

## Targeted Killings: Contemporary Challenges, Risks and Opportunities

Sascha-Dominik Bachmann\*

### Abstract

The use of drones and other forms of targeted killings are being increasingly criticized at the international and domestic level. Before the backdrop of the most recent news that the United Nations has launched an inquiry into the overall legality of such a method of warfare and counterterrorism and its associated loss of civilian life, this article aims to give an overview on targeted killings as a means of warfare. The article asks what constitutes targeted killing and what distinguishes it from assassinations. It reflects on the safeguards, which are necessary to ensure the legality of the targeting process. This article further introduces the reader to an updated account of the use of Unmanned Combat Aircraft Systems, or 'drones', in targeted killings, employed as a means of warfare by the USA in its 'War on Terror'. The US drone campaign in Pakistan also raises questions in respect to State Sovereignty and potential violations of this central tenet of International Law. The article will also touch upon another field of global security, so called 'Hybrid Threats', where the use of targeted killing may have an operational military benefit as part of a holistic counterstrategy. It concludes with a sobering warning that while targeted killing operations may be an effective means of achieving short-term tactical goals within the scope of a wider operational objective, the unregulated and increased use of targeting killings by the USA in the 'War on Terror' would be both immoral as well as illegal in the long run.

### 1. Introduction and Overview

The use of armed Unmanned Aerial Vehicles (UAVs) (also known as Unmanned Combat Aircraft Systems (UCAS) or 'drones')<sup>1</sup> by the USA to target and

\* Reader in International Law (University of Lincoln); State Exam in Law (Ludwig-Maximilians Universität, Munich), *Assessor Jur*, *LLM* (Stellenbosch), *LLD* (Johannesburg); Sascha-Dominik is a Lieutenant Colonel in the German Army Reserves and had multiple deployments in peacekeeping missions in operational and advisory roles as part of NATO/KFOR from 2002 to 2006. During that time he was also an exchange officer to the 23rd US Marine Regiment. E-mail: saschadominikbachmann@gmail.com. The topic was presented at the Conference 'After Bin Laden: Counter-Terrorism Co-operation and International Law' at Newcastle Law School in May 2012. The author would like to thank Dr Tom Frost, *LLB* (Hons) (Leic), *PhD* (Soton) for his help and constructive criticism while finalizing this article.

<sup>1</sup> See M Schmitt, 'Unmanned Combat Aircraft Systems And International Humanitarian Law: Simplifying the OFT Benighted Debate' (2012) 30 Boston University Intl LJ 595 quoting the official US Military definition of such vehicles as 'An unmanned

kill leaders and commanders of Al-Qaeda, the Taliban and their affiliates in Pakistan (as well as for covert operations in Yemen and Somalia) has increased significantly during Obama's first term as President. According to open sources, up to 3176 people have been killed in 337 drone strikes since 2004, of which nearly 290 took place since 2009.<sup>2</sup> Targeted killing as a method of warfare and counterterrorism has been used by the USA and its allies post 9/11 in the 'war on terror' to target and 'decapitate' the leadership and command structure of Al-Qaeda, the Taliban and their affiliates.<sup>3</sup> These strikes lead to the death of a significant number of leaders and commanders.<sup>4</sup> US drone strikes killed Al-Qaeda's deputy leader, Abu Yahya al-Libi, as well as its local leader in Pakistan, Badar Mansoon.<sup>5</sup> These 'leadership decapitation' operations are part of a wider US anti-terrorism and counterinsurgency strategy against Al-Qaeda, adopted post 9/11 as part of the US National Security Strategy<sup>6</sup> and supplementing the ongoing combat operations under Operation Enduring Freedom (OEF).<sup>7</sup> The targeting of terrorist and enemy leaders led to the successful elimination of

aircraft system is defined as "that system whose components include the necessary equipment, network, and personnel to control an unmanned aircraft". The terms UAV, UCAS and drones are used interchangeably throughout the text, with clear distinction being made to its armed or unarmed use.

- <sup>2</sup> New America Foundation, 'The Year of the Drone: Key Observations' <<http://counterterrorism.newamerica.net/drones/observations>>; Institute for National Security and Counterterrorism, Syracuse University, 'Case Study: Targeted Killing by the United States After 9/11' <<http://insct.org/commentary-analysis/2011/05/04/case-study-targeted-killing-by-the-united-states-after-911/>> accessed 2 January 2013; The Bureau of Investigative Journalism, 'Covert Drone War – The Reaper Presidency: Obama's 300<sup>th</sup> drone strike in Pakistan' (3 December 2012) <<http://www.thebureauinvestigates.com/2012/12/03/the-reaper-presidency-obamas-300th-drone-strike-in-pakistan/>> accessed 2 January 2013.
- <sup>3</sup> Cf BC Price, 'Targeting Top Terrorists – How Leadership Decapitation Contributes to Counterterrorism' (2012) 36 *International Security* 9–46 for a discussion of the correlation of targeted killing operations directed against leaders of terrorist organizations and the overall mortality rate of the latter.
- <sup>4</sup> New America Foundation, 'Militant Leaders killed', citing a total of 51 leaders killed during that period at <<http://counterterrorism.newamerica.net/about/militants>> accessed 1 January 2013.
- <sup>5</sup> *ibid.*, with further references; D Walsh and E Schmitt, 'Drone Strike Killed no.2 in Al Qaeda, U.S. Officials Say' *The New York Times* (New York, 5 June 2012) <[http://www.nytimes.com/2012/06/06/world/asia/qaeda-deputy-killed-in-drone-strike-in-pakistan.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/06/06/world/asia/qaeda-deputy-killed-in-drone-strike-in-pakistan.html?pagewanted=all&_r=0)> accessed 2 January 2013; E Giroud, 'Pakistan Al-Qaeda chief "killed by US drone"' *AFP* (9 February 2012) <<http://www.google.com/hostednews/afp/article/ALeqM5iR15ECTQK6m1Wg3sjCFHJ6VilJVw?docId=CNG.e84246ecc808f1ab609f9d56334e67f5.341>> accessed 2 January 2013.
- <sup>6</sup> See *The National Security Strategy of the United States of America* (NSS hereafter) September 2002, 13–15 at <<http://nssarchive.us/NSSR/2002.pdf>> accessed 15 January 2013.
- <sup>7</sup> Referring to US combat operations in Afghanistan, which is different from the operations conducted by the International Security Assistance Force (ISAF), which is a NATO led operation under an UN peace enforcement mandate under UNSC Resolution 1386 of 2001.

Osama bin Laden, the leader of Al-Qaeda, on 2 May 2011, when he was killed after a brief firefight with US Navy Seals.<sup>8</sup> This operation, codenamed 'Operation Neptune Spear', was one of the more prominent capture and kill<sup>9</sup> operations undertaken by the USA as part of its National Security Strategy aimed at targeting and eliminating leaders and commanders of Al-Qaeda and its affiliates.<sup>10</sup> According to the USA, Operation Neptune Spear was the culmination of its successful strategy of decapitating Al-Qaeda's leadership, which has sent, 'al Qaeda into a decline that will be hard to reverse'.<sup>11</sup> The success and outcome of this raid, however, also refuelled a continuing debate concerning whether targeted killing could ever be regarded as lawful and overall moral. This debate was spurned by recent critical media reporting,<sup>12</sup> the release of increasingly critical academic reports on the civilian impact of drone strikes,<sup>13</sup> unsuccessful legal challenges<sup>14</sup> and finally, the decision by the United Nations UN

<sup>8</sup> Cf Institute for National Security and Counterterrorism (n 2); for an academic account of the actual operation, see K Govern, 'Operation Neptune Spear: Was Killing Bin Laden A Legitimate Military Objective' in C Finkelstein, J Ohlin and A Altman (eds), *Targeted Killings – Law and Morality in an Asymmetrical World* (OUP 2012) 355–56.

<sup>9</sup> Referring to Special Forces Operations, mostly executed as night raids, to capture or kill the target, see SD Naylor, 'Chinook Crash Highlights Rise in Spec Ops Raids' (21 August 2011) <<http://www.armytimes.com/news/2011/08/army-chinook-crash-highlights-rise-in-spec-ops-raids-082111w/>> accessed 13 January 2013; for an earlier reference to such operations as part of US security operations, see American Forces Press Service, 'Suspected Terrorists Captured, Killed in Iraq; Weapons Caches Found' (18 March 2007) <<http://www.defense.gov/news/newsarticle.aspx?id=32500>> accessed 15 January 2013.

<sup>10</sup> NSS (n 6) 14.

<sup>11</sup> Reuters, 'Al Qaeda Decline Hard to Reverse After Bin Laden Killing: U.S.' (31 July 2012) <<http://www.reuters.com/article/2012/07/31/us-usa-terrorism-idUSBRE86U15C20120731>> accessed 5 January 2013.

<sup>12</sup> Cf, 'Drone Strikes Kill, Maim and Traumatize too Many Civilians, U.S. study says' (CNN, 26 September 2012) <<http://www.cnn.co.uk/2012/09/25/world/asia/pakistan-us-drone-strikes/index.html>> accessed 27 December 2012.

<sup>13</sup> See eg Stanford Law School—International Human Rights and Conflict Resolution Clinic and NYU School of Law—Global Justice Clinic, 'Living Under Drones – Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan' (Stanford/NYU Living Under Drones Report), September 2012 at <<http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf>> accessed 23 January 2013; Columbia Law School—Human Rights Clinic, 'The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions' (Columbia Drone Report) 2012 at <<http://web.law.columbia.edu/human-rights-institute/counterterrorism/drone-strikes/civilian-impact-drone-strikes-unexamined-costs-unanswered-questions>> accessed 21 January 2013.

<sup>14</sup> Cf the unsuccessful UK High Court challenge of UK—US collaboration in terms of intelligence sharing and targeting, brought by a Pakistani relative of a drone strike victim, O Bowcott, 'High Court Rejects Challenge over UK link to drone strikes in Pakistan' *The Guardian* (London, 21 December 2012) <<http://www.guardian.co.uk/world/2012/dec/21/high-court-drone-strikes-pakistan>> accessed 10 January 2013; the also unsuccessful US civil action against the Obama Administration, see *Al-Aulaqi v Obama* 727 F.Supp.2d 1 Dist Ct, Dist of Columbia 2010 Civil Action No 10-1469 (JDB).

Counter-Terrorism Expert, Ben Emmerson, to launch an inquiry into the killing of civilians by drones and other methods of targeted killings.<sup>15</sup>

Targeted killing seems to achieve tangible returns in terms of ‘decapitating’ terrorist networks: recent reports indicate that Obama’s policy of targeting Al-Qaeda’s top and mid-level leadership has led to significant losses among the ranks of leadership of the organization.<sup>16</sup> Another emerging field of security threats where targeted killing may be used in the future, is in response to countering so-called ‘Hybrid Threats’, which refers to asymmetric threats like terrorism and cyber threats, and which will be discussed in more detail below. The use of UCAS and Special Forces has other benefits too: it serves as a ‘force multiplier’, which basically allows achieving more in terms of tangible military objective with less ‘boots on the ground’. Such considerations matter in times of shrinking defence budgets and an increasing unwillingness in the West to suffer casualties in combat.

This article provides the reader with an updated introduction to targeted killing as a means of warfare with a focus on the use of UCAS as weapon platforms for the execution of such strikes. It describes the targeting process as part of an attempt to ensure overall legitimacy by complying with the necessary legal tenets of humanitarian law. It introduces a new *terminus* of military risk, so-called Hybrid Threats, and reflects on its significance for the future use of UCAS borne Targeted Killing. The article reflects on some of the legal questions arising from the use of targeted killing during hostilities and peacetime and also touches on more recent concerns raised in the context of operational necessity, operational morality and overall legitimacy. The article concludes with a short outlook on the future use of drones on the battlefield.

## 2. Targeted Killing as a Method of Warfare

Targeted Killing can be used for the physical elimination of enemy combatants during hostilities in times of armed conflict but also of suspected terrorists in

<sup>15</sup> The UN Special Rapporteur on Human Rights and Counter-terrorism, Ben Emmerson, will focus on the use of drones by the USA and Israel and study their impact on civilians. Its overall aim is to close an existing accountability gap and to provide for remedies; see *BBC News*, ‘UN Launches Inquiry Into Drone Killings’ (24 January 2013) <<http://www.bbc.co.uk/news/world-21176279>> accessed 24 January 2013; C Woods and A Ross, ‘UN Launches Major Investigation Into Civilian Drone Deaths’ (*The Bureau of Investigative Journalism*, 24 January 2013) <<http://www.thebureauinvestigates.com/2013/01/24/un-launches-major-investigation-into-civilian-drone-deaths/>> accessed 24 January 2013. For the official announcement of this inquiry by the UN High Commissioner for Human Rights, see ‘UN Counter-Terrorism Expert to Launch Inquiry into Civilian Impact of Drones and Other Forms of Targeted Killings’ (22 January 2013) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12943&LangID=E>> accessed 28 January 2013.

<sup>16</sup> Counterterrorism Strategy Initiative, ‘Militant Leaders Killed’ at <<http://counterterrorism.newamerica.net/about/militants>> accessed 8 January 2013.

peacetime. Depending on the circumstances the legal repercussions differ: targeted killing in times of war may be justifiable as a lawful and legitimate method of warfare during hostilities, while such an operation outside an armed conflict may qualify as an act of extrajudicial killing, murder or assassination, unlawful under international and domestic law. Human Rights Watch highlights this potential difficulty in qualifying and assessing such kinetic action, whereas

‘targeted killing’ has commonly been used to refer to a deliberate lethal attack by government forces against a specific individual not in custody under the color of law. It is not a technical legal term. Depending on the circumstances, a particular targeted killing may or may not be lawful under international law. For instance, a sniper shooting at an enemy general on the battlefield would normally be a lawful targeted killing. Targeted killings should be considered distinctly from the summary execution of anyone in custody, which is never lawful.<sup>17</sup>

#### ***A. Definition of Targeted Killing and Some Reflection on its Operational Use***

‘Targeted killing’ refers to a method of warfare whereby individuals are selected and confirmed as so called ‘High Value Targets’,<sup>18</sup> followed by a separate and individual targeting process<sup>19</sup> which ultimately leads to the execution of an military operation aimed at killing these individuals. This definition is reiterated in one of the leading academic texts on the subject of armed conflict, the Handbook of International Law of Military Operations, whereas:

[...] the term targeted killing refers to military operations involving the use of lethal force with the aim of killing individually selected persons who are not in the physical custody of those targeting them.<sup>20</sup>

<sup>17</sup> Human Rights Watch, ‘Q&A: US Targeted Killings and International Law’ (19 December 2011) at <<http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international>> accessed 6 January 2013.

<sup>18</sup> See eg ‘How Osama Bin Laden Was Located and Killed’ *The New York Times* (New York, 8 May 2011) <<http://www.nytimes.com/interactive/2011/05/02/world/asia/abbotabad-map-of-where-osama-bin-laden-was-killed.html>> accessed 12 January 2013.

<sup>19</sup> For an instructive explanation of the targeting process see M Schmitt, ‘Precision attack and international humanitarian law’ (2005) 87 *Intl Rev Red Cross* 445–66; S Bachmann and U Haeussler, ‘Targeted Killing as a Means of Asymmetric Warfare: a Provocative View And Invitation to Debate’ (2011) 1 *Law, Crime and History* 9–15, at 12.

<sup>20</sup> N Melzer, ‘Targeted Killings in Operational Law Perspective’ in TD Gill and D Fleck (eds), *Handbook of International Law of Military Operations* (OUP 2010) 277. For a variety of definitions on the subject from various stakeholders, including the military, the HR community and the operatives tasked with the execution of such acts, see also Finkelstein, Ohlin and Altman (n 8) 358.

An early example of ‘targeted killing’ in the history of armed conflict can be found in the military tactics applied mainly by snipers. Prominent and well-documented examples of sniper warfare can be found in the annals of the Eastern Front during World War II: German and Soviet forces used snipers to annihilate systematically the enemy’s mid-level military leadership: German losses to Soviet snipers were so severe during the battle for Stalingrad in autumn of 1942 that officers as well as non-commissioned officers had to adapt means of camouflage to blend in with their (enlisted) men and in order to avoid being targeted by enemy snipers.<sup>21</sup>

Operation ‘Neptune Spear’ as well as the alleged Israeli Mossad Operation to kill the Hamas official Mahmud al-Mabhuh in Dubai in 2011<sup>22</sup> involved the use of Special Forces on the ground, or intelligence operatives/assets respectively, constitute commando operations as well targeting operations in the wider sense. Such tactical capture and kill operations executed by Special Forces assets are not the focus of this short contribution: its focus is solely on targeted killing, as a means of warfare which is executed by using remotely piloted aircraft, UAVs or drones respectively, as weapons platform.

Falling outside the scope of targeted killings discussed in this article is the continuing use of Improvised Explosive Devices (IEDs) in Iraq and Afghanistan by the Taliban and other affiliated groups. Targeted terrorism, involving the use of IEDs, suicide bombings or suicide attack squads as impressively shown in the 2011 Mumbai attacks, seem to constitute a hybrid form of unconventional warfare which combines elements of both, assassination and targeted killings in the widest sense. The scope of this article is on targeted killing as a means of warfare and hence does not warrant a further discussion of this form of attacks as a potential example for targeted killings.

Targeted killing as a means of killing enemies of a state has been employed most frequently by the USA as part of its overall military strategy against Al-Qaeda and the Taliban.<sup>23</sup> While the USA did not ‘invent’ this form of warfare it has taken the lead in advancing its development and overall design in respect of targeting processes, command and control as well as the use of increasingly sophisticated technology.<sup>24</sup> The use of drones for executing kinetic, lethal, strikes against hostile and enemy targets has its tangible military benefits in

<sup>21</sup> For a gripping account of the impact the use of snipers by the Soviet Army had during the battle for Stalingrad, see A Beever, *Stalingrad* (Penguin Books 2011) 203–5. Aptly dramatized in the Hollywood blockbuster of 2001 ‘Enemy at the Gates’, where a German and Soviet sniper confront each other during the battle of Stalingrad.

<sup>22</sup> For a general discussion of Israel’s targeted killings, see D Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’ 2005 16 EJIL 171–212 and D Kretzmer, ‘Israel’s Policy of Targeted Killing’ (2003) 17 Ethics and International Affairs 111 fn 15.

<sup>23</sup> See US NSS of 2002 (n 6), reaffirmed in the NSS of 2010, with reference to ‘terrorism’ in general.

<sup>24</sup> See A Dershowitz, ‘Targeted Killing Vindicated’ (*Huffingtonpost.com* 5 February 2012), at <[http://www.huffingtonpost.com/alan-dershowitz/targeted-killing-vindicat\\_b\\_856538.html](http://www.huffingtonpost.com/alan-dershowitz/targeted-killing-vindicat_b_856538.html)> accessed 21 January 2013, for a short historical overview on the subject.

terms of operational capabilities, readiness and its overall availability as a defensive as well as offensive form of warfare. Targeted killing by UCAS can be executed at very short notice and does not require the deployment of and the presence of substantial own forces in the theatre of operations. This availability and flexibility of using drones as a platform for the execution of targeted killings makes this form of warfare (without own casualties) so formidable when responding to present threats at an *ad hoc* basis. Consequently, both proliferation and expansion of the use of UCAS are increasing.<sup>25</sup> Examples hereof are the present discussions in the UK to increase the availability of UAV systems for reconnaissance and combat, the RAF's decision to relocate its UAV assets from the US to RAF Waddington near Lincoln and to establish a new Unmanned Air Systems Capability Development Centre (UASCDC) there. The overall capabilities of such airborne weapon platform systems has also found supporters among nations who were initially opposed to this form of warfare, such as Germany which for historical as well as political reasons has been known to be more reluctant to the use of force and to participate in combat operations in a more active role.<sup>26</sup>

### ***B. Targeted Killing by States and International Organizations***

Reported cases where targeted killings have been employed against High Profile Targets involve Russia, Israel, the UK, the USA and NATO.<sup>27</sup> Israel has been using targeted killings as a means of combating Islamist security threats and has a track record of using targeted killing in its fight against militant Islamist organizations and their leaders for years.<sup>28</sup> The most recent examples of using drones in the execution of such operations took place during the Israeli

<sup>25</sup> Drone Wars UK, 'Review of the Year Part 2: A year of Drone Expansion and Proliferation' (30 December 2012) at <<http://dronewarsuk.wordpress.com/>> accessed 13 January 2013; see for an non-authorized overview of UCAS and UAVs, *Datablog*, 'Drones by country: who has all the UAVs' *The Guardian* (London, 3 August 2012) at <<http://www.guardian.co.uk/news/datablog/2012/aug/03/drone-stocks-by-country>> accessed 15 January 2013.

<sup>26</sup> UAS Vision, 'German Air Force Wants Armed UAS' (3 September 2012) <<http://www.uasvision.com/2012/09/03/german-air-force-wants-armed-uas/>> accessed 2 January 2013; V Medick, 'Bundeswehr im Ausland:Regierung will zuegig Kampfdrohnen anschaffen' *Spiegel Online*, at <<http://www.spiegel.de/politik/deutschland/bundesregierung-draengt-auf-einsatz-bewaffneter-drohnen-a-879547.html>> accessed 25 January 2013.

<sup>27</sup> See eg Bachmann and Haeussler (n 19) 9, 14 with reference to NATO's operational practice in Afghanistan.

<sup>28</sup> See for a description of the use of targeted killings by the Israeli Defence Forces against Hamas and Islamic Jihad, 'Israel's "targeted killings"' (*BBC News*, 17 April 2004) <[http://news.bbc.co.uk/1/hi/world/middle\\_east/3556809.stm](http://news.bbc.co.uk/1/hi/world/middle_east/3556809.stm)> accessed 12 January 2013. The use of targeted killing as a means of counterterrorism and ultimately, warfare, 'gained currency in 2000 after Israel made public a policy of targeting alleged terrorists in the Palestinian territories', see J Master, 'Targeted Killings' *Council on Foreign Relations* (8 January 2013) at <<http://www.cfr.org/counterterrorism/targeted-killings/p9627>> accessed 12 January 2013.

Defence Forces' (IDF) military operations during Operation 'Pillar of Defence' in Gaza in November 2012. Israel has been employing its own mix of airborne operations, using both, UCAS as well as attack helicopters and jet fighter aircraft, in addition to ground forces, including special forces and intelligence operatives.<sup>29</sup> In 2006, the Israeli Supreme Court ruled on the issue of targeted killings in its so-called '*Targeted Killing*' case. There the court recognized the use of targeted killing as a means of warfare, characterized the nature of its conflict with terrorist actors as 'armed conflict' and confirmed the legality of targeting killings of terrorists under certain circumstances:

[...] Therefore terrorists may be targeted by armed forces if they take a direct part in hostilities. The targeting of terrorists by armed forces must satisfy the requirements of art. 51(3) [of the First Additional Protocol to the 1977 Geneva Conventions]; the terrorists must take a direct part in hostilities and the targeting of terrorists may be carried out for such time as they do so. The principle of proportionality in carrying out these attacks should also be observed.<sup>30</sup>

The Israeli court did, however, make it clear that targeted killings were to be regarded as an exceptional means of warfare and subject to stringent controls and balances: 'Each case should be examined prospectively by the military authorities and retrospectively in an independent investigation, and the findings should be based on the merits of the specific case. These findings will be subject to the scrutiny of the court.'<sup>31</sup>

Targeted killing has also been used by the USA in theatres of actual combat operations, such as Afghanistan and Iraq, as well as outside these theatres of war and as part of CIA and US military run covert operations in Pakistan. The USA is using drone strikes and Special Forces there to conduct pre-emptive as well as defensive targeted killing operations against Al-Qaeda and the Taliban. The argument is brought forward that such operations are necessary to protect US forces and its allies in Afghanistan and to disrupt the existent terrorist infrastructure. The focus of such operations is on the so-called 'Tribal Areas' of Pakistan, Waziristan, where the Taliban have effectively established an autonomous sphere of influence to the exclusion of the central government in

<sup>29</sup> Cf A Guiora, 'The Importance of Criteria-Based Reasoning in Targeted Killing Decisions' for an overview of past and present Israeli targeting killings and targeting practice; in C Finkelstein, J Ohlin and A Altman (n 8) 303–26; see also A Margalit, 'Did LOAC Take the Lead? Reassessing Israel's Targeted Killing of Salah Shehadeh and the Subsequent Calls for Criminal Accountability' (2012) 17 JCSL 147–73 for a discussion of the legality and legitimacy of such operations from an Israeli point of view.

<sup>30</sup> See '*Targeted Killing*' case before the Israeli Supreme Court sitting as the High Court of Justice, HCJ 769/02 *Public Committee Against Torture v Government of Israel* (2006) 2 *Israel Law Reports* (2006) 459–529 at 460.

<sup>31</sup> *ibid.*

Peshawar.<sup>32</sup> Other such covert operations have seen CIA operated drone strikes in Yemen, Somalia as well Sudan, where a lack of cooperation and/or relative capabilities of the respective governments have created areas which are outside effective state control.<sup>33</sup>

Just to clarify: acts of targeted killing, which are carried out of vengeance or other heinous motives, or as part of an assassination strategy or which are conducted outside the conduct of hostilities or those executed within the context of hostilities but outside military necessity, may constitute crimes committed under the veil of war—and may qualify as crimes under national as well as international law.<sup>34</sup>

### ***C. Targeted Killing in the Context of Political Assassinations and Terrorism***

Historical and contemporary terrorism, anti-colonial struggles and revolutionary intra-state war, have changed the nature of global violence over the last 60 years. The assassinations of political opponents within the context of intra-state conflict, including cases of internationalized intra-state war, where third parties intervene, have always been part of irregular warfare. A historical example can be found in the practices of the Viet Cong during the Vietnam War, whose policy of large-scale assassinations of South Vietnamese government officials willing to work for the US supported government of the Republic of Vietnam was so effective that the US military had to counter this threat by the use of targeted killing operations against the Viet Cong (as well as covert operatives from the North Vietnamese Army, NVA) under the controversial but successful Phoenix program, which used a mix of both targeted killing and assassination for the neutralization of threats.<sup>35</sup> Targeted killing operations, executed outside the context of hostilities and directed against political leaders are often executed by intelligence agents and are usually referred to as ‘assassinations’. Sometimes, the boundaries between such assassinations and targeted killing within hostilities are overlapping.<sup>36</sup> Such operations are now prohibited

<sup>32</sup> SD Murphy, ‘The International Legality of US Military Cross Border Operations from Afghanistan into Pakistan’ in M Schmitt (ed), *The War in Afghanistan: A Legal Analysis* in (2009) 85 International Law Studies 109–39.

<sup>33</sup> See Human Rights Watch (n 17).

<sup>34</sup> Thus qualifying in the UK as the criminal offence of unlawful homicide in terms of English and Welsh law or under international criminal law as war crimes or crimes against humanity in terms of Art 5 (b), 7 and Art 5 (c), 8 of the Rome Statute of the International Criminal Court, A/CONF.183/9 17 July 1998.

<sup>35</sup> T Tovy, ‘The Theoretical Aspect of Targeted Killings: The Phoenix Program as a Case Study’ (2009) 11 Journal of Military and Strategic Studies 11–12.

<sup>36</sup> M Gross, ‘Assassination: Killing in the Shadow of Self Defense’ in J Erwin (ed), *War and Virtual War: The Challenges to Communities* (Rodopi 2004) 99–116, for an overview and discussion of assassinations as a form of warfare. The South African Truth and Reconciliation Commission regarded targeted killing operations by the Apartheid security forces as assassinations and as such constituting acts of extrajudicial killings,

in Western democratic States.<sup>37</sup> The USA after years of employing such acts changed tack when in the aftermath of a congressional committee, the Church Committee, investigated and condemned earlier CIA led political assassinations by the USA.<sup>38</sup> The official US position banning such practices was clarified by President Ford in 1976 when he issued Executive Order (EO) 11905 which officially banned any USA complicity in political assassinations and reigned in excessive powers of the CIA.<sup>39</sup> Confirmed and extended under President Carter, this policy had been used by subsequent US Administrations, including President Bush, who issued EO 13470 in 2008. While none of these EOs authorize the assassination of political and other enemies of the USA, it seems as if the ongoing extended targeting of terrorist leaders around the globe post 9/11 by the USA questions this official caveat on US assassinations, at least in regard to terrorists. One key distinction between assassinations and targeted killings lies in the difference in terms of motivation and purpose, namely the former's nexus to political warfare as part of a politicized irregular warfare: to annihilate opponents and terrorize for the sake of political objectives. Critics of such forms of killings compare these with punitive killings and compare the notion of 'assassination' with operations executed solely for 'vengeance'.<sup>40</sup> The USA tries to avoid such criticism by arguing that targeted operations against leaders of Al-Qaeda do not fall under this prohibition as its forces were engaged in an ongoing armed conflict with Al-Qaeda and its targeting of enemy leaders and commanders constituted acts of combat in execution of state self-defence.<sup>41</sup>

see 'The Former South African Government and its Security Forces – Part One: Overview of Amnesty Applications from Members of the Security Forces: 1960-1994, Vol 6' s 3, ch 1, pt 50 at 192 at <[www.justice.gov.za/trc/report/finalreport/vol6\\_s3.pdf](http://www.justice.gov.za/trc/report/finalreport/vol6_s3.pdf)> accessed 25 January 2013.

<sup>37</sup> *ibid* 108 for a discussion of so-called 'punitive assassinations': he distinguishes between 'punitive assassinations' and 'defensive assassinations', each within a complex and exclusive legal framework, namely domestic security and criminal law in the case of the former and LOAC in the case of the latter.

<sup>38</sup> Cf for an account CIA, 'A Look Back...The Church Committee Meets' 2008 Featured Story Archive at <<https://www.cia.gov/news-information/featured-story-archive/2008-featured-story-archive/a-look-back-the-church-committee-meets.html>> accessed 15 January 2013.

<sup>39</sup> Confirmed by subsequent US Administrations, see C Lotrionte, 'Targeting Regime Leaders During Armed Hostilities: An Effective Way to Achieve Regime Change' in H Hensel (ed), *The Law of Armed Conflict – Constraints On The Contemporary Use of Military Force* (Ashgate 2006) 23.

<sup>40</sup> Gross (n 36) for a critique; also the 2010 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston (Alston Report) A/HRC/14/24/Add.6 Summary. The recent assassination of three members of the Kurdish separatist movement, the PKK, in Paris may well fall into such a category of unlawful, extrajudicial killings, which was perhaps also carried out of vengeance; see J Lichfield, 'War Crimes in Paris Sends Shockwave' *The Independent* (London, 11 January 2013) 28–29.

<sup>41</sup> For a short summary of the legal debate after the Bin Laden raid, see O Bowcott, 'Osama bin Laden: US Responds to Questions About Killing's Legality' *The Guardian* (London 3 May 2011) <<http://www.guardian.co.uk/world/2011/may/03/>>

The ongoing strategy by the Taliban in Afghanistan and Pakistan to systematically target and kill personnel of international and local NGOs involved in health care and social development programmes, constitutes an own category of 'targeted terrorism', 'assassinations' or targeted killings in a wider sense. The deliberate and systematic targeting by the Taliban of coalition forces, associated civil liaison assets as well as other non-military personnel associated with peacebuilding and post-conflict stability efforts is increasing. The Taliban campaign of killing such non-military targets has significantly impacted on the overall success of these efforts in the short and mid term. Recent victims of such terrorist targeting include personnel working for the World Health Organization and UNICEF, who were involved in literacy as well as vaccination programmes.<sup>42</sup> As a consequence, both UN and WHO suspended temporarily some of their vaccination programmes in Pakistan. This targeting of relief and development workers is perhaps as effective as the Taliban sustained campaign of using more and more sophisticated IEDs in their attacks against US, NATO, as well as Afghan/Pakistani security forces and government officials.<sup>43</sup> This terrorist targeting may be part of a wider campaign to force the international community to 'abandon' Afghanistan. It is clear that such indiscriminate, often heinous, acts committed by the Taliban do not comply with international humanitarian law,<sup>44</sup> most notably the criteria of distinction and proportionality, and therefore such kind of attacks do not fall under the terminology of targeted killing as discussed in this article.

#### ***D. Targeted Killings as a Means of Countering Hybrid and Asymmetric Threats: Some Reflections***<sup>45</sup>

The deteriorating security situation in the Maghreb has turned the 'Arab spring' into an 'Arab winter' of radicalized Islamist (often failing)

osama-bin-laden-killing-legality> accessed 14 January 2013; see below under 3.1 for the US view on the nature of the conflict with Al-Qaeda.

<sup>42</sup> See eg F Elliot, 'Vaccine Teams Quit After More Polio Staff Shot' *The Times* (London, 20 December 2012) 32; Aljazeera, 'More Attacks on Polio Workers in Pakistan' (19 December 2012) <<http://www.aljazeera.com/news/asia/2012/12/2012121962433106974.html>> accessed 4 January 2013.

<sup>43</sup> Cf for a recent attack on a senior government officer Emma Graham-Harrison, 'Suicide Bomber Hid Explosives Around Genitals' *The Guardian* (London, 8 December 2012) 36.

<sup>44</sup> Concurring with the above cited 'Targeted Killing' case before the Israeli Supreme Court (n 30) which finds in its judgment that 'terrorists do not satisfy the requirements of the definition of combatants in international law, because inter alia they do not observe the laws and customs of war'.

<sup>45</sup> This discourse forms part of an ongoing project titled Countering Terrorism, Asymmetric and Hybrid Threats: Defining a Comprehensive Approach for 21st Century Threats to Global Risk and Security, with Håkan Gunneriusson Associate Professor in War Studies, Head of research ground operative and tactical areas Department of Military Studies, War Studies Division, Land Operations Section,

states<sup>46</sup> and has created a variety of new, multimodal 'Hybrid' Threats: from failed state scenarios, civil unrest to the threat of proliferation of sophisticated weaponry<sup>47</sup> and even Weapons of Mass Destruction. In 2010, NATO issued its Lisbon Summit Declaration where general challenges to the Alliance's role as well as potential responses were discussed before the backdrop of falling national defence budgets and the recognition of emerging new threat scenarios, often in the context of ever-increasing globalization.<sup>48</sup> NATO defined these threats in its Bi-Strategic Command Capstone Concept as 'those posed by adversaries, with the ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of their objectives'<sup>49</sup> NATO had been working<sup>50</sup> on a comprehensive conceptual framework, which was to provide a wider framework for identifying and discussing such threats and possible multi-stakeholder responses.<sup>51</sup> Falling under NATO's definition of 'Hybrid Threats' were a variety of security threats, such as multimodal, low intensity, kinetic as well as non-kinetic threats to international peace and security including cyber

National Swedish Defence College, which was submitted as a briefing paper to the Swedish High Command. This contribution acknowledges fully Professor Gunneriusson's input to the debate. For more information on the subject, see S Bachmann, 'NATO's Comprehensive Approach to Counter 21st Century Threats – Mapping The New Frontier of Global Risk and Crisis Management' (2011) 88 *Amicus Curiae*.

<sup>46</sup> The events of the so-called 'Jasmine Revolution' in North Africa of 2011 shook the political landscape in the Maghreb, the Arab and the Mid-Eastern world. Labelled somewhat optimistically, as 'Arab Spring' it brought democracy to some, as the example of Tunisia shows, but also lead to the rise of new militant Islamist regimes: Egypt has turned from being pro-Western and a de facto 'partner' of Israel into a fundamentalist Islamist state, run by the radical Muslim Brotherhood. Egypt's new leadership seems to be in the process of repeating a second Iranian revolution, where the spiritual leader of the 'Iranian Revolution', Khomeini, established an Islamic republic governed by a Shia religious mullah Council.

<sup>47</sup> Cf A Harel and A Issacharoff, ' Hamas Boosting Anti-Aircraft Arsenal with Looted Libyan Missiles' *Haaretz* (27 October 2011).

<sup>48</sup> Press Release PR/CP (2010) 0155).

<sup>49</sup> *ibid*, for a Hybrid Threats Description, para 7.

<sup>50</sup> Cf NATO's *Transnet* network on Countering Hybrid Threats (CHT) <<https://transnet.act.nato.int/WISE>> accessed 22 March 2013. NATO Allied Command Transformation (ACT) supported by the US Joint Forces Command Joint Irregular Warfare Centre (USJFCOM JIWC) and the US National Defence University (NDU) conducted specialised workshops related to 'Assessing Emerging Security Challenges in the Globalised Environment (Countering Hybrid Threats) Experiment' in 2011. The workshops of the experiment took place in Brussels, Belgium and Tallinn, Estonia and had the aim of identifying possible threats and to discuss some or the key implications that need to be addressed in countering such risks and challenges.

<sup>51</sup> In essence, Hybrid Threats faced by NATO and its non-military partners require a comprehensive approach allowing a wide spectrum of responses, kinetic and non-kinetic by military and non-military actors. Cf NATO 'Updated List of Tasks for the Implementation of the Comprehensive Approach Action Plan and the Lisbon Summit Decisions on the Comprehensive Approach' 4 March 2011 1–10, para 1.

war, low intensity asymmetric conflict scenarios, global terrorism, piracy, transnational organized crime, demographic challenges, resources security, retrenchment from globalization and the proliferation of weapons of mass destruction.<sup>52</sup> As a consequence, NATO adopted a new Strategic Concept which set out its vision for the immediate future and calling for 'NATO's evolution, so that it continues to be effective in a changing world, against new threats, with new capabilities and new partners'.<sup>53</sup> Despite these developments, NATO had to decide in June 2012 to cease work on Countering Hybrid Threats at its organizational level due to operational constraints but encouraged its Member States and NATO Excellence Centres to continue working on the idea and concept. It is deemed relevant to reflect on this new concept briefly within the scope of this article as it is quite likely that future challenges to peace and security will have hybrid elements which have the potential to warrant conventional as well as non-conventional responses.<sup>54</sup>

In essence, Hybrid Threats faced by NATO and its non-military partners require a comprehensive approach allowing a wide spectrum of responses, kinetic and non-kinetic by military and non-military actors.<sup>55</sup> The use and exploitation of 'biohacking'<sup>56</sup> and nanotechnology for terrorist ends and everything related cyber are potential and likely future security risks for our Western societies.<sup>57</sup> Particularly worrying for our security in the West are the threats coming from the proliferation of advanced weapon systems to non-state actors associated with radical Islam as part of the global advancement of radical Islamism, the 'Green Menace'.<sup>58</sup> This threat has gained new momentum with the breakup of the old autocratic order in the Maghreb, which led to a 'Balkanization' of Libya and the coming to power of new governments in the region which question the existing balance of power in the region. The new,

<sup>52</sup> Cf BI-SC Input for a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Enclosure 1 to 1500/CPPCAM/FCR/10-270038 and 5000 FXX/0100/TT-0651/SER: NU0040, 25 August 2010.

<sup>53</sup> 'Strategic Concept For the Defence and Security of The Members of the North Atlantic Treaty Organisation' 19 November 2010 <[http://www.nato.int/cps/en/natolive/official\\_texts\\_68580.htm](http://www.nato.int/cps/en/natolive/official_texts_68580.htm)> and Lisbon Summit Declaration of 20 November 2010, PR/CP (2010) 0155).

<sup>54</sup> The present situation in Mali highlights how asymmetric threats can lead to traditional military responses: offspring groups of Al-Qaeda, the Al-Qaeda in the Islamic Maghreb, have managed to capture Northern Mali and turn it into a terrorist 'failed' state which threatens the security in the region and beyond. It is taking the joint efforts of France and an AU led coalition of African States to counter this threat.

<sup>55</sup> See 'Updated List of Tasks' (n 51) para 1.

<sup>56</sup> Oxford Dictionaries describes bio hacking as 'the activity of exploiting genetic material experimentally without regard to accepted ethical standards, or for criminal purposes' from <<http://oxforddictionaries.com/definition/english/biohacking>> accessed 23 January 2013.

<sup>57</sup> H Gunneriusson, 'Nothing is taken serious until it get serious' 2012 7.1 Defence Against Terrorism Review.

<sup>58</sup> For this term on militant Islam, see eg R Mansbach and K Taylor, *Introduction to Global Politics* (2nd edn, Routledge 2011) 228.

hybrid nature of present security threats has been highlighted in the last Israeli–Gaza conflict of November 2012, when ‘traditional’ military and security threats<sup>59</sup> were supplemented by the use of new communication technologies, in order to influence global opinion in favour of Hamas. The most recent Gaza conflict is hence a good example of how multimodal threats, asymmetric terror and warfare is supplemented by terrorist (dis)information campaigns. Hamas has been employing tools and strategies of disinformation normally associated with clandestine psychological warfare operations of traditional military state actors: such as the sending of emails and text messages<sup>60</sup> with hoax news updates as well as propaganda slogans to Israeli and non-Israeli internet addresses and cell phones, the use of the internet to disseminate their propaganda.<sup>61</sup> While there is no evidence that these psychological warfare campaigns were successful this time, their potential has to be acknowledged. In the future, Hybrid and dual purpose, ‘joint’ operations of non-state actors, terrorist organizations such as Hamas and Hezbollah, Al-Qaeda as well as global narcotic smuggling syndicates will become more pressing security risks. The example of Mali, where the northern part has become a de facto independent terrorist state has led not only to the export of terrorism in the region<sup>62</sup> but also the use of this ‘failed’ state as a smuggling route for narcotics to Europe. These threats, stemming from terrorism, organized narcotic smuggling syndicates as well as arms traders, are of a truly hybrid nature with repercussions around the region.<sup>63</sup>

Proliferation of Weapons of Mass Destruction, the ‘export’ of Islamist terrorism across the Maghreb region and even to Europe, the emergence of new technological threats such as ‘cyber’ warfare and terrorism with the potential of waging war in the so-called ‘fifth dimension of warfare’,<sup>64</sup> the use of nano-technologies as a means of terrorism, have changed the nature of potential

<sup>59</sup> Such as the use of technologically advanced rocket systems, supplied by Iran to their terrorist proxy Hamas, and used against Israel: the Fajr (Dawn) five rocket is capable of reaching both Tel Aviv and Jerusalem.

<sup>60</sup> ‘Explosive New Arab Music Video: “Strike a Blow at Tel Aviv”’ by L Marcus at <<http://www.jewishpress.com/>> accessed 19 November 2012.

<sup>61</sup> H Jaber, ‘Hamas Goes Underground to Avoid Drones’ *The Sunday Times* (London, 25 November 2012) 27. Hamas sent text messages to Israelis during the 8 days of conflict warning that ‘Gaza will turn into the graveyard of your soldiers and Tel Aviv will become a fireball’.

<sup>62</sup> As seen in the recent attack by Al-Qaeda on a BP oil plant in Algeria with the explicit objective to kill Western workers while sparing the local, Muslim, workers, see eg Associated Press, ‘Al-Qaida-linked militants seize BP complex in Algeria, take hostages in revenge for Mali’ (16 January 2013) <[http://articles.washingtonpost.com/2013-01-16/business/36384683\\_1\\_islamist-militants-militant-group-hostages](http://articles.washingtonpost.com/2013-01-16/business/36384683_1_islamist-militants-militant-group-hostages)> accessed 23 January 2013.

<sup>63</sup> Highlighted in C Coughlin and D Blair, ‘Can Mali be saved from the Islamists?’ *The Daily Telegraph* (London, 16 January 2013) 19.

<sup>64</sup> See for a description on the role of technology and cyber world in the context of conflict, ‘Fighting in the Fifth Dimension’ *Al Jazeera World* (19 February 2012) <<http://www.aljazeera.com/programmes/aljazeeraaworld/2011/10/2011101916939402528.html>> accessed 21 January 2013.

threats to Western democracies. These technological, ecological, economical and scientific threats, including cyber attacks against strategic infrastructures such as nuclear power stations, air traffic control facilities, the use of bio weapons, often designed and made at home, have changed traditional perceptions regarding interstate conflict and hostilities. The necessity to use kinetic options including targeted killings aimed against the originators of such threats, as well as the necessary support network, make it necessary that law enforcement and military options can be used holistically in a supplementing way. While the potential of the use of targeted killings in the context of targeting enemies during hostilities as well as during peacetime in the context of counterterrorism is documented and recognized as a countermeasure, risk challenges posed by future hybrid threats warrant an extension of targeting campaigns and the inclusion of non-terrorist non-state actors who pose threats to national security.

### 3. Targeted Killing and the Law

As outlined above, Targeted Killing is being used as means of both combat and counterterrorism. Targeted killing takes often place within an operational context which is sometimes 'hybrid', which requires responses which combine elements of combat and law enforcement, counterinsurgency or a bit of both.<sup>65</sup> This potential 'dual use' of targeted killing leads to the applicability of different legal standards, as recognized in a recent statement by Human Rights Watch, whereby

[t]he deliberate use of lethal force against a specific target can be legal in operations against a combatant on a genuine battlefield, or in a law enforcement situation in which there is an imminent threat to life and there is no reasonable alternative. We also recognize the challenges faced in trying to address potential threats that are not in a traditional conflict zone yet are also beyond the reach of any law enforcement.<sup>66</sup>

This observation concurs with an earlier finding by the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston,

<sup>65</sup> See P Montague, 'Defending Defensive Targeted Killings', in Finkelstein, Ohlin and Altman (n 8) 285–99ff for a discussion of potential defences to the use of individual targeted killings in the context of hostilities and in peacetime within their wider legal and moral context.

<sup>66</sup> Human Rights Watch, Letter from its then Executive Director, Kenneth Roth, to Barack Obama (16 December 2011) at <<http://www.hrw.org/news/2011/12/16/letter-president-obama-targeted-killings-us-government>> cited in Schmitt (n 1).

who reflected on targeted killings and the legal complexities of this form of warfare and counterterrorism in his 2010 report, whereas

In recent years, a few States have adopted policies that permit the use of targeted killings, including in the territories of other States. Such policies are often justified as a necessary and legitimate response to ‘terrorism’ and ‘asymmetric warfare’, but have had the very problematic effect of blurring and expanding the boundaries of the applicable legal frameworks....<sup>67</sup>

The following pages will reflect on the use of targeted killings as Combat during hostilities as well as Law Enforcement and highlight briefly the legal implications of both.

### **A. Targeted Killings as Combat**

The Law of Armed Conflict (LOAC), the *jus in bello* applies from the moment a state of armed conflict does exist, be it as an international conflict between states or an non-international armed conflict between a state and non-state armed groups.<sup>68</sup> In instances of a non-international conflict, the existence of an armed conflict is accepted when the violence reaches a significant threshold<sup>69</sup> in terms of reciprocal ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.<sup>70</sup>

Once this threshold is reached, LOAC applies even in conflict situations where the overall legality of the use of interstate force, the *jus ad bellum*, is questionable. That means in cases where legitimate self defence is doubtful.<sup>71</sup> This distinction is essential for ‘achieving the ultimate objective of maximizing adherence to the rules of IHL’.<sup>72</sup> The ongoing conflict between Al-Qaeda and the USA constitutes hostilities between a state and a non-state armed group and as such amounts to an armed conflict. There exists some controversy whether the nature of this conflict constitutes a non-international armed conflict or an

<sup>67</sup> Alston Report (n 40).

<sup>68</sup> See MN Shaw, *International Law* (6th edn, OUP 2008) 1191 on the traditional distinctions between these forms of conflict and how that view is changing.

<sup>69</sup> Cf the ICJ *Oil Platforms Case (Iran v US)* 42 *ILM* at 1334 re the intensity of hostile action necessary to qualify as armed attack.

<sup>70</sup> See definition in the ICTY *Tadić case* (Jurisdiction) ICTY-94-1-AR72 (2 October 1995) para 70.

<sup>71</sup> See eg Schmitt (n 1) 601.

<sup>72</sup> See C Martin, ‘Going Medieval: Targeted Killing, Self defence and the *Jus Ad Bellum* Regime’ in Finkelstein, Ohlin and Altman (n 8) 223–52 at 231.

international armed conflict, both of a transnational and extraterritorial nature.<sup>73</sup> Even if one was to regard the conflict between the USA and Al-Qaeda as a non-international conflict, one would have to regard the ongoing combat operations against the Taliban, Al-Qaeda and its affiliates in Afghanistan as an international armed conflict as they take place in a conflict between occupying forces and insurgents.<sup>74</sup> Whether this existence of an armed conflict between the USA and Al-Qaeda also authorizes the USA to conduct drone strikes as hostilities outside its own territory as extraterritorial use of force in Pakistan is a different question and is discussed below.

In order to be lawful, targeted killing during hostilities has to comply with the rules of international humanitarian law, or the LOAC. Its legal sources are the Geneva Conventions of 1949, its two Additional Protocols, the 1907 Hague Regulations, and the customary law principles of armed conflict. Consequently, any deliberate targeting of designated individuals has to comply with the necessary legal safeguards of humanitarian law in order to be legitimate: namely compliance with the fundamental principles of the Law of Armed Conflict, the principles of military necessity, distinction and proportionality.<sup>75</sup>

The following pages give a brief overlook of how military targeting aims to safeguard compliance with the above principles in order to be legitimate. In so-called ‘personality strikes’<sup>76</sup> against High Profile Targets the targeting process is divided into ‘target development’ and ‘target assessment’. Target

<sup>73</sup> *ibid* 230–31 with more references; US official announcements refer to its conflict with Al-Qaeda and its affiliates as ‘armed conflict’, see for an overview Council on Foreign Relations (n 28) with reference to policy announcements by Harold Koh, Legal Advisor to the US State Department, John Brennan, former Chief Counter-Terrorism Advisor (now CIA Director) and Attorney General Eric Holder. A view, which is similar to the Israeli view in respect to its conflict with terrorist non-state actors, as evident in the Israeli Supreme Court’s decision in the ‘*Targeted Killing*’ case (n 30). For a summary of the arguments in favour of the classification as non-international armed conflict, see K Anderson, ‘The Armed Conflict with Al Qaeda’ *Opinio Juris* (6 May 2011) at <<http://opiniojuris.org/2011/05/06/the-armed-conflict-with-al-qaeda/>> accessed 26 January 2013. The US Supreme Court found in *Hamdan v Rumsfeld* 548 US 557 (2006), at 6, that the DC Circuit Court’s (as the appeal court) view that that the conflict with Al-Qaeda was a ‘conflict not of an international character’ as ‘erroneous’, hence reaffirming the view that the conflict with Al Qaeda was non-international in its nature. See C Garraway, ‘Afghanistan and the Nature of Conflict’ in Schmitt (n 32) 157–81 for a summary of the legal situation in general and in particular in relation to the detention and treatment of captured Al-Qaeda and Taliban. The classification of the conflict with Al-Qaeda as a non-international armed conflict with a non-state actor might reduce the scope of protection under LOAC to the minimum protection under Common Art 3.

<sup>74</sup> See A Cassese, *International Law* (2nd edn, OUP 2004) 420.

<sup>75</sup> Cf Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (opened for signature 8 June 1977, entered into force 7 December 1979) 125 UNTS 3 Articles 48–58; Articles 2 and 3 Common to the Geneva Conventions 1949 (opened for signature 12 August 1949, entered into force 21 October 1950).

<sup>76</sup> Referring to strikes against known targets, Columbia Drone Report (n 13).

development refers to the process of identifying the location of a previously designated target and to provide a timely and accurate tracking of it, while target assessment refers to a process of weighting the tactical success of the strike against the overall damage anticipated, including also a 'collateral' damage estimate.<sup>77</sup> Both phases have to comply with the above legal standards of LOAC. The legality test during the planning phase requires compliance not only with legal constraints such as distinction and necessity under the LOAC and the applicable rules of engagement, valid in the particular theatre of operations, but also with other operational implications, such as the potential impact on relations to other 'Green',<sup>78</sup> forces, friendly, allied local forces.<sup>79</sup> The overall success of an operation is assessed in a post-operational assessment where overall compliance of the targeting process, the execution of the strike and the damage is assessed holistically. These requirements also apply in principle to cases of non pre-planned targeting, so-called time sensitive or window of opportunity targeting<sup>80</sup> where the actual targeting process is shortened to allow for operational ad hoc decisions.<sup>81</sup> Also known as 'signature strikes', this form of targeting is based on an 'ad hoc' target assessment, where behavioural patterns of potential targets are observed by the drone operator and if falling into a category of predetermined criteria which is linked to 'militant activity or association'.<sup>82</sup> Such 'Signature' strikes in particular have led to recent challenges and criticism.<sup>83</sup>

In the case of the USA, any targeting process has to comply with the wider legitimacy imperative of the US targeting policy as set forth in the respective US military doctrinal guidelines, such as the official Counterinsurgency (COIN)

<sup>77</sup> See eg Schmitt (n 1) 600.

<sup>78</sup> In the context of the Afghanistan, 'Blue' refers to friendly forces, such as own and NATO/International Forces, who operate either under the mandate of the US Operation Enduring Freedom or the international mandate of International Security Assistance Force in Afghanistan (ISAF) by the UN SC; 'Green' refers to neutral forces, such as the Afghan National Army (ANA) and the Afghan National Police (ANP), while 'Red' refers to hostiles, such as (but not limited to) the Taliban. Recent reports of 'Blue' on 'Green' attacks, referring to rogue ANA and ANP elements which attacked NATO and US forces have made the distinction more difficult.

<sup>79</sup> M Schmitt, 'Targeting and International Humanitarian Law in Afghanistan' in Schmitt (n 32) 307–342 at 310.

<sup>80</sup> For a definition of so-called Time Critical Targeting, see GlobalSecurity.org Time Critical Targeting (TCT) Cell at <<http://www.globalsecurity.org/intell/systems/tct-cell.htm>> accessed 24 January 2012.

<sup>81</sup> M Schmitt (n 1) 601.

<sup>82</sup> Columbia Drone Report (n 13) at 8. It should be noted that the overall consensus is that civilians who are 'taking a direct part in hostilities' can be targeted under the law of armed conflict, see eg APV Rogers, *Law on the Battlefield* (2012 3rd edn, Melland Schill Studies in International Law) 52–53.

<sup>83</sup> *ibid* and below under 4.

manual<sup>84</sup> as well as the US Air Force guideline on targeting.<sup>85</sup> According to its Targeting Doctrine of 2006, targeting has to

achieve the effects and objectives outlined in a commander's guidance and are coordinated and deconflicted with agencies and activities that might present a conflict with the proposed action. It also determines whether a target remains a viable element of the target system. During the development effort, the targets may also require review and approval based on the sensitive target approval and review process, coordinated through the combatant commander to national authorities.<sup>86</sup>

It is important to remember that the targeting process applicable in the context of targeted killings has to follow the general rules governing any targeting process in land, air, sea, space and even cyberspace combat.<sup>87</sup> that is to comply with the basic principles of armed conflict, namely necessity, distinction and compliance with the proportionality requirements in respect to excessive collateral damage, or the prohibition of perfidy.<sup>88</sup> The RAF follows these caveats in its Rules Of Engagement (ROE) for air targeting, which are also applicable for the use of 'Reaper' UCAS strikes. The rules applying for weapon release in UCAS operations are not different to those used for UK manned combat aircraft:

[...] the weapons are all precision guided, and every effort is made to ensure the risk of collateral damage and civilian casualties are minimized, this may include deciding not to release a weapon. UK Reaper is not an autonomous system and does not have the capability to employ weapons unless it is commanded to do so by the flight crew [...].<sup>89</sup>

This overview of the targeting process concludes with the observation that a distinct advantage of using UCAS for executing targeted killings lies in its enhanced surveillance capability and the non-existent physical threat to its remote operator. This allows for a better tactical target assessment during the operation and can be used to minimize the probability of non-combatant

<sup>84</sup> See, for instance, former General Petraeus's Counterinsurgency Guidance of 2010 issued for US and NATO ISAF forces in Afghanistan at <[http://defensetech.org/wp-content/uploads/2010/07/COMISAF\\_COIN\\_Guidance\\_Jul\\_2010.pdf](http://defensetech.org/wp-content/uploads/2010/07/COMISAF_COIN_Guidance_Jul_2010.pdf)> accessed 16 January 2013.

<sup>85</sup> Headquarters Air Force Doctrine Center, 'Targeting' AFDD2-1.9 at 35 (2006) available at <<http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA454614>> accessed 22 March 2013, cited in Schmitt (n 79) 310.

<sup>86</sup> *ibid.*

<sup>87</sup> See M Schmitt, 'Targeting in Operational Law' in Gill and Fleck (n 20) 245.

<sup>88</sup> Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP 2010) para 253.

<sup>89</sup> See RAF summary regarding the use of Reaper drones at <<http://www.raf.mod.uk/equipment/reaper.cfm>> accessed 9 January 2013.

fatalities. This distinction of targets can in theory significantly reduce ‘collateral damage’, if applied thoroughly and systematically, an advantage even recognized by Human Rights Watch,<sup>90</sup> and paramount for any justification of targeted killing as lawful under LOAC.

### **B. Targeted Killing as Law Enforcement**

Targeted killing is also employed outside hostilities in instances of law enforcement, where there is no other option as to kill the ‘targeted’ individual. In such instance, legal limitations other than the above discussed rules governing the conduct of hostilities under the LOAC have to be considered. Potential legal sources can be found in international and/or domestic human rights law, domestic criminal law provisions, and domestic and international anti-terrorism law, both as limitations to a state’s right to employ such targeted killings as well as legal grounds authorizing the use of lethal force on grounds of strict necessity, proportionality and/or the right of individual self defence of the personnel tasked with such an operation.

Targeted Killing outside hostilities and which is not directed against legitimate military targets is governed by the ‘law enforcement paradigm’<sup>91</sup> which is primarily governed by international human rights law,<sup>92</sup> international specialist operational standards<sup>93</sup> and domestic implementing legislation. Outside hostilities, the use of lethal force is the exception and a ‘choice of last resort’ in law enforcement operations, when arrest is not possible without endangering other lives and to prevent imminent harm to life. Melzer provides an authoritative account and overview on the subject: he cautions restraint of using lethal force. Given the closeness of targeted killing outside hostilities to the above discussed assassination paradigm and the dangers of constituting ‘extrajudicial killings’ as well, he proposes a three step safeguard check. Targeted killing as law enforcement should only be admissible as lawful if it ‘(a) aims at preventing an unlawful attack by the targeted person on human life; (b) is absolutely necessary for the achievement of this purpose; and (c) is the result of an operation which is planned, prepared, and conducted so as to minimize, to the greatest extent possible, the recourse to lethal force’.<sup>94</sup> Any possible legality of such forms of

<sup>90</sup> HRW (n 17).

<sup>91</sup> Melzer (n 20) 287.

<sup>92</sup> Most notably the right to life, as guaranteed in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights. During hostilities provisions of international human rights law may be superseded by *ius in bello*, such as Common Article 3 and the Grave Breaches Provisions of the four Conventions, see eg *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 25.

<sup>93</sup> See eg the UN, ‘Basic Principles on the Use of Force and Firearms by Law Enforcement Officials’ at <<http://www2.ohchr.org/english/law/firearms.htm>> accessed 20 January 2013.

<sup>94</sup> Melzer (n 20) 287.

targeted killings as law enforcement is seriously doubted by the UN Special Rapporteur On Extrajudicial, Summary or Arbitrary Executions, Philip Alston, who questions in general the possibility to execute such operations as part of a state's lawful, legitimate and morally justifiable part of its national policies.<sup>95</sup>

In cases where the operation is directed against terrorists additional difficulties arise from the potential hybrid nature of the target: the moment counter-insurgency operations and policies single out a terrorist as a potential target, the line between kinetic actions during hostilities and law enforcement becomes blurred.<sup>96</sup> The legal challenges for using targeted killings in this context remain. Amnesty International warns of the danger of adopting such a method of law enforcement, and compared it in the context of Israel's kinetic response to threats arising from its occupied territories with 'an unlawful and deliberate killing carried out by order of a government or with its acquiescence ... which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice. These killings take place outside any judicial framework'.<sup>97</sup>

Targeting in the context of the ongoing 'war on terror' as well as in the wider context of counterterrorism has its challenges: it is often rather difficult to determine the exact nature of the threat in question and: whether it qualifies as hostility in terms of armed conflict, or as an act of terrorism or sometimes a bit of both.<sup>98</sup> An IED aimed at killing coalition forces in Afghanistan might fall under the first category while the killing of health workers or school children by the same actor might constitute an act of terrorism. Lacking a universal criminal prescription (and definition) of terrorism,<sup>99</sup> any response to such crimes/threats would have to be grounded in the responses available at domestic state and policy level: from criminal prosecution<sup>100</sup> to self-defence as part of a domestic counterinsurgency strategy. Understandable that the USA maintain the position that their policies of targeting terrorist targets should fall under the combat paradigm of its 'Global War On Terrorism' which does leave less room for

<sup>95</sup> Alston Report (n 40).

<sup>96</sup> Cf N Melzer, *Targeted Killing in International Law* (OUP 2008) 222ff for an overview and discussion of cases of permissible cases of targeted killing as a method of law enforcement.

<sup>97</sup> Amnesty International, 'Israel Must End its Policy of Assassination' (4 July 2003) AI Index: MDE 15/056/2003 (21 January 2013).

<sup>98</sup> Targeted killing operations do create an often unbridgeable conflict of how to address the underlying 'targeted situation', as a criminal act of terrorism or an act of war, as aptly identified by G Blum and P Heymann 'Law and Policy of Targeted Killing' (2010) 1 *Harvard National Security Journal* 145.

<sup>99</sup> *ibid* 145.

<sup>100</sup> Based on the jurisdictional principles of territoriality, and active and passive nationality respectively: a state would have criminal jurisdiction if the terrorist acts had occurred on its territory or if either its nationals had perpetrated these crimes or were the victims of such crimes.

legal scrutiny regarding the choice of responses. By following the US position, which characterizes the conflict with Al-Qaeda as an armed conflict as such and its responses like targeted killings as hostilities falling under its inherent right to state self-defence, one would be able to avoid such legal challenges under the rubric of 'lawfare'.<sup>101</sup> Whether this can apply to its covert drone strike programme is however debatable.

### *C. Extraterritorial Targeted Killing and Questions of State Sovereignty*

Such compliance with the principles of the LOAC does, however, not necessarily imply that the wider context in which a state is engaging in combat is a state of interstate self-defence and as such does permit the use of military force against other states.<sup>102</sup> The *jus ad bellum* is distinct from the *jus in bello*, International Humanitarian Law applies 'equally to all parties to an armed conflict, irrespective of whether an armed conflict is waged in compliance with, or in violation of, the general prohibition of the use of force' as enshrined in Article 2(4) UN Charter.<sup>103</sup> The last year has seen an increase in US extraterritorial drone strikes conducted in Pakistan and outside the operational theatre of Afghanistan: 'Estimates state that while there were 52 such strikes during George W Bush's time, this number has risen to 282 over the past three and a half years, with officials justifying it as international "self defence" against a stateless enemy.'<sup>104</sup> Two questions may arise from such US military action against the Taliban, Al-Qaeda and affiliated targets in Pakistan: first, can the US exercise its right to state self-defence after the attacks of 9/11 against Al-Qaeda as a non-state actor and secondly if affirmative, does this right to self-defence also allow for the extraterritorial use of force on the territory of a sovereign, allied state?

Under Article 2 (4) of the UN Charter, States 'shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'. Article 2(4) UN Charter as a customary law principle<sup>105</sup> on the prohibition of the use of force does not affect a state's

<sup>101</sup> A position which finds its echo in the above cited Israeli 'Targeted Killing' case (n 30) at 459 where the court characterized the conflict between Israel and its terrorist non-state adversaries as 'a armed conflict between the State of Israel and the terrorist organizations operating in the territories of Judaea, Samaria and the Gaza Strip the government of the State of Israel'; also *Hamdan v Rumsfeld* (n 73) on the US position.

<sup>102</sup> See eg Schmitt (n 1) 601.

<sup>103</sup> Cf Schmitt (n 1) fn 16; Gill and Fleck (n 20) ch 4, at 52–53.

<sup>104</sup> Cited in T Judd, 'US "should hand over footage of drone strikes of face UN inquiry"' *The Independent* (London, 20 August 2012) at <<http://www.independent.co.uk/news/world/asia/us-should-hand-over-footage-of-drone-strikes-or-face-un-inquiry-8061504.html>> accessed 20 January 2013.

<sup>105</sup> *Nicaragua v United States of America* [1986] ICJ Rep 14 paras 187–93 at 98–103 and International Law Commission, Draft Articles on the Law of Treaties, Report of the International Law Commission, 18th Session (1996) *II ILC Yearbook* at 247.

inherent right of individual or collective self-defence if an armed attack occurs as stipulated in Article 51 of the Charter. The question arises whether this right of state self defence does also apply to cases where the 'aggressor' is not a state but a non-state non-governmental organized armed group such as Al-Qaeda. While Art 51 UN Charter does not specify that the use of force or the threat has to originate from a state (actor), it seems that prior 9/11 the prevailing view excluded non-state actors as originators of such attacks.<sup>106</sup> This interpretation of the Charter consequently ignored the raising role of non-state terrorist actors in modern conflict, which began with the ascent of Islamist fighter networks during the Soviet occupation of Afghanistan in the mid-1980s. A State's right to self-defence against such non-state actor violence should solely reflect on the scale and gravity of the attack or threat and less on formalities.<sup>107</sup> The magnitude and severity of the attacks of 9/11 by Al-Qaeda allowed the USA to exercise its legitimate right to self-defence,<sup>108</sup> recognized by the UN SC in its two post 9/11 UN SC Resolutions 1368 and 1373.<sup>109</sup> Consequently, and in line with UN SC 1368, NATO invoked Article 5 of the Washington Treaty, the Alliance's collective defence clause.<sup>110</sup>

Time will tell whether we witness a definite change in 'legal boundaries of the battlefield',<sup>111</sup> recognizing the new reality of non-state actor aggression, and strengthening the position of States facing an armed attack launched by non-state actors.<sup>112</sup> While the Israeli operations 'Change of Direction' against Hezbollah in 2006<sup>113</sup> and 'Cast Lead' against Hamas in 2008/9 were accepted as justified acts of Israel's right to self-defence under Article 51 UN Charter, the ICJ Advisory Opinion on the Israeli Wall [2004] ICJ Rep 136 seems to confirm the traditional inter-state concept of armed conflict which limits the scope of

<sup>106</sup> See eg Schmitt, 'Drone Attacks under the *Jus Ad Bellum* and *Jus in Bello*: Clearing the "Fog of Law"' (2010) 13 Ybk IHL 311 at 317.

<sup>107</sup> See *Nicaragua v United States of America* (n 105), para 195 where the court recognizes the existence of an armed attack, executed by irregular forces, if comparable in its severity: 'In the view of the Court, this is to be understood as meaning not merely action by regular if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces.'

<sup>108</sup> Art 51 of the UN Charter.

<sup>109</sup> UN SC Res 1368 (12 September 2001); UNSC Res 1373 (28 September 2001), both affirming the right of the USA 'of individual or collective self defence in accordance with the Charter'. See further C Gray, *International Law and the Use of Force* (OUP 2008) at 200 for a discussion of 9/11 on the legal impact of these events.

<sup>110</sup> See NATO, 'Collective defence' at <[http://www.nato.int/cps/en/natolive/topics\\_59378.htm](http://www.nato.int/cps/en/natolive/topics_59378.htm)> accessed 12 January 2013; Statement by the North Atlantic Council of 12 September 2001 at <<http://www.nato.int/docu/pr/2001/p01-124e.htm>> accessed 21 January 2013.

<sup>111</sup> On the new term of 'law fare', see eg M Lewis, 'The Boundaries of the Battlefield' *Opinio Juris Blog* <<http://opiniojuris.org/2011/05/15/the-boundaries-of-the-battlefield/>> accessed 18 January 2013.

<sup>112</sup> Controversial, see Martin (n 72) 239.

<sup>113</sup> See Schmitt (n 106) 317.

defence to state actors only.<sup>114</sup> Whether this view will eventually change towards an explicit recognition under international law of an autonomous legal principle of *jus ad bellum*, remains to be seen.<sup>115</sup>

The next question regarding the legality of executing targeted killings on the territory of Pakistan relates to the question whether the USA has a right to cross territorial borders in pursuing their right to self-defence against Al-Qaeda and other non-state terrorist actors. The exercise of transnational and extraterritorial self-defence may raise questions in regard to the scope of the US's right to self-defence. Prior examples for such transnational, extraterritorial, targeting can be found in the 'Hot Pursuit' and/or extraterritorial 'raid' operations by the former South African Defence Force (SADF) against cadres and members of the African National Congress (ANC), its armed wing, Umkhonto we Sizwe (MK) and the South West Africa's People's Organisation (SWAPO).<sup>116</sup> These operations have been mostly condemned as violations of Article 2(4) UN Charter, often based on political reasons.<sup>117</sup> As examples may serve the prolonged phase of African armed opposition against colonial domination by white minority regimes in 1970s and 1980s, where Soviet backed 'liberation wars' were regarded as manifestations of peoples' self-determination and self-defence in the wider sense and 'as wars of national liberation were exceptions to UN Charter's Article 2(4) prohibition of the use of force',<sup>118</sup> thus precluding the argument of self-defence for non-African opponents. It is questionable whether such

<sup>114</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [ICJ Reports 2004] ICJ Rep 136 at 226, here the Court requested that Israel had to prove that a state sponsor was behind the terror attacks as a prerequisite for its argument of acting in self-defence when building the Wall. Schmitt (n 113) 316 with reference to the Wall case as well as the ICJ case of *Armed Activities on the Territory of the Congo (Dem Rep Congo v Uganda)* [2005] ICJ Rep 116. The scope of the newly defined crime of aggression under the Rome Statute of the International Criminal Court (now provided for in Art 8bis adopted at the Kampala Review Conference and which will enter into force at the earliest in 2017) seems to continue the traditional view as the criminalization (under Art 8bis (1)) of the unlawful use of force is structurally linked to the use of inter state force only, see S Bachmann and G Kemp, 'Aggression as "Organized Hypocrisy" – How the War on Terrorism And Hybrid Threats Challenge The Nuremberg Legacy' (2012) 30 Windsor Yearbook of Access to Justice 247–251.

<sup>115</sup> T Gill in Gill and Fleck (n 20) 193 affirming such a principle as 'a long acknowledged...possibility' with further reference.

<sup>116</sup> In 'Operation Plecksy' of 1985, the South African Defence Force conducted an airborne operation into neutral Botswana, Gaborone and killed 12 people including 5 members of the ANC, see P Molaodi and J Konopo, 'Botswana: Memories of the Apartheid Raids' 14 June 2005 <<http://allafrica.com/stories/200506140916.html>> accessed 23 January 2013.

<sup>117</sup> The UN SC condemned the 'Gaborone' raid by South African security forces as an act of aggression and a violation of Botswana's sovereignty, see UNSC Resolution S/RES/568 of 21 June 1985, amended and affirmed by UNSC Resolution S/RES/572 of 30 September 1985.

<sup>118</sup> Bachmann and Kemp (n 114) 249.

a distinction would be upheld today post 9/11 before the backdrop of the growing recognition of a global terrorist threat; an observation of particular relevance today in respect to Israel's frequent use of force against non-state (terrorist) actors, including the extraterritorial use of force on the territory of third states.

It is not easy to answer the question if the USA can legally use military force on the territory of Pakistan against Al-Qaeda, the Taliban and affiliated targets. Pakistan's right as a sovereign state as enshrined in Article 2 (1) of the UN Charter has to be weighed against the necessity of the USA to exercise its right to self-defence in terms of Article 2 (4) UN Charter (if one follows the argument that the USA has a right to self-defence against Non State Actors post '9/11'). Any such deliberations would have to consider the overall position of Pakistan in this conflict: whether it was unable or unwilling to deny a 'safe haven' to terrorists, was playing an active role as aider and abettor or was simply maintaining a position of 'neutrality'. Pakistan is not only an active partner in fighting terrorism and is undertaking genuine efforts to combat Al-Qaeda and 'home grown' Taliban groups, albeit with varying success and changing allegiances, it also supports ISAF operations by allowing NATO (and the USA) to use its territory for resupplying ISAF in Afghanistan. Problematic is the growing discontent among the military and political leaders in Peshawar with the US drone programme within its territorial borders and the rising death toll among Pakistani civilians.<sup>119</sup> Unless this discontent was to lead to an explicit policy change by the Pakistani government and to an official request by Peshawar to stop any further drone strikes, the USA will face no serious legal challenge for its extraterritorial drone programme in Pakistan. Such a development is, however, unlikely given that the government in Peshawar seems to support silently the US drone programme out of strategic necessity.<sup>120</sup>

#### **4. Targeted Killing: Challenges Founded on Combat Morality and Efficiency**

Targeted killing by drones has become an increasingly debated subject with criticism not only directed against its overall legality and legitimacy but also its negative impact on Pakistan as a sovereign state in cases of extraterritorial

<sup>119</sup> See I Ali and M Ansari, 'Pakistan Fury as CIA Airstrike on Village Kills 18' *The Telegraph* (London, 15 January 2006) <<http://www.telegraph.co.uk/news/worldnews/asia/pakistan/1507895/Pakistan-fury-as-CIA-airstrike-on-village-kills-18.html>> accessed 13 January 2013) and 'Pakistan's Khan Leads Rally Against US Drones' *Al Jazeera* (7 October 2012) <<http://www.aljazeera.com/news/asia/2012/10/2012106181644841459.html>> accessed 18 January 2013.

<sup>120</sup> For an account of Pakistan's silent consent, see 'US Embassy Cables: Pakistan Backs US Drone Attacks on Tribal Areas' *The Guardian* (London, 30 November 2010) at <<http://www.guardian.co.uk/world/us-embassy-cables-documents/167125>> accessed 21 January 2013.

strikes, a potential lack of overall efficiency and in general a growing uneasiness in its overall morality. Generally, it seems that there had been a change in how targeted killing is being viewed: apart from a growing discomfort with civilian deaths involved, there is also growing concern in respect to its overall effectiveness as well as a general uneasiness of accepting targeted killing as a new form of warfare. This was highlighted in a recent statement made by the UN Special Rapporteur on Human Rights and Counterterrorism, Emmerson, who called for more transparency and accountability when employing this form of warfare.<sup>121</sup>

Targeted killing may have some direct implications for the overall morality of armed conflict and combat as such: the evolving drone technology removes the soldier from the actual battlefield and with it the closeness and 'intimacy' of war. UAV technology has created a mechanical and factual distance between operator and his 'target', which acts like a moral distance: targeting killings may have removed any remnants of 'humanity of combat' and produced the factual dehumanization of the enemy.<sup>122</sup> This dehumanizing distance between the protagonists of this new form of armed conflict, thoroughly asymmetric in terms of weapon technologies and capabilities, has led to a growing criticism of the Obama Administration's use of drones.<sup>123</sup> This concern is aptly summarized by the US Army Chaplain and military ethics teacher, Keith Shurtleff, when he states 'that as war becomes safer and easier, as soldiers are removed from the horrors of war and see the enemy not as humans but as blips on a screen, there is very real danger of losing the deterrent that such horrors provide'.<sup>124</sup>

Targeted killing and its wider legal, ethical and moral complexities was brought to the attention of the US public, when Anwar Al-Awlaki, a US citizen of Yemeni descent, and the alleged Al-Qaeda leader in the Arabian Peninsula<sup>125</sup> was killed by a CIA operated drone on 30 September 2011. His selection as a target, targeting and subsequent killing had been authorized by

<sup>121</sup> Statement by B Emmerson, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, see Judd (n 104).

<sup>122</sup> See eg D Moore, *The Soldier A History of Courage, Sacrifice and Brotherhood* (Icon Books 2009) 229–35 and Finkelstein, Ohlin and Altman (n 8) 357–65 for a general discussion of the moral issues surrounding targeting killings within the wider context of war against terrorism.

<sup>123</sup> Cf Guiora (n 29); K McVeigh, 'US under fire over search for "hostile" Afghan children' *The Guardian* (London, 8 December 2012) 36.

<sup>124</sup> C Cole and J Wright, 'Armed Drones: war by remote control' *Peace News* (February 2010) at <<http://peacenews.info/node/3427/armed-drones-war-remote-control>> accessed 4 January 2013, reprinted in Drone Wars UK, 'What are drones?' at <<http://dronewarsuk.wordpress.com/aboutdrone/>> accessed 4 January 2013.

<sup>125</sup> His family brought a legal suit against the Obama Administration, arguing that his constitutional rights as an US citizen had been violated when he was selected as a target; that this selection did constitute the assassination of an US citizen without having any form of judicial process. The case was unsuccessful for procedural reasons. See *Al-Aulaqi v Obama* 727 F.Supp.2d 1 Dist Ct, Dist of Columbia 2010 Civil Action No 10-1469 (JDB). After his death, it was also reasoned that Al-Aulaqi had 'lost' his protection under the US Constitution when giving up, his US citizenship.

President Obama and led to questions regarding the extent the killing of an individual who once held US citizenship was in compliance with international and US domestic law.<sup>126</sup>

Linked to these emerging morality concerns is a growing debate in regard to targeting efficiency: whether target elimination is indeed as efficient as it has been claimed, and whether the rising numbers of 'collateral' (unintended civilian) casualties during combat, among the effected civilian populations in Pakistan does not have an overall negative impact on such antiterrorism and counterinsurgency campaigns.

The number of American drone strikes in Pakistan has significantly increased under Obama since taking office in 2009: 'Estimates state that while there were 52 such strikes during George W Bush's time, this number has risen to 282 over the past three and a half years.'<sup>127</sup> While the Obama Administration maintains that its drone programme was 'achieving' high efficiency rates (in terms of elimination of 'High Value Targets') and low civilian casualties,<sup>128</sup> new reports show the opposite. The Bureau of Investigative Journalism (TBIJ) reported 'that from June 2004 through mid-September 2012, available data indicate that drone strikes killed 2,562 - 3,325 people in Pakistan, of whom 474 - 881 were civilians, including 176 children. TBIJ reports that these strikes also injured an additional 1,228 - 1,362 individuals',<sup>129</sup> which would amount to a 'collateral' rate of 20%. Whether such a figure alone does already constitute violations of the principles of distinction and proportionality of the LOAC and therefore constitutes possible war crimes has to be seen. It is also alleged that there was a lack in terms of overall effectiveness when targeting leaders and commanders of Taleban and other affiliated forces.<sup>130</sup> These reports do, however, contradict any policy announcement by the USA to the contrary. The findings of TBIJ have already found their way into the public debate and perhaps influenced it negatively towards the USA use of drones for targeted killing. The figures produced by TBIJ were used in the critical high profile Stanford/NYU *Living Under Drones Report*,<sup>131</sup> which calls for a careful re-evaluation of the current use of US targeted killing and drone strikes. Together with the above cited *Columbia Drone Report*<sup>132</sup> and the most recent UN decision to begin an official inquiry into the

<sup>126</sup> Some critics (including) his family allege that he had been killed without any judicial process, hence amounting to an act of extrajudicial killing, see eg *BBC News*, 'Obituary: Anwar al-Awlaki' (30 September 2011) <<http://www.bbc.co.uk/news/world-middle-east-11658920>> accessed 6 January 2013.

<sup>127</sup> Cf Judd (n 104).

<sup>128</sup> CNN (n 12).

<sup>129</sup> The Bureau of Investigative Journalism (n 2), cited in the Stanford/NYU *Living Under Drones Report*, 'Executive Summary' (n 13) as well as in the *Columbia Drone Report* (n 13) 20.

<sup>130</sup> Stanford/NYU *Drone Report* (n 13), 'Executive Summary and Recommendations' and CNN (n 12).

<sup>131</sup> Stanford/NYU *Living Under Drones Report* (n 13) 'Executive Summary and Recommendations'.

<sup>132</sup> *Columbia Drone Report* (n 13).

use of drones,<sup>133</sup> the official US policy announcement, whereas drone strikes constituted ‘a surgically precise and effective tool that makes the U.S. safer’<sup>134</sup> is already seriously contested. And this critique does already take into account that the USA has a right to defend itself against Al-Qaeda and therefore the official US position, whereas it was in an armed conflict with this non-state actor. How much harder would it then to justify such ineffective strikes under the above non-combat paradigm of law enforcement?

The repercussions of the US increasing reliance on drones for executing enemies abroad has seen an increase in Anti-US hostility, possibly swelled the numbers of the Taliban and other affiliated groups in the region and led to open criticism by its Ally in the region, Pakistan.<sup>135</sup> These ‘collateral’ damages in the widest sense do not seem to be taken to seriously by the protagonists of this form of warfare, an omission which might turn out to question the overall success of the US ‘War on Terror’ in general and OEF in particular.

## 5. Conclusion: An Outlook on the Future Use of Targeted Killing

Current criticism continues to evolve around the following main points: that targeted killing is illegal as such, that it is inefficient and that it is immoral. The author acknowledges that there is the possibility that some of this critique might be justifiable and that only strict observance of the existing legal and operational frameworks, applicable to targeting and outlined above, can avoid instances where targeted killing might raise such questions. This includes US Targeted Killing, which is executed as a manifestation of the US right to individual self defence<sup>136</sup> or as a means of warfare used within an existing UN SC mandate under Chapter VII of the UN Charter.<sup>137</sup> Targeted killing operations which are planned and executed in accordance with the legitimate targeting process employed by the US military and its allies (and not the CIA or other Private Military Contractors) as part of hostilities can be considered lawful and legitimate as long as in compliance with the fundamental LOAC principles of military necessity, distinction and proportionality and aimed at avoiding ‘collateral damage’.<sup>138</sup> The need to adhere to law is being acknowledged in recent

<sup>133</sup> See n 15.

<sup>134</sup> Official US narrative, cited in the Stanford/NYU Living Under Drones Report (n 13), ‘Executive Summary and Recommendations’.

<sup>135</sup> G Porter ‘Pakistani military want veto on drone strikes’ *Al Jazeera* (17 August 2011) <<http://www.aljazeera.com/indepth/opinion/2011/08/2011817133518875135.html>> accessed 4 January 2013.

<sup>136</sup> Under Art 51, 2(4) UN Charter, such operations including OEF Afghanistan.

<sup>137</sup> Authorized use of force in terms of Art 51 UN Charter, such as in Afghanistan under ISAF mandate.

<sup>138</sup> The reduction of such fatalities is an illusion, despite advanced technologies used and best attempts. See M Schmitt (n 79) 324.

examples in US military academe.<sup>139</sup> This legality argument is, however, seriously in doubt when the operations are executed by non-combatants, such as the CIA, not restricted to 'enemy' targets alone, as it is the case in instances where civilian non-combatants become 'collateral' damage and the affected state as Pakistan is a neutral state which does not consent to such strikes.

This affirmative legal assessment does not cover scenarios outside hostilities and in the context of implementing existing security strategies, such as counterterrorism operations as part of a national COIN policy, as well as entwined, hybrid operations as e.g. counternarcotics operations, or hostage release operations, where legal scrutiny has to be applied. The legality of the above-mentioned signature drone strikes are also debatable as potential violations of the principles of proportionality, imminence and proportionality.

This article concludes with the prediction that the use of UCAS as a method of warfare (together with Special Forces capture and kill operations) will increase in the future. The overall potential military benefit of using drones as a method of warfare on the battlefield of the future is not disputed and with the USA having become a key player in the use of this form of warfare, other nations are set to follow its lead. The use of drones and targeted killing operations will remain a means of warfare of first choice to counter Asymmetric and Hybrid Threats. It seems certain that targeted killing will continue to be an important element of future US long-term counterterrorism and security strategies. It also seems likely that in light of defence budget cuts, troop reductions as well as a growing unwillingness to scarify the lives of soldiers of Western countries, more states will consider turning utilizing armed drones as a means of show of force in the future. Combat capabilities can be significantly enhanced when the use of UAVs are available: this reflects directly on the dual use nature of such airborne systems, which allow for an unarmed use for reconnaissance as well as armed for combat.<sup>140</sup> The recent call by the UN Secretary General to deploy UAVs to Congo to support the African peacekeeping forces of MONUSCO in their attempt to fight rebels in the east of the country highlights the potential use of UAVs outside targeted killing operations.<sup>141</sup> This 'dual use nature' of UAVs, unarmed versus armed, has been recognized for the use in policing and monitoring roles with the potential of further proliferation and use.

<sup>139</sup> MD Maxwell states in his contribution 'Targeting Killing, the Land, and Terrorists: Feeling Safe?' (2012) 64 Joint Forces Quarterly 'This begs the questions of how narrow and tailored a President's authority must be when he orders a targeted killing in the name of self-defense, and when the law of war is activated, necessitating a President to adhere to its concepts.'

<sup>140</sup> Leading to new fields of use, as the newest plan by the British MoD to use drones for underwater missions as marine drones, N Hopkins, 'Ministry of Defence plans new wave of unmanned marine drones' *The Guardian* (London, 2 August 2012) <<http://www.guardian.co.uk/world/2012/aug/02/ministry-defence-plans-unmanned-marine-drones>> accessed 13 January 2013.

<sup>141</sup> D Howden, 'UN wants drones over Congo to keep the peace' *The Independent* (London, 11 January 2013) 30.

The use of drones for executing targeted killing in Afghanistan and Pakistan might well increase in the next years, a forecast which is partly founded in the fact that the USA is moving already now in a transitional role in Afghanistan and plans to end major combat operations there this spring. The withdrawal of combat troops will necessitate the increased use of targeted killing in future, executed by both drones and special forces, in order to close existing combat capability gaps during and after the transition of operational control to the Afghan National Army. In addition, Obama's decision to appoint John Brennan, his former Security Advisor and key promoter of the use of drones for targeted killing, to the top job of CIA director may likely result in an increase reliance on this means of warfare by the USA.<sup>142</sup>

The future use of drones will not only affect national security strategies and policies, but eventually also impact on how we perceive interstate war within its legal contexts of the *jus ad bellum* as well as the law of conflict, the *jus in bello*. These future developments will challenge the international legal fraternity for some time to come: it will be a key responsibility for the international lawyer to discuss and scrutinize these developments within their wider political, legal and military context, and to shape this process. This article concludes with a sobering warning that while targeted killing operations may be an effective means of achieving short-term tactical goals within the scope of a wider operational objective, the unregulated and increased use of targeting killings by the USA (and others) in the 'war on terror' may be both immoral as well as illegal in the long run.

<sup>142</sup> See T McCarthy, 'John Brennan: CIA veteran who became Obama's drone champion' *The Guardian* (London, 7 January 2013) <<http://www.guardian.co.uk/world/2013/jan/07/john-brennan-cia-drones-obama>> accessed 13 January 2013.