Targeted Killings - The Future of the War on Terror?

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CHAPTER 1

Introduction

The purpose of this dissertation will be to assess the legal implications presented by the practice of targeted killings as it is currently being utilised in the ongoing global campaign to combat terrorism. Through this assessment, I hope to document the applicable international laws that pertain to the killing by a state of individuals who will often not be considered to be combatants in a war and will generally be located outside of the borders of the state conducting the killing. Through this process it is my hope not only to catalogue the legal issues surrounding this subject, but also to discuss if the relative silence of the international community implies an acceptance of this practice, and if this acceptance will lead to the use of targeted killings finding a legitimate place in customary international law. The implications of such a body of customary law could be far reaching for states and for individuals; how does a state defend its citizens when they might be targeted by another state and what might the consequences be should they try? Will citizens have a right to be protected by their own country? Does the concept of innocence until proven guilty apply only to citizens of the strongest military nations?

My discussion of the laws surrounding this topic will include subjects such as the right of states to acts of pre-emptive self defence and the sovereignty of those states where the targeted killings are taking place. It will also look at the issue of due process and question the right of a state to condemn a person to death in the absence of any fair trial or public accountability, as well as examining the accepted norms of law in regards to times of war and in regards to the law enforcement norms of the perpetrators and how these might affect their actions on the international stage.

Targeted killing is a subject upon which a relatively small amount of legal discourse has so far been presented. Due to the reluctance of nations which employ targeted killings to actually discuss their policies on the subject and the lack of uncontested legal framework to justify their use, it will be necessary to reference works not on related topics such as assassinations, unconventional warfare, counter terrorism and self defence in order to build up a body of commentary which might also be seen to pertain to targeted killings.

Finally, my study will also examine the justifications for the use of targeted killings which have been put forward by those states which employ these policies. I will look briefly in to the effectiveness of these killings and whether or not the justifications for their use hold true in the real world. Where possible, I will look at the rules which these countries have set for themselves as guidelines for when and where a targeted killing might be an appropriate action, and I will ask if these states have abided by these self-imposed rules and if they might be likely to abide by the rules of international law if and when they are developed to cover this subject.

Targeted Killings – A Definition

The concepts behind targeted killings are nothing new. The use of assassination and the targeting of the leaders of opposing forces are as old as warfare itself. Why risk the lives of soldiers and civilians when one death could end a conflict? But just what is a targeted killing? Is it merely a euphemism for assassination or is it an entirely different type of military action?

The practice of targeted killing has gone by many names, whether on the part of states wishing to cloud the subject and hamper discussion or through an inability of academics to reach an agreed upon term. Terms such as 'extrajudicial killing', 'extrajudicial punishment', 'selective targeting', 'assassination policy', 'named killing', and even the faintly ridiculous 'long-range hot pursuit' have all been used to describe this activity. While we can understand why these terms might be used, their effect is more often than not to merely confuse the subject and make it more difficult to discuss effectively.[1]

For the purposes of this study I have chosen to use the term 'targeted killing'. There are a couple of reasons for this choice; firstly, the term targeted killing has gradually come to be the accepted term to describe these actions, at least in academic discourse. While governments may still choose to muddy the waters on the subject through the use of different terms and euphemisms, academics for the most part now seem to have settled on this one term. For example, Nils Melzer, legal advisor for the International Committee of the Red Cross, chose to use the term in the title of his 2008 (updated in 2010) book *Targeted Killing in International Law.* His book won the 2009 Paul Guggenheim Prize in International Law awarded by the Geneva Graduate Institute[2] and he has become recognised as one of the authoritative voices on the subject.

The second reason for choosing to use the term 'targeted killing' is to differentiate the activity from that of assassination. Assassination is defined by Black's Law Dictionary as "the act of deliberately killing someone especially a public figure, usually for hire or political reasons". Assassination has long been illegal in international law. First prohibited by Article 23b of the Hague Convention of 1899, which outlawed "treacherous" attacks on adversaries, and then later by the Protocol Addition to the Geneva Convention of 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol 1), which prohibits attacks relying on "perfidy".[3] In addition to these international prohibitions, the United States itself instituted a prohibition on the use or sponsorship of assassination with Executive Order 11905, 12036 and 12333.

In the last decade, The United States and Israel have reframed the context of such actions through the use of new language; defining their targets as 'enemy combatants' and painting them as legitimate targets in an ongoing war against terrorism.

The definition of targeted killing which I will be using for this study is that given by Thomas B. Hunter in his 2009 book *Targeted Killing: Self Defence, Pre-emption, and the War on Terror*. Hunter defines targeted killing as: "the premeditated, pre-emptive, and intentional killing of an individual or individuals known or believed to represent a present and/or future threat to the safety and security of a state through affiliation with terrorist groups or individuals." This definition steers clear of the political nature of assassinations and focuses instead on the pre-emptive self defence of a state against the threat of terrorist attacks.

Types of Targeted Killings

Since the onset of the War on Terror, we have come to understand the concept of targeted killing as referring to the deliberate, specific targeting and killing, by a government or its agents, of a supposed terrorist or of a supposed unlawful combatant who is not in that government's custody.[4] First with Israel's admission of using targeted killings in 2000[5] and then the United States' in 2002 (Solis 2010 P.539), the public has been becoming more and more aware of the practices of so-called 'black-ops'.

From the phone bombs of Mossad to the drone attacks of the CIA and SEAL Team 6's raid on Osama Bin Laden's compound in Abbottabad, news of targeted killings is a regular occurrence, with the results of operations being trumpeted by governments across the media as proof of the effectiveness of the anti-terror efforts. These types of actions have also been featured heavily in the entertainment media in film, television and video games. Through this media targeted killing has been shown in a far more favourable light than assassination, with targeted killings being the preserve of the forces for good, while assassination resides firmly in a far murkier world.

Targeted killings are most often actions which are carried out by unconventional military forces such as special operations forces and intelligence agencies. The Central Intelligence Agency of the United States especially has

come to heavily utilise unmanned aerial vehicles (UAV), or 'drones', in their targeted killing operations.

The numbers of US targeted killing attacks using drones have increased dramatically under the Obama administration, with over 120 attacks recorded in 2010 and over 80 in 2011. This compares to fewer than five per year from 2004 to 2007.[6] US reliance on this technology in areas such as the Afghan border in Northern Pakistan and in Yemen has clearly increased greatly in recent years and it appears that reliance is not likely to end any time soon. On March 29th 2012, in a meeting with Pakistan's Prime Minister, Yusuf Raza Gilani, President Obama made it clear that the campaign of drone strikes in the tribal areas of Northern Pakistan would not be ending despite Gilani's indication that Pakistan would no longer accept the continuation of these attacks, which they believe are proving counter-productive.[7] While the benefits of this technology for the United States military are clear, no US personnel are endangered during their operations and drones can be used to strike targets far out of the range of other strike options, the effects of the use of unmanned drones such as the Reaper and the Predator UAVs armed with ordnance like 500lb bombs and hellfire missiles fall far from the surgical precision which the US administration and the media would have us believe. Claims that civilian casualties due to drone strikes have been either non-existent or very low have been called "absurd" by observers of the campaign,[8] with a study by the Bureau of Investigative Journalists claiming that out of a total of over 3,000 people killed by 319 drone strikes, over 800 civilians may have been killed and a further 1,200 injured.[9]

The more traditional type of targeted killing is obviously that which is carried out by special-forces (SF) or intelligence operators such as SEAL Team 6 in the case of the United States or the Special Air Service (SAS) in the case of the United Kingdom.

British SF have been reported to have killed at least fifty high ranking Taliban commanders during Operation Herrick in Afghanistan's Helmand Province, while the SEAL Team 6 strike which killed Osama bin Laden in 2011 is probably the most famous use of a targeted killing policy so far seen.

In the case of Israel's campaign of targeted killings, or "focused foiling" / "targeted prevention" as the Israeli Defence Force often describes their attacks,[10] the strike method is often to use Israeli Air Force attack helicopters such as the AH-64 Apache or F-16 warplanes.

Research Scope – Case Studies

This study will examine case studies covering several different targeted killings.

Firstly, I will examine the details of the drone strike which took place in January of 2012 in Pakistan and resulted in the death of Aslam Awan, an alleged senior al-Qaeda operations planner. This strike came after an eight week hiatus in attacks as relations between the United States and Pakistan grew increasingly frosty regarding the ongoing drone strike campaign following the accidental killing of 24 Pakistani troops stationed at a border post. No reports of collateral civilian casualties were given in the media regarding this attack, meaning that its study can focus solely on the core issues of pre-emptive self defence on the part of the US, and the sovereign rights of Pakistan regarding unauthorised strikes on its territories.

The use of drone strikes has become a regular occurrence in the United States' efforts to tackle those whom they see as presenting a constant and imminent threat upon US security. As of July 24th 2012 the United States had carried out 28 drone strikes in Pakistan alone (2011 saw 70 drone strikes and 2010, 118) with strikes being carried out as long back as 2004.[11] It is worth bearing in mind that the US did not even admit that it was involved in a war in Pakistan until June of 2012.[12] Meanwhile, in Yemen, a country where the US has not admitted to being involved in a war (as of the time of writing) the number was even higher, with 15 drone strikes carried out in the first 15 days of June 2012 – a month which did not stand out as being particularly exceptional in terms of the frequency of drone strikes occurring.[13] The use of unmanned, strike capable aircraft, popularly known as drones, is without a doubt the most prevalent type of targeted killing currently being utilised and this trend looks likely only to increase as time goes by. And with more and more countries now investing in drone technology and considering their defence and law enforcement applications[14] their use will soon go far beyond what we are currently seeing and so their place within

international law will become all the more important.

For these reasons, the focus of this dissertation, while taking in to account case studies and legal discussion of other types of targeted killings, will be very much on the use of drone strikes, and due to the advanced nature of the US drone strategy, will look in particular at their use in the hands of the United States.

In order to examine as many aspects of international law, in the space available, as they relate to targeted killings, I will examine some other types of targeted killing practices which more easily illustrate certain legal considerations.

My second case study will look at the SEAL Team 6 attack on Osama Bin Laden's compound in Abbottabad in Pakistan. This was a more 'traditional' type of attack using SF operators inserted across the Pakistan border from Afghanistan by helicopter. While reasonably surgical in its precision, the attack did result in the killing of several civilians. The importance of this strike is that it had been the stated aim of the war on terror since its inception during the Bush administration. It was an action which was both welcomed and condemned in the media. Its effectiveness, or lack thereof, and the continuation of al-Qaeda as a threat, calls in to question the usefulness of targeted killing policies in the war on terror. This is a question which is of particular importance, as if the targeted killings of high level terror suspects are ineffective in damaging the operational strength of a terrorist organisation, then the bending or breaking of international law in order to carry these strikes out is setting an ever more dangerous legal precedent and could have chilling implications for the future of international humanitarian law, human rights law and the laws of armed conflict.

The next case study will examine the US warplane airstrike which killed Abu Musab al-Zarqawi in June 2006 in the town of Baqubah, north of Baghdad. While the safe house in which al-Zarqawi was taking shelter was at the time surrounded by allied forces, the decision was taken to drop two 500 pound bombs on the building rather than attempt a capture. This case highlights an ancillary aspect of targeted killing, namely the lack of an attempt to detain rather than kill terrorist suspects. To kill or capture is a question which raises its head again and again in the discussion of targeted killing and counter terrorism strategies and one which should be answered on a case by case basis every time a targeted killing is carried out.[15] This is also a discussion which could be raised in relation to any number of other targeted killings, especially that of the killing of Osama Bin Laden mentioned above. However, I believe that the nature of the raid on the Bin Laden compound would make this a more difficult argument to consider and something like the al-Zarqawi airstrike is a much clearer case to facilitate this discussion.

The final case study will look at the failed strikes of January and October 2006, which were intended to kill Ayman al-Zawahiri, but instead killed a large number of civilians as well as destroying several homes in the Pakistani villages of Damadola and Chenagai, near the Afghan border. This case study will highlight the collateral damage implications of targeted killing and the issue of proportionality – a cornerstone of the right of self defence as laid out in customary law as dictated by the Caroline Case. This case also raises the question of the breach of sovereignty as the Pakistani government raised strong objections to the carrying out of the Damadola attack.

Format

This will be a legal dissertation focusing on the legal framework used to justify or to criticise targeted killings.

My methodology for conducting this research will be a to review the relevant laws, both those laid out in the UN Charter and through UN resolutions and findings of the International Court of Justice, and the customary law as has been developed through international treaties on the conduct of states involved in wars.

I will also be conducting an analysis of what has been said by legal experts and commentators in academic works and peer reviewed journals as well as examining what has been said by government administrations and their spokespeople. Another source of information for this research will be the results of reports by NGOs working in the area of human rights.

My legal analysis of the topic will consider a number of different arguments.

While successive United Nations Special Rapporteurs speaking on the subject have expressed apprehension at the tenuous legal foundations for the practice of targeted killings,[16] [17] [18] other legal experts have sought to justify their use.[19]

Two international legal paradigms are generally used to justify the practice of targeted killings: the law of war (*jus-in-bello*) and the principle of self-defence.[20]

The legal framework concerning *jus-in-bello* is laid out both in the various treaties on the laws of war[21] and the framework relating to the principle of self-defence is covered both in Chapter VII Article 51 of the United Nations Charter and in the International Court of Justice ruling on the Nicaragua Case (The Republic of Nicaragua v. The United States of America 1984).

In *Targeted killing, not assassination: the legal case for the United States to kill terrorist leaders* in the Journal of Islamic Law and Culture, Om M. Jahagirdar criticises the argument that targeted killings amount to little more than state-sponsored assassination programs and provides what he believes is a sound legal framework for a targeted killing policy, when it would be authorised, against whom, and the restrictions on which should be placed on such a program.[22]

Matthew D. Burns of the United States Air Force believes that the CIA UAV program in Pakistan represents a compromise between regular incursions on to Pakistani soil by US forces to pursue terrorists on one hand and doing nothing and affording terrorist groups a safe haven in a nuclear state. However, he also believes that the CIA operatives conducting the UAV program are “unlawful combatants and are not authorised under the law of war to carry out targeted killings,”[23] and asks if the United States can feel justified in holding and prosecuting those which it declares to be unlawful combatants, such as those held in Guantanamo Bay, “all while authorising the CIA to conduct targeted killing operations which depart from the law of war.”

The critics of targeted killings raise a number of different legal subjects. One argument against the legality of targeted killings suggests that they are illegal under the international laws which prohibit extrajudicial killings that lack due process.[24]

The principle of international accountability[25] is another subject which is of importance here. In 2010 UN Special Rapporteur Philip Alston said “In a situation in which there is no disclosure of who has been killed, for what reason, and whether innocent civilians have died, the legal principle of international accountability is, by definition, comprehensively violated.”[26]

Also, when the country in which the targeted killing is taking place has not given its consent for the operation to take place and when innocent civilians may find themselves in the firing line we must consider the principles of sovereignty and proportionality.[27]

CHAPTER 2

Methodology

In this chapter I will discuss first the reason for my choice of topic for this dissertation and secondly, the methodology which I employed in its research and structuring.

Why Targeted Killing?

The September 11 2001 terrorist attacks on the United States of America brought with them a new type of threat, foreign policy and rhetoric which has presented a very real threat to international law and world order. The previous world order had been built in the wake of the Second World War. Its laws, checks and balances had been put in

place to limit the chance of global war between states and though the world had been forced to suffer through the Cold War, it survived without succumbing to the threat of a nuclear conflict which would potentially have ended society. The end of the Soviet Union changed the geo-political stage from one of state versus state and super power versus super power to one in which states must contend with a host of non-state actors. National and international terrorist organisations have replaced the 'red menace' of the Cold War, and the fear of nuclear attack has been replaced by the fear of suicide bombers and WMD. Two 'world wars' gave way to the clandestine conflicts of the Cold War which, in turn, has given way to a global war on terrorism.

The subject of targeted killing and its application in the so-called global war on terror is, I believe, one of the most important contemporary issues in modern international law. Presenting as it does literally the choice between life and death for persons (be they terrorist suspects or innocent bystanders), the acceptance of targeted killings as a legal means to conduct aspects of foreign policy and counter terrorism has far reaching implications for the development of international law including the law of war, international humanitarian law and international human rights law. I believe that an unchecked acceptance of this type of action may lead us to a world in which no person is truly safe, not just from the threat of terrorism, but from the threat of the 'justice' which those states who claim to be protecting us from that terrorism can bring to bear at will, and sometimes seemingly arbitrarily, to anywhere in the world.

I believe the discussion contained in this dissertation to be relevant both from the point of view of examining the laws which might apply and how they might develop. It is also a timely discussion of a trend which is relatively new to the world, but one which is steadily moving on a course to affect aspects of the daily lives of almost everyone on the planet. That trend is the use of unmanned aircraft or drones in military and law enforcement roles. And with drone being used for the vast majority of recent targeted killings, the discussion of drones and their application in counter terrorism is extremely important.

Whether it be a CIA controlled Predator drone on a hunter killer mission for terrorist suspects, a border patrol drone warning border guards of illegal immigrants, a police drone monitoring traffic congestion or a DIY drone built and flown by a hobbyist as a weekend project, the number of drones in our skies is increasing every day.[28] [29] [30]

The purpose of this research and the focus of my research question is not only to assess whether or not targeted killings as they are being carried out in the current war on terror are legal under international law, but also whether the tacit approval of the international community, or at least the lack of condemnation of these actions coming from state governments, will mean that the use of targeted killing will become an accepted tool of counter terrorism and foreign policy under customary law.

In order to answer these questions it has been necessary for me to examine not only the laws which might directly apply to the use of targeted killing tactics and technologies, but also the laws applicable to anticipatory acts of self-defence and international law enforcement, as well as the on-going media coverage of the subject and finally, the principles from which customary international laws are developed.

Sources

With news of drone strikes almost a daily occurrence, internet news sources are obviously an excellent resource when it comes to keeping track of targeted killings carried out by drone strikes. These sites are also of course an invaluable source of information for other instances of targeted killing carried out in the war on terror. News agencies such as the Guardian, The New Yorker, the BBC, CNN and Al Jazeera have reported extensively on the policy of targeted killing with both news stories and in-depth analysis by policy makers and academics alike. The Bureau of Investigative Journalism has also conducted an exhaustive cataloguing of the use of drone strikes in targeted killing and so has proven a valuable resource when confirming figures for the numbers of targeted killings being carried out, as have the reports of NGOs such as Amnesty International. Popular scientific and political magazines have also carried extensive coverage of the use of drones and targeted killing in recent months. *The Spectator*, *Time*, *Scientific American*, *Wired Magazine* and *The New Yorker* have all carried feature articles on different aspects of targeted killing, drone warfare and the technologies of targeted killing in recent months.

All of the above sources have been used to build a broad knowledge of the practicalities of the subject of targeted killing and to maintain an ongoing knowledge of recent developments. Since my decision to take targeted killing as my dissertation topic, the subject has developed significantly. The number of targeted killings being carried out by the US against al-Qaeda suspects has steadily grown[31] and new aspects of US policy have emerged[32] while I have been carrying out my studies on the topic meaning a reliance purely on books and academic journal articles would lead to huge gaps in the knowledge which I might otherwise bring to bear on the discussion of this topic. And so the above range of sources has been of the utmost importance for me while undertaking this study. I have endeavoured to keep as up to date as possible with regard to sources and so have continued to include new sources of information right up until the conclusion of my research on August 19 2012.

My research in to the legal aspects, history and implications of targeted killing has of course however been conducted largely through books and academic and legal journals. HeinOnline law library and the JSTOR archive of academic journals have proven to be the most important information resources for the legal research which has been required. Law journals such as *The European Journal of International Law,* the *University of Richmond Law Review,* the *North Carolina Law Review*, the *Case Western University School of Law Review*, the *Denver Journal of International Law and Policy* and the *Cornell International Law Journal* among others have all provided articles which have been important in building up a picture of the legal framework which is relevant to the subject of targeted killings.

While fewer in number, as the number of books discussing the legal aspects of targeted killing is not as bountiful as one might expect, a number of books have also been important in developing my Legal Framework chapter; Nils Melzer's *Targeted Killing in International Law*, provided me with an excellent grounding in the legal discussions which would need to be addressed, as was *Targeted Killings and International Law: With Special Regard to Human Rights and International Humanitarian Law* by Otto Roland. I also made use of Gary Solis' *The Law of Armed Conflict: International Humanitarian Law in* War and *The Conduct of Hostilities Under the Law of International Armed Conflict* by Yoram Dinstein.

The online version of the *Max Planck Encyclopaedia of Public International Law* published by Oxford University Press was also extremely helpful for referencing international laws and treaties.

As already mentioned, the ever developing nature of this topic has meant that I have had to maintain an almost daily observation of news channels in order to keep up to date on how the subject of targeted killing has been changing. These changes have been both in the practical sense – in terms of the technology (drones etc.) being used – and also in the wider sense of how targeted killing is being justified on a regular basis by the United States administration in particular and discussed by academics who might be interviewed by the media or invited to give their views through feature articles in magazines and online.

As discussed above, organisations such as the Bureau of Investigative Journalists and Amnesty International have provided a source of quantitative data in terms of the numbers of targeted killings being carried out, by the United States in particular, but also by Israel. In the case of the United States, analyses have also charted the exceptional rise in the numbers of targeted killings which have taken place under the Obama administration as opposed to the Bush administration, and also the numbers of civilians who have been killed in drone strikes.[33] As the winner of an Amnesty Award, a Thomson Reuters Award and a Foreign Press Association Award in 2010/2011 I judged the information provided by the Bureau of Investigative Journalism to be of a dependable and credible quality. As a British, not-for-profit organisation the Bureau of Investigative Journalists is also unconnected to any major media outlets and so is unlikely to be compromised by agenda setting which might bias its reporting of the issue.

My collection of aggregate figures was through the sources detailed above. News reports collected from magazines and newspapers both in print and online; discussions of legal issues in various law journals and the in depth analysis of points of law as laid out in the academic journals and law reviews listed above and cited throughout this work, all contributed to the qualitative research conducted.

The literature review conducted in Chapter Two of this work demonstrated the wide range of sources whose

examination would be required in order to properly undertake an adequate review of the subject and the appropriate laws pertaining to it. While recent discussion of the legality of targeted killings was easy enough to come by, the fact that this is an emerging trend and that international law by its nature is slow to develop and catch up with the changing world, meant that the laws being examined predate the current incarnation of targeted killing (as opposed to the far more long lived concept of assassination) and so too do many of the discussions of those laws. The literature review also demonstrated how the interpretation of laws can differ wildly from one academic to another, with the interpretation of those same laws being broadest when in the hands of lawyers employed by government administrations. In my appraisal of these various interpretations I have chosen to put most credibility in those arguments which consider the most aspects of each law and put less credibility in the arguments of those who conveniently neglect to mention important facts and details or who are demonstrably incorrect on certain interpretations.

CHAPTER 3

Literature Review

As discussed in the opening chapter, though the use of assassination is a practice as old as warfare, the use of targeted killing policies and in particular their use against non-state actors in a global war on terrorism is a relatively new concept. Academics have had little more than a decade to consider and discuss the ramifications and acceptability of this type of act. And so it is that while that debate has been ongoing and authoritative voices have emerged, the volume of literature purely focused on the subject in no way matches the wealth of information which we might find on other aspects of military or law enforcement policy, as the case may be. And so while it is possible to develop a case for or against the use of targeted killings from an international law point of view, it is often necessary to draw conclusions on how international law and law enforcement norms might be applied to policies of targeted killing from works which predate the emergence of this phenomenon.

For the purposes of this particular dissertation I have drawn on both types of source; those which predate the al Qaeda attack of September 11th 2001, and so were written before what we now know as the global war on terror and our modern notion of targeted killing; and those which have been written since the war on terror began and targeted killings became a recognised tool of some of the countries who claim to be involved in a war on terrorism which out-spans notions of international borders and boundaries. This literature review will focus in particular on two books which I have used as my jumping off points in to the world of targeted killings and their place in international law. It will examine the arguments and discussions which they put forth and explain their positions within the context of the wider canon of work on the subject.

Definitions and Justifications

Thomas Hunter's *Targeted Killing* is a concise examination of the concept of targeted killing and its place in foreign policy strategy. Thomas Hunter's background is in intelligence analysis with the Defence Intelligence Agency. The DIA is a US Department of Defence combat support agency and a leading player in the US intelligence community. It works closely with the DoD in the military planning of operations and in weapon systems acquisitions. Hunter has written for publications such as Jane's Intelligence Review and Jane's International Police Review, publishing articles on counter terrorism and security subjects. He was also the editor of the Journal of Strategic Security and the Journal of Counterterrorism and Homeland Security International. With such a background, Hunter is a strong candidate for an expert in the field of targeted killing.

In this short book, which was developed from a 2005 essay of the same title, Hunter assess the norms which states apply in justifying their use of targeted killing against non-state actors alleged to be involved in terrorist activities. The work examines a number of different case studies involving various types of targeted strikes from drones to special forces and considers the actions of various states such as the US, the UK and Israel. Hunter's *Targeted Killing* serves as a primer to the debate; giving us a thorough definition of just what is meant by the term, the difference (or

alleged difference) between targeted killings and assassinations and brief introductions to the main body of international law governing the right of states to carry out acts of force in self-defence: namely Chapter VII of the United Nations Charter and the norms of self defence.

Hunter claims that targeted killings are not assassinations, which are banned in the United States by Executive Orders such as EO11905. He defines assassination as, "the premeditated killing of a prominent person for political or ideological reasons."[34] Hunter then goes on to clarify this distinction: "In sum, assassination is the killing of an individual or group of individuals for purely political or ideological reasons. Targeted killing, in contrast, is the killing of an individual or group of individuals without regard for politics or ideology, but rather exclusively for reasons of state self defence." It is only through this distinction of setting targeted killings apart from assassinations that any targeted killing policy can be given a degree of legal credibility.

The book provides an excellent jumping off point for finding other relevant works on the subject and its related topics.

Also considered is the threat posed by the potential use of weapons of mass destruction by non-state actors.

Some arguments in support of targeted killing do appear infrequently in the popular press[35] [36], regularly from government policy makers[37], and less frequently, from academics,[38] especially academics based in Israel[39] [40] [41]. This predominance of Israel-based academics supporting targeted killing policies is perhaps unsurprising, given how, as Hunter explains, Israel is the only state which has set out, through a ruling of the Israeli High Court of Justice, the conditions under which its military may conduct such operations.

Most journalists, diplomats and academic authors tend to be less forthcoming in their support for the policy for various reasons however.[42] [43] [44] Even those who do argue in favour of its use, do so only with a number of caveats, pointing out the potential dangers of their use[45]. However, if we consider targeted killing to be a form of anticipatory self defence – as has been argued by successive US administrations[46] [47], we can find a few more supportive, academic voices[48]. The threat of WMD is a major argument put forward by authors seeking to justify the use of targeted killing as a tool of pre-emptive self defence. While Hunter's discussion of targeted killing is a dispassionate look at the facts with little comment on the ethics or legality of the practice, other authors have used extreme examples such as the threat of WMD attacks in seeking to justify the use of targeted killing policies[49].

Though remaining more or less in the middle of the road in terms of conclusions on the subject, Hunter comes finally down on the side of those who recognise the usefulness of targeted killings but who warn of the danger of their use. While noting the effectiveness of the tactics, he is unconvinced of their strategic value. Hunter also warns that the use of targeted killing is likely to set apart those states which employ them from the rest of the international community, and also sets a dangerous precedent by leading the way for other nations to integrate targeted killing in to their own foreign policy strategies.

Legal Authors

Nils Melzer serves as a legal advisor for the International Committee of the Red Cross (ICRC) and is a lecturer at the Geneva Academy of International Humanitarian Law and Human Rights. His research for *Targeted Killing in International Law* was used in Section IX of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.[50]

Though far more thorough an examination of the subject, like Hunter, Melzer does not limit the scope of his work to just one type of targeted killing. He examines a host of cases from air strikes and drone attacks, to special-forces raids and car bombings. Melzer's is an exhaustive examination of the laws which might apply to a situation in which a state chooses to end the life of an individual. Melzer's definition of a targeted killing is the use of lethal force by a subject of international law (a state or agent of a state), that is intentional, premeditated, and deliberate – meaning that the death of the target is the actual aim of the operation and not a result of negligence or chance. In contrast to other authors who believe that international law must develop in order to accommodate the notion of targeted killing, Melzer leaves behind *de lege ferenda* arguments and chooses to show us how the current *lex lata* of human rights

law and international humanitarian law already provide us with a clear and satisfactory response to the international lawfulness of state policies of targeted killing both in law enforcement and in the conduct of hostilities.[51] Melzer puts forward two distinct normative paradigms within which he tells us we can judge each case of targeted killing dependent upon the particular circumstances under which it has been carried out. Firstly, the hostilities paradigm covers targeted killings which take place as a part of the conduct of hostilities in a time of war and are directed against any person not entitled to protection against direct attack – such as combatants and civilians taking an active role in hostilities. All other targeted killings, whether within or outside of the context of a war if they involve the killing of a civilian not directly participating in hostilities fall within the law enforcement paradigm.

Melzer then goes on to explain under which circumstances in each of these paradigms a targeted killing might be considered lawful. His conclusion is that a targeted killing falling within the law enforcement paradigm must have a basis in domestic law. It must be a preventative act rather than a punitive one – meaning it must stop an act, such as a terrorist attack, from happening rather than be used as a strike back against the perpetrators. The protection of human life from an unlawful attack must be its only purpose and the actions undertaken should be "absolutely necessary in qualitative, quantitative and temporal terms for the achievement of this purpose,"[52] with the loss of the target's life being the undesired outcome of an operation which was planned in such a way as to minimise the use of lethal force.

His conclusion on targeted killings which fall within the hostilities paradigm is that they must be "likely to contribute effectively to the achievement of a concrete and direct military advantage without there being an equivalent non-lethal alternative."[53] Neither should the attack be directed against civilians or other individuals who are entitled to protection against direct attack. The attack should also be proportional and be planned to avoid collateral damage in line with those precautionary measures required under IHL. The attack should also not be performed through perfidy or with the use of booby traps or other prohibited weapons.

Melzer's requirements are detailed and reasonably laid out, and even a cursory examination of the majority of targeted killings which have taken place in recent times – especially those carried out by unmanned drones – suggests that the majority of these would fail the tests which he puts forward. In summary, Melzer contends that a targeted killing which takes place under the law enforcement paradigm must be the very last resort in an effort to save the lives of innocent people from an unlawful attack after every option for detaining the suspect and otherwise preventing the attack has been exhausted. And so a law enforcement operation (such as any counter terror operation conducted outside of an actual armed conflict) which sets out from the start to end the life of the suspect must be illegal under human rights law.

Differing Legal Angles

Other authors do not subscribe to Melzer's distinction between these two paradigms, seeing instead the answer to the legal justification of targeted killings lying somewhere in between, with a mixed model. David Kretzmer argues that while in international armed conflicts a terrorist may very well not be a legitimate combatant, in non-international armed conflicts their categorisation may change to that of combatants. In conflicts such as this he believes that the norms of IHL cannot stand on their own and a mixed model which incorporates features of international human rights law must be used.[54]

The mixed model is one which is strenuously rebutted by others such as Ariel Zemach and Ben-Naftali & Michaeli. Zemach believes that the law of war should take precedent over all other concerns such as international human rights law when considering conflict between states and non-state actors whatever the circumstances. In fact, Zemach believes that the mixed model, far from representing the best choice for preserving the adherence to international law, represents a complete departure from the basic principles of international law. He points to the fact that the ICJ has repeatedly held that the law of war governs within its field of application as *lex specialis*, and that those decisions do not distinguish between international and non-international armed conflicts.[55] Zemach takes this standpoint in the belief that to do otherwise sets certain standards upon states involved in a conflict while not setting those same standards upon the non-state actors with whom they are fighting. He rejects the arguments of those authors who distinguish between international and non-international armed conflicts such as conflicts between states

and terrorist organisations.

Seeing conflict and violence as being a part of the normal course of international life rather than a derogation from the normal routine of human existence, Ben-Naftali and Michaeli also argue for the primacy of the law of war over international human rights law. However, this primacy of the law of war does still allow for human rights law to inform the manner in which the laws of war and of occupation are interpreted and applied. Here Ben-Naftali and Michaeli, like Zemach, cite the rulings of the ICJ , but in this case concede that while the law of war might provide *lex specialis*, the application of human right in situations of conflict is not suspended.[56]

The choice of which paradigm or which body of laws to employ in the context of the fight against terrorism is of particular interest to respected authority on the subject of drone attacks, Mary Ellen O'Connell. O'Connell holds the Robert and Marion Short Chair in Law and is research professor of international dispute resolution at the Kroc Institute for Peace Studies at the University of Notre Dame, and her views are regularly reported in the media, making her one of the most recognisable voices on the subject both among academics and to the public at large. O'Connell recognises the fact that while indeed a state of armed conflict might be argued to be in effect between the United States and al-Qaeda, targeted killings through the use of drone strikes regularly are carried out far from what might be considered a usual zone of warfare. Of course the argument of the lawyers tasked with justifying the US war on terror is that this is a global war, making the entire globe one big war zone.[57] The ridiculousness of this statement and the dangers of its acceptance are clear for anyone to see.

O'Connell argues that the choice of whether or not a state and a non-state entity are engaged in an armed conflict is determined based on certain objective criteria and not the opinions of policy makers and the legal team of a particular administration.[58] While prior to the adoption of the UN Charter in 1945 a state could declare war without even having fired a shot[59], that is no longer the case and in order to declare that a legal state of war exists within a territory today organised armed fighting of some intensity must exist.[60] While the level of intensity required is subjective and actual levels of conflict may wax and wane leading to grey areas in assessing whether or not an armed conflict actually exists, in such cases law abiding states must act in conformity with the laws prevailing in times of peace.[61]

O'Connell finds that the jump from the use of criminal law and the law enforcement paradigm, which was used by the United States in the pursuit of terrorism suspects before the events of 9/11, to the use of the law of armed conflict and military means is a choice of action unsupported by international law. When drawing up a set of principles to guide the Obama administration toward reforms of post 9/11 laws and policies, O'Connell along with David Graham and Phillipe Sands wrote: "The phrase "Global War on Terrorism" should no longer be used in the sense of an on-going "war" or "armed conflict" being waged against "terrorism." Nor should it serve as either the legal or security policy basis for the range of counter- and anti-terrorism measures taken by the Administration in addressing the very real and present challenges faced by the United States and other nations in addressing terrorism."[62] O'Connell and her colleagues found conclusively that it was criminal law and not the law of armed conflict, the law enforcement paradigm, not the hostilities paradigm, which was the right choice against sporadic acts of terrorist violence.

For other authors different models of law come to the fore such as the due process model as discussed by Richard Murphy and Afsheen John Radsan in their 2009 paper.[63] Murphy and Radsan argue that the United States, under the due process model as developed by the US Supreme Court in *Ahmadi v. Rumsfeld* and *Boumediene v. Bush,* has a due process obligation to develop fair, rational procedures for its use of targeted killing no matter who the target might be or where in the world they might be located. They point to the lead set by the Supreme Court of Israel and the European Court of Human Rights to require an independent, intra-executive investigation of targeted killings.

Removing the focus from targeted killing in particular and looking instead at anticipatory self-defence, a banner under which the use of targeted killing has repeatedly been defended, Mulcahy and O'Mahony argue that the stronger states have little interest in international laws of any kind, at least in how they might or might not apply to their own actions. Anticipatory self defence, and with it, targeted killing, is simply something which larger states such as the US can force upon the international community and, in turn, international law. They argue for an examination of the

legitimacy of the use of force in acts of anticipatory self defence, a look at the belief of the state itself as to whether or not the action is truly necessary, would be more useful than judgement based on abstract legal concepts.[64] Their argument that the development of international law is inherently political in nature is one which would be very difficult to argue against. Perhaps the real mixed model which is required for the discussion of this subject is a mix between the legal debates and the more philosophical and ethical ones.

CHAPTER 4

Legal Framework

The main question in international law concerning the legality of targeted killing policies being carried out by state actors is whether such actions constitute legitimate acts of self-defence or are in fact extra-judicial executions. Through an analysis of the legal framework relating to this subject I hope to come to a satisfactory answer to this question.

In this analysis I will examine the legality of such killings under the norms of international human rights law and international humanitarian law. Under international human rights law such killings can only be considered lawful when they are carried out to prevent an imminent attack that cannot be stopped by other means, while under international humanitarian law they may only be considered lawful if the target can legitimately be considered as a combatant.[65]

There are currently three distinct areas of academic discussion which have taken place on the subject of State-sponsored targeted killing in contemporary legal doctrine. The first, and most recent, discussion taking place is concerned with the international lawfulness of the policies of targeted killing which have been adopted by States such as Israel, the United States, Pakistan and Russia in their current campaigns against international terrorism. The second discussion which is primarily taking places among American writers concerns the concept of assassination; its status under international and domestic US law and its distinction from the more general concept of targeted killing, while the third discussion is looking at the legality of the 'shoot-to-kill' policies which have entered the world of law enforcement in its approach to anti-terrorism actions.[66]

As far as international law is concerned the discussion of targeted killing is generally conducted under one or more of the three principal normative frameworks regulating the use of force by states. These are the law governing the resort to interstate force, international humanitarian law (IHL) and human rights law. Human rights law is generally associated with the paradigm of *law enforcement*, IHL with the paradigm of *hostilities*, and the law of interstate force with the paradigm of *self defence*. Most commentators agree that no one classification or set of laws is adequate to properly address this complex subject and a combination of one or more paradigms or a development of the same is required.[67]

The Discussion of Assassination

Although the discussion on the permissibility of assassination as a tool of foreign policy which has taken place among writers from the United States, and dates back to the Cold War practices of the US Government, has largely avoided questions of domestic law enforcement and human rights law, it has never the less contributed greatly to the debate on the permissibility of targeted killings under the law of interstate force. It is through the legal framework which has been built up in the United States surrounding the use of assassination that we can begin to build an understanding of the laws which should be applicable to targeted killing policies.[68]

In the 1970s a US Senate Select Committee's (the Church Committee) investigation and subsequent 1975 report in to the involvement of the Central Intelligence Agency in the assassination of foreign leaders recommended a statutory prohibition on assassination. Consecutive US Presidents avoided implementing such legislation by passing executive orders banning US Government agents from engaging in assassination. The executive order currently in place, EO 12333 of 1981, states that "No person employed by or acting on behalf of the United States Government

shall engage in, or conspire to engage in, assassination".[69] EO 12333 did however fail to provide a definition of assassination leaving US officials and military personnel without guidance as to how the presidential order should be interpreted and so giving no real boundaries to how they might conduct affairs.[70]

The discussion of assassination in US legal doctrine preconceives assassination to be unlawful by its very definition and instead focuses its questions on which types of conduct might fall outside the scope of the ban. [71] US doctrine considers two contexts for assassination: peacetime and wartime.

The concept of peacetime assassination refers to the killing of individuals by State agents that is both politically motivated and illegal.[72] This definition is deduced from sources such as the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973)[73], and is inferred from the prohibition of murder in the national legislation of all states, the universal prohibition of interstate force in Article 2(4) of the UN Charter as well as the practice of individual States and of the United States regarding particular studied cases of assassination.[74] Such as definition would correspond with the apparent purpose of the original US executive orders, based as they were upon recommendations arising from an investigation in to the peacetime conduct of the CIA.

The wartime concept of assassination in US legal doctrine refers to the treacherous killing of individuals belonging to the hostile nation or army.[75] This definition is deduced from the prohibition of assassination in the Lieber Code of 1863[76] and from the prohibition of treachery and perfidy in customary international humanitarian law.[77] The link between treacherous killing and assassination is made in the Oxford Manual (1880)[78] and in many military manuals such as those of the Australian, Canadian, Israeli, New Zealand, United Kingdom and United States armed forces. These manuals also prohibit the outlawing of or putting a price on the head of individual enemy but do not prohibit surprise attacks against individual combatants whether in the zone of hostilities, occupied territories or elsewhere. [79]

While the American discussion on assassination is significant in the wider debate on targeted killing its focus is too narrow both in its analysis of peacetime and of wartime assassinations to provide a definitive guide. The discussion of peacetime assassination provides valuable insights concerning the permissibility of targeted killing under the law of interstate force but ignores completely domestic law enforcement and human rights law. And while the discussion of assassination in the wartime context with its focus on treachery and perfidy is valuable in the examination of targeted killings resulting from covert operations, the definition is too narrow to provide a comprehensive analysis of the lawfulness of targeted killings being carried out during the conduct of hostilities.[80]

Targeted Killing under the Law of Interstate Force

When a state resorts to the use of targeted killings within the confines of another state it is generally agreed that this would fall under the prohibition of interstate acts of force as laid out in Article 2(4) of the UN Charter[81], and can only be justified when committed as an act of self-defence when authorised by the state in which the killing is taking place, or when authorised by the UN Security Council. [82]

While an analysis of the concept of extra territorial targeted killings conducted purely under the law of interstate force in the context of right to self defence granted under Article 51 of Chapter VII of the UN Charter might seem to make sense, this ignores the fact that this law is relevant only to the regulation of relations between states and not between states and individuals.[83] Most writers agree that the lawfulness of a targeted killing is dependent on the laws protecting individuals from harm at the hands of a state actor; human rights law in peacetime (in which case the State must adhere to law enforcement standards) and IHL in times of war.[84]

The discussion of targeted killing in relation to the right of states to take action in self defence under the law of interstate force is mainly focussed on two types of situation. Firstly, there is targeted killing as anticipatory or pre-emptive self-defence – such as in the case of the targeted killing of the leader of a rogue state which is attempting to acquire weapons of mass destruction (WMD), as was alleged to have been the case with Saddam Hussein in Iraq[85]or a member of a transnational terrorist organisation which is believed to be planning an attack.

The second situation pertains to targeted killings as self-defensive measures against members of transnational terrorist groups operating from the territory of another state. In both of these cases difficulties arise in defining when the actions for which the targeted killing is a response constitute an armed attack under Article 51 of the UN Charter. Most authors seem to agree that large scale terrorist attacks or frequent, smaller terrorist attacks can qualify as an 'armed attack' within the meaning of Article 51, and many also interpret the right of self defence and of anticipatory self defence in light of the *Caroline Case* (1837), arguing that it justifies actions against non-state actors either carrying out attacks or planning to carry out attacks from a territory where the state is failing to prevent these cross-border attacks against the defending state.[86] The lawfulness of targeted killings in anticipatory self defence is further clouded where a terrorist attack is neither occurring nor imminent but is likely to occur in the foreseeable future.[87] Writers who argue in favour of the lawfulness of this type of targeted killing claim that the UN Charter has not restricted the customary right of self-defence and the nature of transnational terrorist organisations and the enormous potential for damage and loss of life which their attacks can hold requires the allowance for targeted killings whenever those terrorists are visible and not only when their attacks are imminent or in the process of being carried out.[88] American authors in particular have stretched the phrase 'if an armed attack occurs' from Article 51 of the UN Charter to justify self-defensive actions not only against actual attacks and imminent attacks but also against what they call 'continuing threats'.[89]

Some writers involved in the law of interstate force discussion have suggested that the concept of necessity as derived from domestic criminal law be applied to targeted killings – making a targeted killing justifiable if the harm which would be avoided by carrying out the targeted killing is greater than the harm of conducting the targeted killing. This takes in to account both the harm of the infringement upon the national sovereignty of the state in which the killing will occur as well as the potential harm which may be inflicted upon innocent bystanders.[90] However, this proposal which would replace the prerequisite of an 'armed attack' with a proportionality test of whether the benefits outweigh the costs neglects the fact that customary law already recognises an exculpatory concept of necessity which could be used to achieve the same results. So it is not a question of whether or not the law of interstate force needs to be fixed with elements of domestic law, but to what extent Article 2(4) of the UN Charter permits exceptions based on consent, necessity and distress.[91] That said, the law of interstate force clearly requires clarification, especially in its adoption in cases of state self defence against non-state actors.

Targeted Killing under International Humanitarian Law

When discussing targeted killing in the context of IHL it is first necessary to establish whether or not a situation of armed conflict exists; with most analyses of the targeted killing policies being carried out by Israel and the US asking if the Israeli-Palestinian confrontation and the war on terror can be classified as international or non-international armed conflicts within the meaning of IHL.[92]

In the case of the Israeli Palestinian situation the context of belligerent occupation also raises the question of how much an occupying power must also comply with human rights laws despite the primary applicability of IHL. In fact Amnesty International has accused Israel of picking and choosing which set of laws it decides to justify its targeted killings under depending on the situation. [93]

With respect to the conduct of hostilities there is general agreement that a targeted killing is permissible as long as the individual being targeted is a legitimate military target such as a combatant or a civilian who is directly participating in hostilities.[94] And so we see the problem with the targeted killings which have been conducted under the umbrella of the war on terror, where the targeted killings are of non-state actors and are generally being carried out while those individuals are not visibly engaged in hostile acts. This has raised the question of whether or not such non-state actors engaged in an armed conflict against a state should be regarded as civilians and legally targeted only when directly involved in hostilities or as combatants who may be targeted at all times.[95] This raises the further questions of just which types of acts would qualify as hostile acts and leave the individual open to attack. Some authors have attempted to circumvent this whole area of IHL by simply labelling suspected terrorists as legitimate military targets[96] though this is a conclusion which some have argued is without legal merit.[97]

We must also consider the serious concerns which have been put forward with regard to the possibility of the

mistaken targeting of innocents and the collateral damage which often occurs in the wake of a targeted killing – especially those conducted through air strikes by either manned or un-manned aircraft.

The most important questions then when considering targeted killing in the context of IHL is the status of the overall situation as an international or non-international armed conflict or indeed if it constitutes an armed conflict at all, and the status of the non-state actors and how we define combat and direct participation in hostilities. On the first point the US Supreme Court, in the *Hamdan* case of 2006, has subscribed to the notion that the war on terror is in fact a non-international armed conflict – though this makes little sense since a non-international armed conflict cannot by definition assume a global dimension as the US has claimed the war on terror has.[98] On the second point it has been suggested that terrorists may in fact occupy an entirely new categorisation; that of international criminals – and so presumably gaining none of the rights of lawful combatants, under international law, nor simple criminals, under domestic law.[99]

Targeted Killing under Human Rights Law

Human Rights Law is the body of law protecting all human beings at all times including times of armed conflict and other times of emergency.[100] While some authors believe that human rights laws should apply to the actions of states in their own territories or in occupied territories (as might be the case for Israel in the West Bank and Gaza Strip),[101] others contend that the duty of a state to respect the right to life of all people extends to the actions of the agents of that state no matter where in the world they might be operating.[102] Authors in general agree on the point however that the law enforcement standard of human rights law becomes inadequate when the violence between a state and non-state actors reaches the level of a non-international armed conflict.[103] The fact that a State might be unable to apprehend a terror suspect by normal law enforcement means does not however necessarily make their targeted killing a lawful act and the use of lethal force against non military targets should always comply with the standards of human rights law.[104]

Guidance on when a targeted killing might be allowable under human rights laws can be found in the main international human rights conventions and from the statements and findings of the UN Human Rights Council and its Special Rapporteurs, and also in the Universal Declaration of Human Rights[105], the UN Code of Conduct for Law Enforcement Officials (1979)[106] and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)[107].

According to these conventions the use of lethal force under human rights law is governed by the rule of absolute necessity, meaning that the use of force must be the only option available to avert a threat, and the principle of proportionality, requiring that the level of force used be justified in terms of the scale of the threat presented. A requirement of immediacy might also be considered when a threat does not allow for a delay in responding to it. Therefore it is clear that international human rights law would only make a targeted killing lawful in the most extreme cases – for example where a terrorist attack is about to be perpetrated and attempts to apprehend the terror suspects would likely fail to prevent the attack.

Targeted Killing and its place in Customary International Law

Also in question here is whether or not the apparent acceptance of the international community – in that the international community has seemingly failed to condemn outright the practice of targeted killing as employed in the war on terror – will lead to the inclusion of targeted killing as a legitimate practice under customary international law.

Customary international law (CIL) is one of the two primary forms of international law, the other being treaty law, and is defined as a "general and consistent practice of states followed by them from a sense of legal obligation."[108] CIL already allows for limited right to pre-emptive or anticipatory self-defence. This is dependent upon the interpretation of Article 51 of Chapter VII[109] of the UN Charter and also the body of law formulated by the *Caroline Case**[110]* of 1837 which were reaffirmed by the Nuremberg Tribunal following the Second World War.[111] These state that the necessity for pre-emptive self defence must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[112]

CIL is developed without a centralised law-making body or enforcer, instead growing from the accepted practices of states and often reflecting the needs and desires of the most powerful nations, rather than the good of the international community as a whole. CIL is not static however and is affected by new assertions of rights, if other states acquiesce to those assertions.[113] So, the reactions of other states to the policy of targeted killing by the US in the war on terror for example might affect the future legality of that policy in international law.

CHAPTER 5

Case Studies

The choice of case studies included here have been selected for two reasons; firstly, to give the reader an understanding of what the practical details of the targeted killing of a terrorist suspect might be; and secondly, to demonstrate where some of the legal issues which have been discussed previously might arise. In each case I will examine whether or not these examples of targeted killings can pass the tests for necessity, immediacy or proportionality – essential requirements for the justification of acts of anticipatory self defence.

Case Study 1: Aslam Awan, Pakistan, January 2012

Aslam Awan, also known as Abdullah Khorasani, a Pakistani national from Abbottabad was killed by a US drone strike in the town of Miramshah in the Pakistan border province of North Waziristan on January 10 2012. The drone strike which killed Awan and another four people, described by official sources as militants, ended an unofficial eight week hiatus in US drone strikes in Pakistan following the NATO air attack of November 2011 which killed 24 Pakistani troops and soured relations between the Pakistan government and NATO forces. A planned CIA drone strike in the same region had been cancelled on January 4, after the CIA had informed the Pakistani government of the plan and the Pakistan had declined to give permission for the strike. [114]

An eyewitness report told Associated Press that a “modest mud house” had been the target of the strike in which a woman and a child, the wife and son of a Saudi Arabian fighter who was killed, received minor injuries.[115] The attack prompted a number of public protests, though reports from the US administration stated that top administration officials had met with their Islamabad counterparts to inform them that the hiatus on drone strikes would be coming to an end and also stated that no promise had previously been given that the drone campaign in Pakistan would be halted.[116]

Awan was described by a US official as a significant figure in the remaining core of the al-Qaeda leadership: “Aslam Anwar was a senior al-Qaeda external operations planner who was working on attacks against the West. His death reduces al-Qaeda’s thinning bench of another operative devoted to plotting the death of innocent civilians.”[117]

The case of Aslam Anwar’s targeted killing raises two issues in relation to this research. The first issue is that of anticipatory self-defence. US officials maintained that Awan was engaged in planning attacks though they describe them only vaguely as “attacks against the West.” No further public justification was given for this attack, though presumably the US administration did provide the Pakistani government with details of why this target was selected and we are told that officials in Islamabad decided to grant permission for this strike. The generally vague or otherwise lacking explanation for why a particular suspect has been targeted for killing, while conveniently kept hidden for matters of national security, is far from sufficient an argument under which to claim the right to carry out a targeted killing for reasons of anticipatory self-defence. A 2010 report to the UN Human Rights Council by Philip Alston, the United Nations special representative on extrajudicial executions rejected outright the claim of pre-emptive self-defence as a justification for killing terrorism suspects outside combat zones.[118] Furthermore, this case clearly fails the necessity requirement for justifying an act of anticipatory self defence in that no evidence was put forth to support that claim that a clear and present danger of immediate attack existed as opposed to mere general preparations by the enemy[119], such as the vague planning which the CIA had stated that Anwar was involved in.

As mentioned above, the Pakistan government had denied permission for a strike in the same region earlier in the month and the CIA had relented to this denial by cancelling their planned drone strike. This US consideration for the wishes of Pakistan is notable primarily for its novelty in this case (due no doubt to the mistaken killing of 24 Pakistani troops a few weeks earlier and the diplomatic fallout over that incident), as in the vast majority of cases, while Islamabad may officially give its permission for individual strikes it would appear that the Pakistani government has little or no say on whether or not a US strike goes ahead. Pakistani officials have repeatedly stated that they have been requesting an end to the drone campaign, with resolutions being passed in the Pakistan parliament to that effect. These requests have for the most part fallen on deaf ears however and it would appear that the US has no intention to do anything but continue its drone campaign over Pakistan,[120] with the US Defence Secretary even admitting that the US is now fighting a war in Pakistan.[121] Wajid Shamsul Hasan, a senior Pakistani diplomat in London believes that the continuance of the US drone campaign ignoring the continued protests of Pakistan is undermining the credibility of the democratic government in Pakistan with the public recognising that there is little that their government can do to stop the incursions of the US in to their sovereign territory.[122] The actions of the US, it would seem, are carried out with no regard for the legal sovereignty of Pakistani territory and airspace except in those circumstances where NATO errors and the Pakistani reaction to them threaten the continued presence of NATO forces in the area and lead to public condemnations of US policy in the area from the Pakistan government.

Case Study 2: Osama bin Laden, Pakistan, May 2011

The capture or killing of Osama bin Laden had been one of the stated aims of the United States' war on terror since it began following the 9/11 attacks. It would take ten years for the US to finally track him down and carry out its targeted killing of the al-Qaeda founder and spiritual leader.

Operation Neptune Spear, the SEAL Team 6 raid on Osama bin Laden's compound in Abbottabad in Pakistan, was planned as a "kill or capture" mission, though it is unlikely that the 'capture' part of that plan was ever truly on the cards. Though it might be the stated policy of the US military not to kill an unarmed suspect during an operation, numerous accounts of the operation have stated that bin Laden was unarmed at the time of his death and presented no threat to the special-forces operators confronting him.[123] [124] In this case at least, either the plan had always been for the operation to end in bin Laden's death, or the opportunity to end the life of the world's most wanted man had simply been too strong an urge to resist for the operator who finally pulled the trigger. When one tries to consider what might have come next had bin Laden actually been captured though, it seems ever more unlikely that capturing the terrorist leader was ever a realistic option. A fair trial would have been next to impossible for bin Laden, as would international agreement on where that trial might take place. No finding but that of guilt with a death sentence following soon after would likely have been satisfactory for the US media and public – making his capture far more troubling an option for the Obama administration than his killing. It is unlikely that the capture of any high ranking al-Qaeda leader would prove any different to the US. Any idea of due process when it comes to brining al-Qaeda terrorist leader suspects to justice has clearly been put aside in favour of the more quick fix of targeted killing.

The case of the bin Laden targeted killing brings up many questions; apart from the question of to kill or capture, we again have the issue of Pakistan's sovereignty (in this case the decision was taken not to inform Islamabad of the operation for fear of intelligence leaks[125]), but perhaps most importantly we have the question of whether or not the killing of terrorist leaders can really have a lasting effect on those terrorist groups. And if targeted killings are ineffective at limiting the actions of terrorist groups are these killings, and in particular the killing of bin Laden, anything more than acts of revenge by a state upon an individual? We have already seen from Melzer that a targeted killing, in order to be legal, must meet a number of criteria, one of which is that a targeted killing performed under the law enforcement paradigm must be preventative and not punitive. Of course the US administration might argue that this targeted killing was performed under the hostilities paradigm, but given the fact that it was not until mid 2012 that the US Defence Secretary even announced that the US was engaged in warfare in the tribal regions of Pakistan, it is difficult to take seriously an argument that a US military act within a peaceful Pakistani city popular with tourists and with a population of almost one million people should be considered an action within a war zone.

It has been widely acknowledged that bin Laden was no longer any more than a figurehead for the al-Qaeda network with no input on the planning of operations[126] with even President Obama declaring in 2009 that there was no

longer a need to find bin Laden[127]and President Bush declaring the same as early as 2002.[128] With the time of any real threat posed by bin Laden clearly expired, the test of immediacy in order to justify this attack must surely fail in this case.

While the targeted killing of bin Laden might be understandable from the point of view of the US administration, media and public and might even have been welcomed by many the world over, a real, serious argument for its legality under international, or any other, law would be extremely difficult to make.

Case Study 3: Abu Musab al-Zarqawi, Iraq, June 2006

Abu Musab al-Zarqawi, the high-profile leader of the Iraqi insurgency, was killed in a targeted killing on June 7 2006 while attending a meeting in an isolated safe-house eight kilometres north of Baqubah in Iraq.[129] Two USAF F16s dropped two 500-pound bombs on the house killing al-Zarqawi and five others. The strike was the culmination of a long manhunt for al-Zarqawi by Taskforce 145 – the combined UK and US special-forces group charged with tracking down high value al-Qaeda and Iraqi leadership targets in Iraq.

Having observed al-Zarqawi enter the house, Taskforce 145 had reported his location and the house was surrounded by Iraqi security forces[130]. Believing that there was a chance that he might escape, the decision was made to hit the building with an air strike. The lack of a serious attempt to actually capture al-Zarqawi even though both Iraqi security forces and members of Taskforce 145 were clearly present in the area calls in to question the will of the coalition forces to attempt a capture operation when a targeted killing would present a more conclusive solution. Once again we see these actions clearly in contravention of the principles which have been clarified by Melzer and others that the death of the suspect should only be an option when all other options have been exhausted. Even under the hostilities paradigm, a targeted killing should only be carried out to achieve a direct military advantage only when no equivalent non-lethal alternative is available.[131] For this case we have a failure of both the necessity and immediacy tests to justify an act of anticipatory self defence;[132]no immediate threat of attack existed, nor was an attack ongoing which would necessitate the abandonment of attempts to capture the suspect.

Mary Ellen O'Connell also argues that the capture of terrorist suspects should always be preferred over their killing but unlike Melzer who gives weight to the hostilities paradigm, finding criteria for legal targeted killing within its framework, O'Connell believes that the US should have been working under the law enforcement paradigm in all of its confrontations with terrorism suspects – as it always had done previous to 9/11.[133]

Case Study 4: Ayman al-Zawahiri, Pakistan, January 2006 & October 2006

A failed targeted killing attempt was made on the life of Egyptian physician and current leader of al-Qaeda[134] (correct as of August 2012) on January 13 2006 when the CIA launched a drone airstrike on Damadola, a Pakistani village near the Afghan border, where they believed al-Zawahiri was located. [135] Eighteen civilians were killed in the attack involving as many as 10 missiles fired from unmanned drones which failed to hit al-Zawahiri.[136] A second failed targeted killing attempt on al-Zawahiri was made in October of that year when between 70 and 80 people, many of whom were children, were killed in a strike against a madrassa[137] in the village of Chenagai in the Bajaur region of Pakistan. While initial reports were that the attack was carried out by the Pakistani military – reports confirmed by both the US and Pakistan, a later report from *The Times* claimed that it was in fact the United States which had carried out the attack.[138] Whether it was a US drone or a Pakistani helicopter which carried out the attack, this is clearly a case of a targeted killing flying square in the face of the concept of proportionality – a fundamental component of the laws applying to the use of force; both the *jus ad bellum* and the *jus in bello.****[139]***That a targeted killing operation must be proportional is also cited as an essential legal consideration by all academics who have written on the laws applying to the subject and has been mentioned several times previously in this work. It is a demonstrated fact that the use of missile strikes launched from aircraft of all types, whether they be fighter-bombers, helicopters or unmanned drones leads to the large scale loss of civilian life time and time again.[140] This case obviously fails the tests if necessity and proportionality in that neither was there an immediate threat of an attack be averted (simply the desire to target one individual), nor were the strikes a proportional response to the threat of attack[141] (of which an immediate threat did not in any case exist).

The fact that we are not daily presented with reports of civilian deaths is in no small part due to the policy of the US administration of declaring all military-age males within a strike zone as combatants, whether evidence to suggest this as fact exists or not.[142] The requirement for proportionality of force, it appears, is easily circumvented through the selective interpretation of facts on the ground.

CONCLUSIONS

This research began by questioning the legality of the use of targeted killings in the context of counter terrorist operations and the extent to which the development of international law might be influenced by their continued use. At the heart of this topic is the question of whether or not it is permissible for a state to hunt down and kill an individual with little or no consideration for the right to life of that individual, the concept of due process, the right to life of others who may be caught up and injured or killed in the attack and the right of nations to expect that their sovereign territory should be respected by other states with whom they are not supposed to be at war. At stake is perhaps the very basis of international law.[143]

Much of the data for this research has examined the use of lethal drone strikes by the United States, a necessity considering their current prevalence in the war on terror, though the use of drones makes little legal difference when compared to other methods of targeted killing. Discussion on the use of drone attacks against terrorist suspects has tended to focus largely on how targets are selected[144], the morality of these types of strikes[145], the use of power by the President of the United State[146]s, and the identity of victims of the strikes[147][148][149].[150] However, while public opinion outside of the United States on the use of drones (and by extension: targeted killing) is very much negative[151], the lack of regular condemnation or questioning of the policy by the international community and the lack of any treaties specifically aimed at drone use,[152] suggests that a norm of international law permitting the use of targeted killing for counter-terrorism purposes has been emerging and justification for their use may soon exist as a part of customary international law.[153]

Though this research has shown that in many cases, while legal arguments can be made to justify the use of targeted killings, far more compelling arguments can often be made to demonstrate how those targeted killings might have been illegal. The United States in particular has used faulty logic and questionable arguments in justifying its use of targeted killings in places like Pakistan, brushing aside the ideas of sovereignty[154] and setting its own standards on who they can choose to kill,[155]even though these policies fly in the face of the United States' own stated standards of the past.[156] The US use of drones shows little sign of attempting to limit civilian casualties, relying as it does on classifying all males of a certain age in particular areas as militants, the use of signature strikes (where target selection is based on patterns of behaviour such as location, time of day and the number of people in a gathering, rather than concrete evidence that the target is in fact a terrorist)[157] and using the tactic of secondary attacks on persons engaged in rescuing those hurt in previous drone strikes.[158] Targeted killing as performed by the US is failing to live up to both legal standards of international law and moral standards of Just War Theory.[159] The ongoing failure to meet these standards by countries such as the US and Israel, along with their acknowledgement and defence of their targeted killing policies supports the continued spread of a targeted killing norm via emulation and subtle persuasion.[160]

In his report on targeted killings, Philip Alston, the UN Special Rapporteur on Extra-Judicial Killings conceded that there are indeed circumstances in which targeted killings may be legal; targeted killings for example would be permitted in armed conflict situations when used against combatants oor fighters, or civilians who directly engage in combat activities, but targeted killings are increasingly being used far from any battle zone. He believes that the United States has put forward that there is a 'law of 9/11' which enables it to legally use force in the territories of another state as part of its inherent right to self defence:

"This expansive and open-ended interpretation of the right to self-defence goes a long way towards destroying the prohibition on the use of armed force contained in the UN Charter. If invoked by other States, in pursuit of those they deem to be terrorists and to have attacked them, it would cause chaos… I do not for a moment question the

seriousness of the challenges posed by terrorism. I condemn wholeheartedly the actions of al-Qaeda and all other groups that kill innocent civilians, as well as any groups that increase the danger of attacks on civilians by hiding in their midst. These actions unequivocally violate international law. But the fact that such enemies do not play by the rules does not mean that a Government can cast those rules aside or unilaterally re-interpret them. The credibility of any Government's claim that it is fighting to uphold the rule of law depends on its willingness to disclose how it interprets and applies the law – and the actions it takes when the law is broken."[161]

On the subject of international accountability Mr Alston stated that:

"[I]t is an essential requirement of international law that States using targeted killings demonstrate that they are complying with the various rules governing their use in situations of armed conflict… It is clear that many hundreds of people have been killed, and that this number includes some innocent civilians. Because the program remains shrouded in official secrecy, the international community does not know when and where the CIA is authorized to kill, the criteria for individuals who may be killed, how it ensures killings are legal, and what follow-up there is when civilians are illegally killed… in a situation in which there is no disclosure of who has been killed, for what reason, and whether innocent civilians have died, the legal principle of international accountability is, by definition, comprehensively violated."[162]

Though the findings of the report by the Special Rapporteur on Extra-Judicial Killings are not legally binding as they stand, appropriate weight should be given to the findings which he has presented given his respected position. Alston holds the positions of John Norton Pomeroy Professor New York University School of Law and co-chair of that school's Centre for Human Rights and Global Justice, as well as having held a number of senior UN appointments over two decades. And having held the position of UN Special Rapporteur on Extra-Judicial Killings for six years, from 2004 to 2010, he should be counted among the very top legal experts in the field. His assertion that were those states which currently justify their targeted killing policies under their own personalised norms, to themselves find their citizens on the receiving end of the targeted killing policy of another state, those same justifications would in all likelihood be roundly rejected.

In conclusion, the use of targeted killing without proper regard to due process and consideration of the standards of international humanitarian law and international human rights law, must be considered to be illegal under the current international legal framework. In most cases they could be considered to be no more than extra-judicial executions carried out with no compelling case being made that they constitute legitimate acts of anticipatory self defence against realistic and immediate threats from terrorist attacks.

Its use however, is unlikely to be curtailed in the foreseeable future and will, in most likelihood, continue to spread and become more popular among states who maintain that the threat of global terrorism is among the chief security threats facing the safety of their citizens and global interests. With this in mind, it is imperative that the international community takes steps to put in place a legal framework to govern the use of targeted killing in order to avoid a situation whereby any nation might take it upon itself to arbitrarily end the life of any individual.

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