http://www.huffingtonpost.com/2013/05/23/obama-drone-speech-transcript_n_3327332.html) (accessed 12-06-2013 at 14:08 pm).

constitute a shift to an IHL paradigm. Furthermore, these events do not justify the use of self-defence by the United States considering the fact that there is no longer an imminent threat.

It was also stated that a convincing argument could be made for liability of the United States in terms of IHRL, and more specifically, article 6 of the ICCPR. If its targeted killing operations do not occur within in an armed conflict situation, as has been argued, then IHRL applies. Although the United States claims a lack of jurisdiction in terms of the ICCPR because the attacks occur in Pakistan, the fact that its agents have effective control over many targets creates jurisdiction according to the General Comments to the ICCPR.

Furthermore, the United States is in clear violation of the Chicago Convention, which prescribes that no state aircraft, including pilotless aircraft such as drones, may fly over the territory of another state without the latter's consent. As stated in earlier chapters the Pakistani government has still not provided consent.

Despite this view, the United States government seems to continue to adhere to its legal standpoint that these attacks do in fact constitute self-defence, even though President Obama has stated in recent months that morally it may no longer be a good policy.<sup>133</sup> However, talk of morality will bring little comfort or redress to thousands of innocent victims, and, therefore a definitive policy decision based on a sound legal basis is required.

However, there is no doubt that the United States is creating a very dangerous precedent in dealing with terrorism. It is a fact that many states do not yet have the same offensive capabilities as the United States. The image it is portraying is that it is above the law and any form of international scrutiny as a result of its economic and political standing internationally.

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<sup>133</sup> *Id.* President Obama stated the following: 'So this is a just war-a war waged proportionally, in last resort, and in self-defence....America's legitimate claim of self-defence cannot be the end of the discussion. To say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance.'

After the killing of Osama Bin Laden on 2 May 2011 President Obama issued a statement claiming that 'justice has been done'.<sup>134</sup> This begs the question: Whose justice? The American government's perception of justice? Or justice under international legal norms which equally apply to all nations, and being applied and adhered to by all nations?

After a thorough analysis of the current international framework applicable to the practice of targeted killing, it is clear that the legal regime currently in place is sufficient to regulate this practice. By attempting to supplement the already sufficient body of international law regulating this practice, one risks causing fragmentation of international law. It seems that the crux of the problem regarding targeted killing is enforcement. One can imagine the challenge international lawyers face in attempting to enforce international law in this context, especially considering the fact that the main violator of these laws is also the most powerful state in the world.

International law, despite what many scholars would claim, seems too often be a game of power where the strongest make the rules and the weakest are bound by them. Therefore increased pressure on these states is vital. We have already seen the power of such pressure on the Obama Administration by Congress, as well as different states and organisations demanding better oversight and control.<sup>135</sup> It is doubtful whether changing the laws which govern states will improve or ensure enforcement. However, increasing international pressure on the United States might just be the straw that finally breaks the camel's back.

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<sup>134</sup> President Obama's full statement on the death of Osama bin Laden *The Guardian* 2 May 2011 at <http://www.guardian.co.uk/world/2011/may/02/barack-obama-statement-bin-laden> (accessed 01-07-2013 at 12:40 pm).

<sup>135</sup> 'Global opinion of Obama slips, international policies faulted' 13 June 2012 at <http://www.pewglobal.org/2012/06/13/global-opinion-of-obama-slips-international-policies-faulted/>, 'Europe urged to face up to the issue of drones' 24 May 2013 at <http://www.internalvoices.org/international-issues/item/152-europe-urged-to-face-up-to-the-issue-of-drones>, 'Obama restricts drone strikes overseas' 23 May 2013 at <http://articles.latimes.com/2013/may/23/news/la-pn-obama-restricts-drone-strikes-overseas-20130523>, 'Obama faces bipartisan pressure on drone big brother fear' 8 Mar 2013 at <http://www.bloomberg.com/news/2013-03-08/obama-faces-bipartisan-pressure-on-drone-big-brother-fear.html> (accessed 29-07-2013 at 11:39am).

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