

**THE USE OF ARMED DRONES BY THE UNITED STATES AGAINST AL-QAEDA AND
ITS 'ASSOCIATES':**

A STUDY OF LAW AND POLICY ARISING FROM A 'STATE OF EXCEPTION'

A Thesis submitted to the Middlesex University in Partial Fulfilment of the
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Abstract

The use of armed drones in undeclared warzones pose various challenges to well established rules of international law. The US drone policies rest on shaky legal grounds, are ambiguous in nature and have been justified by reinterpretation of international law. The UK government's use of drone strike in Syria shows a new problematic trend. The frequency of armed drones by few states outside area of active hostilities has normalised the use of force and generated a permanent state of exception. Mainstream research on targeted killings has focused on legality of US strikes in Pakistan but largely ignored the problematic role of Pakistan, in particular, the military violence of the Pakistani military in the tribal areas. The case study of Pakistan highlights that the drone strikes are directed against a population that is marginalised within the targeted state. The study argues that the special status of Federally Administered Tribal Areas (FATA) has allowed the US to conduct drone strikes without any accountability. The US has been targeting groups with varying degree of closeness to Al-Qaeda in multiple territories based in Yemen, Pakistan, Somalia and Syria. The study established with the help of control test devised by the International Court of Justice in Nicaragua case that the associations between Al-Qaeda and these groups or organisations is very loose. Targeting groups who pose no threat to the US is both illegal and counterproductive. Therefore the extraterritorial targeting of terrorists who pose no threat to the US is a flawed strategy and must be reviewed.

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Table of Abbreviations

AQAP	- Al-Qaeda in the Arabian Peninsula
AQI	- Al-Qaeda in Iraq
AQIM	- Al-Qaeda in the Islamic Maghreb
AUMF	- Authorisation for the Use of Military Force
CIA	- Central Intelligence Agency
DIA	- Defence Intelligence Agency
DOD	- Department of Defence
DRC	- Democratic Republic of the Congo
ECHR	- European Convention on Human Rights
ECtHR	- European Courts of Human Rights
FARC	- Revolutionary Armed Forces of Colombia
FATA	- Federally Administered Tribal Areas
FBI	- Federal Bureau of Investigation
FCR	- Frontier Crime Regulations
GOP	- Grand Old Party (The Republican Party)
HN	- Haqqani Network
HUMINT	- Human intelligence
HVT	- High Value Target
IAC	- International Armed Conflict
ICC	- International Criminal Court
ICCPR	- International Covenant on Civil and Political Rights
ICJ	- International Court of Justice
ICRC	- International Committee of the Red Cross
ICTR	- International Criminal Tribunal for Rwanda
ICTY	- International Criminal Tribunal for the former Yugoslavia
ICU	- Islamic Courts Union
IHL	- International Humanitarian Law
IHRL	- International Human Rights Law
ILC	- International Law Commission
IRRC	- International Review of Red Cross
ISI	- Inter-Services Intelligence
ISIL	- Islamic State of Iraq and the Levant

ISIS - Islamic State in Iraq and Syria
JSOC - Joint Special Operation Command
KPK - Khyber Pakhtunkhwa
LeT - Lashkar-e-Taiba
MoD - Ministry of Defence
NATO - North Atlantic Treaty Organization
NGO - Non-governmental organizations
NIAC - Non-international Armed Conflict
NSA - National Security Agency
OIG - Office of Inspector General
PKK - Kurdistan Workers' Party
RPV - Remotely Piloted Vehicles
SIGNIT - Signals intelligence
SOF - Special Operations Forces
SCSL- Special Court for Sierra Leone
TTP - Tehrik-e-Taliban Pakistan
UAE - United Arab Emirates
UNESCO - United Nations Educational, Scientific and Cultural Organization
UNHCR - United Nations High Commissioner for Refugees
UNICEF - United Nations Children's Fund
UNIFIL - United Nations Interim Force in Lebanon
UNSC - United Nations Security Council
USAFRICOM - The United States Africa Command
USSOCOM/SOCOM - United States Special Operations Command
WMD - Weapon of Mass Destruction

Introduction

Drones, or unmanned aerial vehicles, are remotely piloted aircraft of different sizes and levels of sophistication, that are transforming the rules of engagement during armed conflicts, geographies and infrastructures of state violence. The way states are using drones in undeclared warzones is rewiring the international system and challenging the meaning of sovereignty. This thesis investigates the legal, ethical and political issues associated with the use of drone strikes by the United States of America (US). The objective of this thesis is threefold. First, it analyses the normalisation of exceptional measures associated to emergency situations and the 'state of exception' involved in the policies and practices underpinning the extraterritorial use of drones by the US for counterterrorism purposes.

Second, the thesis deconstructs the arguments advanced to support the legality of the use of drones advanced by the US, demonstrating their flaws and potential for undermining the international legal order. The current policies on drone strikes have been legitimised by engaging in a reinterpretation of well-established rules of international law, such as those governing the right to self-defence on one hand while, on the other, articulating as a firmly established legal rule of international law the 'unwilling or unable test' despite its weak support in state practice. The rules of attribution, mostly framed in the field of responsibility for internationally wrongful acts, have been grotesquely distorted in order to justify attacks to 'affiliate' groups that fail to meet the attribution tests and standards generally accepted in international law. The opacity of the operations and policies on drone strikes and the asymmetry between the US power and the power of targeted states, has also facilitated the abuse of the consent that provides legal varnish to attacks outside declared warzones.

Finally, the research aims at highlighting that the asymmetry of power that characterises the use of drones is not confined to the different economic, political or military weight that states involved enjoy in international relations. As demonstrated for the case of Pakistan, the attacks are directed to population that is in a vulnerable position within the targeted state. This is an underexplored issue in the scholarship addressing the 'war on terror' in

general and the use of drones in particular. The force delivered by drones outside an armed conflict may not only be always unlawful but, under their current framework, also counterproductive.

Research question

Understanding the legal status of the targeted groups is a necessary condition to any assessment of the legality of the US counterterrorism policies outside its own territory. The core research of this thesis is focused on identifying who are the Al-Qaeda 'associates' targeted by US drone strikes. This analysis is necessary to elucidate whether their actions can be attributed to Al-Qaeda, a premise on which the current policies on drones relies. A credible response to this question is essential for any articulation of legal basis to support any use of armed force by the US in the territories outside its jurisdiction. Targeted individuals by drone strikes must belong or being controlled by the organisation that continues to (allegedly) pose a threat to other states. Establishing this relationship necessitates engagement with the rules on international responsibility. While this framework is not directly aimed to non-state actors, it is the benchmark of reference provided by international law. Only when the legal status of the targeted groups is established, it is possible to address the current scope, limits, meaning and reach of the legal arguments supporting armed attacks against them.

How is the study original?

The legality of drone strikes, targeted killing and the exceptional power invoked by the US have been the object of a growing body of scholarship from different disciplines. What is original to the present research study is that it reviews legality of drone strikes by questioning the status of major terrorist groups targeted by the US in undeclared warzones. This involves the systematic and comparative analysis of terrorist organisations and their affiliation using the control test formulated by the International Court of Justice (ICJ) in the Nicaragua case. The in-depth analysis of these groups reveals that all are unique and follow distinct goals. The strength of the legal arguments advanced to support the legality of US drone strikes varies and there are solid grounds to rebut the legality of drone attacks outside combat

zones. However, all those arguments and counter-arguments are premised on the threat the targeted groups pose to the US.

The case study of Pakistan constitutes a unique contribution to the existing scholarship on drone strikes. The one-dimensional analysis of the legality of US drone strikes in Pakistan invariably fails to capture the complexities of the country. Pakistan's brutal policies towards minority groups based in the Federally Administered Tribal Areas (FATA), its questionable involvement in the Afghan-Soviet war and the hostility between the Pakistani military and civilian institutions made Pakistan an accessible environment for the US targeted killing. The main hypothesis underpinning the doctoral research is anchored on the importance of approaching the use of drones from the perspective of the targeted groups, rather than focusing exclusively on the legality of the actions undertaken by the attacker. Such an approach to this topic has not been taken to date within the legal scholarship. Moreover, the Pakistani example is particularly interesting and important because legal issues surrounding US drone strikes in Pakistan are still unsettled. It is convenient for the US to claim the legality of its strikes in Yemen and Somalia because both states have explicitly consented. To date, the conceptual and practical contours of the consent provided by Pakistan in the past remain undetermined. Further nuanced analysis of the US-Pakistan relations also highlights the weakness of the state consent doctrine. Pakistan's case emphasises that the state consent doctrine can allow both, the targeting state and targeted state to abuse their power.

Research Method

The study is interdisciplinary in nature and involves areas of international law and politics. The US drone strikes in undeclared warzones is a vast multifaceted and controversial topic that includes *inter alia*, challenges to international law following the 11th September 2001 coordinated terrorist attacks by the Al-Qaeda against the United States of America (henceforth 9/11 attacks); barriers imposed by the secrecy surrounding the US drone warfare; the domestic and foreign policy of targeted states; and involvement of clandestine terrorist organisations.

The scope of the research topic requires consideration of a vast body of literature related to the exceptional position of power of the United States, the legal framework governing the use of armed force against non-state actors and the rules of attribution of responsibility for internationally wrongful acts.

The benchmark for attribution of responsibility is based on the case-law of the International Court of Justice and the rules codified by the International Law Commission in the Articles on State Responsibility for Internationally Wrongful Acts. This provides a useful analytical method to determine the attribution of actions carried out by non-state actors to host states. However, this analytical tool presents shortcomings when applied to the relationship between non-state actors. Neither the jurisprudence of the International Court of Justice' nor the Articles on State Responsibility were designed to address such scenario and fail to seize the complexities associated to the use of force by and against non-state actors.¹ Despite its shortcomings, it remains the most prominent and appropriate framework to decide grounds of attribution under international law regarding the conduct of non-state actors and has been used throughout the research as a methodological tool.

The research and methodology supporting the analysis of the law and policy of drone strikes is conditioned by the secrecy surrounding this 'war'. Credible figures of civilian casualties are unavailable. Although the White House released civilian casualties data in 2016, this failed to address the issue of transparency. It gave conservative estimate of civilian deaths and provided no details of the strike and casualties resulting from it. The study employed drone strikes data from the Bureau of Investigative Journalism and the New America Foundation to tally civilian casualties. The clandestine nature of terrorist groups further complicates the task of gathering data. The study relies on the global terrorism database gathered by the University of Maryland to investigate the objectives of terrorist groups.

Structural overview

In terms of structure this thesis consists of five distinct but interrelated chapters.

¹ Lanovoy, Vladyslav. "The use of force by non-state actors and the limits of attribution of conduct." *European Journal of International Law* 28.2 (2017): 563-585.

The first chapter reviews the US policies through the lens of Carl Schmitt theory of the 'state of exception'.² The doctrine of state of exception and its argument that 'necessity knows no law' was revived after 9/11. Necessity is a concept open to abuse since states can argue necessity to escape accountability. The US policies after 9/11 are prime example of the doctrine of 'state of exception'. After outlining succinctly the 'state of exception doctrine', the chapter analyses the US's expansion of the concept of imminence. This is followed by a case study on the use of drone strikes in Syria by the United Kingdom (UK) to highlight a new trend in normalising the use of lethal force in undeclared warzones. Finally, the chapter concludes that secrecy and amalgamation of military and intelligence agencies has made it extremely difficult to establish the relevant facts around the strikes. Here it is emphasised that the notion of state of exception has transformed US approach towards international law.

The second chapter examines the rules on the use of armed force. It argues that well-established norms on the use of force were undermined after 9/11. For instance, before 9/11 a consensus existed that anticipatory use of force in self-defence against imminent threats. This consensus is currently challenged by the argument that new threats require new measures and associated legal doctrines to counter them. This new threat argument has served as grounds for some countries to use force against abstract challenges that might manifest a latent threat. This brings back to life the pre-UN Charter practice where Germany used preventive force against vague and distant threats. Chapter two also examines relevant principles of international human rights law and international humanitarian law. It engages the concept of neutrality and clarifies the irrelevance of the doctrine in today's contemporary conflicts against non-state actors. The chapter concludes that the current state practice shows little support for the preventive use of force against non-imminent threats and the concept of transnational-armed conflict has no recognition within the international community.

The third chapter will apply the principles of international law discussed in the former chapter to the US drone strikes. It considers the legality of armed

² Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2004)

drones under *jus ad bellum*, *jus in bello*, and international human rights law. This chapter argues that extraterritorial targeting by means of armed drones against non-imminent threats violates international law. US armed drones also violate the principle of proportionality because the concrete military advantage gained from these strikes is minimal. Finally, it concludes that the US drone strikes may never be legal under international human rights law because in the absence of armed conflict the circumstances in which an individual can be targeted are much lower. Outside the context of an armed conflict, a person can only be targeted if he poses a lethal and imminent threat to someone. State would also have to prove that the benefit of using lethal force outweighs the dangers posed and that force was used as a last resort. It is submitted that the US has used force as a first resort and against non-imminent threat. Moreover it is argued that drone strikes against low-level combatants who are not even associates of Al-Qaeda would fail to satisfy the military necessity requirement.

While Chapter three applies principles of international law to US drone strikes it does not investigate the legality of US drone strikes under the unable and unwilling test, and state consent doctrines. The fourth chapter explores these controversial doctrines using Pakistan as a case study. The first part of the chapter provides historical background that helps to evaluate the current situation in the former FATA now merged with Khyber Pakhtunkhwa (KPK).³ It explains the controversial role of the Pakistani government and the US Central Intelligence Agency (CIA) in the Afghan-Soviet war in 1979. It then analyses the security policy of Pakistan from 1999-to present. The scrutiny of Pakistani security policies reveals the protracted complicity of the Pakistani government and army officials in the US drone strikes. The chapter notes that the relationship between the US and Pakistan became problematic due to escalation of drones in former FATA under Obama administration. The chapter provides a detailed analysis of the consent doctrine and the unable and unwilling test, arising from two justifications for US drones in Pakistan: 1) Pakistan has consented 2) Pakistan has been unable or unwilling to prevent

³ The Nation, 'President signs Fata-KP merger Bill into law' (Islamabad, 1 June 2018) < <https://nation.com.pk/01-Jun-2018/president-signs-fata-kp-merger-bill-into-law?show=836> > accessed 24 October 2018

terrorist attacks emanating from its territory. It is argued that the US cannot justify most of its drone strikes in former FATA under either doctrine. The final part of the chapter highlights the controversial role of the Pakistani military in former FATA. It explains that the legal status of former FATA resembled a state of exception in Pakistan because the Pakistani Supreme court, High Court and National Parliament had no legal authority there. Instead, tribal areas were governed by a draconian legal regime introduced by the British Empire in 1872, called the 1901 Frontier Crime Regulations. The final section of this chapter provides a brief analysis of the recent merger of FATA with KPK.

Any analysis on the legality of extraterritorial drone strikes needs to explore whether the group targeted is an Al-Qaeda associate. The fifth and final chapter examines Al-Qaeda's relationship with various terrorist organisations operating in Pakistan, Yemen and Somalia. There are dozens of players active in these regions and assessing Al-Qaeda's relation with each one is beyond the scope of this chapter. The study primarily focuses on Al-Qaeda's connections with the Tehreek-e-Taliban Pakistan (TTP), Al-Qaeda in the Arabian Peninsula (AQAP), Haqqani Network (HN) and Al-Shabaab. The study utilises the control test established by the International Court of Justice (ICJ) in the Nicaragua case and consolidated in to explore the links between these actors. The control test established by the ICJ was intended to explore the state's control over the criminal actions of non-state actors in the territory of another state. This chapter has borrowed the same test and applied it to non-state actors to assess the degree of Al-Qaeda's control over them. In addition, the study endeavours to understand the objectives of these groups by focusing on the selection of targets of their terrorist attacks. In doing so, it relies on the terrorism database provided by the University of Maryland. The thorough investigation of the terrorist attacks carried out by these groups reveals they mainly target their own governments, military officials and civilians. None of them were capable of directing any attack against the US. The analysis of data relating to the total number of terrorist attacks carried out by these groups highlights an inherent flaw in the counterterrorism policy of the US. The chapter concludes that the US should focus more on local counterterrorism rather than conducting small or large-scale military

operations abroad, in particular against forces that pose no imminent threat to the US.

Chapter 1: State of exception after 9/11

Introduction

'We are living in a state of exception. We do not know when it will end because we have no idea when the war on terror that began on 11 September 2001 will end'.⁴ Although Al-Qaeda and similar organisations have undertaken terrorist actions over the previous decade⁵, the attacks on September 11 were unique because it was the first attack on the US soil by foreign forces since the Pearl Harbor.⁶ The post-911 era was portrayed as exceptional in nature paving the way for global scale military campaigns, giving special powers to the US President, expanding the role of military and intelligence agencies.⁷ Within days after the 9/11 event President Bush declared a state of national emergency⁸ and the Congress granted President overly broad power to use military force against those responsible for 9/11 attacks and also to prevent

⁴ Mark Danner, *Spiral: Trapped in the Forever War* (Simon & Schuster 2016) 5. ; Two planes were hijacked and deliberately flown into the Twin Towers of the World Trade Centre in New York causing the Towers to collapse. As a result of the attacks some 3,000 people from 80 different countries were killed See Fred Halliday, *Two Hours That Shook the World: September 11, 2001 - Causes and Consequences* (Saqi Books 2001); Carolyn Gard, *The Attack on the Pentagon on September 11, 2001* (Rosen Publishing Group 2003); Strobe Talbott and Nayan Chanda, *The Age Of Terror: America And The World After September 11* (Basic Books 2002); Dean E. Murphy, *September 11: An Oral History* (Doubleday Books 2002); The United States Department of Justice, 'Attorney General Announces Forum Decisions for Guantanamo Detainees' (13 November 2009) < <https://www.justice.gov/opa/speech/attorney-general-announces-forum-decisions-guantanamo-detainees> > accessed 13 April 2016

⁵ Al-Qaeda's attempt to kill US troops in Aden in 1992 See James Philips, 'The Yemen Bombing: Another Wake-up Call in the Terrorist Shadow War', (*Heritage*, 25 October 2000) < <http://www.heritage.org/research/reports/2000/10/the-yemen-bombing-another-wake-up-call-in-the-terrorist-shadow-war> > accessed 13 April 2016; Bombings of the US embassies in Kenya, Tanzania, and other countries See US Dept Of Justice Federal Bureau of Investigation Washington, D.C. 20535, Frontline (18 November 1998), Orcon/Law Enforcement Sensitive, < <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/summary.html> > accessed 13 April 2016; USS Cole bombings, (*9/11 Memorial and Museum*, 12 October 2000) < <http://www.911memorial.org/uss-cole-bombing> > accessed 13 April 2016, See details of these attacks in the 9/11 Commission report, 2004, 109-120 < <https://www.9-11commission.gov/report/911Report.pdf> > accessed 13 April 2016

⁶ John W Dower, *Cultures of War: Pearl Harbor, Hiroshima, 9-11, Iraq* (Norton and Company, 2011)

⁷ Ben Chappel, 'Rehearsals of the sovereign: States of Exception and Threat Governmentality' (2006) *Cultural Dynamics* 313, 314

⁸ George Bush, 'Declaration of National Emergency by Reason Of Certain Terrorist Attacks' (*The White House*, 14 September 2001) < <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010914-4.html> > accessed 6 April 2017

any future terrorist attacks.⁹ The 2002 US National Security Strategy proclaimed that, 'the war against terrorists of global reach is a global enterprise of uncertain duration...and America will hold account to nations that are compromised by terror, including those who harbor terror.'¹⁰

This wording is vague enough to include virtually any 'enemy' anywhere and at anytime. It also indicates that the US is involved in a perpetual 'global war on terror', which is not geographically bound. The phrase that 'America will hold account to nations that are compromised by terror, including those who harbor terror' laid the groundwork for continued use of force against weak states failing to assert an effective control over their territories.¹¹ Before 9/11 terrorist attacks were seen as criminal acts or small-scale war that could be dealt through law enforcement or a limited use of military.¹² Counter-terrorist methods that were once considered illegal under international law (e.g. preventive war, indefinite detention, torture and targeted killings in undeclared war zones¹³) have been since legitimised by these exceptions.¹⁴

This chapter identifies the distinguishing characteristics of the state of exception that emerged in the US foreign and defence policy after the 9/11 attacks through the work of Carl Schmitt¹⁵. The first section of the chapter explores the move from pre-emption to prevention that allowed the US to use force against non-imminent threats. Second section will argue that the negative impact of US policies is visible in the UK governments targeted killing policies. The British governments adoption of a controversial definition

⁹ Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001) (Signed by the President on 18 Sep 2001)

¹⁰ The White House, National Security Strategy of the United States of America (September 2002) < <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/> > accessed 26 October 2018

¹¹ Philip Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, (2010) Human Rights Council Fourteenth session Agenda item 3, 79-86 The US drone strikes in Yemen, Somalia and Pakistan illustrates how this new strategy can be used to justify unilateral use of force penetrating the territory of third states.

¹² Kim Lane Scheppelle, 'Law in a time of emergency: States of exception and the temptations of 9/11' (2004) *Journal of Constitutional Law* 1007, 1023-1024; Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America's New Global Detention System* (NYU Press 2011) 52

¹³ Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press 2015) 306-307

¹⁴ Jackson Nyamuya Maogoto, 'Rushing to break the law? The 'Bush Doctrine' of Pre-emptive strikes and the UN Charter on the use of force', (2003) University of West Sydney; Elvira Domínguez Redondo, 'The EU, torture secrets and dealing with the truth' (2009) European Union Institute for Security Studies; Claire Finkelstein, Jens David Ohlin and Andrew Altman, *Targeted Killings: Law and Morality in an Asymmetrical World*, (Oxford University Press 2012)

¹⁵ Schmitt (n 2)

of an 'imminent' threat used by the US to justify drone strikes in undeclared warzones sets a dangerous precedent.¹⁶ A final feature of the state of exception analysed here is concerned with the uses and abuses of the secret power in this war particularly in relation to drone warfare in undeclared warzones. This chapter will conclude that these features characterising the war on terror demonstrate that exceptionalism has become a new norm.

1.1 State of exception

In a general sense, state of exception involves 'governmental action taken during an extraordinary national crisis that usually entails broad restrictions on human rights in order to resolve the crisis'.¹⁷ The state of exception arises in extreme situations for instance when state faces the threat of foreign invasion, civil war, or a large-scale terrorist attack. Anchored in the assertion 'necessity knows no law',¹⁸ derogations from law are justified to preserve society and its members. The declaration of the state of exception has serious consequences since it involves the suspension of fundamental human rights and transfer of exponential power to the executive, enabling it to respond quickly and effectively to the threat. The extensive emergency measures adopted in the US and other countries after 9/11 brought a renewed interest in emergencies in human rights, political theory and constitutional law scholarship.¹⁹

¹⁶ Reprieve, 'UK Government adopts US principles on secret drone war', (19 October 2016) < <https://reprieve.org.uk/press/uk-government-adopts-us-principles-secret-drone-war/> > accessed 28 Dec 2017

¹⁷ Claudio Grossman, 'A Framework for the Examination of States of Emergency Under the American Convention on Human Rights' (1986) U. J. INT'L L. & POL'Y 35, 36

¹⁸ When Germany violated Belgian territory on August 4, 1914 the German Chancellor's justification was that "We are in need and necessity knows no law" See Roger Alford, "'Necessity Knows No Law'", (*Opinio Juris* 2009) < <http://opiniojuris.org/2009/05/18/necessity-knows-no-law/> > accessed 12 Dec 2017

¹⁹ Giorgio Agamben, *State of exception*, translated by K. Attell, Chicago: (Chicago University Press 2005); Oren Gross, 'Extra-Legality and the Ethic of Political Responsibility,' in V.V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge University Press 2008) 62; idem, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) *The Yale Law Journal* 1011; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006); Scheppele (n 12); William E. Scheuerman, 'Emergency Powers and the Rule of Law After 9/11' (2006) *J.POL. PHIL*; David Dyzenhaus, 'The State of Emergency in Legal Theory', in V.V. Ramraj, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005) 65; idem, 'The Compulsion of Legality', in *Emergencies and the Limits of Legality* (Cambridge University Press 2008); Anna-Lena Svensson-McCarthy, 'The international law of human rights and states of exception: with special reference to the travaux préparatoires and case-

State of exception is not a new concept and has its roots in Roman times.²⁰ The doctrine was applied at the dawn of the modern era in the US. In 1861 during the Civil War President Abraham Lincoln suspended the *habeas corpus* between Washington and Philadelphia without Congress authorization when there were cases of rebellion or invasion. In a speech to Congress that same year, the President justified his actions by declaring '[w]hether strictly legal or not' the measures adopted were taken 'under what appeared to be a popular demand and a public necessity.'²¹

During the Great Depression Hitler's government 'proclaimed the decree for the protection of the people and the state' and suspended the Weimar Constitution. The law suspended the right of due process, protection from arbitrary arrest and search, and freedom of speech and assembly.²² Similarly, during the course of World War II, democratic regimes like the US expanded the power of the executive. In 1942, after the attack on Pearl Harbor President Franklin D Roosevelt signed Executive Order 9066, effectively authorising the internment of Japanese-Americans as a preventive measure.²³ The

law of the international monitoring organs' (1998) Brill ; L.C. Green, 'Derogation of Human Rights in Emergency Situations' (1978) CAN. Y.B. INT'L L 92; Oren Gross, "'Once More unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', (1998) Yale J. Int'l L. 437; Emilie M Hafner-Burton, Laurence R Helfer, and Christopher J Fariss, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) International Organization, 673; Clinton L. Rossiter, *Constitutional Dictatorship - Crisis Government in the Modern Democracies* (Rossiter Press 2007); Sean Mattie, 'Prerogative and the Rule of Law in John Locke and the Lincoln Presidency' (2005) The Review of Politics, 77; John Locke, *Two Treatises of Government*, Peter Laslett (ed.) (Cambridge University Press 2005); Ruth W. Grant, *John Locke's Liberalism*, (The University of Chicago Press 1984) ; Niccolò Machiavelli, *The Prince* (Longman 2003) (Machiavelli argued in this book that rulers are constantly living in a state of exception or emergency which necessitates them to engage in actions that would not be accepted if performed by civilians) ; Schmitt (n 2)

²⁰ Roman state used to nominate a "dictator" in exceptional circumstances of external attack or internal rebellion see Clinton Rossiter, *Constitutional Dictatorship* (Princeton University Press 1948) 22; Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press 2009) 120-125

²¹ Habeas Corpus, Cornell University Law School, Legal information institute < https://www.law.cornell.edu/wex/habeas_corpus > accessed 24 April 2016; Abraham Lincoln, July 4th Message to Congress (1861) < <http://millercenter.org/president/lincoln/speeches/speech-3508> > accessed 26 April 2016

²² Decree of the Reich President for the Protection of the People and State of 28 February 1933 < http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=2325 > accessed 26 April 2016

²³ Executive Order 9066 (1942) General Records of the United States Government; Record Group 11; National Archives < <http://www.archives.gov/global-pages/larger-image.html?i=/historical-docs/doc-content/images/japanese-relocation-order-l.jpg&c=/historical-docs/doc-content/images/japanese-relocation-order.caption.html> > accessed 25 April 2016

declaration of a state of emergency was frequently used to justify US actions in its fight against communism. In the Cold War era the confrontation with the Soviet Union also led the US to adopt exceptional measures in order to confront exceptional powers. Between 1950 and 1970, the Congress allowed the President to use extra power to deal with exceptional situations.²⁴ Scheppele notes that '[b]etween the 1930s and 1970s, Congress passed about 470 statutes that empowered the executive branch to act under emergency powers'.²⁵

The conceptual rationale for state of exception is quite clear and is rooted in the nature of the exceptional. The current chapter focuses on the writings of Carl Schmitt because of its particular relevance to this thesis. In his book 'Political Theology' Schmitt famously wrote 'sovereign is he who decides on the exception'²⁶. Schmitt conceives the sovereign as the absolute power and attacks all forms of constitutional rationalism particularly the principle of the rule of law, as far as it imposes legal restrictions to the state under all circumstances. He argues that during exceptional circumstances it is simply not feasible to submit the sovereign unconditionally to the rule of law because norms and laws become obsolete and hence are unable to deal with the exceptional challenge.²⁷ Schmitt claims in the state of exception the normal legal order 'recedes', making way for an 'authority that is unlimited in principle'.²⁸

In the state of exception, the sovereign has *carte blanche* to take all necessary measures to suppress the threat posed including the suspension of constitutional rights and freedoms to safeguard the state. The Schmitt's conception of the state of exception implies that the action of the sovereign requires neither 'legality' nor 'legitimacy' because it has the power to declare the emergency, the power to determine when the emergency is over to restore rule of law and the power to decide which political actors who are

²⁴ James Bilisland, *The President, the State and the Cold War: Comparing the foreign policies of Truman and Reagn* (Routledge 2015) 33-35

²⁵ Scheppele (n 12) 1019

²⁶ Schmitt (n 2) 13 (The book was written during Weimar Republic (1919-1933) a time in which state sovereignty constantly threatened to dissolve into countless acts of non-state violence)

²⁷ Schmitt (n 2) 15-16; Louiza Odysseos and Fabio Petito, *The International Political Thought of Carl Schmitt: Terror, Liberal War and the crisis of global order* (Routledge 2007) 87

²⁸ Schmitt (n 2) 15

during normal time protected lose their protection during the time of emergency.²⁹Schmitt's approach is based on the premise that the integrity of the state is more pertinent than the rule of law, which may prevent a state from defending itself when its survival depends on the suspension of laws.³⁰ Indeed, the most distinctive feature of the sovereign is its power to suspend the law linked to its responsibility to defend the integrity of state.³¹ Schmitt's idea of the state of exception is quite negative and destructive. Schmitt confers the exclusive power to 'suspend' the law but what prevents the sovereign from becoming as dangerous as the threat justifying it?³²History demonstrates what happened when sovereign exercised this right: the rise of fascism, war, the collapse of democratic governments and camps.³³ Schmittian paradigm promotes fascism.³⁴It may not be wrong to say that state of exception 'is therefore a label that may provide instant legitimacy to the greater limitation of human rights by governments'.³⁵

The unfettered powers of the executive may lead to normalisation of the exceptional measures, which is evident in the US policies after 9/11.³⁶ Arguably the challenge after 9/11 is not of exceptionalism but normalisation of the state of exception.³⁷Seventeen years after 9/11 it remains impossible to foresee the expiry date of these exceptional measures. In today's war on terror traditional distinctions between war and peace, combatant and civilian,

²⁹ *ibid* 93

³⁰ *ibid* 20

³¹ *ibid*

³² Petra Brown, 'Bonhoeffer, Schmitt and the state of exception' (2013) *Pacifica* 246, 257

³³ Didier Fassin, *Humanitarian Reason: A Moral History of the Present* (University of California press 2002) 184

³⁴ Roy Coleman, Joe Sim, Steve Tombs and David Whyte, *State Power Crime*, (SAGE Publications 2009) 116

³⁵ Scott P. Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics' (2013) *Michigan Journal of International Law*, 505

³⁶ Alain de Benoist, *Global terrorism and the state of permanent exception. The significance of Carl Schmitt's thought today*, in *Political Thought of Carl Schmitt Terror, liberal war and the crisis of global order* by Louiza Odysseos and Fabio Petito (Routledge 2007) 88; Walter Benjamin, *Illuminations, Thesis on the philosophy of history* (Schocken Books 1968) 257; Robert Kurz, 'The fatal pressure of competition' (2011) < <https://libcom.org/library/fatal-pressure-competition-robert-kurz> > accessed 25 April 2016 (Kurz has noted that, 'what in the past, came under the domain of the exception becomes today the normal or permanent state'); Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) *EUR. J. INT'L L*, 251 (Fitzpatrick stressed that since 9/11 we are in the 'the permanent emergency')

³⁷ Andrew W Neal, 'Normalization and Legislative Exceptionalism: Counterterrorist law making and the Changing Times of Security Emergencies' (2012) *International Political Sociology* 260, 260

and army and intelligence, have become eroded.³⁸The following sections will examine the revival of the Schmittian paradigm after 9/11. This involved a reinterpretation of international law to legitimise the US's right to militarily intervene in countries that pose threat to national security. As explained below the concept of exceptional circumstances paved the way for the preventive use of armed force.

1.2 From pre-emption to prevention

Following the immediate aftermath of the 9/11 attacks, legal basis for the preventive use of force have been increasingly developed. This can be observed at different normative levels. The event of 9/11 brought a number of changes to law enforcement in the US. New policies 'shifted from the investigation and prosecution of terrorists to a single-minded emphasis on the prevention of future terrorist acts'.³⁹ The Justice Department made it clear that their 'single objective was to prevent terrorist attacks by taking suspected terrorists off the street.'⁴⁰ On this basis suspected terrorists have been detained in the US under Section 412 of the USA Patriotic Act that allows the Attorney General to detain foreign nationals as terrorist suspects without a hearing and without supporting evidence to demonstrate that they pose a danger.⁴¹ The preventive detention of suspected terrorist gives executive exceptional power during times of emergency.⁴²

The use of preventive armed force is a security strategy in which force is used to thwart the development of possible future threats. The 2003 Iraq war was preventive because the US invaded Iraq based on the suspicion that Saddam Hussein was attempting to acquire nuclear weapons, which posed a threat to the US security. At the other end of the spectrum would be limited actions intended to prevent potential threats from developing. Smaller-scale

³⁸David Chandler, 'The Revival of Carl Schmitt in International Relations: The Last Refuge of Critical Theorists?' (2008) *Millennium: Journal of International Studies* 27, 36

³⁹ Attorney General John Ashcroft, 'Prepared Remarks for the US Mayors Conference' (2001) < https://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm > accessed 2 May 2016

⁴⁰ *ibid*

⁴¹ 8 U.S.C. § 1226a(a) (2006)

⁴² The Association of the Bar of the City of New York Committee on Federal Courts, 'The indefinite detentions of enemy combatants balancing due process and national security in the context of the war on terror' (2004) < http://www.nycbar.org/pdf/1C_WL06!.pdf > accessed 2 May 2016

applications of preventive force include: targeted killing with drone strikes in undeclared warzones against individuals who are deemed to pose security threat to the US as well; special operations and cyber-attacks.⁴³ The US targeted killings in undeclared warzones highlights the continued US policy of preventive force; the narrative of the Iraq war in 2002-2003 is still in use today.

1.2.1 US preventive logic before 9/11

Anticipatory logic has a long history in the US foreign policy. The government of US has always argued that the anticipatory use of force is both legal and legitimate and in line with customary international law.⁴⁴ According to the Caroline standard pre-emptive use of force is justified providing a state demonstrates that the threat of attack is imminent and, use of force is extremely necessary and proportional to the overall goal of self-defence.⁴⁵ Anticipatory or pre-emptive force is different from preventive force. According to Doyle 'preemption is motivated by wars that are expected to occur imminently; prevention by wars that, if they must be fought, are better fought now than later'.⁴⁶ Thus preventive force refers to the use of force against non-imminent threats that 'may mature into threats of an armed attack at some unspecified time in the future'.⁴⁷ The US and the broader International Community have considered the use of preventive force illegal and illegitimate before 9/11 as exemplified already in the rejection of Germany's arguments that, 'it had been compelled to attack Norway and Denmark in self-defence to prevent a future allied invasion' by the International Military Tribunal at Nuremberg.⁴⁸ The Tribunal concluded that the attacks were act of aggression

⁴³ A cyber-attack on another country's banking, electrical or other utilities systems would be equivalent of armed attack that is only permitted in self-defence. But with the advancement of technology there is a possibility that technologically advanced nation may take risk free covert preventive cyber-attack on another country in the name of self-defence See Luciano Floridi and Mariarosaria Taddeo, *The Ethics of Information Warfare* (Springer 2014) 65-70; Linda Robinson, 'The Future of Special Operations: Beyond Kill and Capture' (2012) *Foreign Affairs* 110

⁴⁴ R.Y. Jennings, 'The Caroline and McLeod Cases' (1938) *AM. J. INT'L L.* 82, 84

⁴⁵ Webster Michael Doyle, *Striking First: Preemption and Prevention in International Conflict*, (Princeton University Press 2008) 12

⁴⁶ *Ibid* p. 55

⁴⁷ Dominika Svarc, 'Anticipatory and Preventative Force Under International Law' (2007) *Peace Review: A Journal of Social Justice* 217, 217

⁴⁸ International Military Tribunal (Nuremberg Trial), Judgement 1946, 1 *I.M.T.*, 69, 83, 88, 117,118

not legitimate act of self-defence. According to the Tribunal: 'to initiate a war of aggression...is not only an international crime; it is the supreme international crime'.⁴⁹ Nuremberg's 'condemnation of preventive war was incorporated into the UN Charter, affirmed by the General Assembly and accepted by the Security Council'.⁵⁰ In 1950 President Truman rejected preventive wars and declared, 'we do not believe in aggression or preventive war. Such a war is the weapon of dictators, not of free democratic countries like the US.'⁵¹ President Eisenhower labelled preventive war as war of aggression and confirmed in 1955, 'we will never start an aggressive war'.⁵² Secretary of State Dulles also emphasised 'any idea of preventive war is wholly out of the question' and preventive war 'will never be any part of the United States foreign policy'.⁵³ Preventive war was considered at several points during the cold war against Russia during the 1950s before they acquired nuclear weapons but each time it was rejected because it was immoral and inconsistent with American ideals.⁵⁴ President Johnson ruled out preventive attack against China in 1964 afraid of the political backlash this act would carry, both at home and abroad.⁵⁵ When the Israel launched a preventive attack against an Iraqi nuclear plant, in 1981, the UN Security Council unanimously condemned it as a 'clear violation of the Charter of the UN and the norms of International conduct'.⁵⁶ A Council member explained the consensus: 'The concept of preventive war for many years served as a justification for the abuses of powerful states, since it left to their discretion to define what constituted a threat to them, was definitively abolished by the

⁴⁹ Ibid 109

⁵⁰ Resolution adopted by the General Assembly 95 (I), Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, (1946)

⁵¹ Public Papers of the Presidents Harry S Trumann 1945-1953, Radio and Television Report to the American People on the Situation in Korea, (1 September 1950) < <https://trumanlibrary.org/publicpapers/index.php?pid=861&st=&st1=> > accessed 2 May 2016

⁵² Dwight D. Eisenhower, Public Papers of the Presidents of the United States (1955) 304

⁵³ Quoted in Scott Silverstone, *Preventive War and American Democracy* (Routledge 2007) 84

⁵⁴ George Fink, *Stress of War, Conflict and Disaster* (Academic Press 2010) 326

⁵⁵ Scott A. Silverstone, 'Chinese Attitudes on Preventive War and the "Preemption Doctrine"' (2009) U.S. Air Force Academy, Institute for National Security Studies, 12

⁵⁶ Security Council Resolution 487, (1981), A/RES/36/27, Operative paragraph 1 < <http://www.un.org/documents/ga/res/36/a36r027.htm> > accessed 2 May 2016

Charter of the UN'.⁵⁷ On that occasion, the US and Iraq jointly drafted Security Council resolution that condemned Israel.⁵⁸

The consideration of preventive war as immoral and illegal started to shift in the 1990s. The threat of nuclear proliferation to states like North Korea and Iraq led the Clinton administration to consider preventive strikes on nuclear facilities as a viable option but decided against it in the case of North Korea because of its military risks.⁵⁹ Building on this emerging acceptance of preventive force, the Bush administration officially presented it as a policy in the National Security Strategy in 2002 and practically waged the preventive war against Iraq in 2003.

1.2.2 US preventive logic after 9/11

The greater the threat, the greater the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.

National Security Strategy of the US, 2002 ⁶⁰

Major shift in the US policy materialised after 9/11 because it was portrayed as an exceptional event that changed everything.⁶¹ As discussed earlier, after 9/11 Bush declared a state of emergency which was not only imposed during his first term but it matured during his second term and persisted under the administrations of President Obama and Donald Trump. International law recognise the right of preemptive force in self-defence but rejects the right of preventive force in self-defence without Security Council's authorisation.⁶² The state of exception doctrine allowed the shift from pre-emption to prevention because the exceptional circumstances demanded state authorities to employ extraordinary measures in the name of national security.

⁵⁷Security Council Official Records, Thirty six year, 2288th meeting: (1981) Para 115

⁵⁸ Silverstone (n 55), Footnote 80

⁵⁹ Ibid 142; Henry Shue, *Fighting Hurt: Rule and Exception in Torture and War* (OUP 2016) 236

⁶⁰ Bush administration, The National Security Strategy United States of America, (The White House 2002) < <http://www.state.gov/documents/organization/63562.pdf> > accessed 2 May 2016

⁶¹ M. Morgan, *The Impact of 9/11 on Politics and War: The Day that Changed Everything?* (AIAA 2009) 2

⁶² Kevin Jon Heller, 'Why Preventive Self-Defense Violates the UN Charter', (Opinio Juris 7 March 2012) < <http://opiniojuris.org/2012/03/07/why-preventive-self-defense-violates-the-un-charter/> > accessed 3 May 2016

It was argued that the menace of terrorism was substantially different from past threats. Different features of the terrorist threat have been articulated to explain their exceptional danger. First, terrorists who pose a threat to the US and its allies control no territory thus, have no territory to preserve or people to protect.⁶³ They are extremely dangerous because they commit suicide attacks and are motivated by religious ideology that glorifies death.⁶⁴ Secondly, these terrorists are irrational and unlike the Great power rivalry of the Cold War in which nuclear weapons or other WMD were tools of last resort terrorist are willing to get hold of these weapons to kill large number of people.⁶⁵ Finally, terrorist organisations are secret, they are decentralised, small in size and can move undetected between states and are still able to inflict devastating harm.⁶⁶ Under these circumstances the Bush administration argued that:

We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends... Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter

⁶³ Ersel Aydinli, *Emerging Transnational (In)security Governance: A Statist-Transnationalist Approach* (Routledge 2015); However crucial difference between ISIS and other terrorist groups are that ISIS is not stateless and controls territory See Jason S. Belcher, *Aftermath: Rebuilding Global Security After a Century of Warfare* (Post Hill Press 2014)

⁶⁴ "Religion since 1980 has become a prominent factor as the supporting philosophical basis for many terrorist organisations" See Jeffrey Haynes, *Routledge Handbook of Religion and Politics* (Routledge 2008) 345; Pedahzur rejected the claim that "suicide terrorism is a trait of certain religion or culture" instead he argued that it is a result of well-orchestrated organisational process; See Ami Pedahzur, *Suicide terrorism* (Polity Press 2005) 158; According to Pape research not all suicide attackers are motivated by religion he concluded in his study that in the sample of 462 suicide attackers 43 percent were religious whilst 57 percent were secular See Robert Anthony Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (Random House Trade 2006); Al Qaeda expert Peter Bergen, author of "Holy War Inc." calls Pape's theory "kind of brilliant." and said "It's comforting to think that a bunch of Islamic nut cases fresh out of madrassas are attacking us, but it turns out that a group of rational political actors who are as well educated as most Americans are attacking us." See Caryle Murphy, 'A Scholarly Look at Terror Sees Bootprints In the Sand', (*The Washington Post* 2005) < http://www.washingtonpost.com/wp-dyn/content/article/2005/07/09/AR2005070901425_pf.html > accessed 3 May 2016

⁶⁵ Amitai Etzion, *Security First: For a Muscular, Moral Foreign Policy* (Yale University Press 2007) 221

⁶⁶For instance Boston Bombings, CNN, 'Boston Marathon Terror Attack Fast Facts', (2013) < <http://edition.cnn.com/2013/06/03/us/boston-marathon-terror-attack-fast-facts/> > accessed 3 May 2016; Paris terror attacks see The Telegraph, 'Paris terror attack: Everything we know on Saturday afternoon' (21 Nov 2015) < <http://www.telegraph.co.uk/news/worldnews/europe/france/11995246/Paris-shooting-What-we-know-so-far.html> > accessed 3 May 2016

a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.⁶⁷

This logic imposes that the new threat of terrorism demands a shift toward strategies of prevention. The National Security Strategy suggests first strikes will tend to be useful, against threats 'before they are fully formed', because 'traditional concepts of deterrence will not work against a terrorist enemy . . . whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness'.⁶⁸ Arguably, a blanket prohibition on the use of preventive force in self-defence is unreasonable. But preventive force should only be allowed in extraordinary circumstances particularly when 'potential threat is bigger than the risks inherent in preventive action and the threat cannot be mitigated by any other means'.⁶⁹

The National Security Strategy does not identify the rare conditions under which preventive force is acceptable. Instead it claims an unrestrained right to strike first eradicating the difference between 'imminent threat (soon to be realised) and immanent threat (already and permanent)'.⁷⁰ There is no difference between a present and future threat because the US is always vulnerable, setting a dangerous path that undermines well-established principles of international law.⁷¹

Thus, this willingness of using force on mere suspicion of potential threat or on weak evidence goes against well-established international norms and sets a dangerous precedent.

1.3 Impact of US policies on the use of force by the UK

The UK government's use of armed drones generated controversy when they were for the first time used in Syria without Parliamentary approval to target

⁶⁷ Bush administration (n 60) 14

⁶⁸ Ibid, 15

⁶⁹ Kerstin Fisk and Jennifer M. Ramos, *Preventive Force: Drones, Targeted Killing, and the Transformation of Contemporary Warfare*, (NYU Press 2016) 53

⁷⁰ Quoted in Henry Shue and David Rodin, *Preemption: Military Action and Moral Justification*, (OUP 2007) 97

⁷¹ Neta C Crawford, 'The false promise of preventive war: The new security consensus and a more insecure world' in Henry Shue and David Rodin *Preemption: Military Action and Moral Justification* (OUP 2007) 96

British citizens in a country they were not involved in a war with. On 21 August 2015 Reyaad Khan, a British citizen from Cardiff, was killed by a Royal Air Force drone strike in Raqqa, Syria. He had appeared in a prominent recruitment video for ISIS (Islamic state in Iraq and Syria) and was suspected of being involved in plotting and directing terrorist attacks in the UK and elsewhere.⁷² This attack demonstrated that ‘the UK government has adopted the controversial practice of extra-judicial ‘targeted killing’, similar to that carried out by the US and Israel’.⁷³

The targeted killing of Khan reveals a fundamental change in British counterterrorism policy in two ways: First, prior to these strikes the UK government had treated terrorism as a criminal activity and counterterrorism operations were handled by the civilian authorities. But involvement of the Royal Air force in elimination of a terror suspect shows that the British government actions have turned to address acts of terrorism through a war paradigm. On 7 September 2015, the Prime Minister David Cameron, told the House of Commons that, the drone strike in Syria constituted ‘a new departure...(because) this is the first time, in modern times, a British military asset had been used in a country in which the UK was not involved in a war.... the strike was not part of coalition military action against ISIL in Syria; it was a targeted strike to deal with a clear, credible and specific terrorist threat to our country at home’.⁷⁴

Second, it reveals that the British government has adopted the same modern interpretation of International law that the US has employed since the launching of its War on Terror 16 years ago. One has suggested, ‘the strike amounts to a sea change in the UK’s legal position, and indeed aligns it with several US legal positions in the ‘war on terror’ that, yet, no European state has formally embraced’.⁷⁵ The British response to the Joint Committee on Human Rights, regarding its policy on the use of drones for targeted killing,

⁷² Patrick Wintour and Nicholas Watt, ‘UK forces kill British Isis fighters in targeted drone strike on Syrian city’ *The Guardian* (7 Sep 2015) < <https://www.theguardian.com/uk-news/2015/sep/07/uk-forces-airstrike-killed-isis-briton-reyaad-khan-syria> > accessed 29 Nov 2016

⁷³ ‘The UK’s use of armed drones’ (July 2018) A report by the All-Party Parliamentary Group on Drones, 24 < http://appgdrones.org.uk/wp-content/uploads/2014/08/INH_PG_Drones_AllInOne_v25.pdf > accessed 19 July 2018

⁷⁴ HC 7 September 2015, cols 26 and 30

⁷⁵ Nehal Bhuta, ‘On Preventive Killing, (*EJIL:Talk!*, 17 Sep 2015) < <https://www.ejiltalk.org/on-preventive-killing/> > accessed 28 March 2016

also shows that it has adopted some of the key principles of the US drone programme. The British Prime Minister's statement to the House of Commons on 7th September confirmed: 'that it is the government's policy to be willing to use lethal force abroad, outside an armed conflict (in Libya, for example), against individuals suspected of planning an 'imminent' terrorist attack against the UK, as a last resort, when there is no alternative available to prevent the attack'.⁷⁶ The legal basis of the UK government's use of lethal force outside of an armed conflict is self-defence. The government's interpretation of the term 'imminence' is imperative because, 'it determines the scope of its policy of using lethal force outside areas of armed conflict'.⁷⁷ The consequences of this reinterpretation of well-established legal terms are of particular significance due to the leading role of the UK and the US as permanent members of the Security Council. In addition there are genuine concerns that UK's approach is setting a dangerous precedent, influencing the position of other states eroding established legal frameworks applicable to the use of armed force.

1.3.1 UK government's definition of imminence

In April 2004, the then Attorney General Lord Goldsmith distinguished the UK government's position from the US governments wider interpretation of pre-emptive self-defence set out in the US's 2002 National Security Strategy:

It is...the government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote.⁷⁸

The UK government changed its position in 2015 favouring a more flexible and broad interpretation of the term "imminence". In the context of the oral evidence taken before the Justice Select Committee on 15 September 2015, the Attorney General suggested that the traditional 'Caroline' test for 'imminence' may not be perfect in dealing with the modern threat of terrorism

⁷⁶ David Cameron, Supra note 124

⁷⁷ *ibid*

⁷⁸ Lords Hansard, *The Attorney-General (Lord Goldsmith)*, (21 Apr 2004): Col 370

and needs to be reassessed.⁷⁹

The UK government's legal position on defensive force presented by Attorney General Wright on 1st January 2017 further confirms that the UK has now adopted the US definition of 'imminence'. Wright argues that the long-established Caroline test for imminence was established in 1837 and so much has changed since 1837 that the Caroline test is no longer sufficient. Wright pointed that while in the past authorities would have been able to 'see troops massing on the horizon' modern technology means that individuals can 'inspire, enable and direct attacks' from distance.⁸⁰ He stressed that:

At the time of 9/11, social media, Facebook, Twitter, WhatsApp and the like, did not exist. Technology was far less mobile.... Now, an individual so inclined can watch a video on YouTube, source an instruction manual on homemade explosives on the Dark Web, and act on whatever misconceived ideology they have absorbed, all in a short space of time, without travelling abroad and without direct communication with any established organisational leadership.⁸¹

Wright argues that the world is changing fast and so is the threat of terrorism so we must be sure the law is keeping up:

In a world where a small number of committed plotters may be seeking to inspire, enable and direct attacks around the world, and indeed have a proven track record of doing so, we will not always know where and when an attack will take place, or the precise nature of the attack.⁸²

Further Wright refers to Bethlehem's observation that:

[t]he absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of self-defence, provided that there is a reasonable and objective basis

⁷⁹ Oral evidence: The Work of the Attorney General (15 September 2015) HC 409, Q 34

⁸⁰ Attorney General's Speech at International Institute for Strategic Studies, The modern law of self-defence, (11 Jan 2017), 12, 17 <

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech_.pdf >

⁸¹ Attorney General Speech *ibid* 12-13

⁸² Attorney General Speech *ibid* p. 17

for concluding that an armed attack is imminent.⁸³

And states that this 'has been the 'settled position of successive British government'.⁸⁴ Thus, according to Wright 'specific' advance evidence of a terror plot threatening UK interests is not legally required before launching pre-emptive drone strikes against suspects in foreign states. This extremely loose understanding of imminence would enable the government to kill members of Islamic State of Iraq and Syria (ISIS) anywhere. Indeed, international law allows states to use force in self-defence against imminent threat; it does however outlaw pre-emptive uses of force against a threat that is more remote and vague. The use of drones outside armed conflict in the absence of any real and imminent threat may normalise the use of force against sovereign states. This new understanding of term 'imminence' may enable few powerful states to use force against less powerful states without any consent. Arguably, 'UK's actions could have knock-on effects for the stability of the international rules-based order. The long-term implications of an expansive definition of 'imminence' are the potential erosion of use of force norms more broadly in a manner that may be used by an increasingly greater number of states, including states such as Russia, North Korea and China'.⁸⁵

1.3.2 UK's armed conflict against ISIS

The approach of the UK and the US to the fight against ISIS differs. While the US government considers itself to be in a single non-international (albeit geographically global) armed conflict with Al-Qaida and its associates, the UK claims to be involved in a geographically defined non-international armed conflict with ISIS in Iraq and Syria only.⁸⁶

The UK government sees this position as compatible with the use force in self-defence against ISIS members outside an armed conflict providing they

⁸³ Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-state Actors', (2012) *American Journal of International Law* 769

⁸⁴ Attorney General (n 80)

⁸⁵ All-Party Parliamentary Group on Drones (n 73) 37.

⁸⁶ The Government's policy on the use of drones for targeted killing, Legal basis, Para. 3.52, (9 May 2016), < <http://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/57406.htm> > accessed 1 Dec 2016; Anthony Cullen, 'The characterization of remote warfare under international humanitarian law' in Jens David Ohlin (ed), *Research handbook in International law series* (Elgar 2017) 117-118

pose an imminent threat to the UK. The UK government's use of preemptive force against imminent threat in itself is not controversial because there is no established rule of customary international law prohibiting the preemptive use of force undertaken in self-defense against imminent threat.⁸⁷ Despite disavowing the wide US view of the existence of a non-international armed conflict the UK interpretation of the term 'imminent' is so broad that, in practice, its policy is undistinguishable from its US counterpart.

Additionally, the then Secretary of State for Defence stated that all uses of military force is governed by international humanitarian law even when force is employed outside of armed conflict.⁸⁸ This is a controversial position and goes against the conventional view that human rights law governs the use of lethal force outside of an armed conflict as stressed by Dr William Boothby in his written evidence regarding the UK government Policy on the Use of Drones for Targeted Killings. In the same context, Nicholas Justin Mercer made a similar statement arguing that:

Any counter-terror policy the Government puts in place which may breach the right to life, must comply with the limits imposed by the ECHR. Outside of a declared war zone, the Government can only take life if absolutely necessary.⁸⁹

The UN Special Rapporteur in his *Report on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* (2013) stated

International human rights law prohibits arbitrary killing... Outside situations of armed conflict, the use of deadly force by the State is lawful only if strictly necessary and proportionate, if aimed at preventing an immediate threat to life and if there is no other means of preventing the threat from materializing. It follows that lethal remotely

⁸⁷ Attorney General (n 80) 96.

⁸⁸ The Government's policy on the use of drones for targeted killing Legal Basis (9 May 2016) 3.17 < <https://publications.parliament.uk/pa/it201516/jtselect/jtrights/574/57406.htm#footnote-127-backlink> >

⁸⁹ Written evidence submitted by Reverend Nicholas Justin Mercer (DRO0005), WRITTEN SUBMISSION TO THE JOINT COMMITTEE ON HUMAN RIGHTS, (9 Nov 2015) < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-governments-policy-on-the-use-of-drones-for-targeted-killing/written/24291.pdf> > accessed at 20 Dec 2016

piloted aircraft attacks will rarely be lawful outside a situation of armed conflict, because only in the most exceptional of circumstances would it be permissible under international human rights law for killing to be the sole or primary objective of an operation.⁹⁰

1.3.3 Lack of transparency and accountability

The question of the legality of the UK government's targeted killing has been raised multiple times. To date, however, there is not enough information available to be confident in providing answers regarding their legality. In its response to the 2016 Joint Committee's report the UK government declined to state explicitly which law applies to lethal drone strikes outside of armed conflict on the basis that this is 'hypothetical'.⁹¹ The government's response is disappointing because it inhibits accountability. It is difficult to hold a government accountable for unlawful actions if it is unclear what legal regime they are following. Therefore, 'government cannot claim the right to target and kill individuals worldwide, but then refuse to provide even basic answers as to the legal basis for such action'.⁹²

It is nonetheless commendable that the Ministry of Defence respected the increasing demand of transparency and routinely published 'Operation Shader reports'⁹³ providing details of airstrikes conducted by Royal Air Force in Iraq and Syria against ISIS. While it is a step forward towards transparency, but the vague and incomplete wording of the report makes it difficult to analyse the legality of drone strikes. A comprehensive analysis of these reports carried out by Max Byrne raised reasonable objections explaining that describing targets of drone strikes as "terrorist" or 'extremist' has no basis in

⁹⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN doc. A/68/389 (13 September 2013) Para 60

⁹¹ The Government's policy on the use of drones for targeted killing: Government Response to the Committee's Second Report of Session 2015-16 (18 October 2016) < <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74703.htm> >

⁹² Chris Cole, 'British military drones in 2016: Strikes continue as future drone programmes progress' (*Drone wars UK*, 26 Dec 2016) < <https://dronewars.net/2016/12/29/british-military-drones-in-2016-strikes-continue-as-future-drone-programmes-progress/> > accessed 30 June 2017

⁹³ British forces air strikes in Iraq and Syria: monthly list < <https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list> > A chronological list of British forces air strikes to assist the Iraqi government in its fight against Daesh; BBC News, 'Islamic State air strikes: RAF launches Operation Shader' (26 Sep 2014) < <https://www.bbc.co.uk/news/av/uk-29383943/islamic-state-air-strikes-raf-launches-operation-shader> > accessed 8 July 2018

international law and it is inappropriate and unhelpful in terms of transparency'.⁹⁴ Also it is unclear 'who decides whether a person killed by a drone was a 'terrorist' or an 'extremist''.⁹⁵ Moreover reports of civilian casualty are largely absent in this report. 'Just 4% of reports of drone strikes within Operation Shader refer to the presence of civilians and the fact that they were not harmed by the air strike being reported'.⁹⁶ It is striking that the '96% of reports make no mention of civilians'⁹⁷ making it impossible to know the impact on them.⁹⁸The report has even failed to address key issues such as the basis to decide which targeted individuals could be lawfully killed.⁹⁹ Since no information is shared demonstrating their participation in hostilities it is not even clear whether 'the individuals targeted were armed (which, regardless, may well not be sufficient to render someone a lawful target)'.¹⁰⁰ The report does not provide complete information of drone operations. For instance only 53% of reports gave detailed information on the drone targets.¹⁰¹ The All Party Parliamentary Group also presented a comprehensive report on 'The UK government's use of armed drones' in July 2018. The report expressed its concern on the UK's criteria for selecting the target. It stressed that the UK is 'adopting an overly expansive approach to determine who is a lawful target.'¹⁰²The UK government has confirmed that the standard on the selection of targets is in place but has refused to disclose it to either the Parliament or the public alleging security reasons. Furthermore, it is hard to accept governments absurdly low number of civilian casualty. The UK government has conducted above 1700 airstrikes in Syria but claims that only one civilian died from it.¹⁰³This suggests a violation of international law by

⁹⁴ Max Byrne, 'Falling Short | An analysis of the reporting of UK drone strikes by the MOD' (*Drone wars UK*, July 2018), p. 8 < <https://dronewarsuk.files.wordpress.com/2018/07/dw-fallingshort-web.pdf> > accessed 8 July 2018

⁹⁵ *ibid* p. 15

⁹⁶ *ibid* p. 7

⁹⁷ *ibid* p. 21

⁹⁸ *ibid*

⁹⁹ *ibid*, p. 13

¹⁰⁰ *ibid*

¹⁰¹ *ibid*

¹⁰² All Party Parliamentary Group 2018 (n 73) 37

¹⁰³ *ibid*

wrongly qualifying civilians as combatants by applying an overly broad definition introduced by Daniel Bethlehem.¹⁰⁴

It can be concluded that to date, the UK targeted killing policies are not clear. Further the reports of airstrikes available on the Ministry of Defence (MoD) website only gives an impression of transparency. Insufficient information and non-legal terminology employed by the MoD in these reports makes it difficult to analyse the legality of each strike. The All Party Parliamentary Group on Drones also recommended that the UK should make public the policies it was following, including the legal basis for targeted killings and the criteria used in the selection of targets as well as its position on the geographical scope of armed conflicts when engaging with non-state armed groups.¹⁰⁵

The following section will discuss how the powers associated to the state of exception and the secrecy of operations affect governmental unaccountability.

1.4 Secrecy and unaccountable drone wars

In its fight against terrorism, the US government has used secret evidence against suspected terrorist, transferred detainees to secret CIA black sites and drafted secret 'kill list' for targeted killings of people in undeclared warzones.¹⁰⁶ This section will focus on the secrecy surrounding the current US use of drones. Secrecy is extremely problematic because it inhibits accountability. Transparency establishes whether targeted operations are being conducted lawfully. The secrecy in drones is continued through the 'CIA's refusal to publicly discuss the drone program and to provide relevant guidelines, policy, and legal rationales toward the use of drones'.¹⁰⁷

¹⁰⁴ *ibid*; Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) *AJIL* 1, 6-8 (The report suggested that "the Attorney General's indication that the Government has adopted the Bethlehem Principles raises concerns that an expansive approach to determining who is a lawful target is indeed being adopted. Sir Daniel's seventh principle would permit the targeting of those responsible for the 'provision of material support essential to the attacks'")

¹⁰⁵ *ibid* 49

¹⁰⁶ Jo Becker and Scott Shane, 'Secret "Kill List" Proves a Test of Obama's Principles and Will' *New York Times* (29 May 2012) <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=0> accessed at 5 May 2016

¹⁰⁷ Jameel Jafer, 'The Drone Memos: Targeted Killing, Secrecy, and the Law' (*The New Press* 2016), 25

International pressure to mitigate the impact of the opacity surrounding the use of armed drones, has not yielded relevant results.¹⁰⁸

There are institutional, administrative and legal frameworks compounding the issue. Achieving accountability becomes further complicated by the fact that two distinct organisations are conducting joint operations under vague legal authorities. The issue of extensive fluidity between the military (the Special Forces) (SOF) and intelligence agencies (the CIA) in relation to drone killings is central to this section.¹⁰⁹ Peter Singer has termed this situation as ‘double-hatting around the law’ a process that morphs the role of warriors, spy and civilian actors.¹¹⁰ This strange morphing of uniformed military, civilian intelligence and private security contractors seems to serve bureaucracy. Philip Alston argues that this double hatting is deliberate and seeks to hinder the possibility of finding out which agency is behind any given attack.¹¹¹ Today’s drone warfare is highly secretive and bureaucratic in nature; probably nobody enjoys the full authority and nobody can be held accountable. Hannah Ardent once stated that, ‘bureaucracy is the form of government in which everybody is deprived of political freedom, of the power to act; for the rule by Nobody is not no-rule, and where all are equally powerless we have a tyranny without a tyrant’.¹¹² Therefore, a bureaucratic system ensures that nobody has direct responsibility for anything and the humanity is lost in faceless administrative procedures. In this bureaucratization of drone warfare killing

¹⁰⁸ United Nations General Assembly, Human Rights Council Twenty-eighth session, Summary of the Human Rights Council interactive panel discussion of experts on the use of remotely piloted aircraft or armed drones in compliance with international law, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/28/38, 15 Dec 2015, at Para 8 ;Christopher Rogers, ‘Towards a Global Debate? UN Human Rights Council Takes on Drones’ (*Just Security*, 2014) <<http://justsecurity.org/15521/global-debate-human-rights-council-takes-drones/>> accessed 6 May 2016

¹⁰⁹ Andrew Feickert and Thomas K. Livingston, ‘U.S. Special Operations Forces (SOF): Background and Issues for Congress’, *Congressional Research Service*, (3 Dec 2010), 10 <<http://www.fas.org/sgp/crs/natsec/RS21048.pdf>> accessed 5 May 2016

¹¹⁰ Peter W. Singer, ‘Double-Hatting Around the Law: The Problem with Morphing Warrior, Spy and Civilian Roles’ (*Brookings*, 1 June 2010) < <http://www.brookings.edu/research/opinions/2010/06/01-military-roles-singer> > accessed 5 May 2016; The most appropriate term to describe this situation is double hatting. In this particular context double hatting means that military personnel are working under the rules of CIA or vice versa See Prof David Luban, ‘Drones: the law and ethics of drone strikes’ (8 Sep 2013) < <http://podacademy.org/podcasts/drones-the-law-and-ethics-of-drone-strikes/>> accessed 5 May 2016

¹¹¹ Philip Alston, ‘The CIA and Targeted Killings beyond Borders’ (2011) *Harvard National Security Journal*, Forthcoming; NYU School of Law, Public Law Research Paper No. 11-64, 63

¹¹² Hannah Ardent, *On Violence* (Harcourt Publishers, 1970) 81

has become highly administered, organised, impersonal and morally remote.¹¹³

The CIA is a civilian bureaucracy conducting drone strikes from thousands of miles away in Pakistan, Yemen, or Somalia in total anonymity. No one knows precisely who runs the program of targeted killing. The strikes are secret all the information is classified; lawsuits are blocked¹¹⁴ and consequently nobody is held accountable for human rights violations or abuses of law. The fusion of the CIA and the military along with the blurring of the line between the war and the peace has created a state of exception where accountability is impossible because nobody could be held accountable and exceptional circumstances warrant secrecy.

It would be naive to ignore that, traditionally, intelligence agencies have always operated covertly because of the nature of their job. Secrecy is crucial because it 'enables policymakers or operation commanders to make effective decisions'.¹¹⁵ It has been argued that transparency or declassification may compromise the CIA's ability to undertake its missions, and special situation of intelligence agencies demands for lower-threshold measures of accountability.¹¹⁶ It might appear oxymoronic to demand transparency and expecting information sharing from the CIA whose very existence is based on secrecy. However, there is a fundamental difference between the ability to gather intelligence and the power to kill suspected militants in foreign lands. Cohan noted that the September 11 attack and hunt for Bin Laden transformed CIA into 'hunters not gatherers'.¹¹⁷ Arguably the need for intelligence services to be accountable has never been stronger because of

¹¹³ Richard Adams and Chris Barrie, 'The bureaucratization of war: moral challenges exemplified by the covert lethal drone' (2013) *Ethics & Global Politics* 245, 246

¹¹⁴ Jack Serle, 'First UK legal challenge to CIA drones blocked by Court of Appeal', (*The Bureau of Investigative Journalism*, 20 Jan 2014) < <http://www.thebureauinvestigates.com/2014/01/20/first-uk-legal-challenge-to-cia-drones-blocked-by-court-of-appeal/> > ; Katie Rucke, 'Human Rights Lawyer Claims US Blocking Him From Telling Congress About Drone Devastation', (*Mint press News*, 25 Oct 2013) < <http://www.mintpressnews.com/shahzad-akbar-congress-pakistan-drones/171267/> > accessed 5 May 2016

¹¹⁵ Andrew Moran, 'intelligence and security' in Peter Hough, Shahin Malik, Andrew Moran and Bruce Pilbeam, *International Security Studies: Theory and Practice* (Routledge 2015) 180

¹¹⁶ S.1.2(4) Executive Order No 12958 authorises the classification of intelligence sources or methods providing the disclosure of the informant could reasonably be expected to endanger national security

¹¹⁷ Moran (n 115) 186

the excessive power they possess and the likelihood of the abuse of that power.¹¹⁸

After September 11, US intelligence agencies became the leading players in counter terrorism operations and exercised their power without any meaningful congressional consultation. The intelligence agencies ‘kidnapped suspected terrorists, established secret prisons, performed “enhanced” interrogations, tortured prisoners, and carried out targeted killings’.¹¹⁹ Gradually, special operations became far more common, and ‘double hatting’ helped to make accountability even more difficult. The exponential growth of SOF indicates that these groups have evolved from marginal actors towards major networked forms of organisations. US special operations, or possibly the CIA and other intelligence agents, now pursue war-on-terror tasks in at least 75 countries. Moreover, the Congressional report suggests that the US has intended to increase the number of Special Forces to 70,000¹²⁰

1.4.1 Armed Drones and the rise of secret warfare

The era of unaccountable secret wars began with Laos- aerial strikes without the approval of Congress.¹²¹ While the militarisation of the CIA materialised in 1961 in the Laos war, it reached its peak in the years after September 2001 when the Agency began targeted killing missions in undeclared warzones.¹²² The CIA and the US foreign policy changed after Laos becoming ‘another branch of the US Special Forces.... a paramilitary organisation whose primary purpose was killing and war fighting’.¹²³ CIA’s paramilitary operations were not restricted to the Laos war before the 9/11 attacks. President Reagan signed a secret Executive Order directing the CIA ‘to support and conduct paramilitary operations against Nicaragua’.¹²⁴ Then Ronald Reagan signed Executive orders for covert paramilitary operation in Afghanistan for combating

¹¹⁸ Ibid 186-187

¹¹⁹ Moran (n 117)

¹²⁰ Andrew Feickert and Thomas K. Livingston, ‘U.S. Special Operations Forces (SOF): Background and Issues for Congress’, Congressional Research Service (3 Dec 2010) 6

¹²¹ Ibid

¹²² Roger Warner, *Backfire: CIA's Secret War in Laos and Its Link to the War in Vietnam*, (Simon & Schuster Ltd 1996)

¹²³ Joshua Kurlantzick, *A Great Place to Have a War: America in Laos and the Birth of a Military CIA, Kindle edition* (Simon & Schuster 2017)

¹²⁴ Héctor Perla, *Sandinista Nicaragua's Resistance to US Coercion: Revolutionary Deterrence in Asymmetric Conflict* (Cambridge University Press 2017) 29

Moscow.¹²⁵The Snowden budget documents revealed that after September 11 attacks the traditional intelligence gathering role of the CIA became secondary and the Agency spent most of its time conducting drone strikes and many other aspects of paramilitary operations across the globe.¹²⁶

Pre-9/11 the Bush administration was less inclined to carry out lethal military actions in foreign countries because of legal barriers. It was believed that the CIA became something of a loose cannon when Ronald Regan gave the CIA an official legal authority to conduct covert 'counterintelligence activities outside the United States' by signing Executive Order 12333 in 1981.¹²⁷ The Executive Order 12333 maintained the ban on assassinations.¹²⁸ This changed after the African bombings in 1998, when President Clinton's secret Memorandum of Understanding authorised the CIA to kill Osama Bin Laden and key Al-Qaeda figures.¹²⁹The norm against targeted killings completely disappeared after 9/11 when Bush lifted this restriction by signing a Memorandum of Notification creating a secret list of 'High Value Targets' that the CIA was authorised to kill anywhere in the world without further presidential approval.¹³⁰This order began the CIA's transformation from an 'espionage service devoted to stealing the secrets of foreign governments' into 'a killing machine . . . consumed with man hunting'.¹³¹It is further argued that after 9/11 'thorny questions about assassination, covert action, and the proper use of the CIA in hunting America's enemies were quickly swept aside' and the Bush and Obama administrations fully embraced drones as an 'ultimate weapon for a secret war'.¹³²

¹²⁵ Jerel A. Rosati and James M. Scott, *The Politics of United States Foreign Policy*, (Wadsworth Publishing Co 2010) 222

¹²⁶ Scott Shane, 'New Leaked Document Outlines U.S. Spending on Intelligence Agencies' (*The New York Times*, 29 August 2013) < <http://www.nytimes.com/2013/08/30/us/politics/leaked-document-outlines-us-spending-on-intelligence.html> > accessed 6 April 2016

¹²⁷ See 1.8.c of Executive Order 12333 United States intelligence activities; Sherri J. Conrad, 'Executive Order 12,333: Unleashing the CIA Violates the Leash Law' (1985) 70 *Cornell L. Rev.* 968

¹²⁸ Section 2.11 Executive Order 12333 United States intelligence activities

¹²⁹ Micah Zenko, 'Targeted killing and America's 'kill list'', (*Council on Foreign Relations*, 6 October 2011) < <https://www.cfr.org/blog/targeted-killings-and-americas-kill-lists> >

¹³⁰ Jacob Weisberg, *The Best American Magazine Writing* (Columbia University Press 2008) 85

¹³¹ Mark Mazzetti, *The way of knife, the CIA, a secret army and a war at the ends of the earth* (Scribe, 2013) 4

¹³² *ibid* 99

The era of drones began two months after 9/11. The first US armed drone attack took place in Afghanistan in mid-November 2001 killing Mohammed Atef, the military commander of Al-Qaeda.¹³³ A few months later, on 4th February 2002, the CIA conducted a second drone strike on a group they believed included Osama Bin Laden in Afghanistan.¹³⁴ These drone strikes were less controversial because they were fired in hot battlefield. Drone strikes began hotly contested when, on 4 Nov 2002, the CIA conducted the first known targeted killing outside of a declared war zone in Yemen.¹³⁵ The strike killed suspected USS Cole bombing mastermind Qaed Salim Sinan al-Harethi in Yemen. The use of drones outside active hostilities increased and 'since 9/11, over 95% of all non-battlefields targeted killings have been conducted by drones'.¹³⁶ The strikes outside the warzone have raised issues of legality, legitimacy and accountability that will be discussed in next chapters. The focus of this section is to highlight that secrecy erodes the rule of law and makes accountability difficult.

1.4.2 The Convergence of CIA and JSOC operators:

There has been very little public discussion of the significant and complex role of the Joint Special Operation Commands (JSOC) in targeted killings. The JSOC is a secretive and elite branch of the United States' Department of Defence. It falls under the United States Special Operations Command, under the acronym USSOCOM. SOCOM deals with a universe of US military activity that occurs almost completely outside of the view of the American public.¹³⁷ JSOC was designed to be shrouded in secrecy by camouflaging itself '...with cover names, black budget mechanisms, and bureaucratic

¹³³ Khaled Dawoud, 'Mohammed Atef' *The Guardian* (18 November 2001) <http://www.guardian.co.uk/news/2001/nov/19/guardianobituaries.afghanistan> > accessed 4 May 2016

¹³⁴ Brian Glyn Williams, *Predators: The CIA's Drone War on al Qaeda* (University of Nebraska Press 2013), 36

¹³⁵ BBC News, 'CIA 'killed al-Qaeda suspects' in Yemen'' (5 Nov 2002) < <http://news.bbc.co.uk/1/hi/2402479.stm> > accessed at 5 May 2016; John F Burns, 'A NATION CHALLENGED: THE MANHUNT; U.S. Leapt Before Looking, Angry Villagers Say' *The New York Times* (17 Feb 2002) < <http://www.nytimes.com/2002/02/17/world/a-nation-challenged-the-manhunt-us-leapt-before-looking-angry-villagers-say.html> > accessed 5 May 2016

¹³⁶ Quoted in Kenneth R Himes, *Drones and the Ethics of Targeted Killing* (Rowman and Littlefield 2016) 18

¹³⁷ United States Special Operations command 2016 Factbook < https://static.dvidshub.net/media/pubs/pdf_27133.pdf > accessed 5 May 2016

parlour tricks' to maintain its secrecy.¹³⁸The official description of JSOC is confusing and does not mention its involvement in any sort of targeting killings or drone operations. Conversely, it merely lists a number of roles comprising the study of Special Operations requirements, ensuring the interoperability and equipment standardisation, the development of joint Special Operations plans and tactics, and conducting joint Special Operations exercises and training.¹³⁹ Rumsfeld signed a (classified) 2004 Directive (Al-Qaeda Network Exord) with the approval of the President, which 'gave JSOC broad authority to launch intelligence gathering and sometimes lethal operations all over world, from South America to Africa, Asia and the Middle East'.¹⁴⁰This order relaxed the rules and allowed the military to act outside declared war zones. However targets in some countries would still require the approval of high-level administration. The Secretary of Defence, for instance, must approve targets in Somalia, but for countries like Pakistan and Syria, it requires the approval of the President.¹⁴¹

It is a misconception that US drone programme is run by two distinct organisation- one the military's overt strikes in declared warzones¹⁴² and other CIA's covert strikes in undeclared warzones.¹⁴³ Interestingly, many continue to portray a straightforward situation where lines of authority remain relatively

¹³⁸ Marc Ambinder and D. B. Grady, *The Command: Deep Inside the President's Secret Army* (Wiley 2012) 12

¹³⁹ Factbook 2012, US Special Operations Command, 22, <

http://www.socom.mil/News/Documents/USSOCOM_Fact_Book_2012.pdf > accessed 5 May 2016

¹⁴⁰ Eric Schmitt and Mark Mazzetti, 'Secret Order Lets U.S. Raid Al Qaeda' (*The New York Times* 8 Nov 2008) < http://www.nytimes.com/2008/11/10/washington/10military.html?hp&_r=0 > accessed 5 May 2016; James DeShaw Rae, *Analyzing the Drone Debates: Targeted Killing, Remote Warfare, and Military Technology* (Palgrave Pivot 2014); Gordon Adams and Shoon Murray, *Mission Creep: The Militarization of US Foreign Policy* (Georgetown Washington Press 2014) 183

¹⁴¹ Schmitt and Mazzetti (n 140)

¹⁴² US officials does not acknowledge JSOC role in drones and maintain that Special Operations Forces have been for months in Pakistan to train Pakistani forces See US Department of Defence, news transcript, 'DoD news briefing with Geoff Morrell from the Pentagon,' (24 Nov 2009) <

<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4520> > accessed 6 May 2016

¹⁴³ JSOC has worked alongside the CIA in Yemen and possibly in Pakistan as well. For instance US embassy cable from October 2009 confirms that US Special Forces involvement in drone strikes, with the knowledge and consent of the Pakistani Army See The Guardian, 'WikiLeaks cables: US special forces working inside Pakistan' (30 Nov 2010) <

<http://www.theguardian.com/world/2010/nov/30/wikileaks-cables-us-forces-embedded-pakistan> >

accessed 4 May 2016; JSOC's involvement in Pakistani drone strikes was confirmed by a military intelligence official who told the Nation in 2009: 'Some of these strikes are attributed to [the CIA], but in reality it's JSOC and their parallel program of UAVs strikes' See Jeremy Scahill, 'The Secret US War in Pakistan' *The Nation* (23 Nov 2009) < <http://www.thenation.com/article/secret-us-war-pakistan#> > accessed 19 May 2016

clear and uncomplicated. For instance, Radsan and Murphy claim that, 'the Air force controls drone operations in the clear war zones of Afghanistan and Iraq. Elsewhere in the Northwest Pakistan, Yemen and Somalia, CIA controls'.¹⁴⁴ But this is oversimplification of a really murky situation on the ground particularly in the case of Pakistan. Seymour Hersh has reported a former intelligence officer stating that drone strikes in Pakistan involve multiple actors: The NSA, the CIA and the DIA (Defence Intelligence Agency) along with Special Forces.¹⁴⁵

This increasing overlap between the functions of military and civilian organisation is problematic. To understand how this convergence opens further doors of abuse one needs to understand the difference between Title 50¹⁴⁶ and Title 10 of the US Code, *Armed Forces*¹⁴⁷. The CIA is covered under Title 50 defining covert actions as 'activities of the United States government . . . where it is intended that the role . . . will not be apparent or acknowledged publicly, but does not include traditional . . . military activities.'¹⁴⁸ In the case of covert operations, the government cannot legally provide any information about how the CIA conducts targeted killings. Covert actions require permission of the President of the United States who declares that the activity is necessary to 'support identifiable foreign policy objectives' and 'is important to the national security of the United States'.¹⁴⁹ The CIA is also obliged to report their covert activities to Congressional Intelligence Committees.¹⁵⁰ The CIA can avoid the advance notification to Congress if the President determines there are 'extraordinary circumstances affecting vital interests of the United States,' but it still has to notify to the 'Gang of Eight'.¹⁵¹

¹⁴⁴ Afsheen Radsan and Richard Murphy, *Measure twice, shoot once: Higher care for CIA targeted killing* (University of Illinois Law review 2011) 1202

¹⁴⁵ Seymour M Hersh, 'Preparing the battlefield' *THE NEW YORKER* (7 July 2008) < <http://www.newyorker.com/magazine/2008/07/07/preparing-the-battlefield> > accessed 6 May 2016

¹⁴⁶ U.S. Code: Title 50 - WAR AND NATIONAL DEFENSE

¹⁴⁷ U.S. Code: Title 10 - ARMED FORCES

¹⁴⁸ National Security Act of 1947, Sec. 503(e), 50 U.S.C. 413b(e)

¹⁴⁹ Intelligence Authorization Act for FY1991, P.L. 102-88, Title VI, Sec. 602 (a) (2), 50 U.S.C. 413b (a)

¹⁵⁰ s. 503(5)(1) [50 U.S.C. 3093] NATIONAL SECURITY ACT OF 1947

¹⁵¹ 'In extraordinary circumstances President is authorised to limit reporting of a covert action finding to the chairman and ranking members of the congressional intelligence committees, the House and Senate majority and minority leaders, and any other member or members of the congressional leadership that the President may designate. This covert action finding notification is referred to as a "Gang of Eight" notification, because it involves the notification of eight Members of the Congress'

Afterwards, the congressional intelligence committees may conduct the oversight of the relevant covert actions. Special Forces are governed by a completely different regime. JSOC is a subunit of Special Operations Command (SOCOM) that manages and coordinates US special operations forces operating globally.¹⁵² Title 10 of the US Code that guides JSOC operations and outlines the role of the armed forces.¹⁵³ The 'traditional military activities' regulated under Title 10 require neither a presidential finding nor Congressional notification.¹⁵⁴ Therefore, JSOC differ from CIA strikes since their operations are acknowledged by the US government.¹⁵⁵ Oversight of operations carried out under Title 10 lies with the two chambers¹⁵⁶ of the US Congress and the Armed Services Committees.¹⁵⁷ Title 50 oversight may actually be more rigorous, though less transparent, than Title 10 oversight.¹⁵⁸ Title 10 refers to Defence of Department and military operations, while Title 50 covers intelligence agencies, intelligence activities, and covert action.¹⁵⁹ Thus under Title 10 'military' action can be undertaken much more freely and will be subject to little or no congressional oversight, providing it does not cross the threshold of engagement in hostilities.

JSOC is a military organisation that works alongside the CIA. Yet it is neither part of the conventional military nor wholly similar to the CIA. The raid of Bin

See Daniel D. Pegarkov, *National Security Issues*, (Nova Science publishers Inc, 2006) 193; Marshall Curtis Erwin, Sensitive Covert Action Notifications: Oversight Options for Congress, Congressional Research Service, (10 April 2013) 5 < <http://fas.org/sgp/crs/intel/R40691.pdf> > accessed 6 May 2016

¹⁵² Robert M Farley, *Grounded: The Case for Abolishing the United States Air Force* (University Press of Kentucky 2015)

¹⁵³ Title 10, United States Code Armed Forces, Committee on armed services of the House of Representatives, (2011); Micah Zenko, Transferring CIA Drone Strikes to the Pentagon Policy Innovation Memorandum No. 31, (*Council on Foreign relations*, 2013) < <http://www.cfr.org/drones/transferring-cia-drone-strikes-pentagon/p30434> > accessed 2 Feb 2017

¹⁵⁴ Andru E. Wall, 'Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action' (2011) *Harvard National Security Journal*, 102;

¹⁵⁵ Avery Plaw, *The Drone Debate: A Primer on the U.S. Use of Unmanned Aircraft Outside Conventional Battlefields*, (Rowman & Littlefield Publishers 2015) 41

¹⁵⁶ Congress is divided into two chambers, the Senate and the House of Representatives. The Senate is sometimes called the upper chamber and the House the lower chamber see *The Two Houses of the United States Congress*, Indiana University Centre on Representative Government < <http://centeroncongress.org/two-houses-united-states-congress> > accessed 25 March 2017

¹⁵⁷ Andru E Wall (n 154) 85

¹⁵⁸ Naureen Shah, *A Move Within the Shadows Will JSOC's Control of Drones Improve Policy?*, in *Drone Wars: Transforming Conflict, Law, and Policy* (Cambridge University Press. Kindle Edition 2014) 160

¹⁵⁹ Andru E. Wall (n 154) 87

Laden demonstrated that CIA and JSOC work well together.¹⁶⁰ The CIA played a vital role in the intelligence gathering that led to Bin Laden's location.¹⁶¹ The cooperation was even acknowledged by Barack Obama who explained that intelligence officials gathered at CIA's headquarters and labelled the operation as a team effort.¹⁶² Although US Navy SEALs executed Bin Laden's raid, it was characterised as Title 50 operations referring to the section of the US Code that governs the CIA.¹⁶³ This might seem like no more than a typical bureaucratic loophole, but it would have a significant result: JSOC is now empowered to carry out covert operations around the globe with less accountability than the CIA.¹⁶⁴ The legal ambiguity of such operations, which are described as CIA-led but executed mostly or entirely by military commandos, suits the government. As a result, 'some apparently covert operations have, because of the preponderance of military personnel involved, not been conducted with the requisite presidential finding and congressional notification'.¹⁶⁵

This convergence gives the US government a political and strategic advantage. For instance the overlap of CIA and JSOC drone strikes in Yemen allows the government to officially acknowledge that they run the programme due to involvement of military in it but at the same time gives it the benefit of maintaining secrecy and deniability enjoyed by CIA operations.¹⁶⁶ As Gates has posited 'one of the things we have seen since 9/11 is an extraordinary coming together, particularly of CIA and the military, in working together and

¹⁶⁰ 'Minutes and Years: The Bin Ladin Operation' (Central Intelligence Agency, 2016) < <https://www.cia.gov/news-information/featured-story-archive/2016-featured-story-archive/minutes-and-years-the-bin-ladin-operation.html> > accessed 26 March 2017

¹⁶¹ *ibid*

¹⁶² White House, Remarks by the President, CIA Director Leon Panetta, and DNI Director James Clapper to the Intelligence Community at CIA Headquarters (20 May 2011) < <https://www.whitehouse.gov/the-press-office/2011/05/20/remarks-president-cia-director-leon-panetta-and-dni-director-james-clapp> > accessed 7 May 2016

¹⁶³ 'CIA Chief Panetta: Obama made gutsy decision on Bin Laden Raid' (PBS, 3 May 2011) < <https://www.pbs.org/newshour/show/cia-chief-panetta-obama-made-gutsy-decision-on-bin-laden-raid> >

¹⁶⁴ Peter Bergen, *Manhunt: From 9/11 to Abbottabad - the Ten-Year Search for Osama bin Laden* (Vintage 2013) 152

¹⁶⁵ Craig Collins, 'The CIA/DoD Convergence', (Defence Media Network 25 April 2012) < <http://www.defensemедiaNetwork.com/stories/the-ciadod-convergence/2/> > accessed 7 May 2016

¹⁶⁶ Micah Zenko, 'Transferring CIA Drone Strikes to the Pentagon', Policy Innovation Memorandum, (Council on foreign relation, 16 April 2013) < <http://www.cfr.org/drones/transferring-cia-drone-strikes-pentagon/p30434> > accessed 7 May 2016

fusing intelligence and operations in a way that just, I think, is unique in anybody's history'.¹⁶⁷

The CIA-JSOC convergence creates the potential for further exploitation of the situation. During a March 2012 hearing, Representative Hank Johnson, a member of the House Armed Services Committee, questioned military officials about oversight of SOF working under the authority of the CIA. Johnson noted 'that although the Committee has budgetary authority over SOCOM, when Special Operations Forces act under CIA authority, the Pentagon is not required to report back about its activities'.¹⁶⁸ It has been suggested that since JSOC plays an ever-increasing role in drone operations, it should become accountable to Congress and the public about its practices and procedures, particularly in relation to civilian protection.¹⁶⁹

At times even government officials do not have a clear understanding of which organisation is responsible for a strike or for particular conduct. In 2011, the Washington Post reported: 'Their comingling at remote bases is so complete that US officials ranging from congressional staffers to high-ranking CIA officers said they often find it difficult to distinguish agency from military personnel'.¹⁷⁰ A senior US official commenting on his recent visit to Afghanistan revealed, 'You couldn't tell the difference between CIA officers, Special Forces guys and contractors. They're all three blended together, all under the command of the CIA'.¹⁷¹ According to another 2009 report, General Petraeus aggressively pushed the military deeper into CIA's turf allowing Special Forces and private contractors to conduct covert intelligence missions in various countries of the Middle East and outside traditional war zones. As a result, it became impossible to differentiate between military and intelligence

¹⁶⁷ Eric Schmitt and Thom Shanker, *Counterstrike: The Untold Story of America's Secret Campaign Against Al-Qaeda* (New York Times Books 2011) 259

¹⁶⁸ Hearing Before the House Armed Services Committee on Central-Special Operations-Transportation Command's Budget, 112th Congress (2012)

¹⁶⁹ 'The Civilian impact of drones: Unexamined costs, unanswered questions' (*Columbia Law School*, 2010) 66 < https://civiliansinconflict.org/wp-content/uploads/2017/09/The_Civilian_Impact_of_Drones_w_cover.pdf > accessed at 20 Dec 2017

¹⁷⁰ Greg Miller and Julie Tate, 'CIA shifts focus to killing targets' *The Washington Post* (1 Sep 2011) < http://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvJ_story.html > accessed 7 May 2016

¹⁷¹ *ibid*

actors.¹⁷² Al-Awlaki's death represents the most literal illustration of the convergence between the CIA and the military in targeted killings. According to the US officials: 'the CIA was in control of all the aircraft, as well as the decision to fire, and the operation was so seamless that even hours later, it remained unclear whether a drone supplied by the CIA or the military fired the missile that ended the al-Qaeda leader's life'.¹⁷³

The legal framework governing these operations is, therefore, also uncertain. In the words of Representative Rush Holt at a House Permanent Select Committee on Intelligence hearing in October 2009:

There is a lot that one could imagine that is going on in the world these days, whether it be remote killings or assassinations or intelligence collection that falls – or other kinds of actions – that fall somewhere between Title 10 and Title 50 depending on who does them and how they are done. It has become practice here on the Hill not to brief some of these activities....¹⁷⁴

In addition, given the secrecy involved, the official assertion that targets are based on evidence, cannot be trusted by the public because it does not need to be explained to anyone outside the US Administration. As Philip Alston, UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, has noted, the drone campaign is "It's a lot like the torture issue. You start by saying we'll just go after the handful of 9/11 masterminds. But, once you've put the regimen for waterboarding and other techniques in place, you use it much more indiscriminately. It becomes standard operating procedure. It becomes all too easy. Planners start saying, 'Let's use drones in a broader context. Once you use targeting less stringently, it can become indiscriminate.'"¹⁷⁵

¹⁷² Eric Schmitt and Thom Shanker, *Counterstrike* (Times Book Kindle Edition, 2011) 245

¹⁷³ Greg Miller, 'Strike on Aulqi demonstrates collaboration between CIA and military' *The Washington Post* (30 Sep 2011) < https://www.washingtonpost.com/world/national-security/strike-on-aulqi-demonstrates-collaboration-between-cia-and-military/2011/09/30/gIQAD8xHBL_story.html?utm_term=.71f147644e2a > accessed 26 March 2017

¹⁷⁴ Legal Perspectives on Congressional Notification: Hearing before the Subcommittee on Intelligence Community Management of the Permanent Select Committee on Intelligence 111th Cong (2009) 55 < <http://www.gpo.gov/fdsys/pkg/CHRG-111hrg53774/pdf/CHRG-111hrg53774.pdf> > accessed 6 May 2016

¹⁷⁵ Jane Mayer, 'The Predator war' *The New Yorker* (26 Oct 2009) < <http://www.newyorker.com/magazine/2009/10/26/the-predator-war> > accessed 6 May 2016

1.4.4 Secrecy prevents transparency and accountability

The most significant problem stemming from the fusion of intelligence and military operators is its impact in terms of accountability. Already in 2003 Colonel Kathryn Stone noted that: 'When the CIA and SOF operate together on the battlefield the legal distinctions regarding operating authorities and procedures and accountability can become blurred'¹⁷⁶. The National Commission appointed to investigate the 9/11 attacks also addressed the problems stemming from overlapping responsibilities. The Commission recommended the CIA to keep its responsibility for clandestine and covert operations, including propaganda, renditions, and non-military disruption. But it insisted that '[l]ead responsibility for directing and executing paramilitary operations, whether clandestine or covert, should shift to the Defence Department.'¹⁷⁷ Likewise US pro transparency voices, including former senior intelligence and military officials, condemned a 'long-term killing program based on secret rationales' and recommended that the Pentagon rather than the CIA should conduct drone strikes.¹⁷⁸

One viewpoint is that even if implemented this may not have a significant impact under current level of secrecy. According to Jack Goldsmith, a former Bush administration Justice Department official highlights the inherent problems of Department of Defence (DOD) since 'moving lethal drone operations exclusively to DOD might bring benefits' but they 'are no less secretive than the CIA's, and congressional oversight of DOD ops is significantly weaker'.¹⁷⁹ Thus if drone deployment continues to be managed by JSOC based on its secretive operation, there may be no significant improvements in transparency and accountability. Unaccountable intelligence

¹⁷⁶ Kathryn Stone, "'All Necessary Means'" - Employing CIA Operatives in a Warfighting Role alongside Special Operations Forces' (2003) US Army War College, 15 < <http://www.fas.org/irp/eprint/stone.pdf> > accessed 6 May 2016

¹⁷⁷ The 9/11 Commission considered 1995 to be the nadir for the Clandestine Service because it appointed only 25 new officers that year. The 9/11 Commission Report 90 (2004), 415 < <http://www.9-11commission.gov/report/911Report.pdf> > accessed 6 May 2016

¹⁷⁸ Mark Mazzetti, Use of Drones for Killings Risks a War Without End, Panel Concludes in Report *New York Times* (26 June 2014) < http://www.nytimes.com/2014/06/26/world/use-of-drones-for-killings-risks-a-war-without-end-panel-concludes-in-report.html?_r=0 > accessed 5 May 2016

¹⁷⁹ Spencer Ackerman, 'Little will change if the military takes over CIA's drone strikes' *Wired* (20 March 2013) < <http://www.wired.com/2013/03/military-drones/> > accessed 7 May 2016

agencies should not be conducting lethal operations.¹⁸⁰ The responsibility of the DOD for paramilitary covert operations outside war zones would facilitate accountability. Whether some bodies may need to operate without full disclosure, they should still respect international law, inform about their policy and procedures, specify which group is being targeted and on what legal grounds as well as publish the rate and number of civilian casualties.

Under the Trump administration the situation appears to have worsened because the US drone policy has become even less restrained, transparent and accountable.¹⁸¹ The following section will analyse the continuation of exceptional policies in the Trump-years.

1.4.5 The Trump administrations changes to the US drone policy

The US airstrikes have increased drastically under the Trump administration. Reportedly, by January 2018, it has carried out 126 airstrikes in Yemen, 35 in Somalia¹⁸² and 6 drone strikes in Pakistan.¹⁸³ The CIA operated drone strikes in Pakistan have increased from 3 in 2016 (under Obama administration) to 5 in 2017. On 7 June 2018, the Stimson organisation presented a report showing their concern for more relaxed rules for targeted killing in undeclared warzones. According to this report, the Trump administration made three changes to drone policy¹⁸⁴:

1. Expanding the targets of armed strikes by eliminating the requirement that the person pose an 'imminent threat',
2. Loosening the requirement of 'near certainty' that the target is present at the time of the strike to a 'reasonable certainty', and

¹⁸⁰ Alston (n 111) 116

¹⁸¹ Rachel Stohl, Under Trump, U.S. drone strike policy is looser and less transparent, (*AXIOS*, 14 June 2018) < <https://www.axios.com/under-trump-us-drone-strike-policy-is-looser-and-less-transparent-86c49069-b8eb-4a56-b950-b8b86004dc71.html> > accessed at 8 July 2018

¹⁸² Jessica Purkiss, Trumps first year in numbers: Strikes triple in Yemen and Somalia, The Bureau of investigative journalism, (19 Jan 2018) < <https://www.thebureauinvestigates.com/stories/2018-01-19/strikes-in-somalia-and-yemen-triple-in-trumps-first-year-in-office> > accessed at 3 July 2018

¹⁸³ *ibid*; 'The Bureau of investigative journalism, Pakistan: Reported US strikes 2018' (2018) < <https://www.thebureauinvestigates.com/drone-war/data/pakistan-reported-us-strikes-2018> > accessed 6 July 2018

¹⁸⁴ Rachael Stohl, 'An action plan on US drone policy: Recommendation for the Trump administration' (*Stimson*, June 2018) 12 < <https://www.stimson.org/sites/default/files/file-attachments/Stimson%20Action%20Plan%20on%20US%20Drone%20Policy.pdf> > accessed at 8 July 2018

3. Revising the process through which strike determinations are made by reducing senior policymaker involvement and oversight in such decisions and delegating more authority to operational commanders.

By removing the 'imminent threat' requirement, President Trump has broadened the scope of drone strikes. Under the new rules, the US may be able to target even low-level militants who lack special skills or leadership roles even when they pose no threat to the US. The Trump administration has given decision-making power to drone operating commanders. They are allowed to make vital decision on targeted killing which involve they face fewer internal hurdles to launching specific strikes or raids.¹⁸⁵ The consequence of these changes is an escalating use of targeted airstrikes.¹⁸⁶ The Trump administration has preserved a loosened version of the existing requirement of 'near certainty' that no civilians are present before a lethal strike is allowed.¹⁸⁷

Another negative development is the expansion of areas of 'active hostilities', with the designation three more provinces in Yemen as areas falling within the category. A similar approach has affected operations in Somalia.¹⁸⁸

As explained above, the controversial secrecy surrounding the US drones warfare is not new but has taken a new dimension in recent years. For instance, the Trump government has not disclosed the changes introduced to procedures and safeguards laid down by the Obama administration and the involvement of the CIA's in conducting targeted strikes- an information that former President Obama was forced to release by US courts.¹⁸⁹ It is alarming that the Trump administration is further widening the use of armed drones outside areas of active hostilities. According to recent reports, the US has

¹⁸⁵ Charlie Savage and Eric Schmitt, 'Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids' *The New York Times* (21 Sep 2017) < <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html> > accessed 20 Dec 2017

¹⁸⁶ Caitlin Vito, Shifting US counter-terrorism strategy plays out in the Horn of Africa, (*IIS*, 28 June 2019) < <https://www.iiss.org/blogs/analysis/2018/06/us-counter-terrorism-strategy-horn-of-africa> > accessed 9 July 2018

¹⁸⁷ Human Rights Watch, NGO Statement on Reported Changes to U.S. Policy on Use of Armed Drones and Other Lethal Force, (7 March 2018) < https://www.hrw.org/news/2018/03/07/ngo-statement-reported-changes-us-policy-use-armed-drones-and-other-lethal-force#footnote2_6adzmw8 > accessed 9 July 2018

¹⁸⁸ Rachael Stohl (n 181) 16

¹⁸⁹ *ibid* at p. 17-18

started armed drone flights over Niger. Despite the US military officials admitting that ‘none of the groups pose a direct threat to the U.S. today, but there are concerns they could become one if left unchecked’.¹⁹⁰ The United States Africa Command (AFRICOM) chief Gen. Thomas Waldhauser applauded the presence of armed drones in Niger and said, “we have beefed up a lot posture-wise”.¹⁹¹ The presence of US armed drones in Niger broadens the scope of US war, it normalises the use of lethal force against low level militants who pose no imminent threat to the US and it may worsen the internal conflict in Niger because the impact of US drone strikes in Yemen, Somalia and Pakistan has been negative at national level.¹⁹²

Conclusion

The extra-legal justifications for states of exception lost its support amongst most of the international community due to the horrors of the twentieth century. The threat of terrorism and US policies has created a global state of exception where preventive use of force, amalgamation of military and intelligence agencies and secret wars has become a new norm. It may not be wrong to say that since 9/11 the US counterterrorism policies have normalised lawlessness. Framing the fight against al-Qaeda as exceptional circumvents legality by defying any legal categorisation. This reinterpretation of international law has served as basis for the US to claim a right to use preventive force against states or individuals which they deem may pose a threat to the State. The Bush administration purported to ‘adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries’.¹⁹³ The UK government’s drone strikes in Syria against ISIS militants who allegedly pose no imminent threat to the UK highlight that the US has created

¹⁹⁰ John Vandiver, ‘Armed US drones up and running in Niger’ (Stars and Stripes, 20 July 2018) < <https://www.stripes.com/news/armed-us-drones-up-and-running-in-niger-1.538637> > accessed 21 July 2018

¹⁹¹ *ibid*

¹⁹² Abdulrasheed Al-Faqih, Civilian casualties and effectiveness of U.S. drone strikes in Yemen (*Just Security*, 3 April 2018) < <https://www.justsecurity.org/54464/civilian-casualties-effectiveness-u-s-drone-strikes-yemen-part/> > accessed 21 July 2018; HC 772 Defence Committee Written evidence submitted by Reprieve (24 March 2015) <

<https://publications.parliament.uk/pa/cm201314/cmselect/cmdfence/772/772vw21.htm> > accessed 21 July 2018; Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan: The Legal and Socio-political Aspects* (Routledge 2015) 194-229

¹⁹³ President Bush, The National Security Strategy of the USA, September 2002

a dangerous precedent that other major powers with a permanent seat and veto in the UN Security Council are willing to follow. The emergence of ever increasing, borderless and shadowy forms of war suggest that war and use of force have become standardised. This current form of covert wars fought in the name of 'security' resembles a global and permanent policing operation that is based on continuous surveillance and preventive strike operations across the globe. These actions undermine the principle of sovereignty of States targeted and blur the distinction between war and peace and playing a key role in the regularisation of State violence. Finally, the alterations in drone policy introduced by President Trump undermine further transparency and contribute to make the norm what is portrayed as exceptional rules. In the words of Hardt and Negri:

If war is no longer an exceptional condition but the normal state of affairs.... we have entered a perpetual state of war....where war not be a threat....a destabilizing force, but rather, on the contrary, an active mechanism that constantly creates and reinforces the present global order.¹⁹⁴

¹⁹⁴ Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (Penguin books 2004) 13

Chapter 2: International law and the use of lethal force by states

2. Introduction

This chapter seeks to set out principles of the international legal frameworks relevant to the conflicts that emerged after the event of September 11 2001. After the September 11 attacks, the US has used force against states and non-state actors both in the context of the law of self-defence and relying on the legal frameworks governing armed conflict. The chapter will examine three distinct legal paradigms applicable to the use of lethal force by states namely: 1) Right of self-defence as given in Art 51 (Jus ad bellum), 2) International humanitarian law also known as law of war or law of armed conflict (Jus in Bello) and 3) International human rights law. While an in-depth analysis of these three legal frameworks fall outside the scope of this study, this chapter focuses on how law has been applied or disregarded. It also explores how normative frameworks maybe developing as a result of state responses to the threat of terrorism.

2.1 Use of force in International law

After World War II one of the main aim of the UN Charter was to limit the use of force to avoid the horrors of war. The first purpose of UN Charter given in Art 1(1) is 'to maintain international peace and security'.¹⁹⁵ The Charter sought to establish a general and comprehensive prohibition on the use of force and also to set up an organisation that was able to take collective action to deal with the threat to the peace or breaches of the peace.¹⁹⁶ The founder states agreed to surrender their right to use force as a means of protecting their interest and legal rights. In return the UN would provide an effective collective guarantee of security for its when force was used against them or where there was a threat to peace. Indeed, the UN system could never fulfil its promise- a commitment to enforce peace through common action.¹⁹⁷

¹⁹⁵ United Nations, Charter of the United Nations, (1945), Chapter 1, Art 1(1)

¹⁹⁶ *ibid*

¹⁹⁷ Marc Weller, Jake William Rylatt and Alexia Solomou, *The Oxford Handbook of the Use of Force in International Law* (OUP Oxford 2015) 12

The political climate characterising the Cold War resulted in a protracted debate over the need to relax of the prohibition of the use of force enshrined in the Article 2(4) of the Charter because the collective security scheme foreseen in it, had failed. More specifically, some scholars have considered that the prohibition of the use of force should be relaxed in the present day to respond to terrorism.¹⁹⁸

There are three key provisions in the UN Charter dealing with the use of force, including the prohibition contained in Art 2(4);¹⁹⁹ the right of individual and collective self-defence foreseen in Article 51;²⁰⁰ and Article 42 allowing the Security Council to authorise the use of force when the Council considers that there has been a threat to the peace, a breach of the peace or an act of aggression.²⁰¹ This section will only deal with the prohibition of the use of force provided for in Article 2(4).

2.2 Prohibition of the use of force in International law

The UN Charter is based on the abolition of war as a means of national politics to resolve international disputes. Article 2(4) obliges all member states to 'refrain.... from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with

¹⁹⁸ Daniel Bethlehem, 'Self-defence against an imminent or actual armed attack by non-state actors' (2012) *American Journal of International Law*, 770-7 (advocating a significant expansion of the right to use military force to counter the threat of terrorism); Lee Feinstein and Anne-Marie Slaughter, 'A Duty to Prevent' (2004) *Foreign Affairs* 136 (advocates to rewrite or amend the current rules to be able to counter the new threat of a possible terrorist attack where terrorist may use biological weapon. They also said that organisations other than UNSC should have the power to authorise military intervention to prevent proliferation of nuclear weapons)

¹⁹⁹ United Nations, Charter of the United Nations, (1945), Chapter 1, Art 2(4) "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"

²⁰⁰ United Nations, Charter of the United Nations, (1945), Chapter VII, Art 51 "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security"

²⁰¹ United Nations, Charter of the United Nations, (1945), Chapter VII, Art 42 "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations"

the purposes of the United Nations'. It has been established that 'the prohibition of the use of force enjoys the status of a *jus cogens* rule'.²⁰² This means that no state can contract out of the obligation. It is very difficult to change *Jus cogen* rules and it can only be modified 'by a subsequent norm of general international law having the same characteristic'.²⁰³ In practice, the termination or amendment of *jus cogen* rule would require 'near-universal state practice and strong evidence indicating that the value it protects is no longer considered a fundamental one by international community'.²⁰⁴

The interpretation of the notion of 'force' used in Art 2(4) is critical. It is generally agreed among scholars that the meaning of 'force' as used in Art 2(4) refers only to physical or armed force excluding economic or political pressure.²⁰⁵ The International Court of Justice (ICJ) considered the meaning of the use of force in the Nicaragua case. The Court referred to an armed attack as the gravest form of the use of force within Art 2(4).²⁰⁶ Although article 2(4) itself contains no qualification of the term 'force' but the wording of Art 41²⁰⁷ and 46²⁰⁸ suggest that force means military force. In 1970 the UN General Assembly unanimously passed a Resolution 'Declaration on Principles of International Law concerning Friendly Relations' which stated that Art 2(4)

²⁰² In *Nicaragua v USA.*, International Court of Justice, June 27, 1986, General List No. 70 para 190 ICJ held that, "the prohibition on the use of force is covered by treaty law (that is the UN Charter), by customary international law and the prohibition was a *Jus Cogens* norm"; Germany has also consistently held the view that "the non-use of force (as embodied in Art 2(4) of the UN Charter) was a clear and comprehensive norm of *jus cogen* See UN Doc. A/C.6/41/SR.14, 10 Oct 1983, p. 9, Para, 33

²⁰³ Article 53, Vienna Convention on the law of treaties, (1969); *Jus cogen* rule cannot be modified or derogated from by agreement between states; Art 53 and 64 Vienna Convention on the law of treaties, (1969) make clear that a treaty which conflicts with a peremptory norm becomes void and terminates.

²⁰⁴ Helen Duffy, *The 'War on Terror' and the Framework of International Law*, (Cambridge University Press, 2015), 20

²⁰⁵ D. W. Bowett, *Self-defence in International Law*, (The Lawbook exchange, 1958), p. 146-148; Yoram Dinstein, *War, Aggression And Self-Defence*, (Cambridge University Press, 2011), 18; Albrecht Randelzhofer, Article 2(4), in *The Charter Of The United Nations: A Commentary* (Bruno Simma ed., 1994), 112

²⁰⁶ In *Nicaragua v USA.*, International Court of Justice, June 27, 1986, para 191

²⁰⁷ United Nations, Article 41 "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations"

²⁰⁸ United Nations, Art 46 "Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee"

dealt solely with military force.²⁰⁹The prohibition of economic, political or other types of coercion was covered in the 1970 Declaration under the heading of non-intervention,²¹⁰and not of the prohibition of the threat or use of force which suggest that use of force only refers to measures of a military nature.

Art 2(4) covers the use of force by the regular forces of states against other States. However, the question arises whether prohibition extends to the state support for irregular or non-state groups who carry out armed attacks in the territory of another state. It remains disputed whether the prohibition only covers the inter-state use of force or if it also extends to indirect use of force involving non-state actors against a state. The ICJ has asserted that indirect use of force may amount to a breach of Art 2(4). In the Nicaragua case, the Court stated that acts which breach the principle of non-intervention and which 'directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.'²¹¹ This was reaffirmed in the Armed Activities case between the Democratic Republic of Congo and Uganda. The Court confirmed its position and stressed that the principle of 'non-intervention prohibits a state to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another state'.²¹² The section of UNGA Resolution 2625 (XXV) dealing with the prohibition of the use of force obliged states to 'refrain from organizing or encouraging the organization of irregular forces or armed bands.'²¹³ In the Nicaragua case the ICJ appears to have treated General Assembly Resolution 2625 as one generating customary international law. The Court noted that the effect of

²⁰⁹United Nations, 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, (1970), para 1

²¹⁰ Ibid at *The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter*, para 2, "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law"

²¹¹ In *Nicaragua v USA.*, International Court of Justice, June 27, 1986, Para 109-110

²¹² ICJ Reports in *Nicaragua case 1986*, p. 108, Para 206, quoted in paragraph 164 of the *Armed Activities On The Territory Of The Congo 9Democratic Republic Of the Congo v Uganda (2005)*

²¹³ United Nations, 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, (1970)

consent to the text of such resolutions must be understood 'as an acceptance of validity of the rule or set of rules declared by the resolution by themselves'.²¹⁴ Still, the nature of conflicts has changed since the drafting of the UN Charter and there has been an increase in the state support and state's military conflicts with non-state actors.²¹⁵ The central issue is state's responsibility for the actions of non-state actors. What level of support by a state to a non-state group would amount to a use of force by the state and thus a breach of Article 2(4). In the Nicaragua case, the Court distinguished between different forms of state support to non-state groups because the levels of support affect the legal classification of the activity. In this case, the Court distinguished between 'the most grave forms of the use of force' (those constituting an armed attack) and other 'less grave forms'.²¹⁶ The Court held that 'the supply of arms, funds and other support ... cannot be equated with armed attack.... such activities.... constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a state' therefore force cannot be used in self-defence with regard to these activities.²¹⁷ However, if an armed group is operating on behalf of a state, for instance where it has organised and sent them, a victim state will have the right to use force in self-defence depending on the gravity of the force used.²¹⁸ Article 2(4) of the UN Charter does not just prohibit the threat of the use of force but also to 'use force against the territorial integrity or political independence of any state'. This phrase leaves unanswered the possibility of to use force which is not against the territorial integrity or political independence of state This question is significant because it impinges on the scope of the prohibition of the use of force. It is clear that if a state uses armed force resulting in the occupation of that state or uses force that is aimed at the regime change, these actions will amount to breaches of the territorial integrity or political independence of the state. However, there is no

²¹⁴ Armed Activities On The Territory Of The Congo 9Democratic Republic Of the Congo v Uganda (2005), Para 188

²¹⁵ Susan Welch, John Gruhl, Sue Thomas and Mary Borrelli, *Understanding American Government* (Cengage Learning 2013) 496; Joan Ferrante, *Sociology: A Global Perspective* (Wadsworth Publishing, 9th Revised edition, 2014) 412

²¹⁶ In Nicaragua v USA., International Court of Justice, June 27, 1986, Para 191

²¹⁷ Ibid Para 247

²¹⁸ ibid

such clarity for uses of armed forces not seeking such aims or involving such effect. For instance, if it is just airstrikes by planes or missiles against another state that do not have the effect of the occupation or changing the government will that still fall under Art 2(4)?

The broad interpretation of the term 'territorial integrity' means that every territorial incursion is a violation of territorial integrity. This interpretation of 'territorial integrity' turns Art 2(4) into a general prohibition.²¹⁹ Whilst under a narrow interpretation of the term 'territorial integrity', a state may only violate Art 2(4) if it occupies another states territory.²²⁰ A rigid interpretation of such terminology is problematic because it would generally allow the state to use force against another state²²¹ and will also render the phrase which is included in Art 2(4) 'or in any other manner inconsistent with the purposes of the UN' which are expressly provided by the Art 1(1) of the Charter meaningless.²²² Randelzhofer has supported the broad interpretation of the term 'territorial integrity' and stressed that the major reason behind the specific reference to territorial integrity and political independence made in Art 2(4) was to reinforce the general prohibition of the use of force.²²³ This issue was further clarified by 1965 Declaration on the inadmissibility of intervention in the domestic affairs of states²²⁴, the 1970 Declaration on principles of International Law²²⁵ and in

²¹⁹ Ellen Paul, Fred Miller and Jeffrey Paul, *Morality and Politics: Volume 21, Part 1: v. 21*, (Cambridge University Press 2004) 19

²²⁰ Anthony A D'Amato, *International Law: Process and Prospect* (Dobbs Ferry NY Transnational Publishers 1987) 57-59; D. W. Bowett, *Self-defence in International Law* (The Lawbook exchange 1958) 151-152

²²¹ Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press 2001) 81-82; Julius Stone, *Aggression and world order* (Stevens and Sons 1958) 42-44

²²² United Nations, Charter of the United Nations, (1945), Chapter 1, Art 1(1) 'to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace' (According to the article the primary purpose of the Charter is to maintain peace and the relaxing of the prohibition of the use of force would go against the fundamental purpose of the Charter)

²²³ A Randelzhofer, 'Art 2(4)', *The Charter of the United Nations: A Commentary* (Oxford University Press 1995) 117-119

²²⁴ United Nations General Assembly, Resolution adopted by the General Assembly, 2131 (XX) Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, (1965) para 1 "No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned"

the ruling of the Corfu Channel Case.²²⁶The Corfu ruling was reaffirmed in the Nicaragua case, where the Court interpreted Art 2(4) in a non-restrictive way²²⁷and endeavoured to make it clear that Art 2(4) ought to be read in a non-restrictive way because the provision was drafted to provide guarantees to small and weak states.²²⁸

Some scholars have pressed for a narrow interpretation of Art 2(4) during the Cold War because that would permit unilateral military intervention by one state in another to prevent gross human rights abuses. They have argued that such an intervention would not be aimed at destroying either the 'territorial integrity' or the 'political independence' of the targeted state. Moreover it would be entirely consistent with one of the UN's purposes, which is to promote universal human rights.²²⁹Others reject this proposition and argue that the wordings of Art 2(4) are very precise and allow no room for any such misinterpretation, nor does it allow any state to act as a 'world policeman' by taking unilateral action.²³⁰ Any use of force which falling outside the exceptions expressly laid out by the Charter²³¹even for humanitarian reasons is in direct violation of the general prohibition of the recourse to force contained in Art 2(4).²³²

²²⁵ United Nations, 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, (1970)

²²⁶ Corfu Channel Case (Merits) [1949] ICJ Rep 4, 31 (In its ruling the ICJ rejected the UK government argument that forcible intervention in Albanian territorial waters in order to recover evidence that might indicate who was responsible for the destruction of two British warships was not in violation of Art 2(4) because it did not violate the territorial integrity or political independence of Albania. The ICJ stated that 'the court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and cannot....find a place in international law...intervention....would be reserved for the most powerful states')

²²⁷ Nicaragua v USA., International Court of Justice, June 27, 1986, Para 199

²²⁸ Dinstein (n 221) 88

²²⁹ Thomas Franck and Nigel Rodley, 'After Bangladesh : the Law of Humanitarian Intervention by Military Force' (1973) American Journal of International Law 275; Oscar Schachter, 'The Right of States to Use Armed Force' (1984) Michigan Law Review 1620; W. Michael Reisman, 'Coercion and Self-Determination: Construing Article 2(4)' (1984) Yale Law School 645; J.P Fonteyne, 'The customary international law doctrine of humanitarian intervention' (1974) California Western ILJ 203, 253-254; Christine Gray, *International Law and the Use of Force*, (Oxford University Press 2004) 31-32

²³⁰ Dinstein (n 221), 85 and Gray ibid 35

²³¹ UN Charter Art 51 and 42 allows state to use lawful force in will be discussed in detail in next section

²³² Oscar Schachter, 'The legality of pro-democratic invasion' (1984) A.J.I.L. 645, 650; Gray (n 230) 315;UN Charter Art 39-49

To summarise, the phrase 'use of force against the territorial integrity or political independence of any state' in Art 2(4) does not limit the prohibition on the use of force but rather signifies the totality of legal rights of a state therefore a prohibition on the use of force is a comprehensive prohibition and any use of force will be *prima facie* breach of that prohibition. If the use of force was to be deemed to be lawful than it would need to be supported by an exception, for example the right of self-defence as given in Article 51 or authorisation of a use of force by the Security Council as established in practice due to the failure to implement in full the collective security system foreseen in the Charter. The following section will discuss right to use force in self-defence.

2.3 The right of self-defence in International law

Article 51 of the UN Charter sets out the central elements of the right of self-defence. First of all it is an 'inherent right' of states and Article 51 is merely recognising that such right already exists; however, the UN membership involves additional conditions. The term 'inherent' refers to customary international law.²³³ In assessing the states right to use force in self-defence one must look not only at the Art 51 but also at the customary international law.²³⁴ The dual legal basis of the right of self-defence was recognised by the ICJ in the Nicaragua case, where the Court considered that Article 51 does not 'subsume and supervene customary international law...it rather demonstrates that customary international law continues to exist alongside treaty law'.²³⁵ Secondly the right to use force in self-defence is available only in response to an 'armed attack'. This means that political or economic pressure and less grave use of force does not give rise to the right to use

²³³ Nicaragua v USA., International Court of Justice, June 27, 1986, Para 76 ('On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 5 1, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 5 1 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence')

²³⁴ The Customary right of self-defence has its origin in the famous Caroline case "see Extracts from Mr Webster's letter of April 24, 1841 are to be found in D.J. Harris, *Cases and Materials on International Law*, (5th Edition, 1998), 895

²³⁵ Nicaragua v USA, International Court of Justice, June 27, 1986, Para 94

military force in self-defence.²³⁶ Thirdly, self-defence can be individual or collective so there is recognition of mutual defence agreements. Finally it applies only until 'the Security Council has taken measures necessary to maintain international peace and security'.²³⁷

States must fulfil certain conditions to use force in self-defence lawfully. The ICJ has held in various cases that according to customary international law, the use of force in self-defence is only permissible where the measures are proportional to the armed attack they are trying to repel and its necessary to respond to it.²³⁸ The requirements of necessity and proportionality are found in the Caroline case.²³⁹

2.3.1 Necessity

The condition of necessity requires justifying both the immediacy of the attack, the use of self-defence is trying to deter and as the use of force a last resort. Immediacy does not mean that a period of time cannot elapse between the original armed attack and the use of force in self-defence. There are few examples of this in state practice. The UK forces responded to the attacks of the Falkland Islands in the 1980s weeks after they started.²⁴⁰ When the Iraqi government invaded Kuwait in 1991 the coalition forces waited four months to react on self-defence.²⁴¹ Likewise, the US invaded Afghanistan four weeks after the attack of 9/11.²⁴² Thus, state practice reveals that some margin

²³⁶ *ibid*, Para 110, 101

²³⁷ UN Art 51

²³⁸ *Nicaragua v USA*, International Court of Justice, June 27, 1986, Para 176; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion 1996), para 41 and 42; *Oil Platforms (Islamic Republic of Iran v. United States of America)* 1996, para, 74

²³⁹ The Case arose out of the Canadian Rebellion of 1837. The rebel leaders, despite steps taken by United States authorities to prevent assistance being given to them, managed on December 13, 1837, to enlist at Buffalo in the United States the support of a large number of American nationals. The resulting force established itself on Navy Island in Canadian Waters from which it raided the Canadian shore and attacked passing British ships. The force was supplied from the United States shore by an American ship, the *Caroline*. On the night of December 29-30, the British seized the *Caroline*, which was then in the American port of Schlosser and hence on American territory, fired her and sent her over Niagara Falls. Two United States nationals were killed." The Facts of the case are taken from: D.J. Harris, *Cases and Materials on International Law*, (5th Edition, 1998), 894

²⁴⁰ Kinga Tibori Szabó, *Anticipatory Action in Self-Defence: Essence and Limits under International Law* (Asser Press 2011) 271

²⁴¹ 'Gulf war' < <http://www.saylor.org/site/wp-content/uploads/2011/06/Gulf-War.pdf> > accessed at 17 May 2016

²⁴² Tom Lansford, '9/11 and the Wars in Afghanistan and Iraq: A Chronology and Reference Guide' (ABC-CLIO 2011) 44

exists in the timing to respond to an armed attack. However, a state loses its right to use force in self-defence where the armed attack is over, damage has been done and there is no future immediate threat occurring. A forceful response long after an attack is considered retaliatory and therefore unlawful.²⁴³ Conversely, a state may use force in self-defence in the case of continuing threat or series of armed attacks.²⁴⁴ In short, the principle of necessity requires that an armed attack must be in progress or about to be launched in the near future and there are no alternatives available in order to stop or repel the attack.

2.3.2 Proportionality

Proportionality requires that once force is deemed to be necessary the amount of force used must not exceed what is sufficient to repel the threat of attack. The principle of proportionality does not require the victim state to use equal amount of force in self-defence. In the words of Judge Higgins, ‘the concept of proportionality in self-defence limits a response to what is needed to reply to an attack’ and does not involve ‘a requirement of symmetry between the mode of the initial attack and the mode of response’.²⁴⁵ Indeed, it is not always possible for a victim state to use equal amount of force in self-defence. This is the case of illegally occupied territories where the attacking State has a position of military advantage associated to the control over a territory.

²⁴³ Oil platform case Reply and defence to counter-claim submitted by the Islamic Republic of Iran, 10 March 1999, para 7.74: “In the case of single armed attacks ...the attack is terminated when the incident is over. In such a case the subsequent use of counter-force constitutes a reprisal and not an exercise of self-defence”. Judges also seem to endorse Iran’s position and Judge Simma (Separate Opinion para 15) concluded that US use of force against Iran cannot be “regarded as necessary in order to justify action taken in self-defence”, Kooijmans (Separate Opinion para 52, 55, 62) argued that assessment of US attacks give the impression that punitive intent prevailed, Judge Elaraby (Dissenting Opinion para 1.2) said that the USA’s aim was punitive and actions were reprisal; James Turner Johnson and Eric D. Patterson, *The Ashgate Research Companion to Military Ethics* (Routledge 2015) 235; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2010) 53

²⁴⁴ Dinstein (n 221) 228, 231; Mary Ellen O’Connell, ‘Lawful Self-Defense to Terrorism’ (2002) *Journal Articles*, Paper 599, 893-894 ; Carsten Stahn, *International Law at a Crossroads? The Impact of September 11* (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 2002) 233

²⁴⁵ Legality of the Use by a State of Nuclear Weapons in Armed Conflict - Advisory Opinion of 8 July 1996 - Advisory Opinions [1996] ICJ 2; ICJ Reports 1996, p 66; [1996] ICJ Rep 66 (8 July 1996), Dissenting opinion of Judge Higgins, para 5

2.3.3 Existence of an armed attack

Art 51 makes the right of self-defence dependent on the existence of an armed attack. It is argued that self-defence is not available to be used against all unlawful use of force but is only available if an armed attack has occurred. The conceptual contours of the term 'armed attack; cannot be found in the UN Charter but have been provided by the ICJ in the Nicaragua.²⁴⁶ According to the ICJ, the attack will only be considered an armed attack triggering the right of self-defence, if the scale of violence is above the 'mere frontier incidents',²⁴⁷ although a series of small-scale attacks taken cumulatively may also amount to an armed attack.²⁴⁸ In the Oil Platforms case, the ICJ reaffirmed this position.²⁴⁹ The narrowness of the Nicaragua criteria for determining whether a state sponsor of terrorist acts would be considered as the author of an armed attack sustained strenuous criticism from one of the dissenting Judge. Judge Jennings argued that the provision of arms could be 'very important in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement'.²⁵⁰ He raised the important question that what a state can do when there is unlawful use of force not amounting to an armed attack. He stressed that the Court's view created a 'large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap was absent'.²⁵¹ A similar position was advanced by Judge Schwebel who argued that the provision of 'arms, munitions, other supplies, training, command and control facilities, sanctuary and lesser forms of assistance' in fact represented 'substantial involvement', and should be sufficient to trigger the right of self-defence.²⁵² While requiring passing a test of intensity, the Court has failed to provide clear criteria on the level of intensity necessary to define an armed attack and uncertainty remains in this area.

²⁴⁶ Nicaragua v USA, International Court of Justice, June 27, 1986, Para 103-104

²⁴⁷ Ibid Para 93

²⁴⁸ Ibid Para 119-120

²⁴⁹ Oil Platforms case Supra note 291, Para 64

²⁵⁰ Nicaragua v USA, International Court of Justice, June 27, 1986, p. 543-545; Also see Gray Supra note 275, 186-187

²⁵¹ Ibid Nicaragua

²⁵² Ibid, Para 162-171

2.3.4 Collective self-defence

In this globalised world it is important to note that self-defence can also occur when multiple states are operating together. Collective self-defence consists of joint action taken by several states in response to an actual armed attack against any one state. The legal framework governing the legality of collective self-defence does not defer from those established for individual self-defence. An example of acting together whether or not lawfully could be invasion or occupation of Iraq in 2003 in which the US, UK, Australia, Spain and Poland joined to oust Saddam Hussein.²⁵³ In case of collective self-defence a third state cannot act on behalf of a victim state until the victim state asserts that it was attacked and formally requests the third state to help.²⁵⁴

2.4 Use of force in self-defence and war against terrorism

A grey area regarding the use self-defence is the applicability of the rules governing inter-states disputes when a non-state actor who is based in the territory of another state conducts an armed attack. This is an area where practice has grown exponentially since the Charter was drafted and where perhaps the law might be changing through practice and *opinion juris*. In October 2001, the US used force against the Taliban who were providing, at most, only logistical support to Al-Qaeda.²⁵⁵ The Nicaragua test of 'effective control' formulated by the ICJ does not fit easily since there is no evidence of such control of the operations of Al-Qaeda by the Taliban.²⁵⁶ However, a growing state practice suggests the emergence of a right to use armed force against a state where terrorists are based, even when such state is not imputable for the actions of the terrorist group. Examples of this state practice are numerous and can be found in Israeli invasion of Lebanon,²⁵⁷ Turkey's

²⁵³ Dominic McGoldrick, *From '9-11' to the 'Iraq War 2003': International Law in an Age of Complexity*, (Hart Publishing 2004)

²⁵⁴ *Nicaragua v USA*, International Court of Justice, June 27, 1986, Paras 233-234

²⁵⁵ Paolo Tripodi and Jessica Wolfendale, *New Wars and New Soldiers: Military Ethics in the Contemporary World* (Ashgate 2012) 51

²⁵⁶ There was never any suggestion that the 9/11 attacks were the actual work of the Taliban regime in Afghanistan See Rachel E. Utley, *9/11 Ten Years After: Perspectives and Problems*, (Routledge 2016) 184

²⁵⁷ Yaroslav Shiryayev, 'The Right of Armed Self-Defence in International Law and Self-Defence Arguments Used in the Second Lebanon War' (2008) *ACTA SOCIETATIS MARTENSIS*, 80-97 (In 2006 Israel responded to actions by Hezbollah based in Southern Lebanon by invading Lebanon and using force in self-defence. This example was complicated by the fact that although Hezbollah was

invasion of Northern Iraq,²⁵⁸ the use of armed force by Russia against Georgia,²⁵⁹ Ethiopia against Somalia,²⁶⁰ Uganda against Congo,²⁶¹ or the US drone strikes in Pakistan Yemen and Somalia²⁶². In 2014 and 2015 states have invoked the right of self-defence to use force against the Islamic State of Iraq and the Levant (ISIL) also known as Islamic State of Iraq and Syria (ISIS) in Syria and Iraq.²⁶³ All invocations of the right to use force in self-defence against terrorist attacks since 9/11 are based on a right to use defensive force

controlling a substantial portion of Southern Lebanon but was not acting on behalf of Lebanese Government. This raises the question that was state of the Lebanon responsible for the actions of Hezbollah nevertheless?)

²⁵⁸Sebnem Arsu & Stephen Farrell, 'Turkey Says Its Raids in Iraq Killed 150 Rebels' *New York Times* (26 Dec 2007) < <http://www.nytimes.com/2007/12/26/world/europe/26turkey.htm> > (Turkey's 2008 ground incursion into Iraq to incapacitate Kurdish rebels is another example. Iraq's Kurdish region had considerable autonomy from the central government but was not in any meaningful sense ungoverned. Moreover, although some Iraqi officials were probably sympathetic to the rebels, the evidence that these officials actively harboured or supported the rebels is weak. Iraqi officials in the Kurdish region had dissociated themselves from the rebels, and the central Iraqi government was working with Turkey to address the violence. The government was, however, unable to prevent the violence. The incident also raised question can you invade a sovereign states territory from where non-state actors attack?)

²⁵⁹ Theresa Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defence Post-9/11' (2011) *American Journal Of International Law* 244, 255-57 (reviewing incident) Russia's 2002 and 2007 incursions against Chechen rebels in Georgia. Although Georgia was actively taking measures to suppress the rebels' violence, these measures were not yet effective.

²⁶⁰ Getachew Metaferia, *Ethiopia and the United States: History, Diplomacy, and Analysis* (Algora publishing, 2009) 140 (Ethiopia invaded Somalia in 2006 to fight religious extremist in self-defence. This use of force was never condemned by the SC or the African Union, thereby suggesting that the rules on forcible responses to terrorism have developed to some extent outside the UN framework) See Vincent-Joël Proulx, *Institutionalizing State Responsibility* (Oxford University Press 2016) 316

²⁶¹ In March 2008 Columbia attacked members of the Revolutionary Armed Forces of Columbia at a base located in Ecuador. Columbia claimed it had acted in self-defence because the non-state actors were using force against them from a third country) see Abraham D. Sofaer, *The Best Defence?: Legitimacy & Preventive Force* (Stanford University 2010) 52

²⁶² David Cortright, Rachel Fairhurst and Kristen Wall, *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press 2015) 103; Robert Mandel, *Coercing Compliance: State-Initiated Brute Force in Today's World* (Stanford University Press 2015) 38 (US argues that it targets non-state actors in these states because states are unable or unwilling to deal effectively with the threat)

²⁶³ Security Council 'Unequivocally' Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses 'Unprecedented' Threat, 20 Non 2015, SC/12132 < <http://www.un.org/press/en/2015/sc12132.doc.htm> > accessed 21 May 2016; UK wrote a letter to SC to use force in collective self-defence of Iraq against ISIL in Syria Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, S/2015/688 < http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_688.pdf > accessed 21 May 2016; Iraqi government wrote a letter to SC stating that they have requested US to help them in regaining their territory from ISIL See Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, 22 Sep 2014, S/2014/691, < http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf > accessed 21 May 2016

directed against non-state actors. In each case, the victim state has argued that the territorial state is either complicit in the attacks or is unable or unwilling to thwart the terrorists in their territories. In all these cases the states have not claimed a right to use force directly against the territorial state and did not claim that these non-state actors were controlled by the state targeted. Such state of affairs contradicts the jurisprudence of the ICJ regarding the responsibility of states for the actions of non-state actors and the legality of the use of force.²⁶⁴ While it can be argued that state practice has resulted in a change of customary international law, this has not been reflected in the judgements of the International Court of Justice who has maintained its position in cases decided after September 11. It is Advisory Opinion on the Legality of the Construction of a Wall in the Occupied Territory and its Judgment on the Armed Activities on the Territory of the Congo the ICJ has reiterated that force may only be used in self-defence against a state, if the territorial state is legally responsible for the acts of non-state groups.²⁶⁵

These decisions are at odds with state practice. Another intergovernmental organisation, NATO, has invoked self-defence provision for the first time after 9/11 attacks²⁶⁶ and the UNSC adopted Resolution 1368 and 1373 (2001) implicitly affirming the right of self-defence in this situation.²⁶⁷ It has been argued that the rules of attribution governing the responsibility of states are not the adequate lens for analysing self-defence because the right to self-defence is an inherent right of a state and there is no need for a host state to be legally responsible for the actions of non-state actors. The right of self-defence serves the purpose of repelling an attack with independence of another state's responsibility for a breach of international law. As long as the

²⁶⁴ (Court said that financing, training, supplying and equipping and armed group would not trigger the right of self-defence but sending the groups or substantial involvement in their actions may do) Nicaragua Para. 195

²⁶⁵ In Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion), 2004, para 138-141 The ICJ has said that a state may use force in self-defence against non-state actors in a host state if the actions of the non-state actor can be imputed to the host state; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (2005), Paras 146-147 A majority of the ICJ judges agreed that if the attacks by armed bands were not attributable to a state there are no legal circumstances for the exercise of a right of self-defence against the state.

²⁶⁶ North Atlantic Treaty Organisation, Collective defence - Article 5, (2001) < http://www.nato.int/cps/en/natohq/topics_110496.htm > accessed 18 May 2016

²⁶⁷ United Nations Security Council, Resolution 1368, S/RES/1368 (12 Sep 2001); United Nations Security Council, Resolution 1373, S/RES/1373, (18 Sep 2001)

territorial state is either unable or unwilling to prevent non-state actors from using their territory against other states, these activities are threats comparable to any other armed attack that would raise the right to stop or repel it by all available means, including the use of armed force.²⁶⁸

Other commentators disagree with this position and argue that Art 51 does not exist in a vacuum and must be read in conjunction with other principles of law, enshrined in the Charter and customary law, including the principle of territorial integrity, sovereignty and the prohibition of the use of force. Interpreting Article 51 to permit the use of force against non-state actors on the territory of another state, without the consent of that state, would undermine the notion of territorial integrity or state sovereignty.²⁶⁹ Arguably, the unwillingness and inability of a specific state to combat terrorism within its borders does not equate to complete freedom to use force in self-defence. The traditional criteria of necessity and proportionality apply in situations where a territorial state is not legally responsible for the acts of non-state actor. It is important then to question- is it necessary to use force to prevent future attacks? Are those attacks imminent? What other peaceful actions if available were taken by the victim state before using force in self-defence?

2.4.1 Law of self-defence and pre-emptive strikes

As discussed above, some states have claimed that the post-9/11 scenario has changed the International law. For instance, the 2002 US National Security Strategy suggests that a right of self-defence cannot be confined to imminent armed attacks. It had to be capable of being used pre-emptively

²⁶⁸ Dapo Akande, 'The Right of Self-Defence in International Law' < http://legal.un.org/avl/ls/Akande_PS_video_2.html > accessed 18 May 2016; However others argue that "It is certainly possible to argue that the customary rules governing the use of force in self-defence have evolved to adopt the "unwilling or unable" standard. But that is a highly contentious and extraordinarily difficult question" See Kevin Jon Heller, 'The "Unwilling or Unable" Standard for Self-defence', (Opinio Juris, 17 Sep 2011) < <http://opiniojuris.org/2011/09/17/the-unwilling-or-unable-standard-for-self-defense-against-non-state-actors/> > accessed 18 May 2016; Ruys concluded in his study of Article 51 that examines state practice and opinio juris concerning the use of armed force against non-state actors suggested that law is developing in this field and concluded that "we believe that customary law is evolving towards a different application of Article 51 UN Charter in relation to defensive action against a State – viz. coercive action that directly targets the State's military or infrastructure – and defensive action within a State – viz. recourse to force against a non-State group present within the territory of another State." See Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter Evolutions in Customary Law and Practice* (Cambridge University Press 2010)

²⁶⁹ Mr. Dire Tladi, 'Use of Force in Self-Defence Against Non-State actors in International Law' < http://legal.un.org/avl/ls/Tladi_PS_video_2.html > accessed at 18 May 2016

against the threat that has not yet become imminent.²⁷⁰ Scholars who defend that the standard outlined by Caroline Case applies do not share this view.²⁷¹ However, states were not facing the threat of international terrorism in 1837. Arguably,

The destructive power of today's weapons....make it possible to launch attacks....with little or no warning....eliminating altogether the time between when it is known that an attack is imminent....and when the attack occurs.....terrorists operating in secret may carry out attacks causing great destruction without warning, without them ever having become visibly imminent.²⁷²

The sign of the coming terrorist attack will often be the attack itself. Thus imminent as defined in traditional International law is a limiting factor because terrorist can launch attacks with greater speed and surprise the states. For this reason it is argued that a new and more nuanced definition of pre-emptive force is necessary.²⁷³

Whether a new conceptual framework is needed or not, the use of force in self-defence to respond to threats that might occur at some point in the future have no basis in the present International law. The preventive theory has failed to attract ample support internationally, whereas the notion that pre-emptive force could be employed in self-defence against imminent armed

²⁷⁰ The National Security Strategy of the United States of America, The white House Washington, (Sep 2002) 15 ("For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.")

²⁷¹ Robert Jennings and Arthur Watts, *Oppenheim's International Law* (Longman 1992) 420 ("The basic elements of the right of self-defence were aptly set out in connection with the Caroline incident in 1837..."); Clive Parry and John Grant, *Parry and Grant encyclopaedic dictionary of International law*, (Oceana publications 1986) 361 (Under customary international law, it is generally understood that the correspondence between the US and UK...arising out of the Caroline incident...expresses the rules on self-defence.....")

²⁷² Karl P. Mueller, Jasen J. Castillo, Forrest E. Morgan, Negeen Pegahi and Brian Rosen, *Striking First: Pre-emptive and Preventive Attack in U.S. National Security Policy* (RAND Corporation 2006) 57

²⁷³ W. Taft/T. Buchwald, 'Pre-emption, Iraq and International law' (2003) *Journal of International law*, 563; A.D. Soafer, 'On the necessity of pre-emption' (2003) *European Journal of International law*, 225; R Wedgwood, 'The fall of Saddam Hussein, Security Council mandates and pre-emptive self-defence' (2003) *American Journal of International law*, 582-585

attack has received robust sustenance.²⁷⁴ The current position on the (un)lawfulness of preventive strikes can be summed up by the 2004 UN report, 'A more secured world our shared responsibility' reiterating the principles of imminence and proportionality underpinning lawful uses of force in self-defence.²⁷⁵ Non-imminent threats must be assessed by the UN Security Council, which can authorise the use of force, but are not the legal basis of unilateral actions involving armed force.²⁷⁶ If the legal limits are vague, not fixed and interpretation is left to the state, it would render meaningless the Charter's central purpose, which prohibits states' 'threat or use of force against the territorial integrity or political independence of any state' under Article 2(4).²⁷⁷

So far we have discussed the rules and laws that govern the lawfulness of the resort to armed conflict (*jus ad bellum*). The next section will deal with the law applicable to the conduct of hostilities that applies once a party has entered into armed conflict (*jus in bello*). Once hostilities have begun, the rules of international humanitarian law equally apply to both sides in the conflict,

²⁷⁴ Lord Goldsmith gave secret advice to UK Government on the legality of use of force against Iraq which was leaked in 2005. He stated that use of force could be justified if state faces to some degree an imminent threat. On the issue of preventive self-defence, he notes simply that, "if this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which in my opinion exists or is recognised in International law" See Prime Minister Iraq Resolution 1441, Para 2-3 < <http://downingstreetmemo.com/docs/goldsmithlegal.pdf> > accessed 18 May 2016; Philip Alston and Euan Macdonald, *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008) 6-12; Theresa Reinold, *Sovereignty and the Responsibility to Protect: The Power of Norms and the Norms of the Powerful* (Routledge 2012) 149 (The author rejects the legality of preventive war categorically and argues that "the debate over the legitimacy of preventive war has not only reaffirmed the primary rules of international law on the use of force...but has bolstered the traditional approach to custom formation which draws a clear distinction between what law is and what the law ought to be"); Rainer Hofmann, 'International law and the use of military force against Iraq' (2002) *German Yearbook of International law*, 32-33 ; Michael Bothe, 'Terrorism and the legality of pre-emptive force' (2003) *European Journal of International law*, 236-239; On domestic level even American public rejects the notion of using force in self-defence against non-imminent threat See Fraser Cameron, *US Foreign Policy after the Cold War: Global Hegemon Or Reluctant Sheriff?* (Routledge 2005) 111

²⁷⁵ UN, *A more secure world: Our shared responsibility Report of the High-level Panel on Threats, Challenges and Change*, (2004) Para 188

²⁷⁶ *Ibid* para 189-191 (The issue of imminence becomes very serious if seen in the context of individual right of self-defence. However it becomes less problematic when seen in the context of collective self-defence authorised by SC under Art 39 of Charter. The measure in Art 39 can be used pre-emptively and there is no requirement to show that the threat is imminent)

²⁷⁷ Thomas M. Franck, 'Collective Security and UN Reform: Between the Necessary and the Possible' (2006) *Chicago Journal of International Law*, 607

regardless of who is the aggressor.²⁷⁸ Because the main purpose of the humanitarian law is to protect individuals rather than states, and those individuals are in general not responsible for the criminal actions of their state.²⁷⁹

2.5 International Humanitarian law

International humanitarian law (IHL) is also referred as law of armed conflict or *jus in bello* and applies in times of armed conflicts. IHL distinguishes between two types of armed conflicts; 1) armed conflicts of an international character, and 2) armed conflicts not of an international character. International armed conflict (IAC) occurs between two or more states and non-international armed conflict (NIAC) occurs between states and organised non-state armed groups or between such groups.

2.5.1 International armed conflict

In IAC all four of the 1949 Geneva Conventions²⁸⁰ and Additional Protocol I²⁸¹ (only for states that have ratified it) apply. A declaration of war is not required in the case of IAC. The threshold for an IAC is extremely low.²⁸² An

²⁷⁸ At the diplomatic conference which adopted the 1977 Additional Protocols, Vietnam argued that states which committed acts of aggression should not be allowed to benefit from the provisions of humanitarian law see Official records of the diplomatic conference on the Reaffirmation and Development of International Humanitarian law applicable in Armed Conflicts, Geneva (1974-1977), Volume IV, P. 177-178, < https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-4.pdf > accessed 3 June 2016 ; Vietnams proposal was roundly rejected and the preamble to Additional Protocol I was instead adopted by consensus which reads that ‘the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict’

²⁷⁹ War crimes trials held at the end of WWII make clear that the provisions of the earlier Hague Conventions on the laws of wars apply equally to all parties in a conflict See US v List (1948) 15 Annual Digest 632; Singapore oil stock case (1956) 23 ILR 810

²⁸⁰ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949;

²⁸¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Additional Protocol applies because Article 1.3 notes “This Protocol....supplements the Geneva Conventions” and “apply in the situations referred to in Art 2 common to those Conventions”

²⁸² In the words of the Geneva Conventions, the law of international armed conflict applies to ‘all cases of declared war or of any other armed conflict which may arise between two or more of the

IAC occurs where one state's armed forces intervene in another state.²⁸³ The duration of conflict²⁸⁴ and number of civilian casualties is irrelevant.²⁸⁵ However minor incidents that last for short period of time with fewer or no casualties were not classified as armed conflicts.²⁸⁶ For instance in 1981, the US fighter aircrafts were engaged in a fire fight with Libyan aircraft above the Gulf of Sidra. Although the event involved the use of force but because of its low intensity scholars classified this case as an incident, not an armed conflict.²⁸⁷ Obviously, the armed attack will only materialise if the victim state responds in kind. For instance the UK has recently concluded that the allegedly Russian involvement in the poisoning of Mr Sergei Skripal and his daughter in March 2018 'amounts to an unlawful use of force by the Russian state against the United Kingdom'²⁸⁸. However, an IAC would require a response in self-by using armed force by the UK.

2.5.2 Non-international armed conflict

In a NIAC common Article 3, Additional Protocol II and Article 8(2e) of the ICC Statute apply. Common Art 3 does not provide definitions; it simply refers to 'the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties...'²⁸⁹ The difficulty historically in turning to Article 3 is that there is no definitive guidance to what is meant by

High Contracting Parties, even if the state of war is not recognised by one of them' see Common Article 2 Geneva Conventions of 1949

²⁸³ ICRC Commentary explains that 'any difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict' see J. Pictet (ed.), *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field* (ICRC, 1952), 32; In Tadic ICTY held that an international armed conflict exists wherever there is 'resort to armed forces between states' see Cf. Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, Appeals Chamber (2 Oct 1995), p. 70

²⁸⁴ *Abella v Argentina*, supra n 4 at paras. 149-55 (Commission held that an armed conflict had indeed occurred despite the fact that fighting lasted only thirty hours because of the the direct involvement of governmental armed forces, and the nature and level of the violence); Pictet *ibid* 32

²⁸⁵ J. Pictet, 'Commentary to the Third Geneva Convention, Relative to the treatment of prisoner of war' (ICRC 1960) 23 < http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf > accessed 3 June 2016

²⁸⁶ M E O'Connell, 'Enhancing the Status of Non-State Actors Through a Global War on Terror' (2004) *Columbia Journal of Transnational Law* 435, 445-46

²⁸⁷ Steven R. Ratner, 'The Gulf of Sidra Incident of 1981: The Lawfulness of Peacetime Aerial Engagements, in *International Incidents*', (1985) 10 *Yale J. Int'l L.* 59, 75-77

²⁸⁸ BBC News, 'Russian spy: Highly likely Moscow behind attack, says Theresa May' (13 March 2018) < <https://www.bbc.co.uk/news/uk-43377856> >

²⁸⁹ Article 3, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949

the phrase 'conflict not of an international character'. The fact that common Article 3 applies to all cases of armed conflict not of an 'international character' suggest its applicability could be virtually limitless. This begs the question in what circumstances organised armed violence constitutes an armed conflict? And what is the difference between internal armed conflict or internal violence? This answer can be found in Additional Protocol II to the Geneva Convention which supplements the common Article 3²⁹⁰and expressly excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence other acts of similar nature, as not being armed conflicts'.²⁹¹ Situations of internal violence are dealt with the framework of human rights law. The time, space and intensity of the hostility are helpful in deciding whether a specific situation amounts to NIAC.²⁹² Protracted violence²⁹³that extends to a significant part of the territory of a state would affect large sectors of the population and will be categorised as a NIAC. Intensity is also crucial because it distinguishes between internal violence and internal armed conflict. Low intensity armed conflicts can fall within the definition of common Article 3; a low level violence that pose no threat to government or civilian population cannot be classified as internal armed conflict.²⁹⁴

2.5.3 Additional Protocol II and non-international armed conflict

A much higher threshold of application was introduced in Additional Protocol II. Article 1(1) of Additional Protocol II only applies to armed conflicts between the armed forces of a high contracting party and 'dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations'.²⁹⁵ In addition Art 1(2) provides that 'this

²⁹⁰ Art 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

²⁹¹ Art 1(2) *ibid*

²⁹² Laura Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (Martinus Nijhoff Publishers 2006) 57

²⁹³ In Tadic case ICTY confirmed that internal armed conflict involves 'protracted armed violence' See Prosecutor v Tadic, Case No. IT-94-1-T, 7 May 1997, Para 70

²⁹⁴ *ibid*

²⁹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. Unlike common Article 3, Additional Protocol II is quite limited in its application. Additional Protocol applies only to conflicts between state and a rebel group, Common Article 3 is broad enough to cover a conflict between different rebel groups as well. The Additional Protocol requires a higher degree of organisation of armed groups whilst common Article 3 only requires a minimal degree of organisation.²⁹⁶ Another requirement for the applicability of the Protocol is that the armed group must exercise control over a sizeable part of territory.²⁹⁷ The Akayesu Trial Judgement noted that the armed group 'must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II'.²⁹⁸

The effective control over territory attracted mixed reactions from states. Some states, such as Indonesia, took the view that the armed forces should: 'exercise effective and continuous control over substantial...part of its territory for such a prolonged period as to enable them to carry out sustained and concerted military operations of a high intensity and to implement this Protocol'.²⁹⁹ However other states such as Syria and Kenya rejected the requirement of territorial control and argued that 'it opened the door to conflicting interpretations which would make it impossible to implement' the Protocol.³⁰⁰ For Egypt the requirement of territorial control 'was too restrictive in view of the nature of modern, and particular guerrilla, warfare....urban guerrilla armed conflict would not fulfil the requirement of territorial control....would then exclude from the ambit of Protocol II'.³⁰¹ The UK government argued that the Protocol is limited in scope and can only be

²⁹⁶ Prosecutor v Boskoski and Tarculavoski, (2008), IT-04-82-T, para 197

²⁹⁷ Additional Protocol II, Art 1; International Law Association Committee on the Use of Force, Final Report on the Meaning of Armed Conflict in International Law (2010). 12

²⁹⁸ Prosecutor v Jean-Paul Akayesu, Case No ICTR-96-4-T, Judgement, 2 September 1998, para. 626

²⁹⁹ Official records of the diplomatic conference on the Reaffirmation and Development of International Humanitarian law applicable in Armed Conflicts, Geneva (1974-1977), Volume VII, Para. 71 < https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-7.pdf > accessed 4 June 2016

³⁰⁰ Ibid, p. 67, para 47 (Syria), para 82 (Kenya)

³⁰¹ Ibid Vol VIII, p. 235, Para 32, < https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-8.pdf > accessed 4 June 2016

applied to conflicts that were of a 'significant intensity'.³⁰² The opinions regarding the threshold of Protocol are so different that 'it is impossible to trace any common understanding'.³⁰³ The result of the limitations discussed above may indicate 'Additional Protocol II is basically a non-operational treaty'.³⁰⁴ No wonder various commentators view application of Common Art 3 favourably in the case of NIAC in lieu of Protocol II. For instance the International Criminal Tribunals for the Former Yugoslavia and Rwanda noted:

The limited categories of armed conflicts to which Additional Protocol II may be said to apply and doubts as the extent to which it is now part of customary international law have deterred the prosecution....from entering the realm of Additional Protocol II with much enthusiasm, preferring instead to rely on Common Article 3³⁰⁵

Similarly, George Aldrich, who was the head of the US Delegation to the Protocol negotiations stated:

Protocol II...affords very limited protections and has escape clauses designed to make its applicability easily deniable. In the end the only useful result of Protocol II may be to make it somewhat more likely that [common] Art 3...may be found applicable in lieu of Protocol II³⁰⁶

The crucial point is that the criteria contained in Protocol provide little help in defining what constitutes NIAC. Moreover it can be argued that the high bar of application established by the Protocol has provided further excuse for governments to deny the existence NIAC within their borders.³⁰⁷

³⁰² Official records of the diplomatic conference on the Reaffirmation and Development of International Humanitarian law applicable in Armed Conflicts, Geneva (1974-1977), Volume VII, Para 121

³⁰³ Anthony Cullen, *The concept of non-international armed conflict in International Humanitarian Law* (Cambridge University Press, 2010), 101

³⁰⁴ Kenneth Watkin, Andrew J. Norris and Naval, *Non-international Armed Conflict in the Twenty-first Century* (Government Printing Office, 2012), 17

³⁰⁵ Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, 2005), 144

³⁰⁶ G H Aldrich, 'Some reflections on the origins of the 1977 Geneva Protocols' in C. Swinarski (ed), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, p. 136

³⁰⁷ Kenneth Watkin and Andrew Norris, *Non-International Armed Conflict in the Twenty-First Century* (Government Printing Office 2012) 47-48

2.5.4 The 1995 Tadic Jurisdiction decision and non-international armed conflict

A decision by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of Tadic has significantly influenced the development of the law of armed conflict.³⁰⁸ The ICTY established that an 'armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.'³⁰⁹ The Tribunal thus defined NIAC as 'protracted' armed violence that occurs between a state and organised armed group or between two or more armed groups within a state. The term protracted refers more to the intensity of the armed violence than to its duration; it does not require sustained military operations that are conducted continuously.³¹⁰

The Tadic Trial Chamber further explained the definition of NIAC in the following words:

The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organisation of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.³¹¹

The two aspects of NIAC put forward by the Tadic Trial Chamber -the 'intensity' of the conflict and the degree of 'organisation of the parties' involved in the conflict- arguably now serve as a basis for the recognition of 'de facto'

³⁰⁸ Prosecutor v. Tadic, Case No. IT -94-1-1, Decision on Defence Motion for Interlocutory Appeal on jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)

³⁰⁹ Ibid p. 70

³¹⁰ Ibid; The Prosecutor v Haradinaj, Balaj, and Brahimaj, IT-04-84-T, Trial Chamber Judgement, 3 April 2008, paras 37-49

³¹¹ Prosecutor v. Tadic, Case No. IT -94-1-T, Judgment, 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997)

NIAC, and thus for the application of Common Article 3 to such conflicts. Support for this view can be found in case law. The International Criminal Tribunal for Rwanda employed this approach to determine the existence of NIAC when it held that ‘it is necessary to evaluate both the ‘intensity’ and ‘organisation of the parties’ to the conflict’.³¹²

Further endorsement of the Tadic criteria is reflected in the adaptation of the ‘Tadic formula’ in the Rome Statute of the International Criminal Court. The Article 8(2)(f) of the Rome Statute states that the Statute applies ‘to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups’.³¹³

However, both the Statute and case law have failed to categorically explain the level of intensity and organisation required in an armed conflict. The requirement that the violence must be of a certain level of intensity can be interpreted in a number of ways. The existing jurisprudence has highlighted the relevant factors in assessing the required level of intensity such the level of collateral damage, duration of hostilities³¹⁴, involvement of the UNSC,³¹⁵ geographic spread of the violence³¹⁶, or the displacement of the population.³¹⁷ The violence of higher magnitude although of brief duration may be regarded as NIAC.³¹⁸ In the absence of the exact meaning of the terms ‘intensity’ of a conflict and ‘organisation of the parties’ to a conflict, future state practice will sanction the validity of this approach.³¹⁹

2.5.5 Transnational non-international armed conflict

In addition to the IAC or NIAC, conflicts can also be ‘transnational’, that is, between a state and a non-state group (or between non-state groups) that take place on the territory of more than one state. This category is not codified

³¹² Prosecutor v. Akayesu, Case No. ICTR-96-4-T, judgment, 1 620 (Sept. 2, 1998)

³¹³ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90

³¹⁴ Prosecutor v Delalic and Landzo, Case No. IT-96-21-A (2001) para 189

³¹⁵ Boskoski trial judgement paras 220-4, 232-4 and 243

³¹⁶ Ibid para 216-234 and 243

³¹⁷ Limaj para 142, 167 and 134

³¹⁸ International Law Association Committee on the use of force, ‘Final report on the meaning of armed conflict in International law’, (2010) 30

³¹⁹ Watkin and Norris (n 304) 49

under international law and, arguably, IHL does not apply.³²⁰ Some scholars agree that the US could be involved in NIAC with Al-Qaeda but reject the notion of global armed conflict.³²¹

Transnational armed conflicts do not fit the category of IAC, because they don't take place between states, or the 'high contracting parties' - the prerequisite for the application of the Geneva Conventions.³²² Nor do these conflicts fall within the traditional understanding of NIAC.³²³ The Bush administration reasoned that common Article 3 is geographically bound and only applies within the territory of a state, and because the hostilities with Al Qaeda are boundary-less they could not be categorised as NIAC. The position that the conflict with Al Qaeda fell outside the scope of the Geneva Conventions was unfounded because Geneva Conventions cover all armed conflicts³²⁴ and was also rejected by the US Supreme Court in *Hamdan*.³²⁵ Many scholars did not accept the concept of transnational armed conflict but believed that there exist a NIAC between Al Qaeda and the US.³²⁶

Some argue that the use of force against non-state actors extraterritorially, even without the consent of territorial state, does not amount to IAC where the attacks are limited against non-state armed group and its associated military

³²⁰ Kenneth Roth, 'Letter to Obama on Targeted Killings and Drones', (*Human Rights Watch*, 7 Dec 2010) < <http://www.hrw.org/en/news/2010/12/07/letter-obama-targeted-killings> > accessed at 3 July 2015

³²¹ John C. Dehn & Kevin Jon Heller, 'Debate, Targeted Killing: The Case of Anwar Al-Aulaqi' (2011) *U. Pa. L. Rev. Pennumbra* 175, 197-198

³²² Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S.

85; Geneva Convention (III) relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949

³²³ *Hamdan v. Rumsfeld*, 548 U.S. 55, 628–631 (2006)

³²⁴ International Committee of the Red Cross, How is the term "Armed conflict" defined in international humanitarian law? international Committee of the Red Cross (ICRC) Opinion Paper, March 2008 < <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> > accessed 6 June 2016; Thom Shanker & Katharine Q. Seelye, 'Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions', *New York Times* (22 Feb 2002) A12 < <http://www.nytimes.com/2002/02/22/world/nation-challenged-captives-behind-scenes-clash-led-bush-reverse-himself-applying.html> > accessed 10 July 2015

³²⁵ *Hamdan v. Rumsfeld* (n 323) 557

³²⁶ Derek Jinks, 'September 11 and the Laws of War' (2003) *Yale Journal of International Law*, 40-41; Marco Sassoli, 'Transnational Armed Groups and International Humanitarian Law, Humanitarian Policy and Conflict Research' (2006) Harvard, Occasional paper series, no. 6, 1-45, 9 ; Marco Sassoli, 'Use and Abuse of the Laws of War' (2004) *Law and inequality* 195, 201 ; *Hamdan v. Rumsfeld* (n 323) 65-69

infrastructure.³²⁷ However, it is also possible to argue that transnational conflicts should be treated as international conflicts, particularly where the territorial state has not consented to the use of force against non-state actors within its jurisdiction and thereby, they are subject to Geneva Law and Additional Protocol I in their entirety.³²⁸ The use of force by a state against a non-state group on the territory of another state is NIAC where the force is used exclusively against non-state group.³²⁹ But the conflict may as well become IAC when the attacks by the outside state are made more broadly on the territorial state on whose territory non-state groups are present.³³⁰

The law that governs transnational conflicts between a state and a non-state group will depend, in the first place, on whether the territorial state in which the non-state group is based has given its consent to the foreign state using force against that group. Where territorial state has consented to the military attacks, the conflict remains one of a non-international character. The situation here will be no different from a situation in which the territorial state is itself fighting the non-state group and invites the foreign state to intervene. Conversely, in situation where the territorial state opposes, or at least condemns the attacks, the law of international armed conflict will govern the situation. Thus the consent of the territorial state decides whether or not there are two opposing states involved in the conflict.³³¹ The rules of IAC are

³²⁷ Terry D. Gill, 'Letter to the Editor from Professor Terry Gill on Classification of International Armed Conflict' (Just Security, 14 October 2016) < <https://www.justsecurity.org/33569/letter-editor-prof-terry-gill-classification-international-armed-conflict/> >; Kenneth Watkin, 'The ICRC Updated Commentaries: Reconciling Form and Substance, Part I' (Just Security, 24 August 2016) < <https://www.justsecurity.org/32538/icrc-updated-commentaries-reconciling-form-substance/> >; Kenneth Watkin, 'The ICRC Updated Commentaries: Reconciling Form and Substance, Part II' (Just Security, 30 August 2016) < <https://www.justsecurity.org/32608/icrc-updated-commentaries-reconciling-form-substance-part-ii/> > accessed 20 October 2018

³²⁸ Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' (2012) Legal Research Paper Series, Paper No. 50, 58-60

³²⁹ ICC Statute, Article 8(2)(f); How is the Term 'Armed Conflict' Defined in International Humanitarian Law?" (International Committee of the Red Cross Opinion Paper, March 2008) < www.icrc.org/web/eng/siteeng0.nsf/html/armed-conflict-article-170308?opendocument > Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2010) chapter 4 and 13

³³⁰ Qualification of armed conflicts

<http://www.genevaacademy.ch/RULAC/qualification_of_armed_conflict.php> accessed 20 July 2015

³³¹ Akande (n 328) 58

relevant where non-state groups acts on behalf of or with the support of the state against the foreign state.³³²

The International Court of Justice in the Armed Activities case held that:

The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war³³³

The UN Commission of Inquiry into the conflict in Lebanon in 2006 confirmed that an IAC exists where a state uses force against a non-state armed group on the territory of another state without the consent of the territorial state.³³⁴ The conflict was considered to be IAC even when Israel mainly used force against Hezbollah and Lebanese armed forces did not respond in the conflict.³³⁵

It is important to clarify that even when there is an IAC between foreign state and territorial state (where non-state actors are based) this will have no bearing on the conflict between foreign state and the non-state group because that conflict will still be NIAC in nature and there would be two conflicts running simultaneously. This situation means that NIAC against non-state actors will be bound with IAC and it will be difficult to separate the two. Thus, when the US invaded and attacked Afghanistan in response to 9/11 against the Taliban government, claiming that the *de facto* Taliban government of Afghanistan was supporting Al-Qaeda, an IAC was created between the US and Afghanistan-one High Contracting Party invading a second High Contracting Party (common Article 2 IAC).³³⁶ Concurrently, there was a NIAC between the US and Al Qaeda.³³⁷ Therefore, a 'dual status armed conflict

³³² *ibid*

³³³ Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda), I.C.J., 2006 I.C.J. 126, para 163

³³⁴ Human Rights Council, 'Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*A/HRC/3/2 (23 November 2006), Paras 50–62

³³⁵ *ibid* Paras 59, 62

³³⁶ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949

³³⁷ M.N. Schmitt, Louise Arimatsu and Tim McCormack, *Yearbook of International Humanitarian Law* (Cambridge University Press 2010) 110

existed' where IAC (US and Afghanistan) NIAC (US and Al Qaeda) are occurring at the same time within the same state.³³⁸

Scholars have also debated whether the US is engaged in a single global armed conflict without defined territorial limits with Al Qaeda or in multiple armed conflicts with Al Qaeda in different states, such as Afghanistan, Pakistan, Yemen and Somalia³³⁹. A NIAC overspill to other territories, but remain part of the core conflict. A NIAC that spills outside territorial boundaries would remain covered by common Article 3. Indeed, it is not unusual for members of non-state armed groups to be based in the border regions of a neighbouring state. For instance, a conflict between the USA and Taliban in Afghanistan that spills over into Pakistan, remains a NIAC. There is one conflict that is fought in another state.³⁴⁰ The Operation Phoenix that Colombia conducted against Fuerzas Armadas Revolucionarias de Colombia (FARC) is illustrative of this kind of scenario. The NIAC between Colombia and FARC spilled into Ecuadorian territory. Colombian forces entered Ecuadorian territory to fight FARC fighters who were based there and argued that this operation amounted to 'hot pursuit' because hostilities with FARC commenced in the territory of Colombia.³⁴¹ However the hot pursuit doctrine is a maritime law concept and it could not be extended to actions on land.³⁴² Hot pursuit over land is only permissible if the territorial state explicitly consents because it is an exception to the international rule of state sovereignty.³⁴³ Still, we are witnessing the development of land incursions justified by the hot

³³⁸ Gary D Solis, *The law of armed conflict International humanitarian law in war* (Cambridge University Press 2010) 156; David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) *The European Journal of International Law* 196

³³⁹ Authorisation for the Use of Military Force, 18 Sep 2001; Harold H Koh, 'The Obama administration and International law', Speech at the Annual Meeting of the American Society of International Law, (25 March 2010); John O Brennan, 'Strengthening our security by adhering to our values and laws', speech at Harvard Law School (16 Sep 2011)

³⁴⁰ Sandesh Sinakumaran, *The law of non-international armed conflict* (Oxford University Press 2014) 233

³⁴¹ Luz Estella Nagle, 'Colombia's Incursion into Ecuadorian Territory: Justified Hot Pursuit or Pugnacious Error?' (2008) < <http://dx.doi.org/10.2139/ssrn.1105393> >; Elizabeth Wilmshurst, *International Law and the Classification of Conflicts*, (Oxford University Press 2012) 232

³⁴² Hot pursuit is governed by Article 23 of the 1958 Geneva Conventions on the High Seas Art 111 (1) United Nations Convention on the law of the sea (10 Dec 1982) On the law relating to hot pursuit generally See Nicholas M Poúlantzas, *The right of hot pursuit in International law*, (Martinus Nijhoff 2002) 11 and 347

³⁴³ Maarten Daman, 'Cross-border hot pursuit in the EU' (2008) *European Journal of Crime, Criminal Law and Criminal Justice* 171, 172

pursuit doctrine in recent years exemplified by the Kenyan cross-border action against al-Shabaab militants in Somalia³⁴⁴ and the Turkish cross-border action against Kurdish militants.³⁴⁵

Hot pursuit by land involves the use of force 'literally and temporally in pursuit and following the tail of a fugitive' crossing the borders of the chasing state.³⁴⁶ While hot crossing the borders of a third state to capture terrorists remains controversial and not codified outside the confines of the Law of the Sea, it is not comparable to invading another states without an ongoing pursuit'.³⁴⁷

When the territorial state consents to a cross-border attack between a State and a non-state actor, such attack would constitute the continuation of a NIAC. When the consent is expressly denied, the conflict resulting from the use of armed force against the rejecting state would be classified as IAC. If no consent was sought before commencing the attack then the reaction of territorial state will decide whether the conflict would amount to an international or non-international armed conflict.³⁴⁸

Taking into account the categories outlined above, the classification of an armed conflict with an armed group such as Al Qaeda, will depend on whether it is consider that the presence of Al Qaeda in different locations -Afghanistan, Pakistan, Yemen and Somalia- represent different groups or whether they are parts of the same group.³⁴⁹ If these entities are considered the same group, a single NIAC may exist between the US and Al Qaeda. Conversely, the situation is one of multiple NIAC between the US and the distinct groups, providing that the hostilities satisfy the intensity test outlined in Tadic.

Drawing from the arguments above, two main conclusions emerge. Firstly, the identity and nature of the group are the key factors in determining the nature of the conflict and not the territory on which they are based. Second, a state

³⁴⁴ Edel Hughes, 'In (Hot) Pursuit of Justice? The Legality of Kenyan Military Operations in Somalia' 2012) *African Journal of International and Comparative Law* 471

³⁴⁵ Cengiz Gunes, *The Kurdish National Movement in Turkey: From Protest to Resistance* (Routledge, 2012), 130

³⁴⁶ Michael P. Scharf quoted in Lionel Beehner, 'Can States Invoke Hot Pursuit to Hunt Rebels?' (7 June 2007) < <http://www.cfr.org/iraq/can-states-invoke-hot-pursuit-hunt-rebels/p13440?breadcrumb=%%202Fregion%2F414%2Fsyria> > accessed 7 June 2016

³⁴⁷ Nagle (n 337) 3

³⁴⁸ Elizabeth Wilmschurst, *International Law and the Classification of Conflicts*, (Oxford University Press 2012) 237

³⁴⁹ For one view Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24/Add.6, 28 May 2010, Para 55

can be involved in NIAC with non-state actors in multiple territories; however a global non-international armed conflict against a vague enemy is not supported by any legal category.

2.6 Status of individuals on battlefield

A basic principle enshrined in the 1949 Geneva Conventions requires that every individual under enemy control must have some status recognised by international law. They are combatants, prisoners of war (protected by the Third Convention), civilians (Fourth Convention) or a member of the medical personnel of the armed forces (First Convention)³⁵⁰

2.6.1 Combatants

Article 43 of the 1977 Additional Protocol I defines combatants as members of the armed forces of a party to a conflict that have the right to participate directly in hostilities. Without the risk of being prosecuted as long as their actions are in accordance with the laws of war.³⁵¹ This special status is known as 'combatant immunity'.³⁵² Combatants remain military targets at all times, whether or not they are a threat to the enemy, until they surrender or become *Hors de combat*.³⁵³ Only when they fall into the hands of the enemy they benefit from the status and rights associated to the prisoners of war.³⁵⁴

The concept of combatancy is confined to IAC. In the context of NIAC, captured fighters, rebels or insurgents don't enjoy combatant immunity who are treated as ordinary criminals that may face prosecution for murder or treason. Only Common Article 3 of the Geneva Convention assures a minimal standard of humane treatment.³⁵⁵ Additional Protocol II is applicable only to the limited number of state parties to it and in situations where rebels control some part of the national territory. It also guarantees fundamental human

³⁵⁰ Jean Pictet, ed., *Commentary, IV Geneva Convention* (Geneva; ICRC, 1958), 51

³⁵¹ Art 43 (2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

³⁵² Kenneth Watkin, 'Warriors without rights? Combatants, unprivileged belligerents and the struggle over legitimacy', HPCR Occasional Paper Series 2005, 1-77

³⁵³ Marco Sassoli and Laura M. Olson, 'The relationship between International Humanitarian and Human Rights law where it matters: Admissible killing and internment of fighters in non-international armed conflicts' (2008) *In't Rev. of the Red Cross*, 605-606

³⁵⁴ Yoram Dinstein, *The conduct of hostilities under the law of international armed conflict*, (Cambridge University Press 2004) 28

³⁵⁵ Art 3 of Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949

rights to the rebel forces, including the status of prisoner of war if categorised as legal combatants.³⁵⁶ This protection extends to other groups such as member of the militia or volunteer corps fighting alongside a party of the conflict, provided they satisfy the following conditions (art. 4 Geneva Convention III):

- a) that of being commanded by a person responsible for his subordinates;
that of having a fixed distinctive sign recognizable at a distance;
- b) that of carrying arms openly;
- c) that of conducting their operations in accordance with the laws and customs of war.³⁵⁷

The requirements of 'having a fixed distinctive sign and carrying arms openly' were modified by 1977 Additional Protocol I. Art 44 requires that combatants distinguish themselves only while in an attack or preparatory to an attack; if they are unable to do so because of circumstances, they must still carry their arms openly during that period.³⁵⁸ This means, 'if resistance movements are to benefit by the Convention, they must respect the four special conditions...'³⁵⁹ If they fail to satisfy them then they are unlawful combatants.

2.6.2 Civilians

The Additional Protocol II defines a civilian in negative terms, as a person 'who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.'³⁶⁰ A joint reading of these articles reveal that they refer to all categories of armed forces which constitute military objectives and as such are liable to be attacked.³⁶¹ Art 50 of AP I also describes civilian in excluding

³⁵⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

³⁵⁷ Art 4 of Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949

³⁵⁸ Art 44 (3) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

³⁵⁹ Jean Pictet, Commentary, III Geneva Convention (Geneva: ICRC, 1960) 59

³⁶⁰ Art 50(1) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

³⁶¹ Art 4(A) Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own

terms as anyone who is not a member of the armed forces.³⁶² According to this definition only individual who wear uniforms, openly display weapons amongst other criteria are deemed combatants, the rest of the population may be classified as civilians. In the case of any doubt whether a person is a civilian or not, that person shall be considered a civilian.³⁶³

Civilians enjoy the 'general protection against dangers arising from military operations'.³⁶⁴ International law protects civilians from harm during an armed conflict. As the ICTY notes, 'The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law...it is now a universally recognised principle...that deliberate attack on civilians or civilian objects are absolutely prohibited by international humanitarian law.'³⁶⁵

Once civilians take up arms they lose the protection available to them under the IHL and may be attacked or taken as prisoners of war in the event of their capture.³⁶⁶ Under IHL persons who are not actively involved in hostilities but

territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war

Art 43 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 [Link] of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

³⁶² Art 50 (1) API

³⁶³ *ibid*

³⁶⁴ Art 51 (1) *ibid*

³⁶⁵ Prosecutor v Kupreskic et al., IT-95-16-T, Trial Judgement (14 Jan 2000), para. 521

³⁶⁶ Art 13 (3) AP I

work closely with military personnel will still be treated as civilians.³⁶⁷ These include 'civilian members of military aircraft crews, war correspondents, supply contractors and member of labour units or of services responsible for the welfare of the armed forces'.³⁶⁸ The crew members of merchant ships and of the civil aircraft of parties to the conflict as well as retired members of armed forces and legal experts who closely work with armed forces are considered civilians and as such may not be the subject of attack.³⁶⁹

2.6.3 Direct participation in hostilities

In both IAC and NIAC civilians enjoy protection from attack unless and for such time as they take a direct or active part in hostilities. This is a rule of conventional and customary international law.³⁷⁰ However, 'participation in hostilities' remains an uncodified terminology,³⁷¹ it has been left open to states' own interpretation.³⁷² The International Committee of Red Cross (ICRC) offers the following interpretive recommendation: A civilian can be considered to be directly participating in hostilities, according to the ICRC, only if his act satisfies all three conditions:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm),
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation)

³⁶⁷ Art 4 A (4) GC III

³⁶⁸ *ibid*

³⁶⁹ Chris C Wigwe, *International humanitarian law* (Readwide Publications 2010) 132

³⁷⁰ Article 13(3) Additional Protocol II; Art 51(3) Additional Protocol I; Customary International Humanitarian law, Rule 6; ICRC, Interpretive guidance on the notion of direct participation in hostilities under International humanitarian law, (ICRC, 2009), p. 43 ; Prosecutor v Akayesu, ICTR-96-4-T, Judgement, 2 Sep 1998, para 629; Prosecutor v Fofana and Kondewa, SCSL-04-14-T, Judgement, 2 August 2007, para 131; International Institute of Humanitarian Law, *The manual on the law of Non-International Armed Conflict with Commentary* (Sanremo, 2006), 4 < <http://stage.iihl.org/wp-content/uploads/2015/12/Manual-on-the-Law-of-NIAC.pdf> > accessed at 20 Dec 2016

³⁷¹ J.M. Henckaerts and K. Doswald Beck, *International Committee of the Red Cross, Customary International Humanitarian Law* (Cambridge University Press 2009) 995

³⁷² Philip Alston, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (2010) Human Rights Council Fourteenth session, Agenda item 3, Para 58

3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).³⁷³

This criteria excludes conduct that indirectly supports war: such as production of weapon and military equipment,³⁷⁴ political advocacy, supplying food or shelter, or economic support and propaganda.³⁷⁵ The ICRC's interpretive guidance has been criticised by various experts because it defines direct participation in hostilities too narrowly.³⁷⁶ It has been observed that in 'this narrow interpretation, terrorists enjoy the best of both worlds –they can remain civilians most of the time and only endanger their protection as civilians while actually in the process of carrying out a terrorist act'.³⁷⁷ Some argue that the 'definition of direct participation results in a 'revolving door' of protection, giving individuals the liberty to participate in attacks and then quickly regain protection from counter-attack'.³⁷⁸ Critics described such individual as a 'farmer by day, fighter by night',³⁷⁹ who regains protection as a civilian every time he returns home.³⁸⁰ To prevent the 'revolving door' effect, various scholars have argued that a civilian who is repeatedly involved in hostilities should be considered as continuously participating. Critics insist that direct participation must also involve preparation for an attack not just actual execution of the specific act.³⁸¹

³⁷³ Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (ICRC 2009) 46

³⁷⁴ *Ibid* 1020-22 (report opines that bomb makers are not continuous combat functionaries, analogizing them to civilian munitions workers)

³⁷⁵ Nils Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) *NYU J. Int'l L. and Politics*, 858

³⁷⁶ Ryan Goodman & Derek Jinks, 'The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: an Introduction to the Forum' (2010) *N.Y.U. J. Int'l L. & Pol.* 637, 640

³⁷⁷ David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) *EJIL* 171, 193

³⁷⁸ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2010) 142

³⁷⁹ Sinakumaran (n 340) 367

³⁸⁰ Michael N. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) *Harvard Nat'l Security J.* 5, 37

³⁸¹ Kenneth Watkin, 'Opportunity lost: organized armed groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' [2010] *N.Y.U. J. Int'l L. & Pol.* 640, 692

Defending the opposite view, it has been argued that direct participation should only include the conduct of those behaving close to a fighter or directly supporting combat as the only effective mean of protecting the vast majority of civilians.³⁸² There is a risk of potential abuse of power by states if the term 'direct participation in hostilities' is defined too broadly. For instance, Lubell contends that the broader interpretation of direct participation in hostilities may 'make it possible for states to fit almost any desirable target into them, for example by claiming the individual was involved in planning.'³⁸³ Rather than broadly defining the term 'direct participation in hostilities' one can resolve the 'revolving door' problem by the concept of the membership of armed group. The members of the armed group may be targeted at any time, regardless of whether or not they are taking a direct part in hostilities at the time at which they are targeted.³⁸⁴ The individuals who are considered members of organised armed groups are those who are engaged in a 'continuous combat function'

2.6.4 Continuous combat function

Continuous combat function is a new concept introduced in a 2009 ICRC report.³⁸⁵ Unlike the conventional armed forces of states the members of organised armed groups are not recognisable because they wear no uniform. Therefore membership in organised armed groups is not evidenced by uniform or ID card, but by function.

Membership must depend on whether:

the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-state party to the conflict....The decisive criterion for individual membership in an organised armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities....continuous combat function....which requires lasting integration into an organised

³⁸² Philip Alston, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (2010) Human Rights Council Fourteenth session, Agenda item 3, Para 60

³⁸³ Lubell (n 378) 150

³⁸⁴ ICRC's interpretive guidance (n 370) 71-72

³⁸⁵ Ibid at p. 32

armed group acting as the armed forces of a non-state party to an armed conflict....A continuous combat function may be....for example, where a person has repeatedly directly participated in hostilities in support of an organised armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic or temporary role...³⁸⁶

According to this interpretation, civilians who are occasionally involved in hostilities are not members of armed forces nor represent continuous combat function. For the purpose of this thesis, Al-Qaeda leaders or Taliban fighters do not regain civilian protection against direct attack when they put down their weapons. A member of organised armed group will always remain a lawful target whenever he may be located and whatever he may be doing. However this does mean that his targeting at all times be legal because proportionality always remain an issue.³⁸⁷

2.6.5 Unlawful combatants

Another group between the two extremes of lawful combatants on the one hand and civilians on the other are the 'illegal' or 'unlawful' combatants. It is this type of excluded person that is of most interest in relation to terrorists. The term unlawful combatant does not appear in the Geneva Conventions, the Additional Protocols, or any other conventional rules governing armed conflicts. Although the discussion on the legal situation of unlawful combatants is not new, the term became frequently employed by the United States following the US-led military campaign in Afghanistan in 2001. The *Ex Parte Quirin* case (1942) is one of the first places where the term 'unlawful combatant' seems to appear. In this case Supreme Court of the United States stated that:

The law of war draws a distinction between the....lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are

³⁸⁶ Ibid p. 32-35

³⁸⁷ Solis (n 334) 206

subject to trial and punishment by military tribunals for acts which render their belligerency unlawful³⁸⁸

The legal advisor of the ICRC described unlawful combatant as 'all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy.'³⁸⁹ Various scholars consider unlawful combatants as a subcategory of civilian rather than a distinct group³⁹⁰ that can be useful 'for describing those civilians who take up arms without being authorised to do so by international law.'³⁹¹ Their status would be the counterpart of guerrillas and militias are a subset of combatant.³⁹²

A person who engages in military raids by night, while purporting to be an innocent civilian by day is an unlawful combatant. Consequently, those who seek to blend in with the civilian population would not enjoy the status of prisoners of war if captured. Terrorists form part of this group and are thus neither soldiers nor civilians.³⁹³ Although unlawful combatant fails to reap the benefits of prisoner of war status but they must not be deemed beyond the ambit of law.³⁹⁴ At a minimum, captured unlawful combatants are entitled to

³⁸⁸ Ex parte Quirin, 317 U.S. 1 (1942) at 30-31

³⁸⁹ Knut Dormann, 'The legal situation of 'Unlawful/Unprivileged Combatants'' (2003) International Review of Red Cross, 45

³⁹⁰ Yoram Dinstein, *The conduct of hostilities under the law of International armed conflict* (Cambridge University Press 2016), 44 ('The distinction between lawful and unlawful combatants is a corollary of the fundamental distinction between combatants and civilians'); L.C. Green, *The contemporary law of armed conflict* (Manchester University press 2000) 14 ("Today they (civilians who forcibly resist) are more likely to be treated as unlawful combatants"); Kenneth Watkin, *21st century conflict and international humanitarian law: status quo or change* in Michael Schmitt and Jelena Pejic, *International law and armed conflict: exploring the faultlines* (Martinus Nijhoff 2007) 285 (There is no universal agreement...that persons who take a direct part in hostilities have civilian status. One approach has to be categorise such participants as 'unlawful combatants'...); Dieter Fleck, *The handbook of humanitarian law in armed conflicts* (Oxford University Press 1995) 68 (Persons who take a direct part in hostilities without being entitled to do so (unlawful combatants) face penal consequences)

³⁹¹ Antonio Cassese, 'Expert Opinion on whether Israel's targeted killings of Palestinian Terrorists is Consonant with International Humanitarian law' (2003) in HCJ petition 769/02 quoted in Gary D Solis, *The law of armed conflict international humanitarian law in war* (Cambridge University Press 2010) 208

³⁹² Israel v The State of Israel, HCJ 5111/94, 1999: 'The term unlawful combatants does not constitute a separate category but is a sub-category of civilians recognised by International law', This position was reinforced by Supreme Court of Israel in A and B v State of Israel, No. 6659/06 (11 June 2008)

³⁹³ Ingrid Detter, 'The Law of War and Illegal Combatants' (2007) *The George Washington Law Review*, 1064

³⁹⁴ Art 45 (3) of Additional Protocol I reads "Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in

the basic humanitarian protections of common Article 3, and 75 of Additional Protocol I.³⁹⁵ Both endow basic humanitarian guarantees, such as protection against murder, torture or hostage taking. Either military or domestic courts can prosecute unlawful combatants.³⁹⁶

So far the chapter has assessed the status of conflict and status of individuals in the battlefield. The following sections outline the four core principles of IHL governing the legality of actions of those taking part in hostilities.

2.7 Distinction

The principle of distinction codified in Art 48 of Additional Protocol I to the 1949 Geneva Conventions³⁹⁷, obliges belligerent parties to distinguish at all times between civilian persons and objects and between combatants and military targets. This is a fundamental principle of IHL and protects civilian persons and objects from harmful effects of the hostilities. The ICJ has described the principle of distinction as ‘cardinal’ and ‘intransgressible’.³⁹⁸

This principle obliges combatants to distinguish themselves from civilians by wearing uniform or a distinctive sign that is recognisable from the distance. Combatants must distinguish between civilian and military objectives and can only target military objectives. What constitutes a civilian object depends on a number on the vague concept of ‘military advantage’. However, the category normally includes ‘civilian dwellings, shops, schools and other places of non-military business, places of recreation and worship, means of transportation, cultural property, hospitals and medical establishments and units’,³⁹⁹ unless used for military purposes.

accordance with the Fourth Convention shall have the right at all times to the protection of Art 75 of this Protocol”

³⁹⁵ Art 75 of Additional Protocol I gives detailed fundamental guarantees to persons ‘who are in the power of a party to the conflict and who do not benefit from more favourable treatment’

³⁹⁶ Yoram Dinstein, *The conduct of hostilities under the law of International armed conflict* (Cambridge University Press 2004) 31

³⁹⁷ “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”

³⁹⁸ Advisory Opinion on the legality of the threat or use of nuclear weapons, (1996) ICJ Rep, 226, 257

³⁹⁹ UK Ministry of Defence (MOD), *The manual of the law of armed conflict* (Oxford University Press, 2004), para 15.16.1 at 391

However, it is difficult in practice to apply the principle against an enemy, such as terrorist fighters, who disregard it. The traditional laws of war rely on the willingness of the belligerent groups to distinguish between civilian individuals and objects and between military and non-military targets. The clear distinctions become impossible in NIAC where insurgents resort to guerrilla warfare.⁴⁰⁰ On today's battlefields, where unlawful combatants tend to mix with civilian population sometimes combatants have to make hard decisions on the spot. So mistakes do occur and at times civilians get killed during hostilities. The most memorable example was the bombing of the Al Firdos bunker in February 1991 by the US Air Forces in Iraq during Gulf war that killed around three hundred Iraqi civilians.⁴⁰¹ Originally built during the Iran-Iraq war as a civilian air raid shelter, it was upgraded in 1985 to become an emergency headquarters for Iraqi officials. The wives and children of the secret police used it as a shelter from the US air raids. The evidence suggests that the US failed to detect presence of so many civilians.⁴⁰² The ICTY has held in *Blaskic* that only wilful and intentional targeting of civilians or civilian objects will constitute a violation of distinction.⁴⁰³ Thus it is logical to conclude that the bombing of the Al Firdos was not a war crime because the US Air Forces did not intentionally targeted civilians.

The respect for the principle of distinction is not reciprocal and its application does not depend on mutual respect by the adverse party, so the presence of individual combatants in the midst of a civilian population does not allow other party to use force because the presence of a combatant does not change the civilian character of that population.⁴⁰⁴ However, this does not mean that civilian persons and civilian objects enjoy complete immunity. For instance Additional Protocol I declares lawful any incidental civilian damage that is not excessive in relation to the military advantage anticipated from the successful execution of an attack.⁴⁰⁵ This legal framework acknowledges that incidental loss of civilian life in the vicinity of the theatre of operations is almost

⁴⁰⁰ Lindsay Moir, *The law of internal armed conflict* (Cambridge University Press 2002), 2-3

⁴⁰¹ Alexander B. Downes, *Targeting Civilians in War* (Cornell University Press 2008) 222

⁴⁰² Rick Atkinson, *Crusade: The Untold Story of the Persian Gulf War* (Houghton Mifflin 1993) 287-288

⁴⁰³ *Prosecutor v Blaskic*, IT-95-14-T (2000), Para 180

⁴⁰⁴ *Solis* (n 334) 258

⁴⁰⁵ Art 51(5)(b) and 57(2)(b) Additional Protocol I

unavoidable. Therefore the aim of law is not to make it impossible for parties to conflict to use force in hostilities but to oblige parties to the conflict to carry out military operations cautiously to minimise loss of civilian life and harm to civilian objects.⁴⁰⁶

2.8 Military necessity

The military can only lawfully use force that is necessary to achieve the objective in those circumstances.⁴⁰⁷ This principle is closely related to the principle of proportionality and only allows military attack if the attack will offer some definite advantage. The military advantage to be gained is at some unforeseen time in the future.⁴⁰⁸ Military necessity is not codified in the 1949 Geneva Conventions or in Additional Protocol I. It appears in Art 23 (g) of 1907 Hague Regulation IV⁴⁰⁹, in Art 8(2)(b)(xiii) of the Rome Statute of the International Court⁴¹⁰ and in all four 1949 Geneva Conventions and in both 1977 Additional Protocols.⁴¹¹ It was defined in 1863 by Francis Lieber in Art 14 of his 'Lieber Code' as consisting in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war'.⁴¹²

The rules of IHL forbid unnecessary violence. At first sight at least from a humanitarian perspective, military necessity seems to contradict the principle of humanity because it seeks to justify violence, and has been described by Professor Alan Dershowitz as 'the most lawless of legal doctrines....'⁴¹³.

⁴⁰⁶ J.M. Henckaerts & L. Doswald-Beck eds., *Customary International Humanitarian Law*, ICRC (Cambridge University Press 2005) 3-8; Yoram Dinstein, 'Comment, Legal and ethical lessons of NATO's, Kosovo Campaign' (2002) *Int'l L. Studies* 219

⁴⁰⁷ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010) 258

⁴⁰⁸ Tony Rock, 'Yesterday's Laws, Tomorrow's Technology: The Laws of War and Unmanned Warfare' (2011) *N.Y. Int'l L. Rev.* 39, 46; Dieter Fleck, *The handbook of international humanitarian law in armed conflicts* (Oxford University Press 1995) 105, 115

⁴⁰⁹ "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war"

⁴¹⁰ Art 8 describes war crimes and Art 8(2)(b)(xiii) states "Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war"

⁴¹¹ Military necessity is mentioned in Geneva Convention I Arts. 8, 30, 33, 34 and 50; Geneva Convention II Arts. 8, 28 and 51; Geneva Conventions III Arts. 8, 76, 126 and 130; Geneva Convention IV Arts. 9, 49, 53, 55, 108, 112, 143 and 147; Additional Protocol I Arts. 54, 62, 67 and 71; Additional Protocol II Art 17

⁴¹² Instructions for the Government of Armies of the United States in the Field (Lieber Code) 24 April 1863

⁴¹³ Alan Dershowitz, *Shouting Fire* (Brown 2002) 473

However, it only provides legal cover for actions that are in conformity with the laws and customs of war; a state cannot invoke military necessity as a justification to violate humanitarian law or to depart from those rules.⁴¹⁴ Military necessity cannot justify, for instance, killing prisoners of war.⁴¹⁵ Phrases like 'I did it to save American lives' or for 'state survival' are too often used to justify unlawful acts including torture,⁴¹⁶ or to blur the line between military convenience and military necessity.⁴¹⁷

The principle of military necessity tries to achieve 'a middle ground'⁴¹⁸ approach and acknowledges that civilian casualties are unavoidable in armed conflicts so incidental injuries or loss of life are allowed 'if a particular military objective will provide some type of military advantage in weakening the enemy military forces'.⁴¹⁹ The limitations imposed by the principle are illustrated by the actions of the Iraqi army during the 1991 when they set ablaze more than 600 Kuwaiti oil wells. Since Iraqis had already been defeated and the area was evacuated, 'this act could not possibly affect the progress of the war and did not offer a definite military advantage...'.⁴²⁰ Consequently there was no military necessity for destroying the wells.⁴²⁰ Similarly, the ICTY found, in the 2006 Rajic⁴²¹ case, that the attack on a village was unlawful because 'evidence indicated that the village has been destroyed, that its destruction had not been necessary to fulfil any legitimate

⁴¹⁴ Knut Dormann, *Elements of war crimes under the Rome Statute of the International Criminal Court* (Cambridge ICRC, 2004), 16-17; Lieber Code Art 15

⁴¹⁵ Art 13 Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited ; Art 19 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 ("Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger. Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone. Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone") ; Art 41(3) states "When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety"

⁴¹⁶ Solis (n 407) 269

⁴¹⁷ W. Hays Parks, 'Special Forces' Wear of Non-Standard Uniforms' (2003) *Chicago Journal of International Law*, 493 and 543

⁴¹⁸ Yoram Dinstein, *The conduct of hostilities under the law of international armed conflict* (Cambridge University Press 2004) 16-17

⁴¹⁹ Prosecutor v Galic, Case No. IT-98-29-T, 5 December 2003, Para 44, Foot note 76

⁴²⁰ Solis (n 407) 192

⁴²¹ Prosecutor v Rajic, IT-95-12-T (2006)

objectives, that the civilian population was the target of the attack, and that the offence appeared to have been planned in advance...all of which were unjustified by military necessity.⁴²²

2.9 Unnecessary suffering

The infliction of unnecessary suffering on opposing combatants is also prohibited in international law. This principle was first enshrined in the Preamble to the 1868 St Petersburg Declaration.⁴²³ The Additional Protocol I propounds the basic rule: 'It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'.⁴²⁴ Several factors are considered relevant in determining the categories of suffering or injury that are superfluous or unnecessary, among them, the mortality rates associated to specific actions or weapons, their painfulness or severity of the wounds as well as the incidence of permanent damage or disfigurement.⁴²⁵ Psychiatric harm is not included and it is contested whether the social or economic impact on society of the suffering of combatants should be considered as relevant factor.⁴²⁶

The interpretation of unnecessary suffering is intertwined with military necessity. 'The more effective a weapon is from military point of view, the less likely it is that the injuries which it causes will be characterised as unnecessary'.⁴²⁷ The ICJ has stressed that unnecessary suffering means 'a

⁴²² Bernard H. Oxman and Olivia Swaak-Goldman, 'Prosecutor v. Raji, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence' (1997) *The American Journal of International Law* 523, 518 and 529

⁴²³ Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles. Saint Petersburg, 29 November/11 December 1868 ("That the progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity")

⁴²⁴ Art 35(2) Additional Protocol I

⁴²⁵ ICRC Conference of Government experts on the use of certain conventional weapons (Lucerne, 24.9-18.10.1974), Report Geneva 1975, para 23

⁴²⁶ Sandesh Sivakumaran, *The law of non-international armed conflict* (Oxford University Press 2014) 388

⁴²⁷ Christopher Greenwood, 'Current issues in the law of armed conflict: weapons, targets and international criminal liability' (1997) *Singapore Journal of International and Comparative law*, 446

harm greater than that avoidable to achieve legitimate military objectives'.⁴²⁸ Weapons are not banned based exclusively on the suffering they may cause⁴²⁹ but in relation to the military advantage they provide.⁴³⁰ This principle has found echoed at domestic level, as illustrate in the Shimoda Case where the Tokyo District Court stated that "the use of a certain weapon, great as its inhuman result may be, need not be prohibited by international law if it has a great military effect".⁴³¹ However, an increasing number of treaties ban the use of certain weapons based on this principle.⁴³²

2.10 Proportionality

The principle of proportionality seeks to minimise unavoidable and collateral civilian casualties in war.⁴³³ The principle of proportionality is anchored in Art 51(5)(b) that describes breach of the principle as 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.⁴³⁴ Article 57(2)(b) directs that 'an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one.... or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.⁴³⁵ The attack that cause excessive collateral damage to civilians/civilian objects in relation to the anticipated military advantage violates the principle of proportionality and is

⁴²⁸ Advisory opinion on the legality of the threat or use of nuclear weapons, (1996) ICJ Rep. 226 at para 78

⁴²⁹ Dinstein (n 221)

⁴³⁰ B M Carnahan, 'Unnecessary suffering, the Red Cross and the tactical laser weapons', [1996] LLAICLJ 705, 713 ; Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, (ICRC 1987) P. 406, para 1424

⁴³¹ Ryuichi Shimoda et al v The State (1963) 32 ILR 626, p. 634

⁴³² ICRC, Weapons (30 Nov 2011) <https://www.icrc.org/en/document/weapons>

⁴³³ Yoram Dinstein, "Discussion: Reasonable military commanders and reasonable civilians", in, Andru E. Wall, ed., *International law studies, Vol 78, Legal and ethical lessons of NATO's Kosovo Campaign* (Newport, RI: Naval War College 2002) 172, 219

⁴³⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

⁴³⁵ *ibid*

codified as a war crime by Article 8(2)(b)(iv) of the Rome Statute.⁴³⁶ In her dissenting opinion in the Nuclear Weapons Advisory Opinion case, Judge R. Higgins stated:

The principle of proportionality, even if finding no specific mention, is reflected in many provision of Additional Protocol I to the Geneva Conventions of 1940. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack⁴³⁷

There is a close relationship between the concept of proportionality and military necessity and compliance can only be assessed in a case-by-case basis.⁴³⁸ Even the destruction of an entire village with scores of civilian casualties will be acceptable if an entire artillery battery would operate from within the village.⁴³⁹

The main problem with proportionality is that the whole assessment of whether the injury or collateral damage is 'excessive' in the circumstances is subjective.⁴⁴⁰ One issue is that military advantage and civilian casualties are incomparable in a quantifiable manner. Civilian casualties can be calculated and civilian damage may be estimated but how can one measure an anticipated military advantage?⁴⁴¹ Then warring parties hardly share the same viewpoints when it comes to measure military advantage and collateral damage.⁴⁴² Attacking belligerent party may intend to satisfy the test of proportionality by claiming it has achieved long-term military advantage. It remains possible however, to weigh the projected collateral damage against the anticipated military advantage. Additional Protocol I gives some indication on how to calculate military advantage. Both Art 51(5)(b) and Article

⁴³⁶Rome Statute of the International Criminal Court ("For the purpose of this Statute, 'war crimes' means: (iv) Extensive destruction and appropriation of property, not justified by military necessity" ...)

⁴³⁷ Legality of the Use by a State of Nuclear Weapons in Armed Conflict - Advisory Opinion of 8 July 1996 - Advisory Opinions [1996] ICJ 2; ICJ Reports 1996, p 66; [1996] ICJ Rep 66 (8 July 1996), Dissenting opinion of Judge Higgins, 587

⁴³⁸ Dinstein (n 221) 121

⁴³⁹ W M Reisman, 'The lessons of Qana' (1997) YJIL 381, 395-6

⁴⁴⁰ H Blix, *Means and methods of combat, International dimensions of humanitarian law* (UNESCO 1988), 148

⁴⁴¹ M Wells-Greco, 'Operation "Cast Lead": Jus in Bello proportionality' (2010) NILR 397, 416-17

⁴⁴² Dieter Fleck, 'Strategic bombing and the definition of military objectives' (1997) Is YHR 41, 48

57(2)(a)(iii) uses the phrase 'concrete and direct military advantage' and⁴⁴³ Art 52(2) uses the terminology 'definite military advantage'.⁴⁴⁴ The words 'concrete', 'direct' and 'definite' suggest that 'the anticipate military advantage need not to be substantiated, but it must be concrete, that is to say, it must be particular, perceptible and real as opposed to general, vague and speculative'.⁴⁴⁵

The regulatory framework is based on the expectation that the attacking commander to act reasonably and in good faith.⁴⁴⁶ Under the principle of proportionality a military commander can only avoid liability if before attacking he gathered and assessed information about the target, the surroundings and people in the vicinity of the target.⁴⁴⁷In the Galic case, the ICTY trial Chamber stated:

In determining whether an attack was proportionate it is necessary to examine whether a reasonable well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack⁴⁴⁸

Article 8(2)(b)(iv) of the Rome Statute adds the term 'overall' to the phrase "concrete and direct military advantage".⁴⁴⁹ The overall test suggests that the military advantage may not be confined to the geography and time frame of the attack.⁴⁵⁰ But 'the temporal or geographic dimensions must be construed reasonably. They cannot be too remote or long-term'.⁴⁵¹

⁴⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

⁴⁴⁴ *ibid*

⁴⁴⁵ Nils Melzer, *Targeted killing in International law* (Oxford University Press 2008) 293

⁴⁴⁶ L C Green, 'Aerial considerations in the law of armed conflict' (1980) AASL 89, 104 (The attacker must act in good faith, yet subjectivity inevitably colours judgement); Dormann (n 385)165 ('the standard to be applied must operate in good faith and not in accordance with subjectivity')

⁴⁴⁷ F Kalshoven, 'Implementing limitations on the use of force: The doctrine of proportionality and necessity' (1992) PASIL 39, P. 44 (Commander is not allowed to 'simply turn a blind eye on the facts of the situation; on the contrary, he is obliged to weigh all available information')

⁴⁴⁸ Galic (n 419) Para 58

⁴⁴⁹ Rome Statute of the International Criminal Court, ("Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects....which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated")

⁴⁵⁰ Dormann (n 414) 161 foot note 36

⁴⁵¹ Yoram Dinstein, *The conduct of hostilities under the law of international armed conflict* (Cambridge University Press 2016) 161

The vagueness of the principle of proportionality has attracted criticism. In the words of Cassese:

[Proportionality] leaves the belligerents plenty of room to act as they feel the military situation requires. Would it be fair to say that in proclaiming the two principles [proportionality and distinction] states were being entirely hypocritical, pretending to accept bans that are not bans because they can be eluded at every step?...[T]he Great Powers, without whose consent these principles would never have become legal precepts, had every reason to leave them as loose as possible...Yet, since they are not very effective, they can be applied only in exceptional circumstances when their relevance is undeniable. In other words....they become effective in highly pathological and “dramatic” situations, when the disproportion between what they “impose” and how one or more of the belligerents behaves, is gigantic⁴⁵²

The four core principles (distinction, military necessity, unnecessary suffering and proportionality) are intertwined. Any military action that fails to satisfy the standard of military necessity is unnecessary, leading to unnecessary suffering; the collateral damage resulting from the attack will be disproportionate and disproportionate act violates the principle of distinction. Thus, violation of one core principle may often result in the violation of the other three principles as well.⁴⁵³

2.11 The law of neutrality

Another cardinal principle of IHL applicable in IAC identified by the ICJ, in the Nuclear Weapons Advisory Opinion is that of neutrality.⁴⁵⁴

The law of neutrality in international law defines the relationship between states engaged in an armed conflict and those that are not participating in that armed conflict (neutral states).⁴⁵⁵The main purpose of neutrality is to contain

⁴⁵² Antonio Cassese, *Violence and law in the modern age* (Princeton University Press 1988) 17

⁴⁵³ Solis (n 407) 285

⁴⁵⁴ Advisory opinion on nuclear weapons (n 245) 261-262

⁴⁵⁵ ICRC, *The law of armed conflict neutrality*, 2002 see https://www.icrc.org/eng/assets/files/other/law8_final.pdf; L. Oppenheim, *International Law a Treatise*, Vol 2 (7th ed, 1952), p. 653

the spread of hostilities to states that do not take any part in hostilities.⁴⁵⁶ Neutrality is a geographic based framework in which belligerents may only fight on belligerent territory and cannot carry out operations on neutral territories. The neutral state may use force to prevent belligerent state from using its territory for war making purposes.⁴⁵⁷ A neutral state may only use force against other state if the violation constitutes an armed attack within the meaning of Art 51 of UN Charter.⁴⁵⁸

The Hague Convention V sets forth neutrality law's basic principles.⁴⁵⁹ It prohibits the movement of belligerent troops or material across neutral territory⁴⁶⁰ and the use of military installations or communications facilities on neutral territory.⁴⁶¹ It also restricts belligerent states to attack targets in neutral territory. However, neutral state only enjoy such protection if it does not provide, or enable the provision of military supplies to any belligerent, nor allows its territory to be used for military operations.⁴⁶² These principles are expanded further by Article 6 of the Hague Convention XIII provides that: 'The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind

⁴⁵⁶ John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119, 139 (1997)

⁴⁵⁷ Art 5 Hague Convention V ("A neutral Power must not allow any of the acts referred to in Articles 2 [Link] to 4 to occur on its territory. It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory"); Art 2 Hague Convention XIII ("Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden"); Art 9 Hague Convention XIII ("a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads"); Art 24 Hague Convention XIII ("If, notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures. When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained")

⁴⁵⁸ Dieter Fleck, *The handbook of international humanitarian law*, (Oxford University Press 2014) 561

⁴⁵⁹ Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague 18 October 1907

⁴⁶⁰ Art 2 Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague 18 October 1907

⁴⁶¹ Art 3 Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague 18 October 1907

⁴⁶² Dinstein (n 451) 27

whatever, is forbidden.⁴⁶³ Massive financial support for a party to the conflict also affects neutral states status. In brief, the neutral state must abstain from any actions that may have an impact on the conflict.

Traditionally, the rules governing neutrality distinguish between unlawful assistance by the neutral state and assistance by private persons or private companies belonging to a neutral state. Therefore, a neutral state is not bound to prevent the export or transport of war material by private persons for the advantage of one of the belligerent parties (Article 7 of Hague Convention V).⁴⁶⁴ Law does not attribute private individuals' unlawful activities to the neutral state and nor does it obliges neutral state to prevent those activities. However, the state practice has modified this rule because the separation of the state and the contemporary private armament industry is artificial; both arms production and trade are mostly controlled by the state.⁴⁶⁵ The armed forces of neutral states are not allowed to take part in a conflict but the neutral state is not compelled to prevent its nationals from taking part into hostilities at their own risk.⁴⁶⁶

The airspace of a neutral state is inviolable.⁴⁶⁷ This rule is significant because in the era of modern technology of missiles and unmanned aerial vehicle, violations of airspace are easily committed. A neutral state has the right to prevent violations of its airspace. Aircraft that enters into neutral airspace can be forced to leave or put down.⁴⁶⁸ A neutral state has full jurisdiction over the military aircraft and crew of that aircraft.⁴⁶⁹

⁴⁶³ Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907

⁴⁶⁴ "A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet"

⁴⁶⁵ G P Politakis, *Modern aspects of the law of naval warfare and maritime neutrality* (1998) 506

⁴⁶⁶ Art 6 Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907 ("The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents")

⁴⁶⁷ Art. 40 Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923 ("Belligerent military aircraft are forbidden to penetrate into the jurisdiction of a neutral State")

⁴⁶⁸ Art 40 *ibid* ("A neutral Government is bound to use the means at its disposal to prevent belligerent military aircraft from entering its jurisdiction and to compel them to land or to alight on water if they have penetrated therein")

⁴⁶⁹ *Ibid* ("A neutral government is bound to employ the means at its disposal to intern every belligerent military aircraft which is found within its jurisdiction after landing or watering for whatever cause, as well as its crew and its passengers, if any")

As discussed in the early sections, the law governing the use of force is normally categorised into two types: *jus ad bellum* (when state may resort to the lawful use of force) and *jus in bello* (concerns with means and methods of force a state may legally employ during war or armed conflict). Within the *jus ad bellum* analysis, there are three possible legal paradigms in which a state may be acting. First, during peace time states are governed by human rights law and may only use law enforcement methods to ensure security. Second, is self-defence paradigm where state is entitled to use force under UN article 51 and customary international law if it is confronted with imminent threat and the use of force is necessary and proportionate. Finally if there is an armed conflict a state may use force according to the rules of IHL.

IHL is a specialised body of law that is applicable only during the time of war. It regulates, the methods of conducting hostilities and the treatment of victim of warfare. It is different from international human rights law (IHRL) because IHRL principally applies in times of peace, including situations where 'violence exists, but falls short of the threshold for armed conflict'.⁴⁷⁰ But today it is widely accepted that IHRL also applies in situations of armed conflict (whether of an international or non-international character).⁴⁷¹ Thus whether IHL supplements, displaces or discounts IHRL raises a number of important questions. The following section will outline the principles governing the applicability of IHRL during armed conflicts.

2.12 International human rights law

IHRL applies in peacetime and in times of armed conflict. IHRL fill existing gaps in IHL and applies where a state is using military force,⁴⁷² functioning as a *lex specialis*⁴⁷³ during armed conflicts.⁴⁷⁴ IHRL apply in situations of

⁴⁷⁰ Alston, op. cit., para 31

⁴⁷¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p.226, International Court of Justice (ICJ), 8 July 1996, para. 25; Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p.136, ICJ, 9 July 2004, para 106. *Lex specialis*, in short, means the "law governing a specific subject matter" which when applied overrides more general laws

⁴⁷² Supra note 297 at para 25

⁴⁷³ The principle that special law derogates from general law is a widely accepted. It suggests that if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former, See Alexander Peczenik, *Juridikens metodproblem* (Stockholm: Gebers, 1980) p. 106; A

occupation or international or non-international armed conflict to complement the protection provided by humanitarian law, for example in relation to the prohibition on torture, prohibition on death in custody, and right to a fair trial.⁴⁷⁵ Although IHRL applies during both peacetime and during an armed conflict it does not, however, govern the laws of war. Issues such as the conduct of hostilities or the treatment of prisoners of war are dealt in accordance with IHL principles.⁴⁷⁶

Human rights are not absolute and derogation is allowed in most general treaties in times of war or other public emergency threatening the life of the nation.⁴⁷⁷ However certain rights are considered to be so fundamental and

special rule is more specific and clear than a general one and it regulates the matter more effectively than general rules. This rationale is well expressed by Grotius:

“What rules ought to be observed in such cases [i.e. where parts of a document are in conflict]. Among agreements which are equal ... that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general” See Hugo Grotius, *De Jure belli ac pacis*. Libri Tres, Edited by James Brown Scott, *The Classics of International*

Law (Oxford: Clarendon Press, 1925) Book II, Chap. XVI, Sect. XXIX, p. 428;

⁴⁷⁴ Dinah Pokempner, *Terrorism and Human Rights: The Legal Framework*, in *TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES*, p. 19 (Michael N. Schmitt & Gian Luca Beruto, eds. 2002); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Study on Targeted Killings, U.N. Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 14, 29 (28 May 2010) by Philip Alston; (However Michael Newton, Professor of Vanderbilt University Law School, disagrees that international humanitarian law is subset of human rights law, and said “[i]t is an oxymoron to argue that humanitarian law is a mere subset of human rights law [because] IHL has a much richer, longer, and diverse history”) see Michael Newton, *Flying into the Future: Drone Warfare and the Changing Face of*

Humanitarian Law, 39 *DENVER J. INT'L L. & POL'Y*, (2011) 601, p. 602

⁴⁷⁵ RUONA IGUYOVWE, *The Inter-play between International Humanitarian Law and International Human Rights Law*, (2008), *Commonwealth Law Bulletin* Routledge, Vol. 34, No. 4. 749-789, p. 749

⁴⁷⁶ Jakob Kellenberger, President of the International Committee of the Red Cross, “International humanitarian law and other legal regimes: interplay in situations of violence”, statement to the 27th Annual Round Table on Current Problems of International Humanitarian Law, San Remo, Italy, 4–6 September 2003; L Doswald-Beck, *International Humanitarian law and the advisory opinion of the International Court of justice on the legality of the threat or use of nuclear weapons*, (1997), 316 *Int’L Rev. Red Cross* 35, at 51 (‘In the context of the conduct of hostilities, human rights law cannot be interpreted differently from humanitarian law’)

⁴⁷⁷ Article 4 (1) of the International Covenant Civil and Political Rights states (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed..”) ; Article 15(1) of the European Convention of Human Rights states (“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”) ; Article 27(1) of the American Convention on Human Rights 1969 states (“In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion, or social origin”)

important that a state cannot derogate from these rights even in times of national emergency. This includes the right to life; the prohibition against torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery; right to a name; freedom of religion and expression; and no punishment without law.⁴⁷⁸ The right not to be arbitrarily deprived of life is particularly relevant during armed conflicts because the elimination of military targets and possible civilian casualties are expected. However, the ICJ has confirmed its applicability in times of war:

The protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, than falls to be determined by the applicable *lex Specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities⁴⁷⁹

Therefore, in times of war, the term arbitrary 'refers to whether or not the deliberate taking of life is unlawful under that part of the international law which was specifically designed to regulate the conduct of hostilities, that is the laws of armed conflict'.⁴⁸⁰

The use of IHL as *lex specialis* involves the subsidiary application of IHRL. Under certain circumstances, it has been argued that both legal regimes should be complementary. For instance, the members of the UN fact-finding mission on Gaza established by the Human Rights Council in 2009 adopted a complementary approach.⁴⁸¹ The Commission examined the allegations of killing of civilians involving a deliberate attack on police facilities that killed

⁴⁷⁸ Art 27 (2) of the American Convention on Human Rights 1969; Art 4(2) of the International Covenant Civil and Political Rights states; Art 15 (2) of the European Convention of Human Rights states of

⁴⁷⁹ Nuclear Weapons ICJ, *Supra* note 532, Para 24 and 25

⁴⁸⁰ Letter dated June 16, 1995 from the Legal advisor to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, para 3. 101

⁴⁸¹ HRC, The grave violations of human rights in the occupied Palestinian territory, particularly due to the recent Israeli military attacks against the occupied Gaza strip, UN Doc A/HRC/S-9/2 (2009)

around 100 police officers.⁴⁸² The Commission examined the categorisation as civilian of the police under the principles of IHL and whether Israel had respected the principle of distinction between civilian and military objects and persons. The report also discussed the principle of right to life and arbitrary killings under IHRL. It concluded that in this case IHRL and IHL were jointly applicable. The report also concluded there were violations of the right to life under IHRL in relation to individuals who were unlawfully and disproportionately killed according to IHL principles.⁴⁸³ In this case the joint complementary application of two legal frameworks did not result in conflict of rules, but rather a mutually reinforcing conclusion.

The legality of killing outside the context of armed conflict is governed by the standards of IHRL. Although these standards are described as law enforcement model but they do not specifically apply to police forces. This model allows all government officials including police and a state's military and security forces to use lethal force in situations where violence exists, but falls short of the threshold for armed conflict.⁴⁸⁴ This regime only allows killing if it is required to protect life and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life.⁴⁸⁵ Thus in peacetime, the wilful killing of human beings is illegal and only allowed in self-defence. Furthermore this regime does not legitimise the killing of civilians who die when law enforcement agents use force against suspected terrorists attacks as "collateral damage". In peacetime, even the intentional destruction of private property and severe restrictions on individual liberties are generally impermissible.⁴⁸⁶

⁴⁸² Human Rights in Palestine and other occupied Arab territories, Report of the UN fact finding mission on the Gaza conflict, UN Doc A/HRC/12/48 (25 Sep 2009) para 424-429

⁴⁸³ Ibid para 1923 "The Mission also concludes that Israel, by deliberately attacking police stations and killing large numbers of policemen (99 in the incidents investigated by the Mission) during the first minutes of the military operations, failed to respect the principle of proportionality between the military advantage anticipated by killing some policemen who might have been members of Palestinian armed groups and the loss of civilian life (the majority of policemen and members of the public present in the police stations or nearby during the attack). Therefore, these were disproportionate attacks in violation of customary international law. The Mission finds a violation of the right to life (ICCPR, article 6) of the policemen killed in these attacks who were not members of Palestinian armed groups"

⁴⁸⁴ Alston (n 372) Para 31

⁴⁸⁵ Ibid para 32

⁴⁸⁶ Rosa Brook, 'Duck-Rabbits and Drones: Legal Indeterminacy in the War on Terror' (2014) Georgetown University Law Center, 308

2.12.1 Extraterritorial applicability of international human rights la

IHRL has been conceived to respect, protect and fulfil the human rights of persons within its territory because the territory is the main scope of any State's jurisdiction.⁴⁸⁷ Article 2(1) of the International Covenant on Civil and Political Rights stipulates that 'each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [...] Covenant'. A narrow interpretation of this provision suggests that states are not responsible for human rights violations committed outside their territory.⁴⁸⁸ This narrow understanding of provision failed to take into account the main purpose of the Covenant. The Human Rights Committee clarified its meaning by stating that states 'must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that state Party, even if not situated within the territory of the state Party.'⁴⁸⁹ The Committee has interpreted that state is not only obliged to protect the rights of individual in its territory but also to protect the rights of individuals outside its territory where it exercise effective control. This indicated the extraterritorial application of IHRL. The ICJ reaffirmed this position in the Armed activities case where it held that 'international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own

⁴⁸⁷ Israel maintain that international humanitarian law do not apply extraterritorially see Human Rights Committee, CCPR/CO/78/ISR ; CCPR/CO/79/Add.93 ; CCPR/CO/78/ISR, para. 11 ; US also argues that they are not bound by international human rights law outside their territory see Michael J. Dennis, ' Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation ' (2005) American Journal of International Law, 119

⁴⁸⁸ Human Rights Committee, Eighty-seventh session, 10-28 July 2006, International covenant on civil and political rights, CCPR/C/USA/CO/3/Rev.1, 18 December 2006 , the committee showed its concern over the point of view of the United States of America expressed in a periodic report to the Human Rights Committee and notes that "the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of (a) its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice; (b) its failure to take fully into consideration its obligation under the Covenant not only to respect, but also to ensure the rights prescribed by the Covenant; and (c) its restrictive approach to some substantive provisions of the Covenant, which is not in conformity with the interpretation made by the Committee before and after the State party's ratification of the Covenant") at Para 10

⁴⁸⁹ *ibid*

territory'.⁴⁹⁰ The European Court of Human Rights also refers to the effective control of a territory for the application the European Convention:

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action, whether lawful or unlawful, it exercises effective control of an area outside its national territory⁴⁹¹

Likewise the Inter American Commission of Human Rights has taken the following position:

In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control⁴⁹²

However, the exact meaning of the term 'effective control' is not yet determined. The international case law and the views of UN treaty bodies, have intended to interpret it. Different situations have been recognised as amounting to effective control, from 'prolonged' occupations to situations that have lasted for only a short period of time. For instance, the ICJ found in the Wall Case that Israel had obligations under the International Covenant on Civil and Political Rights for its acts in occupied Palestinian territory due to its effective control over the territory.⁴⁹³ In the *Ilasco and others v Moldova and Russia*, where the Court was not dealing with an occupation scenario, the European Court of Human Rights held that Russia exercised effective control on the basis of the presence of a relatively small number of troops.⁴⁹⁴ This situation would not amount to an occupation under IHL as defined in Article 42 of the 1907 Hague Convention⁴⁹⁵, but it was found to constitute effective

⁴⁹⁰ International Court of Justice, *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports (19 December 2005), at Para 216

⁴⁹¹ European Court of Human Rights, *Loizidou v. Turkey*, Application no. 15318/89, (18 December 1996), Para 62

⁴⁹² Inter-American Commission on Human Rights, *Coard v. the United States of America*, Case 10.951 (1999), Para. 37

⁴⁹³ *Wall Case* [2004] ICJ Rep136, Para 109-111

⁴⁹⁴ *Ilasco and others v Moldova and Russia* [2004] VII Eur. Ct. H.R., Para 392

⁴⁹⁵ Art. 42 states "Territory is considered occupied when it is actually placed under the authority of the hostile army"

The occupation extends only to the territory where such authority has been established and can be exercised.

control for the application of extraterritorial human rights obligations.⁴⁹⁶ The Court found that the separatist regime had been:

Set up in 1991-1992 with the support of the Russian Federation, vested with organs of power and its own administration, remained under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survived by virtue of the military, economic, financial and political support given to it by the Russian Federation.⁴⁹⁷

International human rights bodies agree that effective control can be exercised over persons, even if this control is only temporary. Some examples of control over a person would be abduction, detention or ill treatment. In the Chamber judgement in the Ocalan case, the Court held that Mr Ocalan was subject to the Turkish authority and control⁴⁹⁸ after he was arrested and then physically returned to Turkey by Turkish officials. In the Lopez Burgos case, concerning the detention and ill-treatment of the victim by Uruguayan agents in Argentina, the Human Rights Committee noted that Art 2(1) 'does not imply that the state party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another state, whether with the acquiescence of the Government of that state or in opposition to it'.⁴⁹⁹ According to the UN Human Rights Committee:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction...state party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party...This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory..⁵⁰⁰

⁴⁹⁶ Cordula Droege, 'The Interplay between IHL and HR in situations of armed conflict' (2007) *Israel Law Review* 310, 331

⁴⁹⁷ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 140

⁴⁹⁸ ECtHR 12 March 2003, *Ocalan v Turkey* (Chamber) no 46221/99, Para 93

⁴⁹⁹ *Casariago v Uruguay*, UNHR Comm No 56/1979, 29 July 1981, Para 10.1-10.3

⁵⁰⁰ Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, (29 March 2004) Para 10

Therefore states are bound to comply with their human rights obligations in respect of all persons under their jurisdiction, irrespective of whether they are in their territory. This criterion does not resolve many complex cases and the case law is fragmented. Particularly problematic is the application of IHRL to operations conducted by air, including bombing from a distance or a targeted missile launched from unmanned aerial vehicles. The jurisprudence of European Court of Human Rights has provided some guidance in this issue. For instance, in the case of *Banković*, the Court held that aerial bombardment is *per se* excluded from the human rights framework, because it is effective control of the territory in question that is key for the application of human rights law and aerial bombardment does not constitute effective control because there are no troops on the ground.⁵⁰¹

2.13 Conclusion

The view that states can use force preventively has relatively little support, even in the post September 11 era. There can be little doubt that traditional concepts of armed conflict are increasingly subject to question post 11 September 2001. But the view that the US is engaged in a global boundary-less armed conflict with Al-Qaeda has no legal recognition. Moreover, the war rhetoric used by the US justified the application of IHL and lowered the standards of protection to individuals.⁵⁰² Ambiguity allows the manipulation of the law and the selective application of rules when it suits the states. This lack of clarity on the applicability of legal standards directly hinders accountability and affects rule of law. It has been seen that reinterpretation of certain legal terms have been possible by arguing that the post 9/11 era raises new kinds of challenge. This new war theory has enabled governments to implicitly or explicitly challenge the legal regimes governing the use of lethal force against

⁵⁰¹ *Banković and others v Belgium and 16 Other Contracting States*, Appl. no. 52207/99, 12 December 2001, Para 70, 71

⁵⁰² For instance use of targeted killing in undeclared war zones has been justified by claiming we are in an armed conflict with Al-Qadea and associated forces so we can target them anywhere in the world. This has allowed US to use force outside the context of armed conflict and to avoid accountability of civilian casualties by arguing we are operating during the time of war and under international humanitarian law collateral damage that satisfies the principles of law of war is justified. However on the other hand under international human rights law targeted killing can never be justified because force cannot be used as a first resort.

terrorist threats. The threat of terrorism has repeatedly invoked to marginalise the role of human rights in the name of security.⁵⁰³

Although human rights law continue to apply during armed conflicts, the role of IHL as the *lex specialis* has granted primacy to the rules governing war. The *lex specialis* principle is remarkably vague and its broad scope allows multiple and divergent interpretations.⁵⁰⁴ The US and Israel, have argued that in situations of armed conflicts humanitarian law applies exclusively thus displacing or excluding human rights law framework.⁵⁰⁵ However the UN fact-finding report of Gaza highlighted that the complementary application of humanitarian law and human rights principles is practicable and can ensure greater protection of individual rights when applied in such a way that respects the specificities of each field, where humanitarian law and human rights law apply to complete each other. There is no one-size-fits all solutions and complementary application of humanitarian law and human rights law can only develop if each case is handled according to its situation.⁵⁰⁶

⁵⁰³ Secretary General, Addressing Council Meeting On Counter-Terrorism, Says UN 'Stands Four-Square' Against Scourge (18 Jan 2002), SG/SM/8105-SC/7277

⁵⁰⁴ *Lex Specialis* principle has been interpreted to mean that depending on the situation at hand either one of the legal framework could be the more specific one see (Report of the Office of the High Commissioner on the outcome of the expert consultation on the issue of protecting the human rights of civilians in armed conflict, UN Doc A/HRC/14/40 (2 June 2010) at p. 14; Some interpret it as a combined application of two legal frameworks For instance in the context of targeted killing David Kretzmer suggested "the applicable system must be a mixed model, which incorporates features of international human rights law", See David Kretzmer, 'Targetted killing of suspected terrorist: Extra-judicial executions or legitimate means of defence?' (2005) EJIL 171, 171; Marco Sassoli and Laura M Oslon, 'The relationship between International humanitarian law and international human rights law where it matters: Admissible killing and internment of fighters in non-international armed conflicts' (2008) IRRC 599, 626; Not everyone agrees with mutual applicability of international humanitarian law and international human rights law. Shany highlighted the challenges with the mixed model approach see Yuval Shanny, Human rights and humanitarian law as competing legal paradigms for fighting terror in Orna Ben-Naftali, *International humanitarian law and international human rights law* (Oxford University Press 2011) 13

⁵⁰⁵ These arguments were rejected by Human Rights Commission See Human Rights Commission, Concluding observations United States of America ' UN Doc CCPR/C/USA/CO/3/Rev.1 (18 Dec 2006); Human Rights Commission, Concluding Observations, Israel, UN Doc CCPR/C/ISR/CO/3/ (3 Sep 2010) All these documents are from the Human Rights Committee, not the 'Human Rights Commission'; Françoise Hampson and Ibrahim Salama, Working paper on the relationship between human rights law and international humanitarian law, UN Doc. E/CN.4/Sub.2/2005/14, 21 June 2005, para 69 ; Philip Alston, Jason Morgan and William Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the 'War on Terror'' European Journal of International Law 2008, vol. 18, no. 1, pp. 183–209 ; Droege, Cordula, 'Elective affinities? Human rights and humanitarian law', International Review of the Red Cross, 2008, vol. 90, no. 871, pp. 501–548

⁵⁰⁶ Noam Lubell and Nanice Prud'homme, impacts of human rights law in Rain Liivoja, Tim McCormack, Routledge Handbook of the Law of Armed Conflict, (Routledge, 2016), 120

Chapter 3: Targeted killing and use of lethal force by states

3. Introduction

After the 9/11 attacks President Bush not just invaded Afghanistan but authorised a campaign of missiles and bomb attacks beyond a specific armed conflict zone. In November 2002, the US carried out the first drone strike far from the battlefields of Afghanistan in Yemen.⁵⁰⁷ In 2004, the US carried out the first targeted killing attack in Pakistan using a drone.⁵⁰⁸ Then in 2011, similar attacks began in Somalia.⁵⁰⁹ These attacks were launched by using the new technology of unmanned aerial vehicles, commonly known as drones. The drone campaign conflicts with fundamental international law and the proclaimed US policy opposing targeted killing. In response to the Israeli practice of targeted killing, the US Ambassador to Israel, Martin Indyk, stated on the Israeli television in July 2001: 'The United States government is very clearly on the record as against targeted assassinations. They are extrajudicial killings, and we do not support that.'⁵¹⁰ However, the US has carried out targeted killings in the past. In 1981, President Ronald Reagan signed an executive order following up on a ban instituted by President Gerald Ford that barred the Central Intelligence Agency (CIA) from assassinations.⁵¹¹ Though, there is evidence that covert anti-terrorist operation conducted by the

⁵⁰⁷ BBC News, 'CIA 'killed al-Qaeda suspects' in Yemen' (5 Nov 2002) < <http://news.bbc.co.uk/1/hi/2402479.stm> > accessed 15 July 2016 (America's Central Intelligence Agency (CIA) carried out an attack by using armed drones in Yemen that killed six suspected members of Osama Bin Laden's Al-Qaeda network, according to US officials. This was first time the US had carried out such an attack outside conflict zone of Afghanistan)

⁵⁰⁸ 'The Bush Years: Pakistan Strikes 2004-2009' (*Bureau of Investigative Journalism*, 10 August 2011) < <http://www.thebureauinvestigates.com/2011/08/10/the-bush-years-2004-2009/> > accessed 15 July 2016 (On 18 June 2004 US conducted first drone strike in FATA which killed 5–8 people including militant Nek Muhammad Wazir)

⁵⁰⁹ Chris Wood, *Sudden Justice, America's Secret Drone Wars* (Oxford University Press 2015) 215 (The first known JSOC drone strike in Somalia came with an attempt to kill Bilal al Birjawi in June 2011)

⁵¹⁰ Joel Greenberg, 'Israel Affirms Policy of Assassinating Militants' (New York Times, 5 July 2001) < <http://www.nytimes.com/2001/07/05/world/israel-affirms-policy-of-assassinating-militants.html> > accessed 15 July 2016

⁵¹¹ Executive Order 12333 United States Intelligence Activities, Para 2.11 states "No person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in assassination"

CIA may have involved assassinations.⁵¹² In the mid-1990s there were reports that a CIA agent, Robert Baer, had initiated a plot to kill Saddam Hussain, which was blocked by Clintons National Security Affairs advisor.⁵¹³ In 1998, President Bill Clinton took the first major step towards undermining the ban. He authorised the CIA to carry out the covert killing of Osama bin Laden. The Clinton Administration believed that the targeted killing of Bin Laden fell outside the ban on assassination given in Executive Order 12333. Christopher Kojm, a former U.S. Department of State's official claimed that '[s]enior legal advisors in the Clinton administration agreed that under the law of armed conflict, killing a person who posed an imminent threat to the United States was an act of self-defence, not an assassination'.⁵¹⁴

After 9/11, President George Bush expanded President Clinton's authorisation, issuing a presidential 'finding'; while its contents remain classified it has reportedly reiterated President Clinton's 1998 position that Executive Order 12333 allowed the CIA to kill terrorists, specifically Bin Laden, with the approval of the President.⁵¹⁵ Within days of taking office in January 2009, President Barack Obama dramatically increased the number of drone strikes. The Obama administration ordered more than 500 drone strikes between 2009 and 2016.⁵¹⁶ In addition to strikes targeting subjects whose identities are known (personality strikes) the Obama administration also authorised 'signature strikes', targeting a large group of people whose identities are not known but who display patterns of behaviour that render

⁵¹² Bob Woodward, *Veil: The Secret Wars of the CIA, 1981-1987* (Simon & Schuster 2005) 393-397; The two journalists, Tony Avirgan and Martha Honey, claim that CIA was involved in the broad conspiracy surrounded Nicaraguan rebel activities in Costa Rica, including an assassination attempt, drug-dealing and gun-running see Tony Avirgan and Martha Honey, Plaintiffs-appellants, v John Hull and others, U.S. Court of Appeals for the Eleventh Circuit - 932 F.2d 1572 (11th Cir. 1991) 18 June 1991 < <http://law.justia.com/cases/federal/appellate-courts/F2/932/1572/289229/> > accessed 15 July 2016; Joan McCord and John H. Laub, *Contemporary Masters in Criminology* (Springer 1995) 48

⁵¹³ Dan Caldwell, *Vortex of Conflict: U.S. Policy Toward Afghanistan, Pakistan, and Iraq* (Stanford University Press 2011) 156

⁵¹⁴ Craig R. Whitney, 'In a War on Terror, Not All the Rules of War Apply' *N.Y. TIMES* (28 March 2004) < <http://www.nytimes.com/2004/03/28/weekinreview/in-a-war-on-terror-not-all-the-rules-of-war-apply.html?ref=&r=0> > accessed 18 July 2016; Micah Zenko, *Between Threats and War: U.S. Discrete Military Operations in the Post-Cold War World* (Stanford University Press, 2010); Christopher A. Ford and Amichai Cohen, *Rethinking the Law of Armed Conflict in an Age of Terrorism*, (Lexington Books, 2012), 231

⁵¹⁵ Avery Plaw, *Targeting Terrorists: A License to Kill?* (Routledge, 2008), 100-123

⁵¹⁶ The Bureau of investigative journalism, Get the data: drone wars < <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> > ; International Security data site < <http://securitydata.newamerica.net/> > accessed 15 July 2016

them suspicious.⁵¹⁷This shift entails the killing of all males of a certain age in pre-determined locations.⁵¹⁸ President Obama also authorised the killing of Americans. The confirmation came from the then Director of National Intelligence, Dennis Blair, during a congressional testimony in February 2010. Blair said, 'being a US citizen will not spare an American from getting assassinated by military or intelligence operatives overseas if the individual is working with terrorists and planning to attack fellow Americans'.⁵¹⁹

Since then, new drone bases have been established around the world, raising the expectation of future drone attacks beyond armed conflict zones.⁵²⁰ Drones are used by both the US military and the CIA in warzones⁵²¹ (Afghanistan and Iraq) but also outside active battlefields in counterterrorism efforts in Pakistan, Yemen, and Somalia. The Obama administration

Bradley Jay Strawser, *Killing by Remote Control: The Ethics of an Unmanned Military* (Oxford University Press, 2013)

⁵¹⁷ Murtaza Hussain, 'Pakistan's legal fight to end the drone war' (Al-Jazeera, 15 Dec 2011) < <http://www.aljazeera.com/indepth/opinion/2011/12/20111213112743546541.html> > accessed 22 July 2016

⁵¹⁸ Derek Jinks, Jackson N. Maogoto and Solon Solomon, *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects* (T.M.C. Asser Press; 2014), 68

⁵¹⁹ 111th Congress 2D Session, H.R. 6010, To prohibit the extrajudicial killing of United States citizens, and for other purposes, Para 3 < http://fas.org/irp/congress/2010_cr/hr6010.pdf > accessed 15 July 2016

⁵²⁰ Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press 2015) 414; The Washington Post, 'US building secret drone bases in Africa, Arabian Peninsula officials say' (20 Sep 2011) < https://www.washingtonpost.com/world/national-security/us-building-secret-drone-bases-in-africa-arabian-peninsula-officials-say/2011/09/20/gIQAJ8rOjK_story.html > accessed 15 July 2016 (Officials report that US is building new bases in Africa and the Arabian Peninsula); Another report suggests that the US operates fifty-seven drone bases : Nick Turse, 'Mapping America's shadowy drone wars' (*Tom Dispatch*, 16 Oct 2011) < http://www.tomdispatch.com/blog/175454/tomgram%3A_nick_turse_mapping_america's_shadowy_drone_wars/ > accessed 15 July 2016 ; Nick Turse, 'Revealed: The Full Extent of America's Secret Empire of Drone Bases', (*AlterNet*, 6 Feb 2015) <http://www.alternet.org/world/revealed-full-extent-americas-secret-empire-drone-bases> > accessed 15 July 2016

⁵²¹ Warzones mean active battlefield, places in which US is involved in an armed conflict. "The armed conflict between the US and Afghanistan began as an international armed conflict (IAC). Everyone agrees on that. However, I think the US government position is that once the Taliban were defeated and removed from power, the conflict transformed into a non-international armed conflict (NIAC) between the new government of Afghanistan and the Taliban acting as a non-state actor. The U.S. is a party to this conflict as a co-belligerent fighting alongside the "new" government of Afghanistan, helping them to fight their NIAC against the Taliban" see Jens David Ohlin, 'The Nature and Scope of the War in Afghanistan' (*Opinio Juris*, 2015) < <http://opiniojuris.org/2015/05/28/the-nature-and-scope-of-the-war-in-afghanistan/> > accessed 22 July 2016; Mary O'Connell said drones are lawful battlefield weapons and their lawful use includes countries like Iraq and Afghanistan see Mary Ellen O'Connell, 'Lawful Use of Combat Drones, Congress of the United States House of Representatives, Subcommittee on National Security and Foreign Affairs, Hearing: Rise of the Drones II: Examining the Legality of Unmanned Targeting' (28 April 2010) < https://fas.org/irp/congress/2010_hr/042810oconnell.pdf > accessed 22 July 2016

escalated targeted killings through a rapid increase in drone strikes against Al-Qaeda and the Taliban and through expansion of US special operations' kill/capture missions.⁵²² The successful killing of Osama bin Laden in a US Navy SEAL raid, in May 2011, is prime example of this trend.⁵²³

Since 9/11, the US government has given multiple legal justifications for targeted killings. These justifications have appeared in official governmental speeches and documents, as well as in the writing of scholars sympathetic to the practice. This includes the following argument:

- 1) The Bush administration declared that the US is engaged in a 'global war on terrorism' meaning that entire world is a battlefield and members of certain groups could be targeted anywhere.⁵²⁴ The Obama administration continued Bush's policy but used the term 'armed conflict against Al-Qaeda, Taliban and associated forces' that began on 9/11.⁵²⁵
- 2) The US governments targeted killing program is a valid exercise of the United States inherent right of self-defence provided for in Art 51 of the UN Charter.⁵²⁶
- 3) The US is targeting terrorist suspects in states, which have consented to the drone strikes.⁵²⁷

⁵²² Abigail Watson, 'The Golden Age of Special Operations Forces, (*Oxford Research Group* 28 Nov 2017) < <https://www.oxfordresearchgroup.org.uk/the-golden-age-of-special-operations-forces> > accessed 3 July 2018

⁵²³ BBC News, 'Osama Bin Laden's death: How it happened' (10 September 2012), < <http://www.bbc.co.uk/news/world-south-asia-13257330> > accessed 15 July 2016

⁵²⁴ Address To The Joint Session Of The 107th Congress, (20 Sep 2001) 65-73 < https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf > accessed 28 Dec 2017

⁵²⁵ President Barack Obama, 'Remarks by the President at the National Defence University' (23 May 2013) < <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> > accessed 15 July 2016

⁵²⁶ Harold Hongju Koh Legal Adviser, U.S. Department of State Annual Meeting of the American Society of International Law, The Obama Administration and International Law, (25 March 2010) < <http://www.state.gov/s/l/releases/remarks/139119.htm> > accessed 15 July 2016 (Koh said that "a state that is engaged in an armed conflict or in legitimate self-defence is not required to provide targets with legal process before the state may use lethal force) ; Avery Plaw, Matthew S. Fricker and Carlos Colon, *The Drone Debate: A Primer on the U.S. Use of Unmanned Aircraft Outside Conventional Battlefields* (Rowman & Littlefield Publishers 2015) 121-127

⁵²⁷ The US Department of Justice, Attorney General Eric Holder Speaks at North-western University School of Law, (5 March 2012), < <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> > accessed 15 July 2016

- 4) The US is targeting terrorist suspects in states, either 'unable or unwilling' to quell the threat at issue.⁵²⁸

Rather than providing one wholly sufficient exception to the general prohibition on the use of force, the US has opted for a strategy that provides multiple arguments to gain a greater accumulated affect. According to Professor Mary O'Connell, this reliance on multiple arguments may suggest that the policy is on weak legal grounds.⁵²⁹ This chapter will assess whether or not the above-mentioned justifications stand up to the scrutiny of international law.

3.1 Genealogy of drones

'The pilot of the future will not even need to leave home to wage a foreign war'⁵³⁰

After the Air War a new form of warfare will appear much as the Air War succeeded the Ground War. We can call it the Remote War (where).... one side loses people the other side loses toys. All that is left is the shooting and dying ... and toys don't die...⁵³¹

The purpose of this section is to review the genealogy of the predator and to examine the policy standards and procedures for the use of drones in targeted killing. The technology enabling the use of drones can be traced back to the First World War.⁵³² Remotely Piloted Vehicles (RPV) were the earliest ancestor of modern aerial drones. Dumb drones were used to test and train combat pilots, missile men, and antiaircraft gunners. This is possibly the most salient example of the impact of technology on rules of engagement during armed conflicts. The technology underpinning the RPVs first utilised during the 1975 Vietnam War has evolved in the intervening decades and has

⁵²⁸ *ibid*

⁵²⁹ Mary O'Connell, 'International law and drone attacks beyond armed conflict zone', in David Cortright, Rachel Fairhurst and Kristen Wall, *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press 2015) 64-65

⁵³⁰ Paul Dickson, *The electronic battlefield* (Indiana University Press 1976) 179

⁵³¹ "Toys Against the People, or Remote Warfare," *Science for the People Magazine* (1973), 8-10, 37-42 < <http://socrates.berkeley.edu/~schwartz/SftP/MagazineArchive/SftPv5n1s.pdf> > accessed 17 July 2016

⁵³² Ian G.R. Shaw, 'The Rise of the Predator Empire: Tracing the History of U.S. Drones' < <https://understandingempire.wordpress.com/2-0-a-brief-history-of-u-s-drones/> > accessed at 3 July 2018

now forever altered the nature of war. It will not be wrong to say that drones are now the future of war. As Peter Singer reveals, 'there is not a single new manned combat aircraft under research and development at any major Western aerospace company, and the Air Force is training more operators of unmanned aerial systems than fighter and bomber pilots combined.'⁵³³ The US drones have been the key tool in the counterterrorism fight in Pakistan, Somalia and Yemen and have also taken centre stage in the wars in Afghanistan and Iraq. Drones can be either controlled remotely by pilots from the ground or autonomously following a pre-programmed mission.⁵³⁴ The development of drones has been closely connected to warfare. For military purposes, drones are used to achieve two main objectives: reconnaissance and surveillance, on one hand; and on the other, for targeted killing, when they are armed with missiles and bombs. They have been particularly popular with the US military and also with the CIA during the global war against terrorists. During the Vietnam War the US military used an estimate 147 drones⁵³⁵ for reconnaissance purposes and nicknamed as 'lightning bugs'.⁵³⁶ Many of the aerial views of Vietnam appearing in the US press were captured by drones.⁵³⁷ Until November 2001 the drones were machines for intelligence, surveillance and reconnaissance. Even in 1999, in the context of the NATO intervention in Kosovo, the US deployed drones with the specific aim of filming targets and illuminating them by means of lasers, allowing the F-16 planes to strike; they were conceived as 'eyes' rather than weapons.⁵³⁸

⁵³³ Peter W Singer, 'Do Drones Undermine Democracy?' *The New York Times* (21 Jan 2012), < <http://www.nytimes.com/2012/01/22/opinion/sunday/do-drones-undermine-democracy.html?pagewanted=all& r=0> > accessed 17 July 2016

⁵³⁴ Unmanned aerial vehicles (drones) were described to be "a powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely and can be expendable or recoverable" See US Department of Defence, *Unmanned Aircraft Systems Roadmap 2005-2030* (Office of the Secretary of Defence, DoD 2005), 1

⁵³⁵ Josep Guerrero and Rogelio Lozano, *Flight Formation Control*, Chapter 1 1.22 Evolution of UAV's, (ISTE Ltd, 2012)

⁵³⁶ Sarah E. Kreps, *Drones: What Everyone Needs to Know* (Oxford University Press 2016) 11

⁵³⁷ Paul Dickson, *The electronic battlefield* (Indiana University Press 1976) 188

⁵³⁸ JD R. Dixon, 'UAV Employment in Kosovo: Lessons for the Operational Commander' (Naval war college 2000)

3.1.1 Drones in the fight against terrorism

Until 2001 drones were used for reconnaissance only and lacked the ability to fire a weapon.⁵³⁹ In September 2000, when the CIA began flying drones in Afghanistan for surveillance purposes, it quickly became apparent a weaponised version was needed after spotting Osama Bin Laden at a training facility. At that time Bin Laden was wanted for his complicity in facilitating a terrorist attacks against American embassies in Tanzania and Kenya in 1998. Therefore the decision to weaponise drones is connected to their use for surveillance, when drones flown by the CIA from Uzbekistan to Afghanistan spotted a man resembling or allegedly believed by senior US security analysts to be Bin Laden.⁵⁴⁰ The inability to kill Bin Laden on the spot in 2002 triggered the interest in armed drones. Drone-fired missiles can travel faster than the speed of sound and are thus able to strike a target before people on the ground hear it.⁵⁴¹ Conversely, cruise missiles used in 1998 to target Osama bin Laden⁵⁴² had serious limitations, and required reliable intelligence and maps, a heavy time-investment, and above all, their efficacy was subjected to the enemy staying in one place. The 1998 operation on Bin Laden required four to six hours to analyse the intelligence, obtain presidential authorization, program the missiles, and fly them to the target.

It is unsurprising that armed drones have emerged as the platform of choice in the counterterrorism mission.

In military operations, these drones are highly capable and sought after by ground forces. They cost roughly \$4-5M versus a modern fighter's \$150M. They persist on station for 15-20 hours without refuelling, versus 1-2 hours for fighter attack aircraft. They consume 100 gallons of fuel per flight versus 1,000-3,000 gallons for an unrefuelled fighter attack aircraft. Their optics provides full motion imagery at far greater distances and altitudes than the human eye, and the crews are not

⁵³⁹ Mark Mazzetti, *The way of knife, the CIA, a secret army and a war at the ends of the earth* (Scribe 2013) 91

⁵⁴⁰ Jarrett Murphy, 'Infighting delayed Osama hunt' *CBS News* (25 June 2003) < <http://www.cbsnews.com/news/infighting-delayed-osama-hunt/> > accessed 15 July 2016

⁵⁴¹ Micah Zenko, *Reforming US Drone Strike Policies*, (Council Special Report No. 65, 2013) 6

⁵⁴² *ibid*

distracted or disabled by the constant duties of flight. Their sensor information can be distributed to fixed and mobile users in real time.⁵⁴³

On a technical level drones' main advantage in comparison to traditional military means of fighting terrorism (Special Operation raids⁵⁴⁴ or conventional aerial bombings) is their ability to conduct continuous surveillance of suspected targets.⁵⁴⁵

Compared to other military tools, the advantages of using drones are many but a chief factor is that they avoid risks to US forces. Drone pilots sit safely, thousands of miles away from physical danger of the war they are fighting. Drones have literally divided the war theatre between the 'hostile area' and the 'safe area'.⁵⁴⁶ All this helps to understand the rationale leading to the US to adopt them as their main weapon of choice in the fight against terrorism after 9/11.

3.2 Targeted killing or assassination?

Before the emergence of drones, individual hit teams undertook assassinations. However, the use of drones for killing enemies in a third state enabled the governments to engage in targeted killing operations from thousands of miles away while sitting at a computer terminal. This raises important legal and policy questions like, what constitutes an assassination and what may be deemed a permissible targeted killing. It is worth noting that the term 'targeted killing' is often confused with 'assassination'. For instance, the term 'assassination' was used to describe the killing of Osama bin Laden by many major American and world news outlets.⁵⁴⁷ There are important legal differences between these two terms.

⁵⁴³ General (ret) James E. Cartwright, Constitutional And Counter Terrorism Implications Of Targeted Killing, Testimony to the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

(24 March 2013) 2 < <http://www.hsdl.org/?view&did=736523> > accessed 3 July 2018

⁵⁴⁴ "A special operation is conducted by forces especially trained, equipped and supported for a specific target whose destruction, elimination or rescue (in the case of hostages), is a political or military imperative" See James D. Kiras, *Special Operations and Strategy: From World War II to the War on Terrorism*, (Routledge 2016) 4

⁵⁴⁵ Peter W Singer, *Wired for war: The robotics revolution and conflict in the 21st century* (Penguin 2009) 116-120

⁵⁴⁶ Dr John W Clarke, 'Remote control in hostile environments' (1964) *New Scientist*, 300

⁵⁴⁷ Andrea Stone, Bin Laden Killing Threatens Already Tenuous Relationship Between US and Pakistan *Huffington Post* (2 May 2011) < http://www.huffingtonpost.com/2011/05/02/osama-bin-laden-dead-pakistan_n_856584.html > accessed 18 July 2016 (Article reads "But as the assassination of Osama

3.2.1 Assassination

Opponents of targeted killings tend to describe it as extrajudicial execution or assassination.⁵⁴⁸ Extrajudicial killing reflects a government's policy to kill its opponents not for operational or self-defence purposes but as a mean to punish adversaries of the state. It reveals a regime that prefers to eliminate individuals even where capture and arrest is possible.⁵⁴⁹ In contrast, the targeted killing conducted in accordance with international law only targets an individual whose arrest is not feasible. The primary objective of lawful targeted killing is the prevention of a terrorist act intended to kill innocent civilians.⁵⁵⁰

Assassination is generally defined as 'any unlawful killing of someone for political purposes'.⁵⁵¹ Targeted killing is different from assassination.⁵⁵² One of the most problematic aspects of the regime governing assassination is defining the term itself. Many laws refer to assassination but few defined it.⁵⁵³ For instance, the Executive Order 12333⁵⁵⁴ prohibits the United States from conducting assassinations, yet it does not define or specify what constitutes an 'assassination'.⁵⁵⁵ Colonel W. Hays Parks wrote in the Memorandum on Executive Order 12333, that an 'assassination involves murder of a targeted

bin Laden at his palatial fortress compound..."); Pakistan and U.S. Coordinated Bin Laden Assassination, Says Envoy, (2 May 2011) < <http://www.haaretz.com/world-news/pakistan-and-u-s-coordinated-bin-laden-assassination-says-envoy-1.359474> > accessed 18 July 2016 ; Sam Jones & Ben Quinn, 'Osama Bin Laden Dead: Aftermath' *Guardian* (3 May 2011) < <https://www.theguardian.com/news/blog/2011/may/03/osama-bin-laden-death-aftermath> > accessed 18 July 2016 ("Osama bin Laden's assassination by the US Special Forces in Abbottabad..."); Arthur Caplan, 'Was It Right to Kill Bin Laden?' MSNBC (2 May 2011) < http://www.nbcnews.com/id/42861619/ns/world_news-death_of_bin_laden/t/was-it-right-kill-bin-laden/#.V4y5hLgrLIU > accessed 18 July 2016; Parag Khanna, 'Opinion: Bin Laden Assassinated Not Martyred' (CNN, 2 May 2011) < <http://edition.cnn.com/2011/OPINION/05/02/khanna.obl.assassination/> > accessed 18 July 2016

⁵⁴⁸ Amos Guiora, *Legitimate Target: A Criteria-Based Approach to Targeted Killing* (Oxford University Press 2013) 14

⁵⁴⁹ J Nicholas Kendall, 'Israeli Counter-terrorism: Targeted killings under International law' (2002) N.C.L. Rev 1069, 1073

⁵⁵⁰ Guiora (n 548) 14

⁵⁵¹ Abraham D. Sofaer, 'The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense' (1989) *Military Law Review*, 117

⁵⁵² Michael N. Schmitt, 'State Sponsored Assassination in International and Domestic Law' (1992) *Yale J. Int'l L.* 609, 613-618 (see the historical overview of assassination)

⁵⁵³ General Orders No. 100: The Lieber Code, Section IX, Art. 148, "Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism"

⁵⁵⁴ Executive Order 12333 was the latest of the three executive orders on assassination-issued in 1981 by President Reagan, it superseded the previous two executive orders

⁵⁵⁵ Executive Order 12333, United States intelligence activities, 2.11 states "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination"

individuals for political purposes'.⁵⁵⁶ According to this description, a 'victim need not to be a political leader or public official. As long as there is a political motive, an assassination can be committed against a private person'.⁵⁵⁷ Whatever conceptual framework is used these killings don't find justification under the rules governing self-defence in international law.⁵⁵⁸ The assassination ban does not include lawful acts of self-defence, as explained by Koh:

[U]nder domestic law, the use of lawful weapons systems consistent with the applicable laws of war for precision targeting of specific high-level belligerent leaders when acting in self-defence or during an armed conflict is not unlawful, and hence does not constitute assassination.⁵⁵⁹

Scholars also differentiate between peacetime and wartime killings, while acknowledging that both are illegal.⁵⁶⁰ The criteria for determining each type of assassination are slightly different. Peacetime assassination involves the murder of a specifically targeted person for a political purpose. Wartime assassination, on the other hand, requires the murder of a targeted individual by using treacherous means.⁵⁶¹ Wartime killing can only be considered assassination when it involves treacherous means; the political intent is irrelevant,⁵⁶² since 'once a war begins, every death can be viewed as politically motivated because it is difficult to discern political intent from other

⁵⁵⁶ Colonel W. Hays Parks, Memorandum On Executive Order 12333 And Assassination, Department Of The Army Office Of The Judge Advocate General Of The Army (2 November 1989) see Annex A < <https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/ParksMemorandum.pdf> > accessed 18 July 2016

⁵⁵⁷ Matthew C. Wiebe, 'Comment, Assassination in Domestic and International Law: The Central Intelligence Agency, State-Sponsored Terrorism, and the Right of Self-Defence' (2003) *TULSA J. COMP. & INT'L L.* 363, 365-66

⁵⁵⁸ Major Tyler J. Harder, 'Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law' (2002) *172 MIL. L. REV.* 1, 2

⁵⁵⁹ Harold Hongju Koh, Legal Adviser, 'U.S. Department of State, The Obama Administration and International Law' (25 March 2010) < <http://www.state.gov/s/l/releases/remarks/139119.htm> > accessed 22 July 2016

⁵⁶⁰ Daniel B. Pickard, 'Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law' (2002) *GA. J. INT'L & COMP. L.* 1, 6 (Pickard stressed that the legality of assassination typically depends on whether the act is committed during peacetime or wartime)

⁵⁶¹ Major Tyler J. Harder, 'Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law' (2002) *MIL. L. REV.* 1, 4

⁵⁶² Mark Vincent Vlasic, Cloak and Dagger, 'Diplomacy: The U.S. and Assassination' (2000) *GEO. J. INT'L AFF.* 95, 98

acts'.⁵⁶³ Treacherous killing, defined as 'breach of confidence'⁵⁶⁴ includes some form of deceiving the victim, for instance using a false protected status or a bounty.⁵⁶⁵ Treacherous attacks are however different from a-surprise attack. Not all acts that involve trickery or deception are illegal surprise attacks are generally considered legitimate/legal battlefield tactics.⁵⁶⁶ According to Article 23(b) of the Hague Convention IV of 1907 it is forbidden 'to kill or wound treacherously individuals belonging to the hostile nation or army'.⁵⁶⁷ Although the phrase 'wounding treacherously' is not defined, this provision has been interpreted as the first international attempt to codify the law prohibiting assassination.⁵⁶⁸ Therefore, in wartime, the targeting of a specific individual is not assassination providing treachery is not utilised.⁵⁶⁹ Assassination is usually linked to a political motive, such as removing a leader from its position when policies are objectionable. The term targeted killing may be used for the same purpose. The major difference is in the means of force used. Targeted killing is used to describe intentional killing when the

⁵⁶³ Nathan Canestaro, 'American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo' (2003) B.C. INT'L & COMP. L. REV. 1, 12

⁵⁶⁴ Michael N. Schmitt, 'State-Sponsored Assassination in International and Domestic Law' (1992) YALE J. INT'L L. 609, 633 (quoting War office, The law of war on land, being part III of the manual of military law, Art. 155 (1958))

⁵⁶⁵ (Treachery requires a breach of confidence. According to one scholar, "it is the essence of treachery that the offender assumes a false character by which he deceives his enemy and thereby is able to effect a hostile act which, had he come under his true colours, he could not have done. He takes advantage of his enemy's reliance on his honour.") See Michael N. Schmitt, 'State-Sponsored Assassination in International and Domestic Law' (1992) YALE J. INT'L L. 609, 633, footnote 118 (quoting J.M. Spaight, War Rights On Land 86, 87 (1911)); The US Air Force Pamphlet (1976) states that Art 23(b) of Hague Convention IV has been construed as prohibiting "assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy "dead or alive" see United States, Air Force Pamphlet 110-13, International law-The conduct of armed conflict and air operations, US Department of the Air Force, 1976, s 8-2; Matthew C. Wieber, 'Comment, Assassination in Domestic and International Law: The Central Intelligence Agency, State-Sponsored Terrorism, and the Right of Self-defence' (2003) TULSA J. COMP. & INT'L L. 363, 366

⁵⁶⁶ Ibid, 388 (Wieber said that treachery does not include placing a bomb in a compound, or using sniper to kill a victim from a hidden location. Treachery is when one deliberately wear enemy's uniform to look like him and then kill him deceptively); Lieutenant Commander Patricia Zengel, 'Assassination and the Law of Armed Conflict' (1995) MIL. L. REV. 123, 132 (Zengel stated that treachery arises when soldiers disguise as civilians and kill enemy combatants by deceiving them)

⁵⁶⁷ Laws of War: Laws and Customs of War on Land (Hague IV); October 18, 1907

⁵⁶⁸ Brenda L. Godfrey, 'Comment, Authorization to Kill Terrorist Leaders and Those Who Harbour Them: An International Analysis of Defensive Assassination' (2003) SAN DIEGO INT'L L.J. 491, 492 and 495

⁵⁶⁹ Air Force Pamphlet 110-13, International law-The conduct of armed conflict and air operations, US Department of the Air Force, 1976, s 8-2 (Art 23(b) of the Hague Convention IV prohibits treacherous acts but "it does not preclude lawful attacks by lawful combatants on individual soldiers of officers of the enemy")

military force is deployed. By contrast, assassination belongs to the category of extrajudicial intentional killing of a person regardless of the means used to attack.⁵⁷⁰ Assassination is as such illegal, whereas other modes of killing including targeted killing may be legal or illegal, depending on how it is analysed based on the international law of armed conflict and the use of force test.

3.2.2 Targeted killing

The term targeted killing is not defined in international law. The literal meaning of targeted killing implies that lethal force is directed against a specific target. Violence carried out by state officials or non-state officials on behalf of state can result in targeted killings.⁵⁷¹ Most frequently, the terminology is used to describe lethal force directed against individuals involved in terrorism.⁵⁷² It became widely used during the 2000 Palestinian uprising against Israel (the 'Second Intifada') when Israel made public its long-standing policy of killing alleged terrorists in the Occupied Palestinian Territories and elsewhere.⁵⁷³ At that time, the US rejected Israeli targeted killings and categorised them as 'assassinations' and 'extrajudicial killings'.⁵⁷⁴

This discourse changed following the 9/11 attacks, when the US described the term targeted killing as an intentional killing involving the use of military force.⁵⁷⁵ Some international law scholars, such as Nehal Bhuta, persuasively argues that there is no important distinction in international law between the terms 'targeted killing' and 'assassination',⁵⁷⁶ but others such as Nils Melzer

⁵⁷⁰ Mary Ellen O'Connell, 'International law and drone attacks beyond armed conflict zones', 63 in David Cortright, Rachel Fairhurst and Kristen Wall, *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press 2015)

⁵⁷¹ Steven R. David, 'Israel's Policy of Targeted Killing' (2003) *Carnegie Council on Ethics and International Affairs* 111, 112

⁵⁷² *ibid*

⁵⁷³ Christine Gray, 'Targeted Killings: Recent US Attempts to Create a Legal Framework, *Current Legal Problems*' (2013) 75, 76

⁵⁷⁴ Mary O'Connell (n 570)

⁵⁷⁵ Harold Koh, 'US Legal Adviser, The Obama Administration and International Law' (25 March 2010) <<http://www.state.gov/s/l/releases/remarks/139119.htm>> accessed 18 July 2016 (US State Department Legal Adviser Harold Koh has argued that 'targeting of specific high level belligerent leaders when acting in self-defence or during an armed conflict is not unlawful, and hence does not constitute "assassination"')

⁵⁷⁶ Nehal Bhuta, 'States of Exception: Regulating Targeted Killing in a "Global Civil War"', in *Human rights intervention and the use of force* (Philip Alston and Euan MacDonald eds., 2008), 243, 246

asserts that 'the term 'targeted killing' denotes the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.'⁵⁷⁷

Unlike the term targeted killing, the term assassination does not reveal whether the lethal force has been carried out by a state agent or a non-state agent on behalf of a state, or by non-state agents operating on their own without any state involvement.⁵⁷⁸ Another difference between assassinations and targeted killing is that assassinations represent illegal conduct. Peacetime definitions of assassination define it as murder or unlawful killing while wartime definitions of assassination describe it as the killing of a specific person by treacherous means. As discussed, assassinations can never be legal, the legality of a particular targeted killing must be determined by looking at the applicable legal framework. Possible frameworks include the law of self-defence, international humanitarian law, and human rights law. The following section will assess the legality of drone strikes under these frameworks.

3.3 Drone strikes and *Jus ad Bellum*

Drones have become an everyday reality in the war on terror and a weapon of choice for militaries across the globe. The proliferation of drones seems inevitable and, within a decade, it is predicted that almost every single country on Earth will have its own armed drones.⁵⁷⁹ At the time of writing, nine countries including the UK, USA, Pakistan, Turkey, Israel, Iraq, Iran, Nigeria and Azerbaijan are using armed drones in combat.⁵⁸⁰ On 20th April 2018, the

footnote 20. (Her assertion is not followed by majority of states and states practice show that targeted killing is considered unlawful only if it fails to satisfy the laws of war)

⁵⁷⁷ Nils Melzer, *Targeted Killing in international law* (Oxford University Press 2008) 5

⁵⁷⁸ Schmitt (n 565) 632

⁵⁷⁹ Defence one, 'Every Country Will Have Armed Drones Within 10 Years' (6 May 2014) <

<http://www.defenseone.com/technology/2014/05/every-country-will-have-armed-drones-within-ten-years/83878/> > accessed 19 July 2016; The armed drones club has grown exponentially See Clay

Dillow, 'All of These Countries Now Have Armed Drones' (Fortune, 12 Feb 2016) <

<http://fortune.com/2016/02/12/these-countries-have-armed-drones/> > accessed at 19 July 2016;

seven countries have used armed drones in combat: the United States, Israel, the United Kingdom, Pakistan, Iraq, Nigeria, and Iran See New America, 'World of Drones: Military' <

<http://securitydata.newamerica.net/world-drones.html> > accessed 19 July 2016

⁵⁸⁰ New America, "Who has What: Countries with drones used in combat", <

<https://www.newamerica.org/in-depth/world-of-drones/2-who-has-what-countries-drones-used-combat/> > accessed 7 Jan 2017

Trump administration announced a new drone export policy designed to make it easier for the US companies to export armed drones.⁵⁸¹

The rapid proliferation of drone technology among states and militant groups alike poses a new threat to the international community. Several non-state actors including ISIS, Hamas, Hezbollah, or Houthi rebels, have incorporated drones into their operations.⁵⁸² Supporters hail it as an effective and precise military weapon. Independent of the potential benefits the use of drones require a renewed perspective on the issue of legality and legitimacy. Legality of drones is a controversial issue and the debate of the last decade suggests that drone strikes fail to fit in established patterns of legal argument. Concerns about the legality of drones have been raised by Professor Philip Alston, former UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions. In his 2010 report he stated that targeted killing by drones had led to a 'highly problematic blurring.... of the boundaries of the applicable legal frameworks' the result of which 'has been the displacement of clear legal standards with a vaguely defined license to kill'.⁵⁸³

The use of drone strikes raises further questions under laws of war and human rights law. However, this section will not engage with IHL and IHRL. It addresses the question of whether a state can use force in self-defence in undeclared war zones at all. The rules governing the legality of the use of armed force, have proven insufficient in previous decades to regulate wars for national liberation, or alleged humanitarian interventions. Drones used in the context of the war on terror present a fresh challenge. This section will assess to what extent the current jus ad bellum permits the use of drone strikes against terrorists in undeclared warzones. The section will begin by assessing the UN Charter general regime regulating inter-state force. The focus is on the main exception to the use of force, namely the right to act in self-defence.

⁵⁸¹ Michael C. Horowitz and Joshua A. Schwartz, 'A new U.S. policy makes it (somewhat) easier to export drones' (The Washington Post, 20 April 2018) < https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/20/a-new-u-s-policy-makes-it-somewhat-easier-to-export-drones/?noredirect=on&utm_term=.ee8237576d2b > accessed 24 April 2018

⁵⁸² New America, 'Non-State Actors with Drone Capabilities' < <https://www.newamerica.org/in-depth/world-of-drones/5-non-state-actors-drone-capabilities/> > accessed 24 April 2018

⁵⁸³ Philip Alston, 'Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, "Study on Targeted Killings,"' (28 May 2010) UN Doc A/HRC/14/24/Add.6

3.3.1 Prohibition against the use of force and drone strikes

Prohibition against the use of force is considered the ‘cornerstone’ of the UN Charter⁵⁸⁴, and is ‘the most important principle in the contemporary international law to govern inter-state conduct’.⁵⁸⁵ The general prohibition against the use of force is given in Art 2(4) of UN Charter.⁵⁸⁶ However this prohibition is not absolute, Art 42, 43 and 51 of the Charter recognise two exceptions to the general prohibition on the use of force; most important one is the ‘inherent’ right of individual and collective self-defence and enforcement measures involving the use of force sanctioned by the Security Council under Chapter VII thereof.⁵⁸⁷ A third exception not provided for in the UN Charter is the consent of the territorial state. Article 20 of the Draft Articles of State Responsibility recognises that ‘[v]alid consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent.’⁵⁸⁸ It is indisputable that one state may employ force in another state with the consent of that state.⁵⁸⁹ The lawfulness of a state’s allowing other states to use force on their territory was explicitly affirmed by the ICJ in *Armed Activities on the Territory of the Congo*.⁵⁹⁰

When applying the prohibition against the use of force to the problems of drone strikes, two questions need to be answered: 1) Does a drone strike violate the prohibition against the use of force? 2) Can a drone strike be justified under these exceptions?

⁵⁸⁴ *Armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda) Judgement*, (2005), Para 148 (ICJ stated that “The prohibition against the use of force is a cornerstone of the United Nations Charter”); C Joyner, *International law in the 21st century* (Rowman and Littlefield, 2005), 165

⁵⁸⁵ *Oil Platforms (Islamic Republic of Iran v USA)*, (2003) P. 161

⁵⁸⁶ Art 2(4) obliges UN members to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”

⁵⁸⁷ UN Charter, CHAPTER VII: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION Art 39-51

⁵⁸⁸ United Nations, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (2001)

⁵⁸⁹ Alston (n 372) para 35

⁵⁹⁰ *Armed Activities on the territory of Congo* (n 214) 198-199; Antonio Cassese, *International law* (Oxford University Press 2005) 370-371

The answer of first question is straightforward. A drone strike amounts to the use of military force and therefore involves Art 2(4) of the UN Charter.⁵⁹¹ Art 2(4) bans not only full-scale military operations but also all uses of force.⁵⁹² If a drone strike is directed against a terrorist in a foreign state, it will violate the prohibition on the use of force, irrespective of whether the target is a non-state actor not state.⁵⁹³ The UN Security Council has not authorised the US to use force in undeclared warzones. However, the US may invoke state consent, self-defence or both.

The challenges posed by terrorism are not new, but the legal regime governing counterterrorism measures have changed substantially. In the 1980s and 1990s, terrorism was treated as a problem of criminal law that would be addressed through law enforcement methods.⁵⁹⁴ When states asserted a right to use military force against terrorists in foreign states by invoking the right to self-defence, the UN Security Council rejected their claims. For instance, Israel's raid on the Palestine Liberation Organisation Headquarters in 1985 was condemned by the Security Council as an 'act of armed aggression...in flagrant violation of the Charter of the UN'.⁵⁹⁵ The General Assembly strongly condemned the US raid on targets in Libya in 1986 and described it as 'a violation of the Charter of the UN'.⁵⁹⁶ And the

⁵⁹¹ Predator and Reaper drones are used in the war on terror "Predator drones carried only two air-to-surface Hellfire rockets...Reaper drone can carry up to four hellfire missile and two laser-guided bombs and 500 lb munition making it the most heavily armed drone to date" see US Air Force, MQ-1B Predator, published (23 Sep 2015) <

<http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104469/mq-1b-predator.aspx> >

accessed 19 July 2016; US Air Force, MQ-9 Reaper, published (23 Sep 2015) <

<http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104470/mq-9-reaper.aspx> >

accessed 19 July 2016

⁵⁹² Although the use of force against the territorial integrity or political independence of other states is explicitly banned but "any other use of inter-state force by states for whatever reason is banned, unless explicitly allowed by the state" See Yoram Dinstein, *War, Aggression and self-defence* (Cambridge University Press 2011) 87-88; ("Art 2(4) prohibits the threat and actual use of armed force in all its forms: wars, reprisals or all other kinds of use of arms, including of course acts of aggression") Chantal Meloni and Gianni Tognoni, *Is There a Court for Gaza?: A Test Bench for International Justice* (T.M.C. Asser Press 2012) 63

⁵⁹³ Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' (2012) Legal Research Paper Series, Paper No. 50, 58-60

⁵⁹⁴ Stuart Oskamp and P. Wesley Schultz, *Attitudes and Opinions* (psychology 2014) 364 (one exception was 1986 bombing attack on Libya by US)

⁵⁹⁵ See SC Res 586(1985)

⁵⁹⁶ See General Assembly Res. 41/38

Security Council unanimously rejected South Africa's claim that they had a right of hot pursuit against offenders across borders.⁵⁹⁷

3.3.2 Restrictive approach to Jus ad bellum

It has been explained in previous sections⁵⁹⁸ that the International Court of Justice has adopted an interpretation of the terminology 'armed attacks' restricting it to the most grave forms of the use of force. This threshold is crucial because terrorist attacks are more likely to be of lesser intensity than attacks carried out by state forces, and therefore would typically not trigger a right of self-defence. Additionally, where non-state actors or terrorists operate from foreign territory, their conduct has been traditionally attributed to territorial state only if the armed attack was carried under 'effective control' of the territorial state.⁵⁹⁹ The 'effective control' test was reaffirmed in Articles 5 and 8 of the International Law Commissions text on State Responsibility.⁶⁰⁰

The ICJ jurisprudence has also firmly established that the right to self-defence cannot be used to punish the aggressor but only to repel a current or imminent armed attacks against a state.⁶⁰¹ Moreover, the customary law on the right to self-defence, constructed around the 'Caroline Case' obliges states to fulfil the principles of 'necessity', 'proportionality' and 'immediacy'.⁶⁰² Essentially, under this traditional understanding of self-defence states cannot use force against distant or vague threat of terrorism.

However, this traditional approach has come under increased pressure when the world faced the threat of global terrorism and state practice began to influence the interpretation of the jus ad bellum.

⁵⁹⁷ See Security Council Res. 568 (1985) and Security Council Res. 527 (1982)

⁵⁹⁸ See section 2.2 prohibition of the use of force in international law

⁵⁹⁹ Nicaragua (n 205) Para 109,115, 195

⁶⁰⁰ International Law Commission, Articles on State Responsibility, International Law Commission Report, A/56/10 August 2001, Art 5 states "The conduct of a person or entity which is not an organ of the State... shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."; Art 8 states "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"

⁶⁰¹ Enzo Cannizzaro, 'Contextualising proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War' (2006) International Review of the Red Cross 779, 782

⁶⁰² Letter from Mr. Webster to Lord Ashburton, Dep of State, Washington, 6th Aug 1842, (the right to "self-defence do exist, those exceptions should be confined to eases in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.")

3.4 Threat of global terrorism and the changing law of self-defence against non-state actors

Although terrorism has deserved international attention since the 1970s⁶⁰³ the events of 9/11 resulted in a drastic shift. Few weeks after the attack, the Security Council passed Resolution 1373 and called on states to freeze terrorist financing, pass anti-terrorism laws, prevent suspected terrorists from traveling across international borders, and order to screen asylum seekers for possible terrorist ties. It was an unprecedented move under the rubric of Chapter VII of the UN Charter, thereby making these dictates binding under international law.⁶⁰⁴ Several commentators have indeed questioned the legitimacy of the self-endowed powers of the Security Council to impose legislative and executive counter terrorism actions on UN state members.⁶⁰⁵ Nonetheless, a substantial body of international law on terrorism emerged which continue to grow at a frantic pace.⁶⁰⁶ Most recently, the UNSC

⁶⁰³ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, annexed to G.A. Res. 2625 (XXV), U.N. Doc. A/1883 (Oct. 24, 1970) (stating every State's duty to refrain from organizing, participating, or acquiescing in any acts of civil strife or terrorism in another State); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, annexed to G.A. Res. 2131 (XX), U.N. Doc A/1408 (Dec. 21, 1965) (stating that no State shall incite terrorist activities for the purpose of regime change); G.A. Res. 3034 (XXVII), U.N. Doc. A/2114 (Dec. 18, 1972). In this resolution, adopted shortly after the attack at the Munich Olympics, the General Assembly, "deeply perturbed over acts of international terrorism which are occurring with increasing frequency," invited states to become parties to the existing anti-terrorism conventions and to "take all appropriate measures at the national level with a view to the speedy and final elimination of the problem."; International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/RES/54/109 (Dec. 9, 1999); International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. Doc. A/RES/52/653 (Dec. 15, 1997); Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, UN Doc. A/RES/49/60 (Dec. 9, 1994);

⁶⁰⁴ Resolution 1373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001

⁶⁰⁵ Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 American Journal of International Law 175-193; Eric Rosand, 'The Security Council as Global Legislator: Ultra Vires or Ultra Innovative' (2005) 28(3) Fordham Int'l LJ 542

⁶⁰⁶ Protocol Amending the European Convention on the Suppression of Terrorism, May 15, 2003, EUROP. T.S. NO. 190. 44. Convention on the Prevention of Terrorism, May 16, 2005, EUROP. T.S. NO. 196. 45. Protocol to the OAU Convention on the Prevention and Combating of Terrorism (8 July 2004) < <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> >; African Union [AU], Plan of Action of the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa, AU Doc. Mtg/HLIG/Conv.Terror/Plan.(I) (14 Sep 2002). 46. Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism (6 Jan 2004) < <http://www.saarc-sec.org/data/summit12/additionalprotocolterrorism.pdf> > 47. ASEAN Convention on Counter-Terrorism, (13 Jan 2007) < <http://www.aseansec.org/19250.htm> >; Ass'n of Southeast Asian Nations [ASEAN], ASEAN Declaration on Joint Action to Counter Terrorism, (Nov. 5, 2001) <

Resolution 2249 (2015) on Islamic State of Iraq and Levant (ISIL) is an expression of longer term legal developments that started in 2001.⁶⁰⁷ The UNSC unanimously adopted Resolution 2249 in the aftermath of the ISIL bombing of a Russian jetliner over the Sinai desert on October 31, 2015, and ISIL attacks on a Paris stadium and concert hall on November 13, 2015. The Resolution stated that ISIL is ‘a global and unprecedented threat to international peace and security’, and called for ‘all necessary measures’ to ‘eradicate the safe haven [ISIL] established’ in Syria.⁶⁰⁸ Resolution 2249 did not provide a new stand-alone legal basis or authorisation for use of force against ISIL in Syria.⁶⁰⁹ It was not adopted under Chapter VII of the Charter and is not legally binding.⁶¹⁰ Arguably, even if it is not legally binding it can still ‘have an important function in relation to general international law as it applies to the issue at hand’.⁶¹¹ It is constructed in such a way that it can be used to provide political support for military action.⁶¹² The wording of the Resolution has given broader right to states to use force in self-defence:

<http://www.aseansec.org/5620.htm> > 48. Org. of the Islamic Conference [OIC], Kuala Lumpur Declaration on International Terrorism (Apr. 3, 2002) < http://www.oic-oci.org/english/conf/fm/11_extraordinary/declaration.htm > 49. Org. for Security and Co-Operation in Eur. [OSCE], Decision No. 1 on Combating Terrorism, OSCE Doc. MC(9).DEC/1 (4 Dec 2001) < <http://www.osce.org/item/2229.html> >; OSCE, Bucharest Plan of Action for Combating Terrorism, OSCE Doc. MC(9).DEC/1 Annex (Dec. 4, 2001) < <http://www.osce.org/item/851.html> >; OSCE Charter on Preventing and Combating Terrorism, OSCE Doc. MC(10).JOUR/2 (Dec. 7, 2002), < <http://www.osce.org/item/1654.html> > 50. COMMONWEALTH OF NATIONS, REPORT OF THE COMMONWEALTH COMMITTEE ON TERRORISM (CCT): COMMONWEALTH PLAN OF ACTION (2001), <http://www.thecommonwealth.org/document/181889/34293/35144/35145/report_of_the_commonwealth_committee_on_terrorism.htm> ; INTER-AMERICAN CONVENTION AGAINST TERRORISM, AG/RES. 1840 (XXXII-O/02), < http://www.oas.org/xxxiiga/english/docs_en/docs_items/agres1840_02.htm >; International Convention for the Suppression of Acts of Nuclear Terrorism, G.A. Res. 59/290, U.N. Doc. A/RES/59/290, (Apr. 13, 2005) See comment later about format for dates.

⁶⁰⁷ United Nations Security Council, S/RES/2249, (2015)

⁶⁰⁸ *ibid*, para 1 (20 Nov 2015)

⁶⁰⁹ Michael Scharf (please be careful with this kind of typo), ‘How the War Against ISIS Changed International Law’ (2016) *Case Western Reserve Journal of International Law* 48, 52

⁶¹⁰ Legal consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, < <http://www.icj-cij.org/docket/files/53/5597.pdf> > Para 87-116 (Under the rationale in the Namibia Advisory Opinion, a resolution adopted outside of Chapter VII can be binding)

⁶¹¹ Marc Weller, ‘Permanent Imminence of Armed Attacks: Resolution 2249 2015 and the Right to Self Defence Against Designated Terrorist Groups’, (*EJIL Talk*, 2015) < <http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/> > accessed 21 July 2016

⁶¹² Dapo Akande & Marko Milanovic, ‘The Constructive Ambiguity of the Security Council’s ISIS Resolution’, (*EJIL Talk*, 2015) < <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> > accessed 21 July 2016

In confirming that ISIS represent a permanent and active threat of further attack, the Council appears to relieve individual states from having to fulfil the criteria for self-defence when considering armed action in Syria.⁶¹³

Although the UNSC Resolution 2249 legitimises use of force against ISIL, it pays due regard to state sovereignty. Intervention and use of force is allowed only in geographic areas controlled by ISIL in Iraq and Syria.⁶¹⁴

3.4.1 State practice after 9/11

State practice has evolved since the September 11 attacks and acts that were considered unlawful in the 1980s are now being accepted and practiced by various states. Examples include:

- Turkey has consistently invoked the right to self-defence for its military interventions against the PKK in Northern Iraq in 2007 and 2008.⁶¹⁵
- The Russian army has invoked the right to self-defence and entered Georgia officially to combat Chechen terrorists who had taken refuge there.⁶¹⁶
- Israel has always supported a broad right of self-defence and used force against Damascus and Lebanon in 2003 and 2006 respectively.⁶¹⁷
- Colombia airstrikes against FARC terrorist camp in 2008 inside Ecuador's border, killing the FARC's second-in-command, Raul Reyes.⁶¹⁸
- The use of force by Ethiopian armed forces against the 'Islamic Courts' terrorist group which had been conducting a series of cross-border attacks from Somalia in 2006.⁶¹⁹

⁶¹³ Weller (n 611)

⁶¹⁴ Resolution 2249 (n 1175) para 5 ("calls upon Member States...to take all necessary measures (against ISIL)... on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq")

⁶¹⁵ Tom Ruys, 'Quo Vadit jus ad bellum?: A legal analysis of Turkey's military operation against the PKK in Northern Iraq' (2008) *Melbourne Journal of International Law*

⁶¹⁶ Christine Gray, *International law and the use of force* (Oxford University Press 2008) 230-231

⁶¹⁷ Y Ronen, 'The 2006 Conflict in Lebanon' (2008) *Yearbook of International Humanitarian Law*, 362-93; A Zimmermann, 'The second Lebanon war: Jus ad Bellum, Jus in Bello and the issue of proportionality' (2007) *Max Planck Yearbook of United Nations Law*, 99

⁶¹⁸ Ashley S. Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *VA. J. INT'L L.* 483, 534

- The Killing of Osama bin Laden by US Navy Seal in 2011 at his secret compound in northern Pakistan.⁶²⁰
- The Kenyan incursion into Somalia in response to cross-border attacks by the Al-Shabaab terrorist group in 2011.⁶²¹
- The use of force by the US and coalition partners in Syria against ISIS.⁶²²

The state practice is at odds with the ICJ jurisprudence establishing that the use force in response to attacks by non-state actors is unlawful unless those acts can be attributed to the state and actors are effectively controlled by the territorial state.⁶²³ However, some ICJ separate opinions demonstrates that few judges are highly critical of the ICJ's continued stance that self-defence is only available in situations where the attack by non-state actors can be attributed to the territorial state. For instance, in the context of the Wall Case, Judge Higgins has said, 'there is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State'.⁶²⁴ In a separate opinion formulated by, Judge Koojimans in the Armed Activities in the Territory of the Congo Case, stressed that in the era of Al-Qaeda, it is 'unreasonable to deny the attacked State the right to self-defence merely because there is no attacker state'.⁶²⁵ Likewise Judge Simma concluded in his separate opinion in the Congo case that 'Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as 'armed attacks' within the meaning of Article 51'.⁶²⁶ While the majority decision in the two cases (Armed Activities in the territory of the Congo and Legal Consequence of the Construction of a Wall) confirm former

⁶¹⁹ Awol K. Allo, 'Ethiopia's Armed Intervention in Somalia: The Legality of Self-Defense in Response to the Threat of Terrorism' (2010) DENV. J. INT'L. & POL'Y 139, 139

⁶²⁰ Jordan J. Paust, 'Permissible Self-Defense Targeting and the Death of Bin Laden' (2011) DENV. J. INT'L L. & POL'Y 569, 579-580

⁶²¹ The Kenyan Military Intervention in Somalia: Africa Report No. 184, (2012) INT'L CRISIS GROUP, 1-2

⁶²² Michael P. Scharf, 'How the War Against ISIS Changed International Law' (2016) Case W. Res. J. Int'l L. 16, 35

⁶²³ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US) Judgment, 1986 I.C.J. 14, para 195

⁶²⁴ Legal Consequences, 2004 I.C.J. 136, at para 31 (separate opinion of Judge Higgins)

⁶²⁵ Dem. Rep. Congo v. Uganda, 2005 I.C.J. 168, at para 30 (separate opinion of Judge Koojimans)

⁶²⁶ *ibid* para 11 (separate opinion of Judge Simma)

jurisprudence of the ICJ, the issues addressed are substantially different.⁶²⁷ In the Wall Case, the ICJ stressed that the right to self-defence under Article 51 of the UN Charter only applies to attacks coming from another state and did not apply to attacks coming from within the Occupied Territories, because the area was occupied and controlled by Israel so Israel did not have right to use force in self-defence.⁶²⁸ In Congo⁶²⁹, as in Nicaragua⁶³⁰ states used force not only against the attacking terrorist group itself but also throughout the territorial state.

Therefore, the ICJ approach seems in conflict with state practice developed since 2001. The absent reaction from many states suggest a gradual shift from a narrow interpretation of the right to use force in self-defence to a broader application of the right to use force in self-defence against terrorists in foreign territories.⁶³¹ Professor Gray argues that the terrorist attacks of 9/11 have broadened the scope of armed attack to cover acts by non-state actors even if there is no state.⁶³² The UN Security Council Resolutions 1368 and 1373 and Article 5 of NATO's collective self-defence provision adopted in the

⁶²⁷ Michael P. Scharf, 'How the War Against ISIS Changed International Law' (2016) Case W. Res. J. Int'l L. 16, 37

⁶²⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) I.C.J. 136, at para 139

⁶²⁹ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Summary 2005/3, < <http://www.icj-cij.org/docket/files/116/10457.pdf> > accessed at 21 July 2016 (Looking at the issue of state consent the Court noted that the military action by Uganda in the east of the DRC between August 1998 and July 1999 are relatively little contested between the Parties. The Court states that there is, however, considerable controversy between the Parties over the DRC's claim regarding towns taken after 10 July 1999 at P.7), (Looking at the issue of self-defence the Court notes that Uganda military operation known as operation "Safe Haven" on the DRC's territory after 7 August 1998 were not actions of self-defence instead were carried out to "to secure Uganda's legitimate security interests" at p. 8)

⁶³⁰ Nicaragua v. United States of America, ICJ Decision of 27 June 1986 (The laying of mines in early 1984 and certain attacks on Nicaraguan ports, oil installations and naval bases, imputable to the United States constitute infringements of this principle, unless justified by circumstances which exclude their unlawfulness. It also considers that the United States has committed a prima facie violation of the principle by arming and training the contras, unless this can be justified as an exercise of the right of self-defence. Para 227-238)

⁶³¹ The response of 9/11 attacks showed the change in attitude towards law of self defence. Although 9/11 attacks were not attributable to Taliban (See Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 440) in Resolution 1368 of 12 Sep the Security Council expressly affirmed the US right to use force in self-defence See Resolution 1368 (2001) Adopted by the Security Council at its 4370th meeting, on 12 September 2001; "NATO invoked Article 5 for the first time in its history after the 9/11 terrorist attacks against the United States. The principle of collective defence is enshrined in Article 5 of the Washington Treaty" < http://www.nato.int/cps/en/natohq/topics_110496.htm > accessed 20 July 2016

⁶³² Gray (n 616) 273

aftermath of 9/11 have been interpreted as unequivocally acknowledging the right of self-defence against terrorist attacks.⁶³³ In addition, the UNSC Resolution 2249 forcefully strengthens the view that a customary international law rule has emerged allowing the self-defence against non-state actors whose acts are not attributable to a state.⁶³⁴

In the light of these conflicting trends, the law relating to use of force in self-defence against non-state actors in foreign territories remains unsettled. Although the law related to state consent and unable or unwilling doctrine has been mentioned briefly in this chapter, in the case of drone strikes in undeclared warzones this area of law requires greater attention and will be discussed in chapter four in detail.

3.4.2 Drone strikes and law of self-defence

The United States regularly use drones to target members of Al-Qaeda and its 'associated forces'⁶³⁵ in 'active battlefields'⁶³⁶ including Afghanistan⁶³⁷, Iraq, Syria⁶³⁸ and outside active battlefield in Pakistan, Yemen and Somalia.⁶³⁹ The US argues that their use of drone strikes do not violate the prohibition on the use of force because they are acting in accordance with international law relying on its inherent right to self-defence.⁶⁴⁰ The US claims that drones are

⁶³³ Sec. Co. Res. 1368 (2001) 12 Sept. 2001; Sec. Co. Res. 1372 (2001) 28 Sept. 2001; Press Release, North Atlantic Council, 12 Sept. 2001 < <http://www.nato.int/docu/pr/2001/p01-124e.htm> > accessed 1 August 2015

⁶³⁴ Peter Hilpold, The fight against terrorism and SC Resolution 2249 (2015): towards a more Hobbesian or a more Kantian International Society?, (2016), Indian Journal of International Law < http://link.springer.com/article/10.1007/s40901-016-0028-1#Fn49_source > accessed 22 July 2016

⁶³⁵ John Brennan speech at Woodrow Wilson Centre, "The Ethics and Efficacy of the President's Counterterrorism Strategy" < <https://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy#sthash.v0jXXD3J.dpuf> > accessed 20 July 2016 (Brennan used the term Al-Qaida and its associated forces" in his speech)

ibid (Brennan used term active battle field for Afghanistan and Iraq in his speech "There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield")

⁶³⁷ US jets and drones have been bombing Afghanistan since late 2001 to present see Data sheet on Afghanistan: US Air and drone strikes, 2015 to present, Bureau of investigative journalism, < <https://docs.google.com/spreadsheets/d/1Q1eBZ275Znlpn05PnPO7Q1Bkl3yJZbvB3JycywAmqWc/edit?pref=2&pli=1#gid=1283746305> > accessed 20 July 2016

⁶³⁸ Chris Cole, Drones in Iraq and Syria: What we know and what we don't, Drone wars, (7 Nov 14) < <https://dronewars.net/2014/11/07/drones-in-iraq-and-syria-what-we-know-and-what-we-dont/> > accessed 20 July 16

⁶³⁹ Bureau of investigative journalism, Get the data < <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> > accessed 20 July 2016

⁶⁴⁰ Brennan (n 635)

justified if directed against 'leaders of Al-Qaeda or an associate force who present an imminent threat of violent attack against the US'.⁶⁴¹ The term 'imminence' is key here because the US drone policy is premised on a flexible understanding of 'imminence'. Brennan has argued that the term imminent has to be 'broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organisations'.⁶⁴² In a 2011 draft White Paper, the Department of Justice defined imminence loosely:

The condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on US persons and interests will take place in the immediate future.⁶⁴³

The White Paper contended that the requirement of imminence is obsolete because terrorist war did not involve massive attacks across the globe or a one off isolated attack. It was rather a protracted and persistent sporadic pattern of attacks therefore, it is extremely difficult to know when or where the next incident would occur.⁶⁴⁴ The White Paper further asserts that 'the US government may not be aware of all Al-Qaeda plots as they are developing and thus cannot be confident that none is about to occur'.⁶⁴⁵

The notion of imminence is being broadened beyond recognition in order to fit the targeted killings policy of the US government. A literal interpretation of the White Paper means that imminence should be understood as a general presumption of future attacks where the US can always act pre-emptively by presuming that a threat could occur because there is no reassurance that Al-Qaeda will not attack. Indeed, the US government has claimed that it faces a 'continuing, imminent threat' from terrorists that gives them continuing right to

⁶⁴¹ Holder (n 527)

⁶⁴² Remarks of John O. Brennan at Harvard Law School, "Strengthening our Security by Adhering to our Values and Laws" (16 Sep 2011) < <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> > accessed 20 July 2016

⁶⁴³ Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qaida or An Associated Force' (8 Nov 2011) 7 < <https://fas.org/irp/eprint/doj-lethal.pdf> > accessed 21 July 2016

⁶⁴⁴ *ibid*

⁶⁴⁵ *Ibid* 8

use force in self-defence to avert attacks.⁶⁴⁶ The key point that emerges from this discussion is that the US has sought to defend the legality of drone strikes through a particular interpretation of the term imminent.

Following the track record left by the former administration, The Obama administration widened this term beyond its traditional meaning by rejecting any 'immediacy' requirement. The Bush administration insisted after 9/11 that the US 'must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries'⁶⁴⁷ which has come to be known as the 'Bush doctrine'. The 'Bush doctrine' advocates for preventive self-defence against a threat that is rather potential than immediate.⁶⁴⁸ In 2002 the National Security Strategy asserted the need to revisit the rules of self-defence need given the new security threats presented by 'rogue states and terrorists'.⁶⁴⁹ The 2002 National Security Strategy stated:

Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat most often a visible mobilisation of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.....The greater the threat, the greater is the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack..... We will disrupt and destroy terrorist organizations by... using all the elements of national and international power and by identifying and destroying the threat before it reaches our borders.... we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country⁶⁵⁰

⁶⁴⁶ President Obama, 'Remarks by the President at the United States Military Academy Commencement Ceremony' (28 May 2014) < <https://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony> > accessed 22 July 2016

⁶⁴⁷ US National Security Strategy 2002 (2006 rev'n) at 15

⁶⁴⁸ Hill, 'The Bush Administration Pre-emption Doctrine and the Future of World Order: Remark' (2004) ASIL Proceedings, 329–31

⁶⁴⁹ The National Security Strategy of the United States of America, Part V' (The White House 2002) 14

⁶⁵⁰ Ibid p. 6, 15

The document stresses the need to revise not only the concept of imminence but also the to use lethal force in self defence against the threat 'even if uncertainty remains as to the time and place of the enemy's attack'.⁶⁵¹ This broader definition of the self-defence is at odds with Caroline test. This new type of pre-emptive self-defence was used as a basis to invade Iraq. This approach is extremely controversial and has attracted widespread criticism from legal scholars.⁶⁵²

While the Obama administration was reluctant to use the term pre-emptive self-defence, the official rhetoric of the precedent years permeated the interpretation of imminence by its administration following a similar logic to the 2002 National Security Strategy. Indeed the dramatic increase in the use of drone strikes, outside Afghanistan during the Obama Administration manifests that it followed the Bush doctrine of pre-emptive self-defence. Other states in the International community seem willing to accept that force can be used to stop future attacks if the responding state possesses reliable information of their imminence.⁶⁵³ The UK Attorney-General (Lord Goldsmith) has stated that 'international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote'.⁶⁵⁴ The traditional view that the right to self-defence would only emerge if an armed attack has occurred has lost support. The UN High Level Panel report made it clear that a threatened state can take military action as long as the threatened attack is imminent.⁶⁵⁵

This is central to this thesis because the legality of the drone strikes largely depends on the interpretation of 'imminence'. Elizabeth Wilmschurs notes that 'forcible response (against an imminent, future attack) lies at the limits of an already exceptional legal category, and therefore requires a correspondingly

⁶⁵¹ *ibid*

⁶⁵² M Sapiro, 'Iraq: The Shifting Sands of Preemptive Self-Defence' (2003), 97 AJIL 602; V Lowe, 'The Iraqi Crisis: What Now?' (2003) Int'l & Comp L Quart'y 865; A-M Slaughter, 'The Use of Force in Iraq: Illegal and Illegitimate' (2004) ASIL Proceedings, 262–63

⁶⁵³ Garwood-Gowers, 'Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy?' (2004) Aust. YBIL, 55

⁶⁵⁴ House of Lords debate (21 Apr 2004) Vol. 660, Column 370 < http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm#40421-07_spmi0 > accessed 22 July 2016

⁶⁵⁵ United Nations General Assembly, High Level Panel Report, (2004), A/59/565, Para 188 < <http://hrlibrary.umn.edu/instree/report.pdf> > accessed 22 July 2016

high level of justification'.⁶⁵⁶ According to this criterion, there must be 'circumstances of irreversible emergency' for self-defence against an imminent attack to be lawful: 'any further delay in countering the intended attack will result in the inability of the defending state effectively to defend itself against the attack.'⁶⁵⁷ This interpretation of imminence reflects the rationale of the Caroline test that understands imminent threat as 'instant and overwhelming' need for action that left 'no moment for deliberation'.⁶⁵⁸ It may be the case that some drone strikes fit these circumstances. Shah argues that drone strikes fail to fulfil the requirement of imminence.⁶⁵⁹ Targeted killings have taken place before the alleged planned attacks had reached anything close to being imminent. The US targeted killing with drones is based on intensive intelligence gathering and deliberation that last for years.

Worryingly, the 2018 Amnesty international reveals that the US lethal drone programme relies on Signals intelligence (SIGNIT), which is an interior form of intelligence, gathered through the monitoring of electronic communications such as mobile phones and computers. According to Lt. Gen. Michael Flynn, who was Head of the Defence Intelligence Agency from July 2012 to August 2014, 'SIGINT is an easy system to fool and that's why it has to be validated by other INTs — like HUMINT [human intelligence]'. This information was gathered with the help of European States. UK, Germany, the Netherlands and Italy had been sharing intelligence with the USA that was used to locate and identify targets for US drone strikes, as well as metadata from mobile phone networks (for example, the time a call was made, its location, the duration of the call, the originators and recipients of calls) that could then be used for targeting.⁶⁶⁰ This policy raises fundamental questions about the level of risk -measured as instant or overwhelming threat to the US- posed by individuals under surveillance. Shah argues that:

⁶⁵⁶ Elizabeth Wilmschurst, *Principles of international law on the use of force by states in self-defence* (2005) Chatham House, 8

⁶⁵⁷ *Ibid* 7-9

⁶⁵⁸ Timothy Kearley, 'Raising the Caroline' (1999) *Wis International Law Journal* 325

⁶⁵⁹ Sikander Shah (n 192)

⁶⁶⁰ 'Deadly Assistance The role of European states in US drone strikes' (Amnesty International, 2018) < <https://www.amnesty.org.uk/files/2018-04/Deadly%20Assistance%20Report%20WEB.pdf?nnxzvq2leng0LiFu64kg6UtyT2l8Zs3B> > accessed 12 June 2018

These attacks are in fact pre-emptive strikes that aim to weaken Al-Qaeda and the Taliban in the long-term by neutralizing their leadership, and thus, are just one of the many measures that the United States undertakes to achieve its inchoate long term objectives that have little to do with self-defence as recognized under international law.⁶⁶¹

Furthermore, the use of force even against imminent threat will only be justified if it is necessary and effective in countering that threat, and also if the use of force is proportionate to the threat.

3.4.3 Necessity and Proportionality

Necessity and proportionality are core requirements for a valid act of self-defence as stated by Webster in Caroline case.⁶⁶² These principles were reaffirmed in Nicaragua v US⁶⁶³; the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons⁶⁶⁴; the Oil Platforms case⁶⁶⁵; and Armed Activities on the Territory of the Congo (DRC v Uganda)⁶⁶⁶. These requirements apply whether a nation is acting in self-defence against an attack that has already occurred or acting in anticipatory self-defence.⁶⁶⁷ These requirements are not expressly enshrined in the UN Charter, but are part of customary international law. It is generally agreed that necessity and proportionality means that self-defence must not be punitive.⁶⁶⁸ Necessity in the context of self-defence usually refers to two distinct but related concepts. First it refers to the existence of an on-going armed attack or imminent and

⁶⁶¹ Sikander Shah (n 192) 122-123

⁶⁶² Webster letter to Lord Ashburton, DEPARTMENT OF STATE, Washington, 27th July 1842 < http://avalon.law.yale.edu/19th_century/br-1842d.asp > accessed at 23 July 2016

⁶⁶³ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America (1984) Para 194

⁶⁶⁴ Legality of the Threat or Use of Nuclear Weapons (1996) Para 141

⁶⁶⁵ Oil Platforms (Islamic Republic of Iran v. United States of America (2003) Para 43

⁶⁶⁶ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) Para 147

⁶⁶⁷ Linda A. Malone, *International Law* (Aspen 2008) 131

⁶⁶⁸ Alina Kaczorowska-Ireland, *Public International Law 4/e* (Routledge 2010) 717; In the Oil Platform case Some judges argued that US actions were actually unlawful reprisals as they were not necessary and proportionate. Judge Simma (Separate Opinion para 15) concluded that the USA used these two incidents to teach Iran a broader lesson: 'nowhere in these materials do we find any trace of the considerations that an international lawyer would regard as necessary in order to justify action taken in self-defence.' Kooijmans (Separate Opinion para 52, 55, 62) found it hard to avoid the impression that in reality a punitive intent prevailed; Judge Elaraby (Dissenting Opinion para 1.2) said that the USA's aim was punitive and that its actions were reprisals

obvious threat of armed attack.⁶⁶⁹ Necessity may imply immediacy, the longer the time lapse, the more difficult it becomes to justify the necessity of unilateral action. In the Nicaragua case the ICJ held that the measures taken by the USA against Nicaragua were not necessary because they were taken months after the major offensive of the opposition against the government of El Salvador had been completely repulsed.⁶⁷⁰ Second, it requires that force is used as a last resort where no alternative response is possible.⁶⁷¹ The principle of necessity also requires states to use force in self-defence with the purpose of averting the threat. If the use of force in self-defence increases the threat then it becomes unnecessary and consequently.⁶⁷²

Proportionality and necessity are intertwined concepts.⁶⁷³ If a use of force is not necessary, it cannot be proportionate and, if it is not proportionate, it is difficult to see how it can be necessary.⁶⁷⁴ Targeting state institutions when the state is not responsible for an armed attack may also violate the principle of necessity and proportionality.⁶⁷⁵

As discussed above state practice has opened up the right to self-defence to terrorist attacks in foreign territory against terrorists when those attacks cannot be attributed to a state. Irrespective of the recent state practice, international law continues to impose important limitations on the use of self-defence: armed attacks must be of a significantly large scale to trigger a right to self-defence; force can only be used against future attacks if they are imminent and present circumstances of irreversible emergency; and the use of force must be 'necessary to halt an armed attack and must be proportionate to that aim',⁶⁷⁶ having the sole objective of bringing to an end

⁶⁶⁹ Marc Weller, Alexia Solomou and Jake William Rylatt, *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 743

⁶⁷⁰ Nicaragua (n 663) para 237

⁶⁷¹ Judith Gardam, 'Necessity, Proportionality and the Use of Force by States' (2004) Cambridge studies in comparative and International law, 149-153

⁶⁷² Helen Duffy, *The war on terror and the framework of International law* (Cambridge University Press 2005) 162

⁶⁷³ *ibid*

⁶⁷⁴ Christine Gray, *International law and the use of force* (Oxford University Press 2008) 151

⁶⁷⁵ *ibid* 163

⁶⁷⁶ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, "Armed drones and the right to life", 91, UN Doc A/68/382 (13 Sep 2013) 94

the immediate threat.⁶⁷⁷ The willingness to broaden the right to use force beyond these restrictions risks crossing the fine line between reprisals and self-defence.⁶⁷⁸

The following section will assess the legality of drone strikes under the framework of international humanitarian law.

3.5 Drones under International humanitarian law

Drones are not as such illegal weapons and are not expressly prohibited under IHL or considered to be inherently indiscriminate or perfidious.⁶⁷⁹ The 'use of drones is no different from a pilot dropping a bomb from a fighter jet, or a soldier firing a gun'.⁶⁸⁰ From legal point of view the use of drones during an armed conflict does not differ to launching a missile from any other manned platform.⁶⁸¹ While drones are not unlawful in themselves, their use must comply to international regulations governing weapons. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ confirmed that the entire law of armed conflict 'applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future'.⁶⁸²

While the term 'global war on terror' was abandoned in 2009, the US continues to consider itself engaged in an on-going armed conflict against Al-Qaeda, the Taliban and associated forces based on its inherent right to self-defence and the domestic Authorisation for the Use of Military Force.⁶⁸³ In the

⁶⁷⁷ Christian J. Tams and James G Devaney, 'Jus ad Bellum: Crossing borders to wage war against individuals', 47 in *legitimacy and drones investigating the legality, morality and efficacy of UCAV's* by Steven Barela, (Ashgate 2015)

⁶⁷⁸ *ibid*

⁶⁷⁹ ICRC, 'The use of armed drones must comply with laws' (10 May 2013) < <https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm> > accessed 25 July 2016 ; Statement of David Glazier, Hearing on Rise of the drones II: Examining the legality of unmanned targeting, (28 April 2010), Committee on oversight and government reform, House of representatives, One hundred eleventh Congress, Second Session, 29

⁶⁸⁰ Alston (n 372) 79

⁶⁸¹ U.S. House of Representatives Subcommittee on National Security and Foreign Affairs Subcommittee Hearing: "Rise of the Drones: Unmanned Systems and the Future of War", Testimony submitted by Kenneth Anderson, (23 March 2010) 3

⁶⁸² ICJ, Nuclear Weapons Advisory Opinions (1996) 86

⁶⁸³ Koh (n 575) ("the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF)")

US government's view this armed conflict is global in scope, recognises no boundaries and provides authority for the use of lethal force outside warzones. Combatants, as well as civilians directly participating in this armed conflicts are treated as carrying the armed conflict wherever they move.⁶⁸⁴The US government's official position is that any US operation against Al-Qaeda and associated forces would be part of a NIAC even if it takes place outside active warzone. A US Department of Justice White Paper leaked to the press confirms the US government's position that:

The United States retains its authority to use force against al-Qaeda and associated forces outside the area of active hostilities when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans.⁶⁸⁵

This position has been heavily criticised. In his report to the General Assembly, Ben Emmerson identified a number of legal issues on which there is currently no clear international consensus, or where current practices and interpretations appear to challenge established legal norms.⁶⁸⁶ The US is criticised for distorting and rendering meaningless the boundaries of the armed conflict. The legality of the use of drones revolves around the geographical scope of the laws of war.⁶⁸⁷ Vogel has noted that controversies surrounding drone warfare are not really about the weapon itself but, *inter alia*, 'defining the battlefield in a conflict with a transnational non-state actor'.⁶⁸⁸ The geographic scope of the laws of armed conflict has become

⁶⁸⁴ Anderson (n 681) noted that world has rejected US's view that it "can simply follow combatants anywhere and attack them" Para 11

⁶⁸⁵ Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qaida or An Associated Force' (8 Nov 2011) < <https://fas.org/irp/eprint/doj-lethal.pdf> > accessed 25 July 2016

⁶⁸⁶ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Human Rights Council Twenty-fifth session, Agenda item 3, A/HRC/25/59, Para 70

⁶⁸⁷ See generally Jessica Dorsey and Dr Christophe Paulussen, 'The Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism' [2013] ICCT Research Paper; Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) Journal of International Criminal Justice; Michael Lewis, 'Drones and the Boundaries of the Battlefield', Texas International Law Journal, Vol 47 Issue 2

⁶⁸⁸ Ryan Vogel, 'Droning On: Controversy Surrounding Drone Warfare Is Not Really About Drones' (2013) The Brown Journal of world affairs, 1-2

extremely controversial when it refers to US drone strikes in undeclared warzones since 9/11.⁶⁸⁹

Today's conflict pit states against non-state entities that do not have any territorial control but go wherever they can find safe haven from government intrusion. Although the US has officially ended its combat mission in Afghanistan, some scholars suggest that the US may remain a participant in an armed conflict in Afghanistan for some time both by independently engaging in military operations against the Taliban/AQ, and also by providing military support to the Afghan government in the conflict between Afghanistan and the Taliban/AQ.⁶⁹⁰ The 'global war on terror' is not limited to Afghanistan but it is challenging to identify when other areas become warzone as a result of terrorist attacks. The table below shows the major terrorist attacks after 9/11 in a wider geographical scope:

Countries	Year	Civilian Casualties
Bali attack (Indonesia) ⁶⁹¹	2002	200+
Madrid train bombing ⁶⁹² (Spain)	2004	191
London Subway (UK) ⁶⁹³	2005	52
Mumbai attack (India) ⁶⁹⁴	2008	166
Christmas day bombing ⁶⁹⁵ attempt (Holland)	2009	0
Failed Time square Bomb ⁶⁹⁶ (USA)	2010	0

⁶⁸⁹ See discussion in previous chapter under heading "transnational non-international armed conflict"

⁶⁹⁰ Nathalie Weizmann, 'Why U.S. being a party to armed conflict in Afghanistan may not end soon' (*Just security*, 7 Jan 2015) < <http://justsecurity.org/18904/u-s-forces-transition-drawdown-afghanistan/> > accessed 27 July 2016

⁶⁹¹ BBC News, 'Bali death toll set at 202' (19 Feb 2003) < <http://news.bbc.co.uk/1/hi/world/asia-pacific/2778923.stm> > accessed 26 July 2016

⁶⁹² BBC News, 'Madrid train attacks' (11 March 2004) < <http://news.bbc.co.uk/1/shared/spl/hi/guides/457000/457031/html/> > accessed 26 July 2016

⁶⁹³ BBC News, '7 July bombings' < http://news.bbc.co.uk/1/shared/spl/hi/uk/05/london_blasts/what_happened/html/ > accessed 26 July 2016

⁶⁹⁴ Bruce Riedel, 'Modeled on Mumbai? Why the 2008 India attack is the best way to understand Paris' (*Brookings*, 14 Nov 2015) < <http://www.brookings.edu/blogs/markaz/posts/2015/11/14-paris-attacks-mumbai-isis-terrorism-riedel> > accessed 26 July 2016

⁶⁹⁵ Anahad O'Connor and Eric Schmitt, 'Terror Attempt Seen as Man Tries to Ignite Device on Jet' *The New York Times* (25 Dec 2009) < http://www.nytimes.com/2009/12/26/us/26plane.html?_r=0 > accessed 26 July 2016

After the US invasion of Afghanistan, Al-Qaeda began to retreat from this country and spread to other territories. The table below shows the presence of Al-Qaeda around the globe:⁶⁹⁷

Countries	Al-Qaeda groups
Pakistan	FATA region
Iraq	Al-Qaeda in Iraq (AQI)
Yemen	Al-Qaeda in Arabian Peninsula (AQAP)
Syria	Al-Nusra
Somalia	Al-Shabab
Mali & Nigeria	Al-Qaeda in the Islamic Maghreb (AQIM)

In 2004, the then-Secretary of Defence Donald Rumsfeld, signed a secret order giving the US military authority to strike at Al-Qaeda targets anywhere in the world.⁶⁹⁸ The reaction of the US to the geographical expansion of Al-Qaeda and its associates posits the challenge of whether or not there is an armed conflict between the US and Al-Qaeda, and thus, whether IHL is applicable

3.5.1 Is there an armed conflict between US and Al-Qaeda?

As discussed in previous chapters, international law recognises two types of armed conflicts, IAC and NIAC. This categorisation is elusive when it involves transnational terrorist organisation such as Al-Qaeda. In Security Council debates, the most common approach is a general call for adherence to international law, including human rights law and humanitarian law.⁶⁹⁹ This does not help to clarify the classification of armed conflicts between the US and Al-Qaeda. The UN Special Rapporteur on extrajudicial, summary or

⁶⁹⁶ Al Baker and William K Rashbaum, 'Police Find Car Bomb in Times Square' *The New York Times* (1 May 2010) < <http://www.nytimes.com/2010/05/02/nyregion/02timessquare.html?pagewanted=all> > accessed 26 July 2016

⁶⁹⁷ Mapping Militant Organisations, Stanford University < <http://web.stanford.edu/group/mappingmilitants/cgi-bin/maps/view/alqaeda> > accessed 26 July 2016

⁶⁹⁸ Eric Schmitt and Mark Mazzeti, 'Secret Order Lets U.S. Raid Al Qaeda' *The New York Times* (9 Nov 2008) < http://www.nytimes.com/2008/11/10/washington/10military.html?pagewanted=all&_r=0 > accessed 5 July 2015

⁶⁹⁹ Noam Lubell, 'The War (?) against Al-Qaeda', in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 16

arbitrary executions has noted the difficulty of claiming the existence of a conflict with Al-Qaeda outside Afghanistan and Iraq.⁷⁰⁰

The armed conflict between the US and Al-Qaeda is not international in nature because IAC must be between two (or more) states. This conclusion is based on the fact that according to article 2 of the Hague Regulations⁷⁰¹ and article 2 common to the 1949 Geneva Conventions, the Conventions apply to armed conflicts between contracting parties.⁷⁰² Since Al-Qaeda, as a non-state actor, cannot be a contracting party to these treaties, it follows that these treaty rules will not apply to armed conflicts between it and the US.⁷⁰³

3.5.2 A Non-International Armed Conflict with Al-Qaeda and associates?

IHL cannot apply in the absence of an armed conflict, and the determination of whether an armed conflict exists is based upon the intensity of the violence and the organisation of the forces involved, as laid out in the Tadic case.⁷⁰⁴ Moreover, NIAC are geographically restricted and apply only if the minimum threshold of violence that defines an armed conflict is met within that geographical area. If the Tadic threshold is not met the laws of armed conflict (IHL) do not apply and IHRL will apply. A conflict between a state and transnational non-state entities may only qualify as armed conflict when it crosses a required threshold of intensity of hostilities and organisation of the non-state actors participating in the conflict⁷⁰⁵ Main indicator of the group organisation are their control over military forces, the existence of headquarters, designated zones of operations, the ability to procure, transport and distribute arms, the existence of a command structure, disciplinary rules

⁷⁰⁰ Alston (n 372) Para 53

⁷⁰¹ 7 Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907

⁷⁰² Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Art 2 “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”

⁷⁰³ Just Common Article 3 applies to armed conflicts that are not international in nature see previous chapter under heading “Common Art 3 and non-international armed conflict” 23-26

⁷⁰⁴ Prosecutor v Tadic, Case No. IT-94-1-T, Opinion and Judgement, May 7, 1997 at para 561-562

⁷⁰⁵ See the discussion under title “The 1995 Tadic Jurisdiction decision and non-international armed conflict” in previous chapter at p. 28-31

and mechanisms, control of territory, the existence of recruits, military training, military strategy and tactics, and the ability to speak with a unified voice.⁷⁰⁶

After 9/11 the US justified its targeted killing policies by arguing that the armed conflict is more capacious and goes where the participants go, as it did in World War II.⁷⁰⁷ The US government has also defended that the conflict extends both in space and time,⁷⁰⁸ despite scholarly opposition to this stance.⁷⁰⁹ Indeed the scale of the 9/11 attacks comfortably fulfilled the intensity requirement.⁷¹⁰ This was endorsed by the United Nations Security Council.⁷¹¹ The Security Council's invocation of Article 51 necessarily implies that it classified the September 11 attacks to be an armed attack.⁷¹² The issue here is not whether the 9/11 attacks categorised as an armed attack but whether Al-Qaeda is still capable of being a party to conflict. Fifteen years later, particularly after bin Laden's death, Al-Qaeda's activity had slowed down; arguably it no longer posed a serious military threat, nor it possesses a centralised military command structure. There is no current evidence that the worldwide attacks that allegedly were attributed to Al-Qaeda occurred under its leadership's control.⁷¹³

The problematic question is whether the violence of Al-Qaeda or its associates still meets the intensity requirements associated to a lawful use of armed force in self-defence. In his report to the UN Human Rights Council, the Special Rapporteur Philip Alston concludes, 'even when there have been

⁷⁰⁶ ICTY, *Prosecutor v Fatmir Limaj, Haradin Bala and Isak Musliu*, above note 105, para. 90 ; ICTY, *Prosecutor v. Ramush Haradinaj*, above note 40, paras. 63–88

⁷⁰⁷ John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, "The Ethics and Efficacy of the President's Counterterrorism Strategy" (30 April 2012) < <https://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy#sthash.Z7MNzllh.dpuf> > Brennan said "As a matter of International law, the United States is in an armed conflict with, Al-Qaeda the Taliban and associated forces, in response to the 9/11 attacks"); Kenneth Anderson, "Targeted Killing and Drone Warfare: How We Came to Debate Whether there Is a 'Legal Geography of War'" (2011) Stanford University, 4; Annyssa Bellal, *The War Report: Armed Conflict in 2014* (Oxford University Press 2015) 20

⁷⁰⁸ *Ibid*, 5

⁷⁰⁹ Alain Pellet, 'The Attack on the World Trade Center: Legal Responses, No, This is not War!', (3 Oct 2001); Antonio Cassese, 'Terrorism is also disrupting some crucial legal categories of International law' (2001) EJIL 993

⁷¹⁰ Derek Jinks, 'Sep 11 and the laws of war' (2003) Yale Journal of International Law 28, 30

⁷¹¹ Resolution 1373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001,

⁷¹² Thomas Franck, 'Terrorism and the Right of Self-Defence' (2001) AM. J. INT'L L. 839, 842

⁷¹³ Kai Ambos and Josef Alkatout, 'Has 'Justice Been Done'? The Legality of Bin Laden's Killing Under International Law' (2012) Israel Law Review 341, 350

terrorist attacks by al-Qaeda or other groups claiming affiliation with it, the duration and intensity of such attacks has not risen to the level of an armed conflict'.⁷¹⁴

The isolated terrorist attacks in various parts of the globe may not reach to the required level of intensity to be classified as an armed conflict, unless their numbers around the globe are aggregated. This perspective raises the question of the source of the attacks that should remain the same if they must be considered as an amalgamation meeting the required intensity threshold. The fundamental purpose of requiring a certain level of intensity is to differentiate between situations where law enforcement suffice to deal with the unrest and others allowing the use of military armed force in response. When violence is spread out geographically, if the required level of intensity is absent in each territory then international humanitarian law does not apply; instead domestic law and IHRL provide the normative framework to address the situation.⁷¹⁵

To satisfy the second prong of the test is even more daunting. A NIAC can only exist if the parties to an armed conflict are 'organised armed groups'. Al-Qaeda does not display the characteristics of an 'organised armed group' as laid out by ICTY in Ramush.⁷¹⁶ This demands a centralised command structure, membership, and the capability of abiding by the rules of IHL.⁷¹⁷ Al-Qaeda is a vague and secret enemy and little to date is known about its organisation. Until 2001, Al-Qaeda could be identified as an organisation with a 'clear leadership, territorial control, training camps and headquarters'.⁷¹⁸ But the US invasion of Afghanistan destroyed Al-Qaeda organisation. Professor Fawaz Gerges explains, 'Al-Qaeda central no longer exists...senior leaders like Osama bin Laden and Ayman al-Zawahiri are more preachers of global jihad than field lieutenants who give direct orders.'⁷¹⁹ The organisation is now

⁷¹⁴ Alston (n 372) para. 54

⁷¹⁵ Sasha Radin, 'Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts' (2013) INT'L L. STUD. 696, 736

⁷¹⁶ Prosecutor v Ramush Haradinaj, (2008) Para 49, 60

⁷¹⁷ Ibid, prosecutor v Boskoki, (2008) para 194

⁷¹⁸ ibid

⁷¹⁹ Eben Kaplan, 'The Rise of al-Qaedaism' (18 July 2007) < <http://www.cfr.org/terrorist-organizations-and-networks/rise-al-qaedaism/p11033> > accessed 28 July 2016

'decentralised in nature'.⁷²⁰ The Special Immigration Appeals Commission (SIAC) judgement stressed that the image that emerges of 'Al Qaeda is that of a series of loosely connected operational and support cell'.⁷²¹ According to Dr Andrew Silke, a criminologist and forensic psychologist on the UN Roster of Terrorism Experts, Al-Qaeda lacks 'a clear hierarchy, military mind set and centralised command'. From the evidence available, it appears that Al-Qaeda is a loose network of associated groups that share same religious and ideological backgrounds but sparingly interact. Al-Qaeda is less an organisation than a 'state of mind' encompassing 'a wide range of followers and members who can differ dramatically from each other'.⁷²² Lubell has also suggested that Al-Qaeda lacks the characteristics of a party to a conflict and resembles a 'network of networks' and an 'ideology rather than an entity'.⁷²³ Even the US government has confirmed that Al-Qaeda's structure has changed and rather than being a centralised group, the 'franchising of Islamic extremism has resulted in decentralising control in the network'.⁷²⁴ The London Tube bombings, Madrid bombings, Mumbai attacks all appear to be carried out by perpetrators who share the same ideology of Al-Qaeda but this lacks any concrete evidence demonstrating that Al-Qaeda which carried out 9/11 was responsible for them.⁷²⁵ Another category of home grown extremists, are self-radicalising, self-funding and self-executing. They have no formal affiliation with Al-Qaeda but they are inspired by its ideology. The case of Faisal Shehzad shows that although he was inspired by the ideology but had no affiliation with Al-Qaeda.⁷²⁶

⁷²⁰ Jenna Jordan, 'When Leaders Die, Terror Still Thrives' *The New York Time*, (4 Oct 2011) < http://www.nytimes.com/2011/10/05/opinion/awlakis-death-wont-destroy-al-qaeda.html?_r=0 > accessed 27 July 2016

⁷²¹ SIAC judgement paras 98-99, cited in *A & Ors v Secretary of State for the Home Department* [2004] EWCA Civ 1123, Para 218

⁷²² Andrew Silke, 'Profiling Terror,' (2003) *Police Review* 18, 19

⁷²³ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press, 2010), 118

⁷²⁴ US National Military Strategic Plan for the War on Terrorism, Chairman of the Joint Chiefs of Staff Washington, (2006) DC 20318, 13

⁷²⁵ Lubell (n 723) 119

⁷²⁶ Daniel L Byman, 'Coming to America: The Rise of Al Qaeda Affiliate Groups' (Brookings 5 May 2010) < <https://www.brookings.edu/opinions/coming-to-america-the-rise-of-al-qaeda-affiliate-groups/> > Faisal Shehzad was in contact with extremist factions in Pakistan but he conducted the failed attack on its own see Fawaz Gergez, *The rise and fall of Al-Qaeda* (Oxford University Press 2011)

Overall, it cannot be credibly claimed that all the military operations undertaken against the world are a part of a single armed conflict with Al-Qaeda.⁷²⁷ The threshold of violence and identity of the party to the conflict are linked. If various incidents across the globe could be attributed to Al-Qaeda it could be potentially possible to argue that the threshold for recognising the existence of an armed attack/conflict has been crossed. The scenario is different if separate and distinct groups that lack unified command and control structure have carried out these attacks. It becomes then difficult to aggregate this violence as evidence of an existing conflict.

Al-Qaeda defies categorisation as an organisation an ideology or a distinct local, regional, national or individual manifestation of a broad ideology. The matter is further complicated with the assertion that unknown and unidentified Al-Qaeda 'associates' are also party to this armed conflict. The United States claims to be in a 'global' armed conflict with Al Qaeda and its affiliates. It also claims that these affiliated armed groups are connected, part of the same conflict and, collectively, constitute a threat to the US which is global in reach. There is no firm basis to sustain that these internal, or even regional conflicts, amount to a global armed conflict. It is not even possible to prove that these affiliated groups are, in fact, part of the same conflict that spread out across multiple States. In most cases these affiliated groups are engaged in entirely separate conflicts.⁷²⁸ For example, the majority of fighting conducted by Al-Qaeda affiliates such as 'Al Shabaab' in Somalia is internal in nature. Al Shabaab's interests and targets are predominantly local.⁷²⁹

The US describes these allegedly associate groups as 'enemy combatants', enabling the US to claim anyone that virtually anyone can be an Al-Qaeda associate. Even under this premise, the US government has no legal basis to target individuals who share Al Qaeda's ideology. Dehn has argued that the focus should not be on 'ideological alignment with al Qaeda, but on their coordinated activity'.⁷³⁰ It is highly plausible that the 'enemy' is 'a new

⁷²⁷ Lubell, (n 723) 119-120

⁷²⁸ This point is elaborated in detail in chapter 5

⁷²⁹ Stanford University, 'Al Shabab Mapping Militant Organisations', (30 Sep 2013) <<http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61>> accessed 22 July 2015

⁷³⁰ John C. Dehn & Kevin Jon Heller, 'Debate, Targeted Killing: The Case of Anwar Al-Aulaqi' (2011) 159 U. Pa. L. Rev. Pennumbra 175, 190

generation of Islamic terrorists who act alone, abetted by jihadi websites'.⁷³¹ The attacks that are associated with Al-Qaeda appear sporadic, individual, unpredictable and lacking any responsible command.⁷³² As Alston contends, 'Al-Qaeda and other 'alleged associated' groups are often loosely linked if at all'.⁷³³ Al-Qaeda affiliates include Al Qaeda in the Arabian Peninsula (AQAP), Al-Qaida in the Islamic Maghreb, Al Shabaab and Al Qaeda in Iraq.⁷³⁴ Can it be claimed that the terrorist attacks committed since 9/11 constitute a global NIAC even when distinct armed groups have carried them out? Arguably, whether these armed groups form a single party to a conflict depends on how connected they are. A declaration of allegiance to an armed group (such as was the case with Al Shabaab and Al Qaeda in 2012)⁷³⁵ is insufficient to determine that the affiliated group is part of the similar armed conflict.⁷³⁶ To be part of the same armed conflict the affiliate group must fall under a responsible command of a party to the conflict. Therefore, armed groups pledging allegiance or changing does not suggest that they have become part of Al Qaeda's command structure.⁷³⁷ The violence of AQAP is not directed against the United States so it is not part of the same conflict.⁷³⁸ Thus there is a good reason to conclude that Al-Qaeda and associated groups lack the unity to consider their actions as originating from the same group. Separately, they do not meet the threshold for an armed conflict under IHL, and there is no transnational armed conflict between the US and Al-Qaeda.

⁷³¹ Dan Bilefsky and Maia de la Baume, 'French Gunman Seen as Home-grown Militant', *The New York Times* (21 March 2012) < <http://www.nytimes.com/2012/03/22/world/europe/mohammed-merah-france-shooting-suspect-seen-as-home-grown-militant.html> > accessed 31 May 2015

⁷³² Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press 2015) 398

⁷³³ Alston (n 372) Para 55

⁷³⁴ Clayton Thomas, 'Al Qaeda and U.S. Policy: Middle East and Africa', Congressional Research Service, (5 Feb 2018) 1 < <https://fas.org/sgp/crs/mideast/R43756.pdf> > accessed 25 Feb 2018

⁷³⁵ Bill Rogio and Thomas Joscelyn, 'Shabab formally joined Al-Qaeda' (*The long war journal*, 25 Feb 2012) < http://www.longwarjournal.org/archives/2012/02/shabaab_formally_joi.php > accessed 27 July 2015

⁷³⁶ Sasha Radin, 'Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts' (2013) INT'L L. STUD. 696, 728

⁷³⁷ Daniel L. Byman, 'Breaking the bonds between Al-Qaeda and its affiliate organizations' (*The Brookings institutions*, 2012), 11 < <http://www.brookings.edu/~media/research/files/papers/2012/7/alqaida%20terrorism%20byman/alqaida%20terrorism%20byman.pdf> > accessed 29 July 2015

⁷³⁸ Radin (n 736) 734

The status of persons targeted in drone strikes is another important issue and has significant impact on the principle of distinction and proportionality. The principle of distinction dictates that all parties to a conflict distinguish between those who are fighting and those who are not, and direct attacks are aimed exclusively at those who are participating in hostilities. The principle of proportionality seeks to minimize the incidental casualties during war and limits the methods and weapons to be lawfully used. It prohibits from attack in which the expected civilian casualties will be excessive in light of the anticipated military advantage gained. The principle of military necessity recognises that military has a right to use measures acceptable in IHL to completely defeat the enemy.⁷³⁹

3.6 Who can be targeted?

Enemy leaders look like everyone else; enemy combatants look like everyone else; enemy vehicles look like civilian vehicles; enemy installations look like civilian installations; enemy equipment and materials look like civilian equipment and materials⁷⁴⁰

Legal Advisor Koh has confirmed that the US drone strikes are limited to 'military objectives' and that 'civilians shall not be the objects of the attack'.⁷⁴¹ These words reiterate international humanitarian law's key principle of distinction. The ICJ has described the principle of distinction as the 'cardinal rule' of IHL.⁷⁴² Art 51(2) of Additional Protocol asserts, 'The civilian population as such, as well as individual civilians shall not be the object of attack'.⁷⁴³ Drone strikes in countries including Pakistan, Yemen and Somalia take place in the context of a NIAC.⁷⁴⁴ The principle of

⁷³⁹ See section 2.8

⁷⁴⁰ Defense Science Board 2004 Summer Study on Transition to and from Hostilities, (2004), 154 < <http://www.acq.osd.mil/dsb/reports/ADA430116.pdf> > accessed 22 July 2015

⁷⁴¹ Koh, H, Legal Adviser, 'U.S. Department of State, Speech at the Annual Meeting of the American Society of International Law' (2010) 7 < <http://www.state.gov/s/l/releases/remarks/139119.htm> > accessed 30 July 2015

⁷⁴² See section 2.7

⁷⁴³ Additional Protocol II

⁷⁴⁴ U.S. Supreme Court, *Hamdan v. Rumsfeld* (548 U.S. 557, 630 (2006) (US Supreme court held that US is in an NIAC with Al-Qaeda and associates)

distinction applies in both IAC and NIAC.⁷⁴⁵ In NIAC two categories of individuals are targetable, namely, members of organised armed groups and civilians who take direct part in hostilities.⁷⁴⁶

The concept of what constitutes direct participation is highly subjective.⁷⁴⁷ Because there is no commonly accepted definition of direct participation in hostilities,⁷⁴⁸ it has been left open to states' own interpretation.⁷⁴⁹ The US has not disclosed its criteria for establishing which groups or persons are taking direct participation in hostilities. As acknowledged elsewhere 'this is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing. It also leaves open the possibility that States will unilaterally expand their concept of direct participation beyond permissible boundaries'.⁷⁵⁰ The fact that US is targeting drug traffickers in Afghanistan who have links to the insurgency shows that their criteria is much more expansive than that set out by the ICRC.⁷⁵¹ Although the US claims that they target high-level Al-Qaeda leaders who are planning attacks, evidence suggests otherwise. According to various sources people killed in US drone strikes are mainly low-level combatants. Providing testimony to the US Congress, Peter Bergen claimed that Obama killed foot soldiers in drone attacks.⁷⁵² Similarly, the Bureau of Investigative Journalism has claimed that the US drones killed just 4% of Al-Qaeda members.⁷⁵³ After reviewing copies of top-secret US intelligence reports, McClatchy concluded that drone operators 'weren't always certain who they were killing'. These unknown low-

⁷⁴⁵ J.M. Henckaerts and K. Doswald Beck, *International Committee of the Red Cross, Customary International Humanitarian Law* (Cambridge University Press 2009) 3

⁷⁴⁶ See Section 2.6.3

⁷⁴⁷ On the meaning of direct participation in hostilities see Section 2.6.3

⁷⁴⁸ Alston (n 372) Para 19

⁷⁴⁹ *ibid*, Para 58

⁷⁵⁰ *ibid*, Para 68

⁷⁵¹ *ibid*, Para 68

⁷⁵² See Peter Bergen, "Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing", Testimony presented before the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights, (23 April 2013) < <http://www.judiciary.senate.gov/imo/media/doc/04-23-13BergenTestimony.pdf> > accessed 24 June 2016

⁷⁵³ See Jack Serle, 'Only 4% of drone victims in Pakistan named as al Qaeda members', (16 Oct 2014) < <https://www.thebureauinvestigates.com/namingthedead/only-4-of-drone-victims-in-pakistan-named-as-al-qaeda-members/?lang=en> > accessed 1 August 2015

level suspected terrorists were described as 'other militants' or 'foreign fighters'.⁷⁵⁴

On which criterion US is targeting low-level combatants is yet unknown. Is government targeting these individuals because they indirectly support militants by providing logistics, weapons or other support? If the government is using continuous combat function criterion then how it assesses whether an individual has regained civilian status by leaving combat role unequivocally? Ambiguity on these questions complicates any assessment on US compliance with the principle of distinction.

Civilians sharing geographical location with militants become particularly vulnerable when there is no possibility of knowing what constitutes 'direct participation'. Christopher Rogers has highlighted this issue by noting that:

Residents of areas in which drones operate do not know what kind of conduct or relationships could put them at risk. Offering indirect support to militants such as food or quarter or political or ideological support would not formally qualify under international norms as "direct participation in hostilities." However, it is entirely possible that the US considers many people to be combatants, owing to their relationships to known militants, when they are legally civilians.⁷⁵⁵

Under IHL the US can legally target individuals whose identities are not known but their conduct explicitly shows that they are plotting against US interests and are involved in planning military attacks against the US.⁷⁵⁶ The US may also lawfully target individuals who are involved in transporting weapons in a vehicle to be used in an armed attack against the US. The elimination of such individuals offers a definite military advantage so it also fulfils the principle of military necessity.⁷⁵⁷ Drone strikes against individuals who are involved in bomb making or unloading ammunitions that are to be

⁷⁵⁴ See Jonathan S Landay, 'Obama's drone war kills 'others,' not just al Qaida leaders' (*MacClatchy*, 17 June 2015) < <http://www.mcclatchydc.com/news/nation-world/world/article24747826.html> > accessed 20 April 2018

⁷⁵⁵ Christopher Rogers, 'Civilians in Armed Conflict: Civilian Harm and Conflict in Northwest Pakistan' (2010) *Campaign for Innocent Victims in Conflict (CIVIC)*, 20-22

⁷⁵⁶ A.P.V. Rogers, 'Direct Participation in Hostilities' (2009) *Military Law and Law of War Review* 144, 157

⁷⁵⁷ Dinstein, 'Distinction and Loss of Civilian Protection in International Armed Conflicts', (2008) *International Law Studies Series of the US Naval War College* 183, 191-192

used against the US is also legal under principle of distinction. Al-Qaeda compound and training camps are lawful targets because their destruction clearly provides military advantage to the attacker. However, if civilians are also present in the compound the use of drone strikes is particularly restricted by the principle of proportionality.

There are some drone strikes that may never satisfy the principle of distinction. The inclusion of any male fit for military service in the vicinity of drone strike a lawful target is inconsistent with the principle of proportionality. According to the legal framework explained above, an individual can only be targeted if they belong to an organised armed group or are participating directly in hostilities, not simply because they happen to be present near terrorists.

The US targeting killing policy still adheres to 'either with us or against us policy' by targeting individuals who are 'consorting with known militants'.⁷⁵⁸ The link-analysis method adopted by the US to add people on kill lists involves including any person in contact with militants. Membership to the group is established from the number and frequency of contacts, regardless of their nature.⁷⁵⁹ As one officer has noted, 'If we decide someone is a bad person people with him are also bad'.⁷⁶⁰ Sympathising, collaborating or supporting the ideology of known terrorist should not result in making a person targetable because that individual unless she is planning attacks against the US and her consorting is designed to have adverse impact on US military operations.⁷⁶¹ Likewise, carrying guns and weapons in an area where insurgents live does not licence the US to use drone strikes.⁷⁶²

⁷⁵⁸ D Filkins, 'The Journalist and the Spies' *New Yorker* (19 September 2011) < http://www.newyorker.com/reporting/2011/09/19/110919fa_fact_filkins > accessed 26 July 2016

⁷⁵⁹ Chamayou Grégoire, *Drone Theory* (Penguin Books Ltd 2015) 51

⁷⁶⁰ Gareth Porter, "How McChrystal and Petraeus Built an Indiscriminate Killing Machine," (*Truthout*, 26 Sep 2011) < <http://www.truth-out.org/news/item/3588:how-mcchrystal-and-petraeus-built-an-indiscriminate-killing-machine> > accessed 28 July 2016

⁷⁶¹ Rogers, *Supra* note 82, 146

⁷⁶² M. Schmitt, 'Targeting and International Humanitarian Law in Afghanistan' (2009) *International Law Studies Series of the US Naval War College* 307, 319; Judgment Simić, Trial Chamber, (17 October 2003), Para. 659 (In this case the ICTY said that the possession of weapons does not create a reasonable doubt as to the civilian status' of the individuals in question)

In tribal areas of Pakistan and Yemen, it is customary for most male to carry weapons.⁷⁶³The US routinely targets civilian buildings on the bases that areas controlled by militants are used by military purposes, failing to justify the military advantage their destruction involves.⁷⁶⁴

There is no evidence that the surveillance and technology underpinning US decisions are enough to identify members of organised armed groups and civilians directly participating in hostilities.⁷⁶⁵Some argue that life analysis surveillance and reconnaissance capabilities of drones help to distinguish between a civilian and militant. Drones allow commanders to track and analyse the daily activities of suspected militants, helping to ensure that civilians are not mistakenly targeted.⁷⁶⁶Schmitt argues that, 'high resolution imagery usually transmitted in real time to a drone crew...helps to.... monitor the potential target for extended periods before engaging it with precision weapons...the result is often a significantly reduced risk of...attacking the wrong target.'⁷⁶⁷ However a CIA drone operator admits that a drone camera cannot distinguish shapes precisely because 'You can only see so much from 20,000 feet.'⁷⁶⁸ Americans jokingly say that, 'When the CIA sees three guys doing jumping jacks, the agency thinks it's a terrorist training camp'.⁷⁶⁹

Arguably the US drone surveillance is not that accurate and excessive reliance on quantitative data has on numerous occasions resulted in the death of civilians.⁷⁷⁰ For instance, the US targeted a traditional Jirga in Pakistan

⁷⁶³ Adam Entous, Siobhan Gorman and Julian E Barnes, 'U.S. Relaxes Drone Rules Obama Gives CIA, Military Greater Leeway in Use Against Militants in Yemen', *The Wall Street Journal*, (26 April 2012) < <http://www.wsj.com/articles/SB10001424052702304723304577366251852418174> > accessed 20 July 2016

⁷⁶⁴ Kevin Jon Heller, 'One Hell of a Killing Machine': Signature Strikes and International Law' (2013) *Journal of International Criminal Justice* 89, 105

⁷⁶⁵ *ibid*

⁷⁶⁶ Laurie R. Blank, 'After "Top Gun": How Drone Strikes Impact the Law of War' (2012) *J. Int'l L.* 675, 693

⁷⁶⁷ Michael N. Schmitt, 'Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the Fog of Law' (2010) *Y.B. INT'L HUMANITARIAN L.* 311, 320

⁷⁶⁸ Quoted in Ken Dilanian, "CIA Drones May Be Avoiding Pakistani Civilians," *Los Angeles Times*, 22 February, 2011) < <http://articles.latimes.com/2011/feb/22/world/la-fg-drone-strikes-20110222/2> > accessed 17 July 2016

⁷⁶⁹ Becker and Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will" *The New York Times* (29 May 2012) < <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> > accessed 22 July 2016

⁷⁷⁰ Stanford Law School International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, 'Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan', (September 2012), p. 13 <<http://chrgi.org/wp-content/uploads/2012/10/Living->

because a meeting observed from sky resembled terrorist behaviour.⁷⁷¹ On 2 September 2010, the US announced that they had killed an important Taliban leader in Afghanistan. It was later revealed that the strike killed ten civilians including Zabet Amanullah, a civilian engaged in an electoral campaign.⁷⁷² In another incident the US drone strike accidentally killed two Westerners in Pakistan in April 2015.⁷⁷³ This suggests that US is willing to conduct targeted killing on the basis of evidence that is far from definitive.

The distinction between organised groups or civilians directly participating in hostility carries little weight in the decision-making leading to strikes. As noted earlier, the US considers any male who consorts with terrorists or military age male in an area of known terrorist activity, targetable. The double tap drone strikes may violate the principle of distinction. It may not be feasible for US to establish in these strikes that a person who came to rescue survivors is a member of an organised armed group. The violation of the principle of distinction resulting from targeting rescuers under the presumption that these males are engaged in a continuous combat function has been highlighted by several commentators. In their 2012 Report, 'Living Under Drones', scholars from two academic centres at Stanford University and New York University Schools of Law, stressed, 'The short time between first and second strikes at rescue sites... raises questions over how an individual's lawful target status could be properly determined'.⁷⁷⁴ While the US insists that its targeting killing is not solely based on drone surveillance but also supported by 'signals intercepts' and 'human sources',⁷⁷⁵ media reports have revealed that the primary

[Under-Drones.pdf](#) > ; Columbia Law School Human Rights Clinic, 'The Civilian Impact of Drones', (September 2012) 34 < http://civiliansinconflict.org/uploads/files/publications/The_Civilian_Impact_of_Drones_w_cover.pdf > accessed 19 July 2016

⁷⁷¹ Salman Masood and Pir Zubair Shah, 'C.I.A. Drones Kill Civilians in Pakistan', *The New York Times* (17 March 2011) < <http://www.nytimes.com/2011/03/18/world/asia/18pakistan.html> > accessed 28 July 2016

⁷⁷² Kate Clark, 'The Takhar attack and Targeted Killings: the Legal Challenge', *Afghanistan Analyst Network* (12 August 2012) < <https://www.afghanistan-analysts.org/the-takhar-attack-and-targeted-killings-the-legal-challenge/> > accessed 28 July 2016

⁷⁷³ CNN News, 'U.S. drone strike accidentally killed 2 hostages' (24 April 2015) < <http://edition.cnn.com/2015/04/23/politics/white-house-hostages-killed/> > accessed 22 July 2016

⁷⁷⁴ Living Under Drones (n 770) 115

⁷⁷⁵ G. Miller, 'White House Approves Broader Yemen Drone Campaign' *The Washington Post* (26 April 2011) < http://www.washingtonpost.com/world/nationalsecurity/whitehouseapprovesbroaderyemendronecampaign/2012/04/25/gIQA82U6hT_story.html > accessed at 22 July 2016

method to locate targets are not human intelligence but controversial metadata analysis and cell-phone tracking technologies.⁷⁷⁶ Moreover, drone strikes take place in remote areas where even the host states do not have full access, therefore it is unlikely for the US to have useful informants, such as in Federally Administered Tribal Areas (FATA) in Pakistan and in Yemen.⁷⁷⁷ In practice, there is no realistic way for the US to establish with certainty if the targeted individual is a militant who is a permanent member of armed organisation.

3.6.1 Proportionality

In Afghanistan, the US military has set itself a maximum collateral damage threshold of 10 percent, and, has claimed to achieve an 'actual collateral damage rate of 1 percent'.⁷⁷⁸ By contrast, in Pakistan -according to data collected by the New American Foundation- 23 percent of CIA strikes caused collateral damage, a percentage that seems excessive following the US military's proportionality threshold.

However to base the proportionality analysis on this data is problematic because the 23 percent figure is obtained by combining civilian casualties and unknown casualties, that can include⁷⁷⁹ civilians or militants.⁷⁸⁰ For many years, official data on drones-related casualties was unavailable. On 1 July 2016, the Obama administration released a two and a half page report with official data on civilian casualties outside areas of active hostilities. The US government report confirms that drone strikes killed between 64 and 116 'non-combatants' in 473 counter-terrorism strikes in Pakistan, Yemen, Somalia and Libya between January 2009 and the end of 2015.⁷⁸¹ The gap between the

⁷⁷⁶ Jeremy Scahill and Glen Greenwald, 'The NSA's secret role in the US assassination programme' *The Intercept* (12 Feb 2015) < <https://firstlook.org/theintercept/2014/02/10/the-nsas-secret-role/> > accessed 26 July 2016

⁷⁷⁷ The civilian impact of drones (n 770) 34

⁷⁷⁸ Megan Brauna & Daniel R. Brunstetter, 'Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim' (2013) *Journal of Military Ethics* 304, 310

⁷⁷⁹ Avery Plaw and Carlos R. Colon, Correcting the record: civilians, proportionality, and the Jus ad vim, 172-173 in *Legitimacy and drones investigating the legality, morality and efficacy of UCAV's* by Steven J Barela, (Ashgate 2015)

⁷⁸⁰ The New American Foundation Labels unknown to be "those who are not identified in news reports definitively as either militants or civilians" < <http://securitydata.newamerica.net/drones/key-findings.html?country=Pakistan> > accessed 27 July 2016

⁷⁸¹ Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities, <

US figures and other estimates including those provided by New America Foundation, Long War Journal, and the Bureau of Investigative Journalism is striking. These three organisations have reported that strikes carried out during the Obama administration killed 4,189 persons, an estimated 474 of whom were civilians.⁷⁸² Unfortunately, the official release of data has generated renewed controversy and criticism.⁷⁸³ In the absence of any reliable data it is impossible to reach firm conclusions about the proportionality of the attacks.

The surveillance, intelligence gathering and the fact that a drone can hover for days provides a commander ample information to avoid civilian casualties.⁷⁸⁴ As discussed earlier an obvious problem with the drone strikes is their dependence on potentially unreliable intelligence.⁷⁸⁵ In Tribal areas citizens lack unity and are divided into various tribes who are hostile towards each other. There is an obvious risk that a local informant may provide intentionally misleading information against a member of another tribe for any number of self-serving purposes.⁷⁸⁶

In line with the US official position, John Brennan lauded in 2012 the ability of drones to conform to the principle of proportionality because drones succeed in killing terrorists while minimising the collateral damage.⁷⁸⁷ Proponents of drones mainly try to satisfy the standard of proportionality by comparing drones with other weapons. For instance Anderson asserts:

<https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF> > accessed 27 July 2016

⁷⁸² Micah Zenko, Questioning Obama's Drone Deaths Data (*Council on foreign relations*, 1 July 2016) < <http://blogs.cfr.org/zenko/2016/07/01/questioning-obamas-drone-deaths-data/> > accessed at 27 July 2016

⁷⁸³ Jack Serle, Obama drone casualty numbers a fraction of those recorded by the Bureau (1 July 2016) < <https://www.thebureauinvestigates.com/2016/07/01/obama-drone-casualty-numbers-fraction-recorded-bureau/> > accessed 27 July 2016; Micah Zenko, Do Not Believe the U.S. Government's Official Numbers on Drone Strike Civilian Casualties It's way, way too low (*Foreign Policy*, 1 July 2016) < <http://foreignpolicy.com/2016/07/05/do-not-believe-the-u-s-governments-official-numbers-on-drone-strike-civilian-casualties/> > accessed 27 July 2016

⁷⁸⁴ Blank (n 766) 697-698

⁷⁸⁵ Jane Mayer, 'The Predator War', *The New Yorker* (26 Oct 2009) < <http://www.newyorker.com/magazine/2009/10/26/the-predator-war> > accessed 25 July 2015

⁷⁸⁶ *ibid*

⁷⁸⁷ John O Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy' (*Council on Foreign Relations*, 30 April 2012) < <http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100> > accessed 22 July 2016

The [drone] technology provides force protection to (one side's) combatants; it provides greater protection to civilians through precision targeting. What's not to like? No weighing up of perplexing values needs to take place, because everything is on the plus side, win-win.⁷⁸⁸

To further establish his point Anderson has compared the estimates of civilian casualties caused by drones to the history of civilian deaths in war. The argument is that the proportionality of US drone warfare should be assessed by comparing it with the horrors of Second World War.⁷⁸⁹ However, the UN Charter and rules of law restricting the means of warfare were introduced precisely to avoid the horrors of WWII. Therefore referring to an armed conflict where the allies intentionally targeted civilian population to weaken German morale is methodologically flawed and will justify the gratuitous use of force.⁷⁹⁰ Another scholar Plaw also carried out his research on civilian casualties and concluded that 'the civilian casualty rate of the drone strikes looks significantly better than alternative actions'.⁷⁹¹ His data showed that the US non-drone operations (commando raids and precision artillery strikes) and the Pakistani Army operations in FATA have killed a much higher proportion of civilians than drones.⁷⁹² But others argue that this comparison is problematic because it is based on two different operations where military objectives of parties are different, so the proportionality calculus employed is also widely divergent. For example, Pakistani Army conducted a counterinsurgency operation against Taliban in FATA with a clear objective of reclaiming the province.⁷⁹³ Whilst on the other hand US is targeting individuals on the basis of mere suspicion who may or may not pose any direct or imminent threat to US. Additionally, quantitative analysis of comparing the

⁷⁸⁸ Kenneth Anderson, 'Efficiency in Bello and ad Bellum: Making the Use of Force Too Easy?' in Claire Finkelstein, Jens. D. Ohlin & Andrew Altman (Eds), *Targeted Killings: Law and Morality in an Asymmetric World* (Oxford University Press 2012) 388

⁷⁸⁹ Ibid, 383-384

⁷⁹⁰ Henry Shue, 'Concept Wars' (2008) *Survival: Global Politics and Strategy* 185, 187 ; Daniel R Brunstetter & Megan Braun, 'The Implications of Drones on the Just War Tradition' (2011) *Ethics & International Affairs* 337, 346

⁷⁹¹ Avery Plaw, *Counting the Dead: The Proportionality of Predation in Pakistan*, in Bradley J Strawser (Ed), *Killing by Remote Control: The Ethics of an Unmanned Military* (Oxford: Oxford University Press 2013) 150

⁷⁹² Ibid

⁷⁹³ Megan Brauna & Daniel R. Brunstetter, 'Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim' (2013) *Journal of Military Ethics* 304, 310

number of civilians killed or wounded to the numbers of insurgents killed or wounded is an inappropriate way to measure proportionality. Whether or not an attack is proportionate depends on the military advantage gained from the attack that resulted in collateral damage.⁷⁹⁴

The objectives of the US drone operations in undeclared war zones are 'to decimate the al-Qaeda and Taliban leadership core, and to deny safe haven to members of these groups in order to disrupt the planning and execution of terrorist attacks'.⁷⁹⁵ It is important to consider proportionality in two contexts, that is, strikes targeting high-value targets (HVT) and strikes targeting low-level militants. It is understandable that government would consider high civilian casualties in targets that kill Al-Qaeda or Taliban leaders proportionate. The military advantage gained from killing a HVT lies in eliminating their expertise, leadership, command and experience. According to Peter Bergen however, drones have killed only 2% of HVT in Pakistan.⁷⁹⁶ The US drone program has also targeted suspected militants who are low-level combatants, may be affiliated to Al-Qaeda or its associates and might pose little or no threat to the US or its interests. The main reason advanced to justify the targeting of suspected militants has been the ability to disrupt their plans and plots before they can carry out an attack.⁷⁹⁷ The constant hovering of drones create fear amongst low level combatants and makes it hard for them to plot against US, preventing the creation of terrorist safe heavens. The 24/7 humming of drones also scares civilians and cause numerous psychological problems.⁷⁹⁸ Striking low-value targets in public areas where

⁷⁹⁴ Chris Jenks, 'Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict' (2010) *North Dakota Law Review*, 667

⁷⁹⁵ Megan Brauna & Daniel R. Brunstetter, 'Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim' (2013) *Journal of Military Ethics* 304, 310

⁷⁹⁶ Peter Bergen & Megan Braun, 'Drone is Obama's Weapon of Choice' *CNN New* (6 Sep 2012) < <http://www.cnn.com/2012/09/05/opinion/bergen-obama-drone/index.html> > accessed at 22 July 2016

⁷⁹⁷ Brennan (n 787)

⁷⁹⁸ Reprieve, 'Drones in Yemen causing a 'psychological emergency', psychologist tells MPs', (5 March 2013) < http://www.reprieve.org.uk/press/2013_03_05_drones_in_yemen_psychological_emergency/ > accessed 25 July 2016

collateral damaged is assured makes the military advantage debatable when confronted to almost any test of proportionality.⁷⁹⁹

On one hand the use of drones has arguably diminished the capabilities of Al-Qaeda and its affiliates. On the other hand, the targeting of low level combatants and 24/7 hovering of US drone strikes has reportedly had 'serious social and political repercussions that tangentially affect the proportionality calculus'.⁸⁰⁰ As Sauer and Schörnig warn, drone strikes are protracting the conflict rather than bringing it closer to termination.⁸⁰¹ Dr Paul Gill's 2015 report highlighted that the indirect impact of US drone strike in Pakistan is overwhelming. Although the use of drones directly might meet the proportionality test in the short term, the 'terrorist reprisals following a drone strike are disproportionately more likely to target civilians'.⁸⁰² Another report by Dr Wali Aslam concluded that drones have not eliminated HVT from tribal areas of Pakistan; they have relocated them in settled areas of the country.⁸⁰³ This raises doubt on whether the use of drones by the US meets the proportionality criteria when apparently rhetoric of drone proportionality is leading to problematic strategies.

3.6.2 Military necessity

The principle of military necessity bans the use of force if the military advantage pursued can be only achieved at some unforeseen time in the future.⁸⁰⁴ It is plausible that the US military will gain military advantage by killing Al-Qaeda core members; however, targeting anyone involved with Al-Qaeda with the view that it is convenient and capture is difficult may not satisfy the principle of military necessity. The law of war allows using force

⁷⁹⁹ Ryan J. Vogel, 'Drone Warfare and the Law of Armed Conflict', (2011) *Denv. J. Int'l L. & Pol'y* 101, 127

⁸⁰⁰ Megan Brauna & Daniel R. Brunstetter, 'Rethinking the Criterion for Assessing Cia-targeted Killings: Drones, Proportionality and Jus Ad Vim', (2013) *Journal of Military Ethics* 304, 312

⁸⁰¹ Frank Sauer & Niklas Schörnig, 'Killer Drones: The 'Silver Bullet' of Democratic Warfare?' (2012) *Security Dialogue* 360, 371

⁸⁰² Dr Paul Gill, 'THE IMPACT OF DRONE ATTACKS ON TERRORISM: THE CASE OF PAKISTAN', Remote Control project, (June 2015), 12 < http://remotecontrolproject.org/wp-content/uploads/2015/06/Paul_Gill_drones_terrorism_Pakistan.pdf > accessed 28 July 2016

⁸⁰³ Dr Wali Aslam, 'Terrorist relocation and the societal consequences of US drone strikes in Pakistan', The Remote project, (June 2014), 12-13 < <http://remotecontrolproject.org/wp-content/uploads/2014/09/Wali-Report.pdf> > accessed 26 July 2016

⁸⁰⁴ Tony Rock, 'Yesterday's Laws, Tomorrow's Technology: The Laws of War and Unmanned Warfare' (2011) *N.Y. Int'l L. Rev.* 39, 46

against enemy but this should not be taken as a licence to kill.⁸⁰⁵ The military necessity standard requires that US drones target individuals who are involved in combat functions instead of those who are propagandist, share ideology of Al-Qaeda or are financing the organisation.⁸⁰⁶ The use of drone strikes must therefore demonstrate a high level of certainty in targeting to satisfy the principle of military necessity.⁸⁰⁷ Suspicion on the status of a combatant may not be enough to meet the threshold.

For the reasons explained above, the current US practice of targeting anyone linked with Al-Qaeda may not satisfy the core principles of IHL. The lack of access to actual US policy hinders any attempt to evaluate its conformity with the rules governing the conduct of hostilities. The US should make public the criterion on which it decides membership of individuals to an armed group and disclose the data of civilian and militant deaths to make it feasible to assess the legality of its actions. It is unlikely that the US will stop using drones as a counterterrorism tool in the near future. A more constrained approach to drone strikes which takes into account these principles would make the US drone strike program much more acceptable.

3.7 US drone strikes and Human Rights Law

A number of human rights organisations have alleged that the US drone strikes violate basic principles of IHRL.⁸⁰⁸ The US has resolved this by rejecting the applicability of IHRL to its drone strikes. With notable exceptions, the United States has always adopted a strict interpretation on the extra-territorial applicability of human rights law.⁸⁰⁹ US has repeatedly argued that provisions enshrined in the International Covenant on Civil and Political rights and other human rights instruments have no extraterritorial application.⁸¹⁰ With regard to the application of human rights law during armed conflicts, the

⁸⁰⁵ Thomas Michael McDonnell, 'Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists' (2012) *Geo. Wash. Int'l L. Rev.* 243

⁸⁰⁶ Afsheen John Radsan & Richard Murphy, 'Measure Twice Shoot Once: Higher Care for CIA-Targeted Killing' (2011) *U. Ill. L. Rev.* 1201, 1212

⁸⁰⁷ *ibid* 1230

⁸⁰⁸ *Living Under Drones* (n 770)

⁸⁰⁹ Beth Van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Give it Up' (2014) < <https://digitalcommon.law.scu.edu/facpubs/848> >

⁸¹⁰ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 148

US Defence of Department stated in 2003 that the Covenant 'does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during and international armed conflict'.⁸¹¹ The US also resorted to the *lex specialis* argument and found the application of human rights law was precluded by humanitarian law.⁸¹²

The US official position is that it is involved in a global NIAC with Al-Qaeda, Taliban and associated forces, and thus its drone strikes must comply only with IHL.⁸¹³ As discussed previously the categorisation of the conflict is disputed. Noam Lubell has concluded that the attacks against US facilities or its personals are 'isolated and sporadic violence' that does not rise to the level of NIAC.⁸¹⁴ The lack of centralised command structure between these groups means that the US on-going 'war' with Al-Qaeda cannot be classified as a global NIAC.⁸¹⁵

The legality of killing outside the context of an armed conflict is governed by IHRL.⁸¹⁶ This regime only allows execution only if they are required for the protection of life and no other means are available for preventing an imminent threat to life.⁸¹⁷ Thus in peacetime, the wilful killing of human beings is illegal and only allowed in self-defence. For instance, law enforcement bodies cannot bomb a building where suspected criminals are sleeping.⁸¹⁸ Furthermore, IHRL does not provide legal cover for the killing of civilians who die when law enforcement agents use force against suspected terrorists as 'collateral damage'.⁸¹⁹ Alston concluded that under IHRL a US targeted killing by drone strikes 'cannot be legal because, unlike in armed conflict, it is never

⁸¹¹ United States Defence Department, Working group report on detainee interrogations in the global war on terrorism: assessment of legal historical policy, and operational considerations (6 March 2003) 6

⁸¹² See Section 2.12 for *lex specialis* argument

⁸¹³ Koh (n 741) and Brennan (n 787) (However on numerous occasion US has also used expression that we are using force in self-defence so law of self-defence may also be an applicable framework to govern US drone strikes)

⁸¹⁴ Lubell (n 723) p. 116-117

⁸¹⁵ Alston (n 372) para 55, 31

⁸¹⁶ *ibid* Para 31

⁸¹⁷ *ibid* para 32

⁸¹⁸ Rosa Brook, 'Duck-Rabbits and Drones: Legal Indeterminacy in the War on Terror' (2014)

Georgetown University Law Centre, 308

⁸¹⁹ *ibid*

permissible for killing to be the sole objective of an operation'.⁸²⁰ Conversely, during an armed conflict, an enemy combatant is a legal target, based on his status rather than the activities involved.⁸²¹ Collateral damage is generally accepted during wartime providing it is consistent with the principles of necessity, humanity, proportionality, and distinction.⁸²² Thus actions that are considered immoral and illegal in peacetime are permissible during wartime. The U.S. drone strikes nicely illustrate the high stakes involved in the choice of legal paradigms. If the United States is at war with al Qaeda and its associates, and a U.S. drone strike kills an individual suspected of being a terrorist combatant, the killing is presumptively lawful under the law of armed conflict. If the United States cannot be said to be 'at war' with al Qaeda and its associates, the same act becomes an extrajudicial execution—or, to put it more bluntly, a simple murder.⁸²³

The US has always, as stated earlier, rejected that IHRL applies extraterritorially. It claims that drone strikes legality are governed by IHL or by domestic US law, in particular the Authorisation for the Use of Military Force.⁸²⁴ When lethal force is used outside an armed conflict IHRL applies and US domestic law becomes irrelevant because international law framework is applicable.⁸²⁵ It is accepted that IHRL apply extraterritorially but only binds governments' vis-à-vis their relations with individuals within their jurisdiction or control.⁸²⁶ The Inter-American Court has also established the extraterritorial applicability of human rights in the case of *Alejandro v Cuba*. Court stated that 'when agents of a state, whether military or civilian exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues.'⁸²⁷ In other words IHRL only applies where government effectively controls the territory or persons. The

⁸²⁰ Alston (n 372) para 33

⁸²¹ Brook (n 818) 308

⁸²² *ibid*

⁸²³ *ibid*

⁸²⁴ Kenneth Anderson, 'Targeted Killing in U.S. Counterterrorism Strategy and Law' (2009) Working Paper of the Series on Counterterrorism and American Statutory Law, 13

⁸²⁵ David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extrajudicial Executions or Legitimate Means of Defence?' (2005) *European Journal of International Law* 171, 183-185

⁸²⁶ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2010) 249

⁸²⁷ *Alejandro v Republic of Congo*, 183 F 3d 1277, 1282, (11th Cir 1999)

'effective control over territory does not require detailed control over the policies and actions of the authorities in question rather, 'effective overall control' is sufficient'.⁸²⁸ Also jurisdiction is not just confined to territories it is believed that state also has jurisdiction whenever it exercises 'authority or control over an individual'.⁸²⁹ States exercise effective control over individuals who are in their custody. But question here is about the US drone strikes can it be said that the drone operators who are not on ground have effective control over individuals who are their targets? Although, ECtHR's jurisprudence does not apply to the US, nevertheless it provided some guidance in this issue for instance in the case of *Bankovic*. The ECtHR upheld that aerial bombardment does not constitute effective control because there are no troops on the ground.⁸³⁰ In the light of *Bankovic* judgement it has been suggested that:

While the ability to kill is 'authority and control' over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft. Under this reasoning, drone operations in Yemen or wherever would be just as excluded from the purview of human rights treaties as under *Bankovic*.⁸³¹

Frau has suggested that use of unmanned drones is different from fighter jets because unlike a plane that flies over the area and just spends about a moment above the individual, drones hover over an individual for days. Within that time frame drone operator is free to fire missile as he pleases. So there may not be any troops on ground but there are 'troops in the air' capable of shooting individuals anytime. Also government do have authority to kill someone so taking life can be considered to be 'ultimate public power'.⁸³² Moreover ECtHR has stated that effective extraterritorial control exists when the sending state 'through the consent, invitation ...of the Government of that

⁸²⁸ ECtHR, *Loizidou v Turkey*, Appl. no. 15318/89, 18 December 1996, para 56

⁸²⁹ Milanovic, M., "Al-Skeini and Al-Jedda in Strasbourg" (2012) *European Journal of International Law* 32, 128

⁸³⁰ *Banković and others v Belgium and 16 Other Contracting States*, Appl. no. 52207/99, 12 December 2001, para. 70, 71

⁸³¹ *Milanovic and Al-Jedda* (n 829) 130

⁸³² Robert Frau, 'Unmanned Military Systems and Extraterritorial Application of Human Rights Law' (2013) *Groningen Journal of International Law* 1, 9

territory...exercises all or some of the public powers normally to be exercised by that Government.’⁸³³

In Yemen, the US is conducting drone strike with the consent of the Government so arguably according to this understanding human rights Law do apply to such situation.⁸³⁴ Unlike Yemen, the case of Pakistan is complex because apparently Pakistan condemns US drone strikes but secretly endorses and facilitates them.⁸³⁵ Human rights law applies in both situation, if Pakistan consents the US has effective extraterritorial control and if Pakistan does not consent and the US is not in an armed conflict with Pakistan then also human rights law applies. The US targeted killing under human rights law may never be legal because how it can be established that individuals in Pakistan or Yemen pose an imminent threat to the US? Further, IHRL requires that an opportunity to surrender be offered before lethal force is employed.⁸³⁶ Because drones use force as a first resort and are incapable of offering surrender before utilising lethal force they may never be legal under IHRL.⁸³⁷ This absolute prohibition does not apply to other forces which are operating on the ground, because it is possible for them to give enemy the opportunity to surrender and thus can operate within the parameters of IHRL. All the law enforcement agents including police officers, armed forces and Special Forces can adapt their operating procedures to comply with IHRL requirements. Armed drones simply cannot.⁸³⁸ Finally, the human rights regime does not accept the death of civilians as collateral damage.⁸³⁹ The killing radius of a Hellfire missile is 15 metres and the wounding radius is 20 metres so even if drone strike precisely, in order to kill a militant, civilian may

⁸³³ Al-Skeini and others v The United Kingdom, Appl. no. 55721/07, 7 July 2011 para. 135

⁸³⁴ Greg Miller, ‘Yemeni president acknowledges approving U.S. drone strikes’, *The Washington Post* (29 Sep 2012) < https://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-aff-d6c7f20a83bf_story.html > accessed 25 July 2016

⁸³⁵ John Hudson, ‘WikiLeaks Cache Reveal Pakistan's Role in Drone Strikes’ (*The Wire*, 20 May 2011) < <http://www.thewire.com/global/2011/05/wikileaks-cache-reveal-pakistans-role-drone-strikes/37966/> > accessed 26 July 2016

⁸³⁶ Alston (n 372) para 75

⁸³⁷ Ibid para 85

⁸³⁸ Michel Lewis, ‘Drones and the boundaries of the Battlefield’ (2012) *Tex. Int'l L. J.* 293, 300

⁸³⁹ Mary O'Connell, Written testimony, Hearing on “The Rise of the Drones II: Examining the legality of unmanned targeting, Serial No. 111–120, (2010) < http://fas.org/irp/congress/2010_hr/drones2.pdf > accessed at 20 March 2017

be executed. Therefore, the strike will always violate IHRL.⁸⁴⁰ David argued that:

The problem with the law-enforcement model in the context of transnational terror is that one of its fundamental premises is invalid: that the suspected perpetrator is within the jurisdiction of the law-enforcement authorities in the victim state, so that an arrest can be effected. What is the situation when, according to our premise, the terrorist is in the territory of another state? The victim state may not arrest or apprehend that person without the active assistance and support of that other state. But what if that state is either unwilling to arrest the suspected terrorist or incapable of doing so? Leaving aside issues of state sovereignty, and relying solely on the duty of the victim state under international human rights law to respect the right to life, could it not argue that it has no choice but to resort to force against the suspected terrorist? That force is absolutely necessary to protect its civilians against unlawful violence?⁸⁴¹

Counter argument could be that in situations where territorial state is unwilling to help force could only be applied providing there is credible evidence that the threat is imminent.

3.8 Conclusion

When the boundaries between war and peace, combatants and civilians have eroded, both law and morality lose their power. The in depth analysis of different legal frameworks highlight that if we cannot figure out whether or not there is a war or the geography of war, or who is a combatant and who is a civilian in this war we will have no way of deciding which law applies. Most importantly if we cannot have clear rules governing this conflict how will we decide the most important question of this war who lives and who dies? A war which is shrouded in secrecy where government have 'secret policies' how can one imagine of any sort of public scrutiny and accountability? How to talk about proportionality when the official data of civilian casualties created more

⁸⁴⁰ Living under drones (n 770) 10

⁸⁴¹ David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) *The European Journal of International Law*, 179

doubts? How can we establish that government is not violating the principle of distinction when it does not make its targeting policy public? How to argue that US is in an armed conflict with Al-Qaeda when we do not even know what Al-Qaeda is? Do we want to live in a world where the globe is a battlefield and there is a war that will never end? Perhaps not, if we do not want to live in permanent state of exception then we have to decide what kind of legal and institutional framework serves best in this type of conflict? Because the US refuses to make public its drone policy it is extremely difficult to assess the legality of its strike program. What we do know, however, creates significant cause for concern. First the US claim that it is in a global armed conflict with Al-Qaeda is incorrect-post 9/11 the alleged Al-Qaeda's attack against US are sporadic and do not amount to armed attack, then Al-Qaeda is not an organised group so IHL outside active battlefields is inapplicable. Second, US drone strikes in undeclared war zones are unlawful under IHL because the strikes fail to satisfy core principles of law of war that is distinction, proportionality and necessity. Third if not all most of the US strikes conducted outside of armed conflict would violate IHRL prohibition on arbitrary deprivation of the right to life. Fourth the US use of force in self-defence outside of armed conflict is also controversial because it fails to satisfy the core requirement of 'imminence'. Taken together, those concerns indicate that the US drone program in undeclared warzones may well be an unlawful one.

Chapter 4: US drone strikes in Pakistan 2004-2018

4. Introduction

US drone strikes in Pakistan are extremely controversial and raise many legal, moral and strategic issues. Scholars have focused on the violation of Pakistan's territorial sovereignty and the infliction of collateral damage. The centre of attention has been mostly unidimensional, addressing the role of the US actions but largely ignoring the role played by Pakistan, in particular, the military violence of the Pakistani military in the tribal areas.

The tribal areas hold a special status in Pakistan that has allowed the US to conduct drone strikes without any accountability. This chapter will endeavour to highlight how the collective military violence of US military, the Central intelligence agency (CIA) and Pakistan's military has turned the tribal areas of Pakistan into something similar to a 'state of exception'.

4.1 Pakistan dragged into a quagmire

The section will begin explaining how the US has resorted to drone strikes in tribal areas of Pakistan. The presence of Al-Qaeda or extremist groups in tribal areas of Pakistan is a result of Islamabad's Afghan foreign policy of the 1980s. Pakistan's Afghan policy played a crucial role in shaping its domestic politics and created an Islamic fundamentalist backlash at home. Pakistan interfered in Afghan politics to such an extent in the 1990s and early 2000s that both countries' fate became closely intertwined.⁸⁴² The origins of the phenomenon of radicalisation and extremism in Pakistan cannot be found in the events of 9/11 but in the support of the Pakistani military and intelligence agencies along with the CIA to Mujahedeen in Afghan-Soviet war of the 1980s.⁸⁴³ By supporting the Afghan Mujahedeen⁸⁴⁴ in concert with the West,

⁸⁴² Ahmad Rashid, *Pakistan and the Taliban in William Maley, Fundamentalism reborn? Afghanistan and the Taliban* (New York University Press 2001) 72-89 ; Tim Judah, 'The Taliban papers' (2002) *Survival: Global Politics and Strategy* 69

⁸⁴³ M. Ehsan Ahrari, 'China, Pakistan, and the "Taliban Syndrome"' (2000) *Asian Survey* 658 ; Mujtaba Rathore & Abdul Basit, 'Trends and Patterns of Radicalization in Pakistan' (2010) 1; Bahir Ahmad, 'Radicalization In Pakistan And The Spread of Radical Islam In Pakistan' (2015) *International Journal Of Scientific & Technology Research*, 291-292

and later facilitating the Taliban takeover of Afghanistan in 1994-5, Pakistan created a space for religious radicals.⁸⁴⁵ As the war in Afghanistan protracted the US set up a CIA arms pipeline through Pakistan to funnel aid to the resistance.⁸⁴⁶ Pakistan's Inter-Services Intelligence (ISI) Directorate managed the aid and was responsible to train Mujahedeen groups. The strategy was to 'integrate guerrilla training with the teachings of Islam and, thus, create Islamic guerrillas'.⁸⁴⁷ Historically, the US security establishment have not regarded the Islamic jihad and even Bin Laden's terror networks as a negative phenomenon. Prince Turki al Feisal, the then head of Saudi intelligence to organise resistance in Afghanistan, recruited Bin Laden with the US approval at the highest level.⁸⁴⁸ This approval does not imply that the US established or created Al-Qaeda. The US authorities did not maintain a direct relationship with Bin Laden but knew that Bin Laden was playing active role in the jihad against the Soviet Union. For instance, in 1986, Bin Laden was involved in building the Khost tunnel complex that, funded by the CIA, was used 'a major arms storage depot, training facility, and medical centre for the Mujahedeen, deep under the mountains close to the Pakistan border'.⁸⁴⁹ The US financed, armed and trained all these terror networks only because they were fighting against the pro-Soviet regime in Afghanistan.⁸⁵⁰ According to Ahmed Rashid, the active encouragement of the CIA and Pakistan's ISI, that sought 'to turn the Afghan jihad into a global war waged by all Muslim states against the Soviet Union'⁸⁵¹ resulted, between 1982 and 1992, on approximately 35,000 Muslim radicals from 43 Islamic countries joining the Afghan Mujahedeen.

⁸⁴⁴ Mujahedeen were anti-communist rebels who were fighting against Soviet occupation in Afghanistan in 1979 to 1980's see Vincent Burns and Kate Dempsey Peterson, *Terrorism: A Documentary and Reference Guide* (Greenwood press 2005) 5-6

⁸⁴⁵ Hassan Abbas, 'The Roots Of Radicalization in Pakistan' (*South Asia Journal*, 9 Sep 2013) < <http://southasiajournal.net/the-roots-of-radicalization-in-pakistan/> > accessed 30 July 2016

⁸⁴⁶ Larry P. Goodson, *Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of the Taliban* (University of Washington Press 2001) 61; Moran (n 117) 185

⁸⁴⁷ *ibid*

⁸⁴⁸ Robin Blackburn, 'The imperial presidency and the revolutions of modernity' (2002) Wiley 3,15 < <https://doi.org/10.1111/1467-8675.t01-1-00261> > accessed 20 Jan 2017

⁸⁴⁹ Ahmed Rashid, *Taliban* (Yale University Press 2000) 132

⁸⁵⁰ Moran (n 117)

⁸⁵¹ Rashid (n 849)

Eventually, the Afghan jihad attracted more than 100,000 foreign Muslim radicals.⁸⁵²

The USA spent millions of dollars to glorify the jihad. Textbooks filled with violent images and militant Islamic teachings were developed in the early 1980s under an AID grant awarded to the University of Nebraska and its Centre for Afghanistan Studies. The CIA spent \$51 million between 1984 and 1994.⁸⁵³ These books remained part of the Afghan school system's core curriculum for the rest of the 20th century. Interestingly, after 9/11 even the Taliban used the American-produced books to sell their radical ideology.⁸⁵⁴ The motivation of Pakistan to participate in the war was different. Rather than pursuing the defeat of the Soviet Union by assisting Afghan groups involved in the conflict, it sought to strengthen its military position against India by favouring tribal groups based in Peshawar rather.⁸⁵⁵ In the short run, the religious card played by the CIA and ISI paid off well; the holy war against the Soviet Union united the Muslims from all over the globe and eventually Moscow was embroiled in an unwinnable quagmire.⁸⁵⁶

Unfortunately, the Soviet Union's withdrawal did not mean the end of the conflict but its transformation into a national civil war.⁸⁵⁷ Several factors lead to the deterioration of the situation in Afghanistan. Firstly, the Soviet continued its covert support to the Afghan regime; secondly, there was no unity amongst the resistance groups; and finally, the US support for the mujahedeen

⁸⁵² Ahmed Rashid, *The Taliban: Exporting terrorism* (Foreign Affairs, 1999) < <http://www.foreignaffairs.com/articles/55600/ahmed-rashid/the-taliban-exporting-extremism> > accessed 14 Feb 2015

⁸⁵³ Eric Walberg, *Postmodern Imperialism: Geopolitics and the Great Games* (Clarity Press 2013) 108

⁸⁵⁴ Dana Burde, *Schools for Conflict or for Peace in Afghanistan* (Columbia University Press, 2014), 87; Ishaan Tharoor, 'The Taliban indoctrinates kids with jihadist textbooks paid for by the US' *The Washington Post* (8 Dec 2014) < <http://www.washingtonpost.com/blogs/worldviews/wp/2014/12/08/the-taliban-indoctrinates-kids-with-jihadist-textbooks-paid-for-by-the-u-s/> > accessed 4 March 2016

⁸⁵⁵ Zalmay Khalilzad & Daniel Byman, 'Afghanistan: The consolidation of a rogue state' (2002) *The Washington Quarterly* 65, 69

⁸⁵⁶ Philip Emil Muehlenbeck, *Religion and the Cold War: A Global Perspective* (Vanderbilt University Press 2012) 290

⁸⁵⁷ Oktay F. Tanrisever, *Afghanistan and Central Asia: NATO's Role in Regional Security Since 9/11*, (IOS Press 2013) 191

declined drastically.⁸⁵⁸ Another blow for the mujahedeen was the assassination of their major supporter General Zia-ul-haq, in August 1988.⁸⁵⁹ In the early 1990s, the fragmentation of the mujahedeen groups became deeper. The lawlessness and ever escalating and continued political instability and violence in Afghanistan frustrated Pakistan because it affected its trading prospects and influence in Central Asia. Moreover, the impact on Pakistan felt from both the narcotic smuggling and the klashinkovisation was overwhelming. Arms were supplied to the Afghan Mujahedeen by Western states but many of these arms were smuggled and sold to local population in Pakistan and Afghanistan at bargain prices. This increased armed robberies, kidnappings for ransom and gun-battles between rival groups, particularly in tribal areas of Pakistan.⁸⁶⁰ To address this situation, Pakistan felt compelled to play a leading role in the stabilisation of Afghanistan. Since the mujahedeen failed to accomplish that aim, Pakistan moved away from its traditional client, Hekmatyar⁸⁶¹, towards a new actor: the Taliban.⁸⁶² The Taliban shared the same Islamist ideology but were closer to the tribesmen who were residing in Pakistan.⁸⁶³ In August 2000, the Pakistani President, General Musharraf, openly announced military support for the Taliban because they shared the Pashtun ethnicity with Pakistani who resides in tribal areas of Pakistan, Khyber Pakhtunkhwa KPK and Baluchistan.⁸⁶⁴ Following this logic, both Pakistan and Saudi Arabia started supporting a new movement known as the Taliban in 1994. The Taliban were Afghan refugees,

⁸⁵⁸Larry (n 846) 70; M. Saleem Kidwai, *US Policy Towards the Muslim World: Focus on Post 9/11 Period* (UPA 2010) 250

⁸⁵⁹ Elaine Sciolino, 'Zia Of Pakistan Killed As Blast Downs Plane; U.S. Envoy, 28 Others Die' *The New York Times* (18 August 1988) < <http://www.nytimes.com/1988/08/18/world/zia-of-pakistan-killed-as-blast-downs-plane-us-envoy-28-others-die.html?pagewanted=all> > accessed 30 July 2016

⁸⁶⁰Khawar Mumtaz, Yameema Mitha and Bilquis Tahira, *Pakistan: Tradition and Change* (Oxfam Professional 2003) 28; Erich Reiter and Peter Hazdra, *The Impact of Asian Powers on Global Developments*, (Springer 2004), 30 ; John Braithwaite and Ali Wardak, 'Crime And War In Afghanistan' (2013) *Brit. J. Criminology* 179, 183-184

⁸⁶¹ Gulbodin Hekmatyar was a prominent Afghan Pashtun and was very close to Pakistan's ISI he took part in Afghan jihad against Soviets and received military and financial aid from Pakistan and other foreign countries involved See Nabi Misdaq, *Afghanistan: Political Frailty and External Interference*, (Routledge 2008) 302-303

⁸⁶² Ashutosh Misra and Michael E. Clarke, *Pakistan's Stability Paradox: Domestic, Regional and International Dimensions* (Routledge, 2012), 127

⁸⁶³ Emran Qureshi, 'Taliban' < <http://www.oxfordislamicstudies.com/article/opr/t236/e0895> > accessed 30 July 2016

⁸⁶⁴ Larry (n 846) 84; Robert D. Crews and Amin Tarzi, *The Taliban and the Crisis of Afghanistan* (Harvard University Press 2009) 69; Encyclopaedia Britannica, *Britannica Book of the Year 2008*, 363

and war veterans based in rural and tribal areas of Pakistan. Most of the Taliban were graduates of madrasah funded by Saudi Arabia.⁸⁶⁵ They grew up and socialised in a purely conservative religious environment. They had never been exposed to any alternative religious views and had a naive opinion on world affairs. They had rigid views about other religions, religious sects within Islam, society and the West from a very young age.⁸⁶⁶ When the Taliban emerged in the political landscape of Afghanistan they enjoyed massive public support in the beginning because there was a perception amongst the Afghan public that the movement leaders were extremely pious, not involved in any corruption, against opium trade and devoted to create a just Islamic state.⁸⁶⁷

The Afghan public was repulsed by the civil war amongst mujahedeen for personal gains and accepted the Taliban; perhaps because they had no alternative.⁸⁶⁸ A factor largely ignored relates to the ethnic forces that backed the Taliban movement. The Taliban did not face any resistance in the Pashtun parts of Afghanistan. All the Pashtun warlords had a strong resentment against Tajiks⁸⁶⁹ who got powerful during the war. The Taliban provided organisation and financial resources to Pashtuns who did not enjoy these benefits until then, making it easier to support them.⁸⁷⁰ In addition, funds channelled to the Taliban from Saudi Arabia, Pakistan, Gulf countries and Osama Bin Laden also contributed in their success.⁸⁷¹

Saudi Arabia has been the major financial supporter for the Taliban. In July 1996, a trip to Pakistan by Prince Turki al-Faisal Saud, Head of the Saudi

⁸⁶⁵ Larry (n 846) 76

⁸⁶⁶ Nasreen Akhtar, 'Pakistan, Afghanistan, And The Taliban' (2008) *International Journal on World Peace* 49, 57

⁸⁶⁷ Yoshinobu Nagamine, *The Legitimization Strategy of the Taliban's Code of Conduct: Through the One-Way Mirror*, (Palgrave Macmillan; 1st ed. 2015), 23; Antonio Giustozzi, *Decoding the New Taliban: Insights from the Afghan Field* (C Hurst & Co, 2009) 124-125

⁸⁶⁸ Larry (n 843) 110

⁸⁶⁹ Tajiks are second largest ethnic tribe in Afghanistan and few are even in important government positions See John L Cook, *Afghanistan: The Perfect Failure: A War Doomed By The Coalition's Strategies, Policies and Political Correctness* (XLIBRIS 2012) 32

⁸⁷⁰ Akhtar (n 866) 58

⁸⁷¹ According to Human Rights watch Pakistan provided financial and military support to Taliban till May 2001 See Pakistan's support of the Taliban <

<https://www.hrw.org/reports/2001/afghan2/Afghan0701-02.htm> > accessed 30 July 2016; Lee Windsor and David Charters, *Kandahar Tour: The Turning Point In Canada's Afghan Mission* (WILEY 2008) 8

General Intelligence Agency, proved to be decisive in making Saudi Arabia the main financial supporter of the Taliban.⁸⁷² However, following Bin Laden's involvement in the 1998 bombing of the US embassy in Tanzania⁸⁷³, the US pressurised Saudi Arabia to break diplomatic contact with the Taliban.⁸⁷⁴ The US also pressed Saudi Arabia to stop funding the Taliban. Official Saudi's aid reportedly stopped but Saudi money continued to support the Taliban through private contributors.⁸⁷⁵ According to information released by WikiLeaks, the Saudi support to Islamists is ongoing. In a leaked 2009 memo, Hilary Clinton is shown as having stated that, 'Saudi Arabia remains a critical financial support base for al-Qaeda, the Taliban, LeT [Pakistan based Lashkar-e-Taiba] and other terrorist groups'.⁸⁷⁶

The role played by Pakistan in the emergence and military success of the Taliban cannot be dismissed. Pakistan equipped, financed and guided the Taliban movement for advancing its own geostrategic interests.⁸⁷⁷ Pakistan has supported the Taliban movement to checkmate its regional rivals and keep itself a strong and influential regional player. For decades, the Pakistani governments' policy has been to keep a foothold in Afghanistan to balance India. Pakistan's interest in the Taliban government was not ideological but pragmatic.⁸⁷⁸ They were strong enough to provide stability in the Pashtun areas of Afghanistan, which was important for maintaining security and stability in Pakistan's Pashtun dominated areas. Furthermore, a friendly government in Afghanistan was crucial to maintain a gas pipeline from Turkmenistan and trade with Central Asian states.⁸⁷⁹

⁸⁷² Ahmed Rashid, "Pakistan and the Taliban," in *Fundamentalism Reborn?: Afghanistan and the Taliban* by William Maley, 76 (C Hurst & Co 1998)

⁸⁷³ Sundara Vadlamudi, 'The US embassy bombings in Kenya and Tanzania' in James J. F. Forest, *Countering Terrorism and Insurgency in the 21st Century: International Perspectives* (Praeger Publishers Inc, 2007) 103

⁸⁷⁴ James Ridgeway, *The 5 Unanswered Questions About 9/11: What the 9/11 Commission Report Failed to Tell Us* (Seven Stories Press 2005) 149

⁸⁷⁵ Human Rights watch, 'Afghanistan Crisis Of Impunity, The Role of Pakistan, Russia, and Iran in Fuelling the Civil War' (2001) 32

⁸⁷⁶ The Guardian, 'US embassy cables: Hillary Clinton says Saudi Arabia 'a critical source of terrorist funding', (5 Dec 2010) < <http://www.theguardian.com/world/us-embassy-cables-documents/242073> > accessed 30 July 2016

⁸⁷⁷ Akhtar (n 866) 57

⁸⁷⁸ Professor Hall Gardner, *American Global Strategy and the 'War on Terrorism'* (Ashgate Pub Co 2005)

⁸⁷⁹ Akhtar (n 866) 59

The Taliban enjoyed widespread support within the Pakistani government, the military and some private actors in society. Although the Pakistani government and its army have denied, until today, that they ever supported Taliban's activities, evidence reveals that since 1994 various Pakistani actors have continued to provide support to them. Pakistan's assistance to the Taliban has included direct and indirect military involvement, training, financial aid, logistical support, recruitment and diplomatic recognition.⁸⁸⁰

The Pakistani authorities had no check on the cross-border movement of ammunition or movement of men in either direction. According to Human Rights Watch reports in 2001, around 30 trucks carrying ammunitions and fuels entered Afghanistan from the Pakistani border every day.⁸⁸¹ A 1997 UN Secretary-General report indicated that vehicles full of fuels arms and ammunition were transported from foreign countries to Taliban-controlled land.⁸⁸² Pakistan's porous border with Afghanistan facilitated the illegal transportation of men and goods.⁸⁸³

The tribal areas of Pakistan are semi-autonomous regions and governed with the help of political agents.⁸⁸⁴ The Taliban are not former Mujahedeen neither they are simple religious students; they are well trained to fight a war using sophisticated weapons because ISI has recruited thousands of Pakistani youth since 1994 mainly from Madrassa's to fill Taliban ranks.⁸⁸⁵ Apart from the Pakistani government, other religious political parties, such as Jamat-e-Islami, or the more radical Islamist organisations Lashkar-e-taiba, Hizbul Mujahedeen, and Harkatul-mujahedeen supported with recruits the Taliban in Afghanistan.⁸⁸⁶

On balance, Pakistan failed to obtain the geostrategic benefits it expected from the Taliban, but supporting them proved a costly endeavour at domestic

⁸⁸⁰ William Maley, *Fundamentalism Reborn? Afghanistan and the Taliban* (New York University Press 2001)

⁸⁸¹ Human Rights Watch (n 875)

⁸⁸² Report of the Secretary-General, 'The situation in Afghanistan and its Implications for International Peace and Security' (14 November 1997) UN doc. A/52/682-S/1997/894, para 18

⁸⁸³ Larry (n 846) 165

⁸⁸⁴ Shahid Javed Burki, *Historical Dictionary of Pakistan* (Rowmann and Littlefield 2015) 203

⁸⁸⁵ Mohammad Zaef, *My life with the Taliban* (C Hurst & Co 2010); Yossef Bodansky, *Bin Laden: The Man who Declared War on America* (Blackstone Audiobooks 2002) 97; Soofia Mumtaz, *Jean-Luc Racine and Imran Ali, Pakistan: The Contours of State and Society* (Oxford University Press 2002) 253

⁸⁸⁶ Dr Ahmad Shaye Qassem, *Afghanistan's Political Stability: A Dream Unrealised* (Ashgate 2009) 93

and foreign policy levels. On the domestic front, the religious parties in Pakistan introduced militant version of Islam amongst their followers which radicalised Pakistani youth and strengthened the political religious groups.⁸⁸⁷ In the arena of foreign policy, the strategic partnership with Taliban proved to be fraught with problems. Pakistan's relations with Iran, Kyrgyzstan and other central Asian states deteriorated to unmanageable levels.⁸⁸⁸ The International Community rejected Taliban's medieval, brutal and harsh treatment of women, minorities and non-Muslims.⁸⁸⁹ In Resolution 51/108, adopted in December 1996, the General Assembly called on all the Afghan parties to, 'fully respect and act in accordance with all human rights and fundamental freedoms, regardless of gender, ethnicity or religion'.⁸⁹⁰ Taliban government's refusal to hand over Osama Bin Laden to the US was totally unacceptable to international community.⁸⁹¹ Pakistan's association with them caused major damage to its world image.

The social policies, rigid interpretation of Islamic law and inappropriate behaviour towards women led to the marginalisation of the Taliban by most of the International community. World leaders such as UN Secretary General Boutros Boutros-Ghali, the heads of UNICEF, UNESCO, UNHCR and the European Commissioner for Human Rights criticised Taliban for hanging former President Najibullah and the harsh treatment of women.⁸⁹² In 1996, the Taliban captured Kabul and since became *de facto* government of Afghanistan.⁸⁹³ Only the United Arab Emirates, Saudi Arabia and Pakistan temporarily recognised Taliban as the government of Afghanistan.⁸⁹⁴ But the

⁸⁸⁷ Hamid S. Lillah, 'Religious extremism in Pakistan', (2014) Naval postgraduate school, 58-60

⁸⁸⁸ Rollie Lal, *Central Asia and Its Asian Neighbors: Security and Commerce at the Crossroads* (Rand Publishing 2006) 44

⁸⁸⁹ Marjorie Agosin, *Women, Gender, and Human Rights: A Global Perspective* (Rutgers University Press 2001) 106

⁸⁹⁰ See A/RES/51/108, (12 December 1996), Situation of human rights in Afghanistan

⁸⁹¹ Rudiger Wolfrum and Christiane E. Philipp, 'The status of the Taliban: Their obligations and rights under international law' (2002) Max Planck Yearbook of United Nations Law, 559-601, 574-575

⁸⁹² Ahmed Rashid, *Taliban: The Power of Militant Islam in Afghanistan and Beyond* (IB Tauris & Co Ltd 2010)

⁸⁹³ Gerhard Böwering and Patricia Crone, *The Princeton Encyclopedia of Islamic Political Thought* (Princeton University Press 2013) 541

⁸⁹⁴ House of Commons, Foreign Affairs Committee Foreign Policy Aspects of the War against Terrorism, Fourth Report of Session 2005–06, p. 60, para 141 <

<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaff/573/573.pdf> > accessed 31 July 2016; Hilary Synnott, *Transforming Pakistan: Ways Out of Instability* (Routledge 2009) 154

rest of the world has continued to recognise the Rabbani regime as the legitimate government of Afghanistan.⁸⁹⁵ The US rejected Taliban because of their willingness to provide safe haven and training facilities to Islamic militants who were working under Bin Laden. Bin Laden was wanted for his involvement in the June 1996 bombing of American barracks in Saudi Arabia and for his bombings of the US embassies in Kenya and Tanzania in August 1998.⁸⁹⁶

In 1996, Bin Laden moved to Afghanistan and subsequently created his own terrorist organisation, Al-Qaeda, which became closely associated to the Taliban.⁸⁹⁷ The Taliban leader, Mullah Omer gave Al-Qaeda sanctuary to train terrorists and plan operations in return of getting trained fighters to fight against the Northern Alliance.⁸⁹⁸ In November 1999, the UN Security Council imposed sanctions on Taliban because they failed to turn Osama Bin Laden over to the US for his alleged involvement in terrorist activities.⁸⁹⁹ The Taliban became notorious globally for granting refuge to separatists and extremists in their land, including Uzbek and Krgyz anti-government Islamist rebels.⁹⁰⁰ In 2000, the UNSC imposed new sanctions on Taliban because they were not prepared to give up Bin Laden who was complicit in bombings of the USS Cole in Aden and Yemen.⁹⁰¹ The Taliban could not giving up Bin Laden because it was an important source of financial support. Their credibility would have also been damaged for handing over a Muslim jihadi to an 'infidel'. Mullah Zaeef, Taliban's ambassador to Pakistan, categorically rejected the

⁸⁹⁵ Larry (n 846) 80

⁸⁹⁶ Newton Lee, *Counterterrorism and Cybersecurity: Total Information Awareness* (Springer 2015) 23

⁸⁹⁷ Marcia Amidon Lusted, *Capture and Killing of Osama Bin Laden* (ABDO 2012) 97-99; Thomas J. Biersteker and Sue E. Eckert, *Countering the Financing of Terrorism*, (Routledge 2008) 54-55

⁸⁹⁸ Larry (n 846) 230

⁸⁹⁹ UN S/RES/1267 (1999) para 2: "Demands that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice...." Harsh sanctions were imposed on Taliban Government in case they failed to handover bin laden under Para 4(a) "Deny permission for any aircraft to take off from or land in their territory if it is owned, leased or operated by or on behalf of the Taliban" and Para 4(b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban.."

⁹⁰⁰ Ibp Usa, *Afghanistan Foreign Policy and Government Guide* (International Business Publications 2000) 309; Jakob Hedenskog, Vilhelm Konnander and others, *Russia as a Great Power: Dimensions of Security Under Putin* (Routledge 2007); Harvey W Kushner, *Encyclopaedia of Terrorism* (Sage Publications 2003) 187

⁹⁰¹ UNSC S/RES/1333 (2000) (In December 2000, after strong pressure from the United States and Russia, the Security Council strengthened the sanctions)

US demands and stated 'we have not given shelter to Osama bin Laden so we can make a deal to hand him over . . .' because this would 'amount to giving a kind of superiority to non-Islamic laws over Islamic laws . . .'.⁹⁰² Even after the US started bombing Taliban, they refused to hand over Bin Laden because -in Zaeef's words- that was an 'issue of faith'.⁹⁰³

These factors dragged the Taliban into unnecessary fight with the US. Abu-ul-Wahid, who worked closely with Mullah Omar, has claimed that there were internal rifts amongst Taliban related to the issue of Bin Laden. He has argued that Bin Laden overburdened the Taliban rule and his controversial statements and terrorist actors made them more enemies than friends. This would have been particularly true regarding their relations with Saudi Arabia, their biggest financial contributor. Despite the widespread condemnation over their policies the international community was willing to engage in a dialogue with them until 9/11.⁹⁰⁴ According to Steve Coll, the Saudi's mistakenly believed that, gradually, the Taliban would evolve into a responsible state, but Taliban's refusal to hand over Bin Laden and harbouring of Al-Qaeda, proved that their policy of supporting Taliban was short-sighted.⁹⁰⁵ Following 9/11 Saudi Arabia severed ties with Taliban for strategic reasons claiming that, 'the Taliban government has paid no attention to the calls and pleas of the Kingdom of Saudi Arabia to stop harbouring, training and encouraging criminals.'⁹⁰⁶

Pakistan has over the years adopted controversial policies toward Afghanistan, exploiting its vulnerabilities as a weak state to its advantage. Pakistan's policy of supporting the Taliban in the post-Soviet war era gave rise to internal rivalries that further destabilised Afghanistan. Subsequently, this policy of supporting militias proved to be venomous in the long-term and Afghanistan's internal strife has had a negative impact on Pakistan's security.

⁹⁰² Paul Sharp, 'Mullah Zaeef and Taliban diplomacy: an English School approach' (2003) *Review of International Studies* 481, 488

⁹⁰³ *Ibid* p. 494

⁹⁰⁴ Fawaz A Gerges, *The Far Enemy: Why Jihad Went Global* (Cambridge University Press 2009) 194; Sharp (n 898) 488-494

⁹⁰⁵ Steve Coll, *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001* (Penguin Books 2004)

⁹⁰⁶ Greg Bruno, 'Saudi Arabia and the Future of Afghanistan Council on Foreign relations' ((11 Dec 2008) < <http://www.cfr.org/afghanistan/saudi-arabia-future-afghanistan/p17964> > accessed 31 July 2016

The situation became precarious for Pakistan when it emerged that Al-Qaeda was involved in 9/11. Al-Qaeda and Taliban, despite their alliance, remain separate entities. While Al-Qaeda has kept a global agenda, the Taliban's ambitions have always been local.⁹⁰⁷ The Taliban provided shelter to Al-Qaeda but were not directly involved in the 9/11 attacks. Indeed, the US never claimed the Taliban were responsible for such attacks beyond their permissive attitude towards Al-Qaeda operations within the territory under their control contribution.⁹⁰⁸ Bin Laden never involved Taliban in any of his activities.⁹⁰⁹ Neither Taliban nor Pakistan foresaw a full-scale war against Afghanistan.

4.2 General Musharraf's security policy 1999-2008

General Musharraf entered Pakistan's politics in 1999, after toppling Nawaz Sharif's government in a military coup.⁹¹⁰ The failure of Nawaz Sharif's government has been associated to his willingness to withdraw support for the Taliban, under international pressure.⁹¹¹ The relationship between the civil and military arms of the government has always been complicated in Pakistan as demonstrated in this context. The military believed in the importance of maintaining close relationships with the Taliban as the most reliable allies in Afghanistan.⁹¹² Sharif was willing to change its foreign policy towards the Afghan regime. In order to overcome the opposition of the military and assert his constitutional authority, he removed the army chief.⁹¹³ By mounting the coup against the Sharif's government, the army demonstrated that they remained the most powerful institution of the state. Following the coup, General Musharraf imposed the fourth Martial Law in the short history of Pakistan. All religious parties backed General Musharraf because his actions

⁹⁰⁷ Karl Yambert, *Security Issues in the Greater Middle East* (Praeger 2016) 257; Gerges (n 900) 63-66

⁹⁰⁸ Christian Henderson, 'The 2010 United States National Security Strategy and the Obama Doctrine of "Necessary Force"' (2010) 421; Rachel E. Utey, *9/11 Ten Years After: Perspectives and Problems* (Routledge 2012) 184

⁹⁰⁹ Gerges (n 904) 195

⁹¹⁰ Eugene Cotran and M. Lau, *Yearbook of Islamic And Middle Eastern Law: (2003-2004)* (Brill Academic Publishers 2006) 24

⁹¹¹ Peter R. Lavoy, *Asymmetric Warfare in South Asia: The Causes and Consequences of the Kargil Conflict* (Cambridge University Press 2009) 305

⁹¹² Naseem Ahmed, 'General Musharraf's Taliban Policy 1999-2008' *The Dialogue*, p. 97

⁹¹³ Ayesha Siddiqi, *Military Inc.: Inside Pakistan's Military Economy* (Pluto Press 2007) 292; Muhammad Anwar and Ebad Baig, *Pakistan: Time for Change* (Author House 2013) 15

were directed against a Prime Minister who had expressed dissatisfaction with the previous policy of Pakistan toward the Taliban and was perceived as pro-India and pro-Washington; he was also portrayed as willing to betray Islamic Jihadi's in Kashmir.⁹¹⁴ However, the army's decision to support the Taliban ignored its international isolation. The International Community persistently pressurised Musharraf to distance his government from the Taliban, but the Pakistani government emphasised the control over the territory of the Taliban as a reason to defend the need to engage with the group.⁹¹⁵ This continued until 2001, when realising the severity of 9/11 incident Pakistan took a U-turn in its Afghan policy and became a major ally of the US in its war against terrorism.

After 9/11, Bush chose to pursue counter-terrorism not only by law-enforcement and intelligence measures, but also through a muscular military response. No distinctions were made between terrorists and those who harboured them.⁹¹⁶ Pakistan had only two options. It either perpetuated its alliance with the Taliban facing wrath of International community or it supported the US led coalition against terrorism. The Bush's policy of 'either with us or against us' meant that there was no neutral ground left for Pakistan. General Musharraf acknowledged in his memoir that: 'He had no choice after the Sept 11 attacks but to switch from supporting the Taliban to backing the US-led war on terror groups or face an American 'onslaught'.'⁹¹⁷ He claimed that America would surely 'react like a wounded bear' and 'if the perpetrators turned out to be Al-Qaeda then that wounded bear would come charging straight toward us'.⁹¹⁸ It was a strategic move and by supporting International community in the war against terror Pakistan became a frontline state. Afghanistan did not have any significant military power but its geographical

⁹¹⁴ Ahmed Shaye Qassem, *Afghanistan's Political Stability: A Dream Unrealised*, (Ashgate 2009) 97

⁹¹⁵ Ibid at p. 99; Christopher L. Gadoury, Should the US Officially Recognise The Taliban? The International Legal And Political Considerations, (2001) *Houston Journal Of International Law*, 385

⁹¹⁶ President George Bush, Address To The Nation On The September 11 Attacks, (11 Sep 2001) 58 < https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf > accessed 1 August 2016

⁹¹⁷ Associated Press, 'Musharraf's controversial memoir released Pakistan leader spells out allegations of U.S. intimidation after 9/11' (25 Sep 2006) < http://www.nbcnews.com/id/15003128/ns/world_news-south_and_central_asia/t/musharrafs-controversial-memoir-released/#.V54THbgrLIU > accessed 31 July 2016

⁹¹⁸ ibid

location affords it protection. Afghanistan is surrounded by states with which US had no close relations. Pakistan was a key and a natural ally in this war against terror because being a neighbour state they were familiar with Afghan culture. Woodward aptly wrote that Pakistan was the 'linchpin for any strategy to isolate and eventually attack Al-Qaeda and the Taliban'.⁹¹⁹ Pakistani army and intelligence officials nurtured Taliban and had very close ties with the Taliban leader Mullah Omer. Mullah Umar escaped the Afghanistan in December 2000 and established a leadership council in 2003 in the Pakistani city of Quetta to run the movement.⁹²⁰ The US also required accessing Pakistan's territory to conduct any military operation from sea. Within this context, one day after the 9/11 attacks Musharraf approved the US seven demands to Pakistan, namely:⁹²¹

1. Stop Al-Qaeda operatives at the border, intercept arms shipments through Pakistan and end all logistical support for Bin Laden;
2. Blanket overflight and landing rights;
3. Access to Pakistan naval bases, air bases and borders;
4. Immediate intelligence and immigration information sharing;
5. Condemnation of the September 11 attacks and curbing of all domestic expressions of support for terrorism;
6. Cutting off all shipments of fuel to the Taliban, and stopping the Pakistani volunteers from travelling to Afghanistan to join the Taliban.
7. Should the evidence strongly implicate Osama Bin Laden and the Al-Qaeda network in Afghanistan, and should the Taliban continue to harbour him and his accomplices, Pakistan had to break diplomatic relations with the Taliban regime and assist the U.S. in the aforementioned ways to destroy Osama and his network.⁹²²

General Musharraf knew that 'Pakistan faced a stark choice it could either join the US coalition that was supported by the UNSC⁹²³, or expect to be declared

⁹¹⁹ Bob Woodward, *Bush at war* (Pocket Books 2003) 58

⁹²⁰ John W. Young and John Kent, *International relations since 1945* (Oxford University Press 2013) 562

⁹²¹ Zahid. Hussain, *Frontline Pakistan the Struggle with Militant Islam* (Vanguard Books (Pvt) Ltd. 2007) 35-36

⁹²² Bob Woodward, *Bush at war*, (Pocket Books 2003) 25

⁹²³ UN S/RES/1373 (2001) Security Council; UN S/RES/1368 (2001) Security Council

a terrorist state, leading to economic sanctions'.⁹²⁴ Furthermore, the military understood that a stance of non-cooperation with the US government would enhance the Indian position.⁹²⁵ Even states that were hostile towards the US, like Russia and Iran offered their full assistance against the Taliban. Tehran had long opposed both Al-Qaeda and the Taliban.⁹²⁶ Therefore, on 19th September 2001, Musharraf addressed the nation and revealed that he had offered his full cooperation to the US in its war against terrorism. Musharraf insisted that this move aimed at securing Pakistan's strategic assets, assist Pakistan in its Kashmir cause, prevent Pakistan from being declared a terrorist state, prevent the possibility of an anti-Pakistani government coming to power in Kabul and improve Pakistan's global image.⁹²⁷

Pakistan took a 'historical U-turn in its policy towards Taliban' and assured the US its unconditional support in the war on terror.⁹²⁸ Musharraf reshuffled the army officials and removed officials who were sympathetic towards Islamists.⁹²⁹ The military 'top brass now bore a totally new and liberal image'.⁹³⁰ The commitment to the Taliban movement was never ideological. The Pakistani military supported Islamists to enhance national security. After 9/11, the Generals concluded that the Islamists had become a liability instead of a valuable asset. Ironically, in 1979, the Pakistani military along with the US glorified the concept of jihad and then in 2001 it again joined US to destroy the forces that emerged because of that jihad. Musharraf's unlimited support to Washington in this war against terrorism received appraisal from the international community. However, the religious segment in Pakistan vehemently opposed Musharraf's pro-West policies.⁹³¹ Contrary to Musharraf's

⁹²⁴ Ahmed (n 914) 105

⁹²⁵ ibid

⁹²⁶ Robin B. Wright, 'The Iran Primer: Power, Politics, and U.S. Policy', 203; Lilia Shevtsova, *Russia lost in Transition: The Yeltsin and Putin Legacies* (Carnegie Endowment for International Peace 2007) 226

⁹²⁷ Ahmed Faruqi, *Musharraf's Pakistan, Bush's America and the Middle East*, (Vanguard Books, 2008), 61

⁹²⁸ Wright (n 926) 105

⁹²⁹ Nadeem Iqbal, 'Pakistan: Change in Key Military Officials Triggers Speculation' (*Inter Press Service*, 8 Oct 2001) < <http://www.ipsnews.net/2001/10/pakistan-change-in-key-military-officials-triggers-speculation/> > accessed 31 July 2016

⁹³⁰ Ahmed (n 927) 105

⁹³¹ Andrew Holden, Pakistan's Religious Parties: A Threat To Musharraf's Policies? *The Central Asia-Caucasus Analyst* (11 June 2002) < <http://www.cacianalyst.org/publications/analytical-articles/item/7002-analytical-articles-caci-analyst-2002-11-6-art-7002.html> > accessed 31 July 2016

expectations, the pro-war on terror policy proved as short-sighted as the previous pro-Taliban policy.

Musharraf insisted that supporting the US in war on terror would benefit Pakistan. Unfortunately Pakistan's political, strategic, economic and security issues deteriorated progressively. The emergence of numerous militia groups in Pakistan, unprecedented series of terrorist attacks against civilians and Government officials, created a growing sense of uneasiness, insecurity, and perplexity amongst the international community. According to an internal national security document 'from 2001 to November 2013, 48,994 people were killed in the country including 5,272 personnel of the law-enforcement agencies, a large number of them (17,642) having been killed in just three years from 2011 to 2013 including 2,114 personnel of the law-enforcement agencies'.⁹³² The general perception became that Pakistan's nuclear arsenals were not secure and could fall into the hands of extremists.⁹³³

Domestic terrorism problems related to Kashmir were also on the backbench. The presence of Bin Laden in Abbottabad just few kilometres away from military academy and cross border movement of Taliban and Al-Qaeda members between the Afghan-Pakistan border, made Pakistan an unreliable ally in the fight against terrorism.⁹³⁴ Pakistan's controversial involvement in Afghan domestic politics since the 1980s left 'Pakistan with fewer friends and

⁹³² Ismail Khan, 'Pakistan most terror-hit nation' *Dawn* (23 Feb 2014) < <http://www.dawn.com/news/1088864> > accessed 31 July 2016

⁹³³ Naeem Salik and Kenneth N. Luongo, 'Challenges for Pakistan's Nuclear Security' (*Arms control Association*, 2013) < https://www.armscontrol.org/act/2013_03/Challenges-for-Pakistans-Nuclear-Security > accessed 31 July 2016; Shaun Gregory, 'The Terrorist Threat to Nuclear Weapons in Pakistan' (*European Leadership Network*, 4 June 2013) < http://www.europeanleadershipnetwork.org/the-terrorist-threat-to-nuclear-weapons-in-pakistan_613.html > accessed 31 July 2016; David E Sanger and William J Broad, 'U.S. Secretly Aids Pakistan in Guarding Nuclear Arms' *The New York Times* (18 Nov 2007) < <http://www.nytimes.com/2007/11/18/washington/18nuke.html?pagewanted=all&r=0> > accessed 31 July 2016

⁹³⁴ Rachel E. Utley, *9/11 Ten Years After: Perspectives and Problems* (Routledge 2012) 152; Bill Roggio, 'Pakistan did not take substantial action against the Afghan Taliban or Haqqani Network: State Department' (*The Long War Journal*, 3 June 2016) < <http://www.longwarjournal.org/archives/2016/06/pakistan-did-not-take-substantial-action-against-the-afghan-taliban-or-haqqani-network-state-department.php> > accessed 31 July 2016 ;Zalmay Khalilzad Former U.S. Ambassador To Iraq, Afghanistan And U.N.; Counsaler, Center for strategic and international studies house committee on foreign affairs: Subcommittee on terrorism, non-proliferation, and trade 12 July 2016 Pakistan: Friend or foe in the fight against terrorism < <http://docs.house.gov/meetings/FA/FA18/20160712/105188/HHRG-114-FA18-Wstate-KhalilzadZ-20160712.pdf> > accessed 31 July 2016

more enemies in Afghanistan⁹³⁵, particularly among non-Pashtuns. Pakistan's previous ties with Taliban and religious militias undermined its credibility. Hamid Karzai, leader of the Afghans between 2001 and 2014, was not satisfied with Pakistan's performance in securing its ungoverned tribal areas. Pakistan was also accused of playing double games. It was believed that some retired ISI officials and right-wing Army generals were assisting Taliban and Al-Qaeda fighters.⁹³⁶

Washington adopted a carrot and stick approach towards Pakistan. On 12 February 2007, the then US Defence Secretary Robert Gates travelled to Pakistan and expressed appreciation towards its constructive role in fighting the battle on the border.⁹³⁷ However, in the context of a surprise and unusual secret tip to Pakistan, Dick Cheney, expressed his concerns to General Musharraf about the reorganising of Al-Qaeda and Taliban in the tribal region of Pakistan. He further warned of a possibility of linking Pakistan's aid to its effectiveness in combating both Al-Qaeda and the Taliban.⁹³⁸ Pakistan wanted to be front line state in the fight against terrorism to compete with India but its efforts failed. When President Bush visited Pakistan in 2006, he lectured General Musharraf on the need to 'do more' to securing its border and getting tougher with Al-Qaeda.⁹³⁹ Conversely, India was praised as an emerging world power and was awarded with a civilian nuclear deal.⁹⁴⁰ Hamid Karzai went a step further and called Pakistan 'more than a boss' of the Taliban and accused Pakistani state elements of directly supporting them.⁹⁴¹ General Musharraf even tried to fence the Pakistani-Afghan border to put an end to the accusations of cross-border infiltration. The Afghan government rejected this proposal because allowing Pakistan to fence the area would

⁹³⁵ Ahmed (n 927) 107

⁹³⁶ David Sands, 'India Says Pakistan Aids Ousted Extremists' *Washington*

Times (4 Jan 2002) < <http://www.highbeam.com/doc/1G1-81297068.html> > accessed 5 Dec 2016

⁹³⁷ Linda D. Kozaryn, 'Gates, Pakistani President Discuss Border Issues' (*US Department of Defence*, 12 Feb 2007) < <http://archive.defense.gov/News/NewsArticle.aspx?id=3029> > accessed 16 Oct 2015

⁹³⁸ David E Sanger, 'Cheney Warns Pakistan to Act on Terrorism' *The New York Times* (26 Feb 2007) < http://www.nytimes.com/2007/02/26/world/asia/26cnd-pakistan.html?_r=0 > accessed 16 Oct 2015

⁹³⁹ Vilani Peiris, 'Bush's public slap in the face to Pakistan's president' (*World Socialist website*, 11 March 2006) < <https://www.wsws.org/en/articles/2006/03/paki-m11.html> > accessed 16 Oct 2016

⁹⁴⁰ BBC News, 'US and India seal nuclear accord' (2 March 2006) < http://news.bbc.co.uk/1/hi/world/south_asia/4764826.stm > accessed 16 Oct 2015

⁹⁴¹ Associated Press, 'Afghans accuse Pakistan of supporting Taliban', (NBC News, 12 Dec 2006) < http://www.nbcnews.com/id/16166102/ns/world_news-south_and_central_asia/t/afghans-accuse-pakistan-supporting-taliban/#.ViDP-flViko > accessed 16 Oct 2015

mean that Afghanistan has accepted the Durand line.⁹⁴² The international pressure made General Musharraf halt the plan of fencing or mining the border. He categorically denied that any intelligence agent was helping Taliban, but admitted that some border security forces guards might have allowed Taliban militants to cross into Afghanistan.⁹⁴³

Unfortunately both pre-9/11 and post-9/11 Pakistani policies were imprudent and had their own repercussions. Where supporting Islamist isolated Pakistan from the International community and Islamised a few sections of society, supporting the US-led war on terror further divided the country, gave rise to terrorist groups like Tehrik-e-Taliban Pakistan (TTP) and radicalised the youth. The Pakistan's complicity in the US war on terror helped fuel the growth of radical Muslim groups within Pakistan especially in tribal areas and in Baluchistan. TTP emerged with a program of violence aimed at the US, the Pakistani military and at the liberal forces in Pakistan.⁹⁴⁴ Days after 9/11 General Musharraf addressed the nation and highlighted the possibilities of unilateral US attacks if Pakistan failed to support them in this war. Overall, Pakistan became a key state in this war against terrorism; however its controversial and opportunist policies failed badly to protect the country from the unilateral military attacks of the US.

4.2.1 Rise of drones strikes in Pakistan under General Musharraf

In 2004, the first CIA drone strike hit Pakistan, starting a never ending bombing campaign that would span two US presidencies and three Pakistani

⁹⁴² (After two Anglo-Afghan wars in (1838 and 1878), the Durand Line came into existence as the result of an agreement between official of Afghanistan and British India in 1893. The Durand Line is 2640 km long and cuts across Pashtun Tribal areas further South of Baluchistan. It politically divides Pashtuns, Baluch's and other ethnic groups. Durand Line is a controversial and artificial separation of tribes and is not recognised by Pashtuns on either side of the divide.) See Rajen Harshé and Dhananjay Tripathi, *Afghanistan Post-2014: Power Configurations and Evolving Trajectories* (Routledge 2016) 21-22; B. Muralidhar Reddy, 'Pakistan for border fencing with Afghanistan' *The Hindu* (20 Sep 2005) < <http://www.thehindu.com/2005/09/20/stories/2005092004981200.htm> > accessed 16 Oct 2015; Farhan Bukhari, 'Pakistan to mine and fence Afghan border' *Financial Times* (27 Dec 2006) < <http://www.ft.com/cms/s/0/697a844a-954e-11db-a911-0000779e2340.html#axzz3ojg07Hil> > accessed 16 Oct 2015

⁹⁴³ BBC News, Musharraf admits border problems, (2 Feb 2007) < http://news.bbc.co.uk/1/hi/world/south_asia/6323339.stm > accessed 16 Oct 2015

⁹⁴⁴ Mark Juergensmeyer and Wade Clark Roof, *Encyclopaedia of Global Religion* (SAGE 2012) 696

administrations⁹⁴⁵. On 17th June 2004, a CIA drone strike hit Nek Muhammad a senior Pakistani Taliban leader.⁹⁴⁶ Nek Muhammad was targeted with the drone when Pakistani military was about to sign Shakai peace agreement with him.⁹⁴⁷ This fuelled the popular perception that the US did not seek peace in Pakistan and was trying to sabotage any attempt of a peace deal between Pakistan and the Pakistani Taliban. The US was perceived as an imperial state targeting a powerless country.

Pakistani military's experience in tribal areas has been dreadful and they have suffered heavy loss and hamstrung by sniper attacks and ambushes.⁹⁴⁸ The tribesmen who opposed the deployment of Pakistani military in Waziristan became furious and anti-Military. The attacks against Frontier Corps increased and regular Pakistani-army began looking for alternative to boots on ground in tribal areas. Thus the Pakistani Army, exasperated with the shenanigans of the Pakistani Taliban, allowed the CIA to conduct drone strikes against Pakistani Taliban militants in FATA. The consent to this operation was conditional.⁹⁴⁹ In particular, the CIA was to conduct these strikes as a covert operation, enabling the US to neither confirm nor deny these strikes and Pakistan to either take credit for these strikes or remain silent. General Musharraf did not see this as a problem and told one CIA official, 'In Pakistan things fall out of the sky all the time'.⁹⁵⁰ Nek Muhammad was an easy target for the CIA because, unlike other militants, he was not hiding. He gave interviews to various news channels and Americans were

⁹⁴⁵ The Bureau of investigative journalism, 'Get the drone data' < <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> > accessed 31 July 2016

⁹⁴⁶ Mark Mazzetti, 'A secret deal on drones seal in blood' (The new York Times, 6 April 2013) < <http://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html> > accessed 31 July 2016

⁹⁴⁷ David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*, (Oxford University Press 2009) 239

⁹⁴⁸ Imtiaz Gul, 'Afghanistan Imbroglio: Implications for Pakistan's Tribal Areas', Institute of policy studies < <http://www.ips.org.pk/the-uslim-world/985-afghanistan-imbroglio-implications-for-pakistan-tribal-areas> > accessed 31 July 2016

⁹⁴⁹ Boone and Peter Beaumont, 'Pervez Musharraf admits permitting 'a few' US drone strikes in Pakistan' *The Guardian* (12 April 2013) < <http://www.guardian.co.uk/world/2013/apr/12/musharraf-admits-permitting-drone-strikes> > accessed 15 April 2015 Pakistan's former president, Pervez Musharraf admitted in an interview that he gave consent to drone strikes "only on a few occasions, when a target was absolutely isolated and [there was] no chance of collateral damage

⁹⁵⁰ Mark Mazetti, 'A Secret Deal on Drones, Sealed in Blood' *The New York Times* (6 April 2013) < <http://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html> > accessed 17 Oct 2015

regularly tracking his movement through his phone via satellite; eventually, he was attacked one day after he spoke to BBC in his compound.⁹⁵¹ The Pakistani Army was quick in taking responsibility for Nek Muhammad's killing and said that reports of American involvement were 'absolutely absurd'.⁹⁵²

In May 2005, another CIA drone killed Haitham-al-Yamani, an Al-Qaeda member in North Waziristan. This time the CIA refused to comment over this issue and the Pakistani foreign minister denied that such incident took place.⁹⁵³ According to Coll, General Musharraf urged the Bush administrations officials to give the drones to Pakistan but the US declined because of high-technology transfer restrictions. In 2004 Pakistani Army intensified military operations in tribal areas and as violence spread Musharraf allowed CIA to conduct drone strikes to support Pakistani military action. A CIA drone operator told Coll that all the drone strikes were carried out with the prior approval from ISI. Pakistani intelligence officers were shown the feed from predators circling over the targets by the CIA.⁹⁵⁴

Initial drone strikes in Pakistan did not attract much media attention due to the low level of collateral damage. But on 30th October 2006, a deadly drone strike on a madrassa took Pakistanis by surprise. The strike resulted in the death of 82 people including 70 children. The attack was damaging for Pakistan not only because of excessive collateral damage but also because on that day local militants were expected to sign a peace agreement with Islamabad.⁹⁵⁵ While the Pakistani military was comfortable until this point with US drone strikes because they were targeting Al-Qaeda leaders or a few Pakistani Taliban leaders who were creating nuisance for Pakistan. However, the scale of this strike resulted in senior military leaders realising that the drone war carried serious risks for Pakistan's war against the Pakistani

⁹⁵¹ David Rohde and Mohammed Khan, 'Ex-Fighter for Taliban Dies in Strike in Pakistan' *The New York Times* (19 June 2004) < <http://www.nytimes.com/2004/06/19/international/asia/19STAN.html> > accessed 17 Oct 2015

⁹⁵² *ibid*

⁹⁵³ Dana Priest, 'Surveillance Operation in Pakistan Located and Killed Al Qaeda Official' *The Washington Post* (15 May 2005) < <http://www.washingtonpost.com/wp-dyn/articles/A60743-2005May15.html> > accessed 17 Oct 2015

⁹⁵⁴ Steve Coll, 'The Unblinking stare' *The New Yorker* (24 Nov 2014) < <http://www.newyorker.com/magazine/2014/11/24/unblinking-stare> > accessed 17 Oct 2015

⁹⁵⁵ Mushtaq Yusufzai, 'Tribal militants agree to work for peace in Bajaur' *The News* (29 Oct 2006) < <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=3912&Cat=13&dt=10/29/2006> > accessed 17 Oct 2015

Taliban. The Pakistani Military's outlook towards the US drone war changed when it became clear that the US was unilaterally targeting insurgents who were willing to make peace a deal with Pakistan and who were against the Al-Qaeda and TTP's war against Pakistani army. Former ISI chief, General Durrani, denounced the United States deception and said that the Bajaur Madrassa strike 'effectively sabotaged the chances for an agreement'. That was 'a very clear message' from the CIA not to enter into any more such peace agreements.⁹⁵⁶ Roggio has suggested that the main motivation behind the strike was to disrupt the peace accord because the US deemed peace with militants a major threat to the security of both Afghanistan and nuclear Pakistan.⁹⁵⁷ This one incident irreparably damaged the credibility of General Musharraf. He faced fierce criticism at national level because rather than condemning the US he ordered the Pakistani military to take complete responsibility for the incident.⁹⁵⁸

4.3 Escalation in drones under General Kyani

General Kayani became Pakistan's army in chief on 29 November 2007.⁹⁵⁹ Pakistan's national security policy during Kayani's era continued Musharraf's policies. He continued denying Pakistan's complicity in drone strikes and persistently condemned US for violating Pakistan's fictional national sovereignty. Initially, the US and Pakistan cooperated and developed a joint list of targets for drone strikes.⁹⁶⁰ The situation changed when Michael V. Hayden became CIA Director in May 2006. Under Hayden, the Agency stopped the practice of notifying the Pakistanis before launching strikes primarily

⁹⁵⁶ Gareth Porter, 'Why Pakistani Military Demands a Veto on Drone Strikes' *Inter Press Service* (16 August 2011) < <http://www.ipsnews.net/2011/08/why-pakistani-military-demands-a-veto-on-drone-strikes/> > accessed 31 July 2016

⁹⁵⁷ Bill Roggio, 'A Closer Look at the Chingai Airstrike in Bajaur, Pakistan' (*The Long War Journal*, 30 Oct 2006) < http://www.longwarjournal.org/archives/2006/10/a_closer_look_at_the-2.php > accessed 31 July 2016

⁹⁵⁸ Usama Butt, N. Elahi, *Pakistan's Quagmire: Security, Strategy, and the Future of the Islamic-nuclear Nation* (Continuum 2010) 146

⁹⁵⁹ Pakistan Army Chiefs < <https://www.pakistanarmy.gov.pk/AWPReview/TextContent.aspx?pld=30&rnd=179> > accessed 31 July 2016

⁹⁶⁰ Adam Entous, Siobhan Gorman and Sseed Shah, 'Drone Shift Alters Relations Overseas' *The Wall Street Journal* (25 May 2013) < <http://www.wsj.com/articles/SB10001424127887323336104578503540182119964> > accessed 18 Oct 2015

because the CIA believed that Pakistan's intelligence agencies were undermining the program by tipping off would-be targets.⁹⁶¹ The CIA began operating unilaterally and more broadly and the trajectory began to change: from 2 drone strikes in 2006 to 36 in 2008.⁹⁶² In addition, the CIA introduced extremely controversial 'signature strikes'.⁹⁶³ Previously, the agency could only strike targets that were identified and had needed confirmation of the presence of an approved Al-Qaeda target before it could shoot. Conversely, signature strikes allowed the CIA to attack militants based solely on their patterns of behaviour. Thus with permission from the White House, the CIA began hitting suspected militant gatherings.⁹⁶⁴ Drone strikes further intensified when Obama became President of the US.

Meanwhile, Islamabad continued to issue pro forma statements against the drones but, behind closed doors, Pakistani civilian leaders endorsed US drone strikes.⁹⁶⁵ For instance WikiLeaks cables reveal that Pakistan's former Prime Minister, Yousuf Raza Gilani, suggested that he would protest the attacks in parliament while ignoring them in practice.⁹⁶⁶ Likewise, President Zardari publicly rebuked drone strikes to be counterproductive but secretly told Americans that 'Kill the seniors. Collateral damage worries you Americans. It does not worry me.'⁹⁶⁷ Peter Bergen summed up Pakistan's duplicity in regards to the US drone strikes:

For Pakistani politicians, the drone program is a dream come true. They get to posture to their constituents about the perfidious Americans even as they reap the benefits from the U.S. strikes. They are well-aware that neither the Pakistani Army's ineffective military operations nor the various peace agreements with the militants have

⁹⁶¹ *ibid*

⁹⁶² The New American Foundation, 'Drone Wars Pakistan: Analysis Number of drone strikes Pakistan Drone Strikes - Obama v. Bush' < <http://securitydata.newamerica.net/drones/pakistan-analysis.html> > accessed 31 July 2016

⁹⁶³ Signature strikes have been discussed in chapter three

⁹⁶⁴ Greg Miller, 'At CIA, a convert to Islam leads the terrorism hunt' *The Washington Post* (25 March 2012) < https://www.washingtonpost.com/world/national-security/at-cia-a-convert-to-islam-leads-the-terrorism-hunt/2012/03/23/gIQA2mSqYS_story_3.html > accessed 18 Oct 2015

⁹⁶⁵ Daniel S. Markey, *No Exit from Pakistan: America's Tortured Relationship with Islamabad* (Cambridge University Press 2013) 157

⁹⁶⁶ The Express Tribune, 'WikiLeaks: Gilani open to drone strikes on 'right people'' (1 Dec 2010) < <http://tribune.com.pk/story/84402/wikileaks-gilani-open-to-drone-strikes-on-right-people/> > accessed 18 Oct 2015

⁹⁶⁷ Bob Woodward, *Obama's Wars* (Simon & Schuster 2011) 26

done anything to halt the steady Talibanisation of their country, while the U.S. drones are the one sure fire way to put significant pressure on the leaders of the Taliban and Al Qaeda. This is called getting to have your chapati and eat it too.⁹⁶⁸

It wasn't just Musharraf who gave the US a blank cheque to operate drone strikes in Pakistan; General Kayani was equally seduced by the drones. WikiLeaks cables show that Kayani asked for more, rather than less, drone strikes. According to cables referring to operations carried out in 2008 and 2009, the Pakistani military requested on numerous occasions for greater back up for its own military operations to the US.⁹⁶⁹ The Pakistani military never accepted the US soldiers on the ground because 'it would not be politically acceptable'.⁹⁷⁰ In July 2008, President Bush authorised the US Special Operation Forces to conduct ground raids in Pakistan without the approval of the Pakistani government.⁹⁷¹ On 3rd September 2008, 24 US Navy Seals landed on Pakistan's soil and killed dozens of people within a targeted house. The political objective was to defeat and deter Al-Qaeda from using Pakistani soil to plan operations. The operation failed and resulted in the killing of a few militants and several civilians, including children.⁹⁷² The Pakistani military reacted fiercely and General Kayani vowed to protect Pakistan 'at all cost'.⁹⁷³ This time Pakistan was really serious and those were not hollow words. The Pakistani military ordered its forces to open fire on any US troop found entering the country covertly.⁹⁷⁴ Reportedly, twelve days after that controversial raid, the US military tried again to enter Pakistani soil but

⁹⁶⁸ Peter Bergen and Katherine Tiedemann, 'The Drone War' *New Republic* (3 June 2009) < <http://www.newrepublic.com/article/the-drone-war> > accessed 31 July 2016

⁹⁶⁹ Dawn, 'Army chief wanted more drone support' (19 May 2011) < <http://www.dawn.com/news/630057/army-chief-wanted-more-drone-support> > accessed 31 July 2016

⁹⁷⁰ *ibid*

⁹⁷¹ Eric Schmitt and Mark Mazetti, 'Bush Said to Give Orders Allowing Raids in Pakistan' *The New York Times* (10 Sep 2008) < <http://www.nytimes.com/2008/09/11/washington/11policy.html> > accessed 31 July 2016

⁹⁷² Micah Zenko, *Between Threats and War: U.S. Discrete Military Operations in the Post-Cold War World* (Stanford University Press 2010) 152

⁹⁷³ Stephen Graham, 'Pakistan troops ordered to open fire on US raiders' (Associated Press 16 Sep 2008) < http://usatoday30.usatoday.com/news/topstories/2008-09-16-390748188_x.htm > accessed 31 July 2016; Mark Moyar, *Strategic Failure: How President Obama's Drone Warfare, Defense Cuts, and Military Amateurism Have Imperiled America* (Threshold Editions 2015) 133

⁹⁷⁴ *ibid*

Pakistani border troops fired them. Threats from the Pakistani military, civilian casualties and the operation's failure deterred US forces from deploying ground forces in Pakistan.⁹⁷⁵

This incident reveals that the Pakistani military had no objections in any mutual military operations, but had no patience for unilateral attacks from the US. According to leaked cables, a sea change in Pakistan's policy means that, since 2009, the military had no objection in the deployment of US Special Forces in providing support to Pakistani military operations.⁹⁷⁶ But no strategy worked for very long because the US-Pakistan relationship was based on mutual mistrust. Malicious interests, pursued by both sides, from the onset, contaminated the relationship. There was never a genuine agreement between them in regards to drone strikes or deployment of Special Forces in Pakistan. When the Pakistani military reacted harshly to US boots on grounds, the Bush administration decided to rely heavily on armed drones. Bush ordered the CIA to expand its drone attacks. Furthermore, the US government discontinued the practice of notifying Pakistani officials before strikes and conducted attacks against militants without obtaining their permission.⁹⁷⁷ Later the Bin Laden's raid caused an irreparable damage to US-Pakistani relationship. The US Navy Seals invasion on 2nd May 2011 resulting in the killing of Osama Bin Laden humiliated the Pakistani military globally. Washington showed its deep mistrust towards the Pakistani government or its military by not giving any advance notice.⁹⁷⁸

Before the Bin Laden's raid, on 27 Jan 2011, the CIA-spy Raymond Davis killed two civilians in Lahore. Generally 'Pakistanis saw the episode as more evidence of imperialistic arrogance'.⁹⁷⁹ While there has always been anti-American sentiment in Pakistan it peaked after the Raymond Davis

⁹⁷⁵ Zenko (n 972) 152

⁹⁷⁶ The Guardian, 'US embassy cables: Pakistan approves secret US special forces deployment' (9 Oct 2009) < <http://www.theguardian.com/world/us-embassy-cables-documents/229065> > accessed 31 July 2016

⁹⁷⁷ Bergen and Tiedemann (n 964)

⁹⁷⁸ Hasnain Kazim and Gerhard Spörl, 'Jihad against America: Relations Remain Icy Between Pakistan and the US' (*Spiegel online*, 10 May 2012) < <http://www.spiegel.de/international/world/tense-relationship-between-the-us-and-pakistan-since-bin-laden-death-a-832291.html> > accessed 31 July 2016

⁹⁷⁹ Declan Welsh, 'A CIA spy, a hail of bullets, three killed and a US-Pakistan diplomatic row' *The Guardian* (20 Feb 2011) < <http://www.theguardian.com/world/2011/feb/20/cia-agent-lahore-civilian-deaths> > accessed 30 July 2016

incident.⁹⁸⁰ The final nail in the coffin was the NATO attack on the Pakistani check-post in Salala that killed 24 Pakistani soldiers.⁹⁸¹ It is hard to say with surety what actually happened there because both sides blame each other. According to NATO, Pakistani forces fired first and it was a retaliatory action from their side; the Pakistani military denied this and argued that the strike was unprovoked. Whosoever was at fault it was a costly mistake and the Pakistani military shut down NATO supply routes into Afghanistan in retaliation for the attack.⁹⁸² Pakistan demanded an official apology from the US over this incident when the US apologised, Pakistan reopened NATO supply lines into Afghanistan following seven month of blockage.⁹⁸³

This was not the first time that NATO had attacked Pakistani soldiers. On 30th September 2010, NATO helicopters crossed the Afghan border and shelled an area for about 25 minutes that resulted in the death of 3 Pakistani soldiers. Pakistani officials immediately blocked all NATO supply trucks for ten days from crossing the border checkpoint to Afghanistan in apparent retaliation.⁹⁸⁴ Pakistan did not only block NATO supply route but also ordered the US to leave Shamsi airbase within 15 days.⁹⁸⁵ The constant violation of Pakistan's sovereignty and the United States unilateral and unauthorised drone strikes and boots on grounds indicated that US-Pakistani relation were at an all-time low. Realising the severity of the circumstances, Obama administration

⁹⁸⁰ D. Suba Chandran, P. R. Chari, *Armed Conflicts in South Asia 2012: Uneasy Stasis and Fragile Peace* (Routledge 2013) 62; Mark Mazetti, 'How a single spy turn Pakistan against the US' *The New York Times* (9 April 2013) < <http://www.nytimes.com/2013/04/14/magazine/ramond-davis-pakistan.html> > accessed 31 July 2016

⁹⁸¹ Iftikhar Firdous, '24 soldiers killed in NATO attack on Pakistan check post' *The Express Tribune* (26 Nov 2011) < <http://tribune.com.pk/story/297979/nato-jets-attack-checkpost-on-pak-afghan-border/> > accessed 31 July 2016

⁹⁸² Al Arabiya News, 'Pakistan says no more 'business as usual' with U.S. after lethal NATO raid' (29 Nov 2011) < <http://english.alarabiya.net/articles/2011/11/29/179757.html> > accessed 31 July 2016

⁹⁸³ Huma Imtiaz, 'After US says 'sorry' for Salala attack, Pakistan reopens GLOCs' *The Express Tribune* (3 July 2012) < <http://tribune.com.pk/story/403075/us-says-sorry-for-salala-attack/> > accessed 31 July 2016; Vali Nasir, *The Dispensable Nation: American Foreign Policy in Retreat* (Doubleday, 2013)

⁹⁸⁴ Rob Crilly and Ben Farmer, 'Nato strike kills three Pakistani soldiers' *The Telegraph* (30 Sep 2010) < <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/8033913/Nato-strike-kills-three-Pakistani-soldiers.html> > accessed 31 July 2016

⁹⁸⁵ Bill Rogio, 'Pakistan orders closure of key US airbase after ISAF troops conduct cross-border attack' (*The Long War Journal*, 26 Nov 2011) < http://www.longwarjournal.org/archives/2011/11/pakistan_orders_key.php > accessed 31 July 2016; Saeed Shah, 'Pakistan orders US to leave airbase in row over deadly Nato assault' *The Guardian* (27 Nov 2011) < <http://www.theguardian.com/world/2011/nov/27/pakistan-orders-us-leave-shamsi-airbase> > accessed 31 July 2016. Incomplete reference. No author, no title, no date. Please don't leave any on-line reference like this. This is an address, not a reference.

tightened its drone rules and agreed to give Pakistani leaders advance notice about operations. In addition, the CIA and the State of department became more selective in strikes against militants.⁹⁸⁶ The diagram below shows the gradual decline in CIA drone strikes after 2010.⁹⁸⁷ It is uncertain who was actually killed in those strikes but data shows low number of civilian casualties in 2012 and 2013.⁹⁸⁸

CIA Strikes Obama	Total Drone strikes	Total Killed	Civilians Killed
2009	52	465-744	100-210
2010	128	755-1108	89-197
2011	75	363-666	52-152
2012	50	199-410	13-63
2013	27	109-195	0-4

Reports also suggest that there was a division between the CIA and State Department regarding the issues of drone strikes. Many senior officials began to question CIA's aggressive methods. Military officials argued that killing low-level militants was counterproductive. One of the official said 'You can kill these foot soldiers all day, every day and you wouldn't change the course of the war'.⁹⁸⁹ Washington decided to use drone strikes more judiciously because they wanted to avoid a situation where Pakistan decided to stop the drones. Islamabad never wanted a blanket halt on these strikes but an equal say on who to be targeted which they achieved, at least nominally, after blocking the NATO's route. As one CIA official described 'It's not like they took the car keys away from the CIA, there are just more people in the car.'⁹⁹⁰

⁹⁸⁶Adam Entous, 'Siobhan Gorman and Julian E. Barnes, U.S. Tightens Drone Rules' *The Wall Street Journal* (4 Nov 2011) < <http://www.wsj.com/articles/SB10001424052970204621904577013982672973836> > accessed 31 July 2016

⁹⁸⁷ The Bureau of investigative journalism, 'Get the data: drone wars' < <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> > accessed 31 July 2016

⁹⁸⁸ ibid

⁹⁸⁹ Entous (n 986)

⁹⁹⁰ ibid

4.4 General Raheel Sharif and Drones

General Raheel Sharif took over after General Kyani completed his term. He adopted hard line approach against 'all militants' and, in June 2014, launched a long awaited military operation -known as Operation Zarb-e-Azab in North Waziristan.⁹⁹¹ The future of the US-Pakistan relations is still uncertain but Pakistan's policies towards the US drone strikes are becoming clearer. In November 2014, top US Lt. Gen. Joseph Anderson acknowledged the effectiveness of operation Zarb-e-Azab and said that Haqani Network had become 'fractured like the Taliban' with a weakened ability to launch attacks on Afghan territory.⁹⁹² However, a few months later, in October 2014, Gen Anderson's report played down the findings in the Pentagon's report on 'Progress toward security and stability in Afghanistan' and stated that:

Taliban attacks in Afghanistan launched from sanctuaries in Pakistan remain a serious problem. These sanctuaries exist primarily in the Federally Administered Tribal Areas (FATA) and Baluchistan.... Pakistan uses these proxy forces to hedge against the loss of influence in Afghanistan and to counter India's superior military....⁹⁹³

In January 2018 President Trump directly threatened to cut aid to Pakistan for allegedly lying to the US and offering 'little help' in hunting 'terrorists' in Afghanistan.⁹⁹⁴ Therefore, the US rhetoric's on blaming Pakistan has not changed but rules on drones have become progressively stricter due to diplomatic sensitivities. As a result, the number of drone strikes has dropped

⁹⁹¹ Farhan Zahid, 'The Successes and Failures of Pakistan's Operation Zarb-e-Azb' (*Terrorism Monitor*, 10 July 2015) <

http://www.jamestown.org/programs/tm/single/?tx_ttnews%5Btt_news%5D=44144&cHash=d4281630e5ad104ab6fbc0bd5f3bbf9f#.V546abgrLIU > accessed 31 July 2016

⁹⁹² Lt. Gen. Joseph Anderson, 'ISAF Joint Command' (11 May 2014) <

https://www.dvidshub.net/video/372104/lt-gen-joseph-anderson#.Viddo_mrTIW > accessed 31 July 2016; Department of defence USA, 'Progress toward security and stability in Afghanistan (Oct 2014) < http://www.defense.gov/Portals/1/Documents/pubs/Oct2014_Report_Final.pdf > accessed 31 July 2016

⁹⁹³ Department of defence USA, 'Progress toward security and stability in Afghanistan' (Oct 2014) < http://www.defense.gov/Portals/1/Documents/pubs/Oct2014_Report_Final.pdf > accessed 31 July 2016

⁹⁹⁴ Saba Aziz, 'Pakistan-US war of words over Donald Trump's tweet' *Al-Jazeera* (2 Jan 2018) <

<https://www.aljazeera.com/news/2018/01/pakistan-war-words-donald-trump-tweet-180102055709366.html> > accessed 25 April 2018

sharply. The table below shows a dwindling number of drone strikes and single-digit civilian casualty.⁹⁹⁵

CIA Strikes Obama and Trump	Total Drone strikes	Total Killed	Civilians Killed
Dec 2013	1	3-4	0
2014	25	115-186	0-2
2015	13	62-85	2-5
2016	3	8-11	0
2017	5	15-22	3
2018	1	1-3	0

Unlike previous Prime Ministers, the Nawaz Sharif's (in office June 2013-July 2018) government did not consent for drone strikes. Within a week of taking office Nawaz Sharif bashed the military for lying to Pakistanis about its cooperation with the CIA to target militants in tribal areas of Pakistan and stated that, 'The policy of protesting against drone strikes for public consumption, while working behind the scenes to make them happen, is not on'.⁹⁹⁶ To further highlight his position internationally, the Sharif's Government sponsored a UN General Assembly resolution demanding more transparency and independent investigation of the civilian killings.⁹⁹⁷

The situation transformed after the deadly terrorist attack on Karachi Airport on 9 June 2014⁹⁹⁸, Pakistan and the US reached a compromise and expressly carried out the first ever-joint drone strike against militants on 12 June

⁹⁹⁵ Bureau of investigative Journalism (n 983)

⁹⁹⁶ Daniel Markey, 'How to Bargain With a Newly Drone-Skeptical Islamabad' (Foreign Affairs, 8 August 2013) < <https://www.foreignaffairs.com/articles/south-asia/2013-08-08/new-drone-deal-pakistan> > accessed 31 July 2016

⁹⁹⁷ UN General Assembly, A/HRC/25/L.32, Human Rights Council Twenty-fifth session Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 24 March 2014

⁹⁹⁸ BBC News, 'Taliban claim deadly attack on Karachi airport' (9 June 2014) < <http://www.bbc.co.uk/news/world-asia-27758029> > accessed 31 July 2016

2014.⁹⁹⁹ But on 23rd May 2016 the US Government violated the agreement and conducted a unilateral drone strike against Afghan Taliban chief Mullah Akhtar Mansour in Baluchistan.¹⁰⁰⁰ Pakistan reacted publicly on 22 June 2016 before the United Nations Security Council, condemning the May strikes as an unacceptable and blatant violation of Pakistan's sovereignty, the UN Charter and international law.¹⁰⁰¹ The public condemnation of the Sharif's government indicates that Pakistan is no longer complicit in the US drone strikes. Nothing indicates there is a secret agreement between the Trump administration and Pakistan because the Pakistani government has strongly protested against drone strikes carried out under his Presidency.¹⁰⁰²

In addition to other legal justifications discussed in previous chapters, the US has tried to legitimise drone strikes in Pakistan by claiming that either Pakistan has consented to these strikes or it is unable or unwilling to suppress terrorists in its tribal area.¹⁰⁰³ Available data reveals that previous Pakistani governments have provided at least tacit consent for US drone strikes. More problematic is to determine the scope of such consent. The following section will examine the theory of state consent in international law and will apply it to the case of Pakistan.

4.5 Consent in international law and the use of force

Under international law a state can consent to acts otherwise contrary to its sovereignty. Art 2(7) of the UN Charter states, 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters

⁹⁹⁹ Mehreen Zahra-Malik and Haji Mujtaba, 'Drones hit Taliban hideouts in 'joint Pakistan-U.S.' raid, say officials' *Reuters* (12 June 2014) < <http://www.reuters.com/article/2014/06/12/us-pakistan-drones-idUSKBNOEN0TP20140612> > accessed 31 July 2016

¹⁰⁰⁰ Baqir Sajjad Syed, 'US strike crosses 'red line' on Baluchistan' *The Dawn* (23 May 2016) < [http://www.dawn.com/news/1260044/us-strike-crosses-red-line-on-balochistan?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+dawn-news+\(Dawn+News\)](http://www.dawn.com/news/1260044/us-strike-crosses-red-line-on-balochistan?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+dawn-news+(Dawn+News)) > accessed 31 July 2016

¹⁰⁰¹ Pakistan Mission to United Nations, Pakistan condemns US drone strike in the UN Security Council, (22 June 2016) < <http://www.pakun.org/press-releases/2016/06222016-01.php> > accessed 1 August 2016

¹⁰⁰² Shafqat Ali, 'Washington tells Islamabad: Drone attacks to continue until Pakistan 'satisfies' US' *The Nation* (29 Jan 2018) < <https://nation.com.pk/29-Jan-2018/washington-tells-islamabad-drone-attacks-to-continue-until-pakistan-satisfies-us> > accessed 25 April 2018

¹⁰⁰³ The US Department of Justice, Attorney General Eric Holder Speaks at North-western University School of Law (5 March 2012) < <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> > accessed 31 July 2016

which are essentially within the domestic jurisdiction of any state'. The Draft Articles on State Responsibility, that are widely considered as codifying customary law, recognise the state's right to consent to the use of armed force by a third state'.¹⁰⁰⁴

Various US officials have invoked the consent doctrine on different occasions as legal basis for the use of armed force in other territories. For instance, in 2012, the US Attorney General Eric Holder argued that the use of force in states where US is not at war is 'consistent with international legal principles if conducted...with the consent of the nation involved'.¹⁰⁰⁵ Brennan repeated Holder and stressed: 'There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents'.¹⁰⁰⁶ Similarly the US Department of Justice emphasised that use of force 'would be consistent with international legal principles of sovereignty and neutrality' where state gave its consent.¹⁰⁰⁷ These official statements show that the doctrine has been key to the use of drones by the US.

The International Law Commission has stressed that the validity of consent requires that it, 'must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked'.¹⁰⁰⁸ This confirms that consent must be clear and exhibit the true intention of state. There are conflicting opinions amongst International law scholars as to what amounts to valid consent. Professor Mary O' Connell has

¹⁰⁰⁴ Art 20 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001

¹⁰⁰⁵ Eric Holder, 'Attorney General Eric Holder Speaks at Northwestern University School of Law' (2012), United States Department of Justice, < www.justice.gov/opa/speech/attorney-general-eric-holder-speaksnorthwestern-university-school-law > accessed 2 August 2016

¹⁰⁰⁶ John O Brennan (White House Counterterrorism Advisor) 'The Ethics and Efficacy of the President's Counterterrorism Strategy' (April 2012) prepared remarks at the Woodrow Wilson International Centre for Scholars < www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy > accessed 2 August 2016

¹⁰⁰⁷ US Department of Justice, White Paper 'Lawfulness for a Lethal Operation Directed Against a US Citizen Who Is a Senior Operational Leader of al-Qa'ida or an Associated Force' (2011) 1 < http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf > accessed 2 August 2016

¹⁰⁰⁸ Draft article on state responsibility (n 1004) Art 20, para 6

stressed the need for the consent to be express and public.¹⁰⁰⁹ On the other hand, Sean Murphy has argued that secret, consent could be valid.¹⁰¹⁰ The publicity argument put forward by O’Connell finds no basis on any international legal documents, nor does it appear to be supported in practice amounting to customary international law. On the contrary, non-public consent has acceptance in law. In 1979, the then-Special Rapporteur Roberto Ago in his report on state responsibility to the International Law Commission, stated that ‘like all manifestations of the will of a State...consent can be expressed or tacit, explicit or implicit’.¹⁰¹¹

There are some voices that undermine the requirement of consent in the use of force. For instance Jordan Paust says that consent becomes irrelevant and is not required at all when state use force in self-defence against non-state actors.¹⁰¹² Arnulf Lorca supports this approach he has argued that consent is not required when it involves states in which governments ‘might be willing but might be too weak to effectively act against the non-state actor, as in the case of Yemen’.¹⁰¹³ These views are controversial because they involve a broad interpretation of the right to self-defence and encourage actions with weak foundation on existing legal frameworks.¹⁰¹⁴

4.5.1 Criterion for valid consent

For the consent to be valid it must be provided by the ‘legitimate government’ of a state,¹⁰¹⁵ that is, the government determined by the domestic

¹⁰⁰⁹ Mary Ellen O’Connell, ‘Unlawful Killing with Combat Drones’ (2010) Notre Dame Law School Research Paper, 18

¹⁰¹⁰ Sean D Murphy, ‘The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan’ (2009) *International Legal Studies* 109, 118

¹⁰¹¹ Roberto Ago, ‘Eighth Report on State Responsibility’, UN Doc A/CN.4/318 and ADD.1-4 (1979) *Yearbook of the International Law Commission* 3, 35 as quoted in Max Byrne, ‘Consent and the use of force: an examination of ‘intervention by invitation’ as a basis for US drone strikes in Pakistan, Somalia and Yemen’ (2016) *Journal on the Use of Force and International Law* 97

¹⁰¹² Jordan J Paust, ‘Self-Defence Targeting of Non-State Actors and Permissibility of US Use of Drones in Pakistan’ (2010) *Journal of Transnational Law and Policy* 237, 249–50

¹⁰¹³ Arnulf B Lorca, ‘Rules for the “Global War on Terror”’: Implying Consent and Presuming Conditions for Intervention’ (2012) *NYU Journal of International Law & Policy* 1, 9 as quoted in Max Byrne, ‘Consent and the use of force: an examination of ‘intervention by invitation’ as a basis for US drone strikes in Pakistan, Somalia and Yemen’ (2016) *Journal on the Use of Force and International Law* 97, 105

¹⁰¹⁴ *Ibid* Byrne 105

¹⁰¹⁵ Louise Doswald Beck, ‘The legal validity of military intervention by invitation of the government’ (1985) *British Yearbook of International Law* 189, 191

constitutional framework, or *de facto* government exercising effective control over the territory and the population of a particular state.’¹⁰¹⁶ While most countries will have a widely recognised government, the question of control over the territory becomes thorny when such control is contested or during transitions.¹⁰¹⁷ Several examples illustrate the practical difficulties. In 1978, Lebanon invited peacekeeping operation UNIFIL (United Nations Interim Force in Lebanon) when Lebanon army had little control over the capital.¹⁰¹⁸ David Wippman has loosely interpreted state control and argued the consent of a government is valid as long as it maintains control over the capital city.¹⁰¹⁹

Whether other actors of the international community recognise a particular government as legitimate interlocutor plays a significant role. The events following the 2011 uprising against the President of Libya, Muammar Gaddafi, illustrates the importance of the recognition of governments when assessing whether consent has been provided by the legitimate authority.

Following its fourth meeting, the ‘Libya Contact Group’, composed of several international organizations and 32 States, issued the following statement:

The Contact Group reaffirmed that Qaddafi regime no longer has any legitimate authority in Libya and that Qaddafi and certain members of his family must go. Henceforth and until an interim authority is in place, participants agreed to deal with the National Transitional Council (NTC) as the legitimate governing authority in Libya.¹⁰²⁰

Several states have also recognised the Syrian opposition group National Coalition for Syrian Revolutionary and Opposition Forces (NCS) as the sole legitimate representative of the Syrian people, while not removing recognition

¹⁰¹⁶ International Law Association Committee on the Use of Force, Washington Conference ‘Report on Aggression and the Use of Force’ (2014) Though it is a draft report yet to be agreed by the ILA, it nonetheless represents the considered opinions of over 30 of the world’s leading experts on the use of force in international law and, as such, possesses significant authoritative weight

¹⁰¹⁷ Christine Gray, *The Use of Force in International Law* (Oxford University Press, 3rd edn 2008) 99

¹⁰¹⁸ Resolution 426 (1978) < [http://www.unsco.org/Documents/Resolutions/S_RES_426\(1978\).pdf](http://www.unsco.org/Documents/Resolutions/S_RES_426(1978).pdf) > accessed 2 August 2016; Louise Supra note 1099, 197-198 gave the example of Lebanon inviting UNIFIL despite having no effective control of the country.

¹⁰¹⁹ David Wippman, ‘Military Intervention, Regional Organizations, and Host-State Consent’ (1996) *Duke Journal of Comparative & International Law* 209, 220

¹⁰²⁰ “Fourth Meeting of the Libya Contact Group Chair’s Statement” (15 July 2011, Istanbul) < http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_-15-july-2011_-istanbul.en.mfa >

of the Assad's regime as regular interlocutor.¹⁰²¹ The European Court on Human Rights has had to address the recognition (or lack of) *de facto* regimes in cases involving the Republic of Moldova and Northern Cyprus to assert its own jurisdiction.¹⁰²² While the case-law and state practices is erratic and profoundly influenced by political processes, what entity can be considered as government is determined by its effective control on the territory and its recognition by the international community.¹⁰²³

In practice, heads of states, heads of government and ministers of foreign affairs are the governmental bodies whose consent is necessary for a foreign intervention.¹⁰²⁴ For instance, President Kabila consented to the presence of Ugandan troops on the territory of the Democratic Republic of Congo.¹⁰²⁵ The US-led coalition operated in Afghanistan with the consent of its elected President Hamid Karzai¹⁰²⁶. The Iraqi foreign minister requested the US to assist in their fight against ISIL.¹⁰²⁷

From an international law perspective, the issue of consent from other sources is more problematic. In its draft 'Report on Aggression and the Use of Force', the Use of Force Committee of the International Law Association stated that consent coming 'from the military/intelligence services rather than highest echelons of current government, will not suffice.'¹⁰²⁸ Whether they

¹⁰²¹ Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12 Chinese Journal of International Law 2, 1219–253

¹⁰²² Gaiane Nuridzhanian '(Non-)Recognition of De Facto Regimes in Case law of the European Court of Human Rights: Implications for Cases Involving Crimea and Eastern Ukraine' *EJILTalk*, (9 October 2017) < <https://www.ejiltalk.org/non-recognition-of-de-facto-regimes-in-case-law-of-the-european-court-of-human-rights-implications-for-cases-involving-crimea-and-eastern-ukraine/#more-15587> >

¹⁰²³ Byrne (n 1013) 109

¹⁰²⁴ As reflected in article 7 of the 1969 Vienna Convention on the Law of Treaties that acknowledges the competence to express consent to be bound by a treaty to these figures,

¹⁰²⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005, Para 29

¹⁰²⁶ Christopher Greenwood, 'International law framework for the treatment of persons detained in Afghanistan by Canadian forces' (2007) Para 13 < <https://bccla.org/wp-content/uploads/2012/04/Report-of-Prof.-Greenwood-London-School-of-Economics.pdf> > accessed 3 August 2016

¹⁰²⁷ United Nations Security Council S/2014/440 (2014) < http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_440.pdf > accessed 3 August 2016

¹⁰²⁸ *Draft Report on Aggression and the Use of Force* (Use of Force Committee, International Law Association, 2014) < <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1057&StorageFileGuid=1af35245-6705-48c1-be3d-4b099ea7ce60> > For a similar view, see Christof Heyns, 'Report of the Special

suffice or not, it is a well-accepted rule of customary law that acts of the military can be attributed to the state. The difficulties to deny in principle, the validity of the consent provided by the military probably explains the change of language in the final 2018 Report where it states that: 'Requests or approval coming (...) from the military/intelligence services not authorised to speak on behalf of the State, will not suffice.'¹⁰²⁹ The consent must be provided before the commencement of the armed attack and non-governmental actors cannot invite or consent to the use of armed force in the territory of a state.¹⁰³⁰

4.5.2 Pakistan's consent and US drone strikes

The first criterion for a valid consent is that it must be 'clear and manifest the true intention of state'.¹⁰³¹ As discussed above consent can be public or secret, implicit or explicit. Several sources have confirmed that former Pakistani Presidents (Musharraf and Zardari), Prime Minister Yousaf Raza Gillani and General Kyani had expressly given their consent to the United States in private.¹⁰³² Ben Emerson, then UN Special Rapporteur on human rights and counter-terrorisms, has highlighted the strength of the evidence revealing that between June 2004 and June 2008 remotely piloted aircraft strikes in the Federally Administered Tribal Areas were conducted with the active consent and approval of senior members of the Pakistani military and intelligence service, and with at least the acquiescence and, in some instances, the active approval of senior government figures.¹⁰³³ Since the

Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (13 September 2013) UN General Assembly, UN Doc A/68/382, Para 82.

¹⁰²⁹ *Report on Aggression and the Use of Force* (Use of Force Committee, International Law Association, 2018) a, p. 18 < <https://t.co/aVWm38hjOV> > ; International Law Association (draft) (n 1028)

¹⁰³⁰ *Report on Aggression and the Use of Force* (Use of Force Committee, International Law Association, 2018) 18 < <https://t.co/aVWm38hjOV> > accessed 30 October 2017

¹⁰³¹ Ago (n 1011)

¹⁰³² Tim Lister, 'WikiLeaks: Pakistan quietly approved drone attacks, U.S. special units' *CNN* (2 Dec 2010) < <http://edition.cnn.com/2010/US/12/01/wikileaks.pakistan.drones/> > accessed 3 August 2016; The Express Tribune, 'Wikileaks: Kayani wanted more drone strikes in Pakistan' (20 May 2011) < <http://tribune.com.pk/story/172531/wikileaks-kayani-wanted-more-drone-strikes/> > accessed 3 August 2016; Amanda Hodge, 'Pakistan allowing CIA to use airbase for drone strikes' *The Australian* (19 Feb 2009) < <http://www.theaustralian.com.au/archive/news/pakistan-permits-cia-base-for-strikes/story-e6frg6t6-1111118893683> > accessed 3 August 2016

¹⁰³³ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/68/389, (18 Sep 2013), Para 52 < http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_68_389.pdf > accessed 3 August 2016

consent was not public the territorial scope of the consent as well as the groups included in the agreement, is unknown. In the *Armed Activities* case, the ICJ established that the consent to use force in territory is not 'open-ended' and 'the parameters of that consent, in terms of geographic location and objectives, would have remained thus restricted'.¹⁰³⁴ It further acknowledged that consent could be withdrawn at any time without following specific formalities.¹⁰³⁵ According to the ICJ's jurisprudence, the US did not have blanket permission to use drones in Pakistan. Any use of armed force outside the scope of the consent provided by the Pakistani authorities would constitute an act of aggression and violation of Pakistan's sovereignty as given in Art 2(4) of the UN Charter.

Some evidence suggests that the consent provided by Pakistani authorities, when existent, was not always open-ended. General Musharraf admitted that Pakistan consented to drones but he emphasised that Pakistan gave permission 'only on a few occasions, when a target was absolutely isolated and [there was] no chance of collateral damage'.¹⁰³⁶ This remarks may have legal implications on the categorisation of strikes carried out during his tenure but not the strikes that occurred after Musharraf stood down in 2008. Following the raid that ended with the life of Bin Laden, the relationship between the US and Pakistan has fluctuated over time. It remains uncertain whether the drone strikes conducted by the Obama administration were carried out with Pakistan's consent. Various events may suggest the explicit rescinding of consent.¹⁰³⁷ According to Ben Emerson:

Officials stated that reports of continuing tacit consent by Pakistan to the use of drones on its territory by any other State are false, and confirmed that a thorough search of Government records had revealed no indication of such consent having been given. Officials also pointed

¹⁰³⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005, Para 52

¹⁰³⁵ *Ibid*, Para 51 and 52

¹⁰³⁶ Jon Boone and Peter Beaumont, 'Pervez Musharraf admits permitting 'a few' US drone strikes in Pakistan' *The Guardian* (12 April 2013) <

<https://www.theguardian.com/world/2013/apr/12/musharraf-admits-permitting-drone-strikes> >

accessed 3 August 2014

¹⁰³⁷ Qasim Nauman 'Pakistan Condemns US Drone Strikes' *Reuters* (4 June 2012)

<www.reuters.com/article/2012/06/04/us-pakistan-usa-drones-idUSBRE8530MS20120604>

accessed 3 August 2016

to public statements by Pakistan at the United Nations emphasizing this position and calling for an immediate end to the use of drones by any other State on the territory of Pakistan.¹⁰³⁸

In 2011, Pakistan decided to remove US presence from the Shamsi airbase from which drones had been flown.¹⁰³⁹ Later in 2013, the Pakistani Parliament unanimously passed a resolution against drone strikes.¹⁰⁴⁰ The withdrawal of consent was obvious when Nawaz Sharif came into power in 2013 and called for an end to the US drone strikes in Pakistan, confirming this position before the UNSC.¹⁰⁴¹ According to reports the US has long tried to expand its drone operations to Quetta, the capital of Baluchistan province but Pakistan categorically denied any expansion of drone strikes beyond tribal areas.¹⁰⁴² In 2016, the US targeted Afghan Taliban leader in Baluchistan¹⁰⁴³ and received open condemnation by both civilian and military leadership. This particular strike suggests that the US has carried out strikes without Pakistan's consent. Pakistan's case is primarily complex due to the controversial civil-military relationship and balance of power. Democracy is weak in Pakistan and the military retains control over security, foreign policy and strategic issues. It has been suggested that, in this context, the consent of the Chief of Army would override governmental formal opposition.¹⁰⁴⁴ According to some sources, the military has been making decisions on US drone strikes. For instance, it has been reported that the CIA used to send fax to Pakistan's ISI outlining broad areas where the US intended to conduct strikes with drone aircrafts, but there

¹⁰³⁸ Statement of the Special Rapporteur following meetings in Pakistan < <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13146&LangID=E#sthash.CKovbsCo.dpuf> > accessed 3 August 2016

¹⁰³⁹ Saeed Shah, 'Pakistan Orders US to Leave Airbase in Row Over Deadly NATO Assault' *The Guardian* (27 November 2011) < www.theguardian.com/world/2011/nov/27/pakistan-orders-us-leave-shamsi-airbase > accessed 3 August 2016

¹⁰⁴⁰ Dawn News, 'NA unanimously passes resolution against US drone strikes' (10 December 2013) < <https://www.dawn.com/news/1061704> >

¹⁰⁴¹ BBC News, 'Pakistan PM Nawaz Sharif urges end to US drone strikes' (5 June 2013) < <http://www.bbc.co.uk/news/world-asia-22779669> > accessed 3 August 2016

¹⁰⁴² The Express Tribune, 'Pakistan rejects expansion of US drone campaign' (21 Nov 2010) < <http://tribune.com.pk/story/79256/drone-operations-expansion-will-not-be-allowed-fo/> > accessed 3 August 2016

¹⁰⁴³ Baqir Sajjad Syed, 'US strike crosses 'red line' on Baluchistan' *Dawn* (23 May 2016) < [http://www.dawn.com/news/1260044/us-strike-crosses-red-line-on-balochistan?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+dawn-news+\(Dawn+News\)](http://www.dawn.com/news/1260044/us-strike-crosses-red-line-on-balochistan?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+dawn-news+(Dawn+News)) > accessed 3 August 2016

¹⁰⁴⁴ Sean D Murphy, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan' (2009) *International Legal Studies* 109, 119

is no evidence on whether the US also consulted the Pakistani civilian government.¹⁰⁴⁵ As explained above, this raises complicated issues in terms of validity of the consent provided by institutional arms of the state beyond the head of states, heads of governments or foreign affairs ministers.

4.5.3 Limitations of consent

The Article 20 of Draft Articles on State Responsibility favours a narrow interpretation of the scope of consent and precludes the wrongfulness of an act when it remains within the limits of the assent provided.¹⁰⁴⁶ An action that violates the conditions and parameters of the consent is unlawful.¹⁰⁴⁷ Some IHL and IHRL are not subject to consent.¹⁰⁴⁸ Larson and Malamud have emphasised this point:

If Pakistan has consented to the drone strikes, then the United States and Pakistan must still ensure the legality of the strike. A finding that the cross-border incursion is 'legal' does not relieve States from their obligations to follow the Law of War.¹⁰⁴⁹

Similarly, Schmitt has asserted that:

the [host] state may only grant consent to operations that it could itself legally conduct....and cannot lawfully allow attacks that would violate applicable human rights or humanitarian law norms, since it does not itself enjoy such authority.¹⁰⁵⁰

In a similar vein Alston explains the consenting state is under the positive obligation to ensure that the targeting state uses force lawfully within the parameters of international law.¹⁰⁵¹ If a third state violates IHL or IHRL the

¹⁰⁴⁵ Adam Entous and others, 'U.S. Unease Over Drone Strikes' *The Wall Street Journal* (26 Sep 2012) < <http://www.wsj.com/articles/SB10000872396390444100404577641520858011452> > accessed 3 August 2016

¹⁰⁴⁶ Byrne (n 1013) 110

¹⁰⁴⁷ General Assembly Resolution 3314 (XXIX) Definition of Aggression (1974), Art 3(e)

¹⁰⁴⁸ Heyns (n 1028) Para 38

¹⁰⁴⁹ Kurt Larson and Zachary Malamud, 'The United States, Pakistan, the Law of War and the Legality of the Drone Attacks' (2011) *Journal of International Business and Law* 1, 13

¹⁰⁵⁰ Michael N Schmitt, 'Drone Attacks under the Jus as Bellum and Jus in Bello: Clearing the "Fog of Law"' (2010) *Yearbook of International Humanitarian Law* 311, 315

¹⁰⁵¹ Paul Alston, 'Study on Targeted Killings' (2010) Human Rights Council, UN Doc A/HRC/14/24/Add.6, Para 30-33

host state should 'seek prosecution of the offenders and compensation of the victims'.¹⁰⁵²

Mary O'Connell argues along the same line:

even where the US is using drones on the basis of consent from the [host] state, that state may not consent to use military force on its own, against its own people, except when it is engaged in armed conflict hostilities.¹⁰⁵³

In brief, even where a state consents to the use of armed force within its territory, it must guarantee the compliance with international law.

To summarise, there is enough evidence revealing the existence of consent to US drones by successive Pakistani governments, although its scope remains uncertain due to its secrecy. It is also clear that the Nawaz Sharif's government withdrew such consent and succeeding government has maintained this policy. Nonetheless, the US has continued to carry out drone strikes, meaning that, at least since 2013, the US has been employing drones without Pakistan's consent. In the absence of consent the US can only legally use drones against non-state actors in self-defence providing they pose imminent threat to the US.

The case study of Pakistan illuminates the inherent flaws in this doctrine. It shows that the powerful states are in a position to get consent by exploiting unstable governments. The US relied on secret consent from a corrupt government and military officials. For instance, in Pakistan the US has obtained consent by sending the Pakistani intelligence officials faxes about drone strikes.¹⁰⁵⁴ In Yemen the validity of consent is also controversial because, the US relies on consent of President Hadi who overstayed his term in office, resigned once and even fled to Saudi Arabia for six months in 2015.¹⁰⁵⁵ Secret consent is legal but morally and politically questionable. It generates a culture of impunity and shields the targeting state agents from prosecution for human rights abuses. International law allows one state to

¹⁰⁵² *ibid* Para 37-38

¹⁰⁵³ Mary Ellen O'Connell, 'Remarks: The Resort to Drones under International Law' (2011) *Denver Journal of International Law & Policy* 585, 597

¹⁰⁵⁴ Dawn News, 'CIA sends ISI monthly faxes about drone attacks: WSJ' (27 Sep 2012) < <https://www.dawn.com/news/752400> > accessed 29 October 2017

¹⁰⁵⁵ Joe Dyke, 'Is the Saudi war on Yemen legal' *IRIN* (3 April 2015) < <http://www.irinnews.org/analysis/2015/04/03/saudi-war-yemen-legal> > 29 October 2017

accept another states consent at face value, targeting state is not obliged to ensure that the consenting state is not violating its domestic and international obligations.¹⁰⁵⁶ Consent also enables targeted state to make shoddy secret deals with a foreign state and escape domestic backlash by publicly condemning the strikes. Specifics of consent are important and should not generally be kept secret because, 'states can make their consent conditional on certain criteria'.¹⁰⁵⁷The details of consent may also reveal targeted states involvement in unlawful act contrary to its own legal obligations.¹⁰⁵⁸ The legitimacy of consent has been especially controversial in states who have weak civilian institutions or who are engulfed in a civil war. Consent could allow targeted state to circumvent its own domestic laws by authorising the targeting to do something it could not do explicitly.¹⁰⁵⁹ These problems could be addressed if states are transparent and willing to provide the following details:

- Who communicated consent to the US drone strike?
- When was consent withdrawn?
- What is the scope of consent given by targeted state to targeting state?
For example how long it can conduct drone strike and in which part of the country?
- What does the consent allow and according to what law (domestic and international)?

The US also justifies its drone strikes in Pakistan under unwilling and unable doctrine. Arguably, 'the very concept of 'unable and unwilling' calls into question the legal framework surrounding the law of self-defence and consent'.¹⁰⁶⁰ For instance if a state does not consent or withdraws its consent, the targeting state would use force by arguing that the state was unwilling to

¹⁰⁵⁶ Ashley Deeks, Targeting Non-Al Qaeda members in Yemen(?): The role of consent (*Lawfare*, 15 May 2014) < <https://www.lawfareblog.com/targeting-non-al-qaeda-members-yemen-role-consent> >

¹⁰⁵⁷ Alex Moorehead, 'Yemen's consent for U.S. counterterrorism operations: Questions for the Trump Administration' (*Just Security*, 9 Feb 2017) < <https://www.justsecurity.org/37530/yemens-consent-u-s-counterterrorism-operations-questions-trump-administration/> >

¹⁰⁵⁸ Under international law the consent of targeted state becomes invalid if it consents to unlawful actions by the targeting state. See Art 46 Vienna Convention on the law of treaties (with annex) Concluded at Vienna on 23 May 1969; Articles 16 and 41 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001

¹⁰⁵⁹ Deeks (n 1056)

¹⁰⁶⁰ Moorehead (n 1057)

address the perceived threat. The following section will examine the credibility of this claim.

4.6 Unable or unwilling

For the purpose of this thesis, we adopt a working definition of the 'unable and unwilling' doctrine provided by Daniel Bethlehem, is adopted: A state:

may not take armed action in self-defence against a non-state actor in the territory or within the jurisdiction of another state without the consent of that state [unless] there is a reasonable and objective basis for concluding that the third state is unwilling [or is unable] to effectively restrain the armed activities of the non-state actor such as to leave the state that has a necessity to act in self-defence with no other reasonably available effective means to address an imminent or actual armed attack.¹⁰⁶¹

The doctrine has been summarised by Ashley Deeks as follows:

[I]t is lawful for State X, which has suffered an armed attack by an insurgent or terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat.¹⁰⁶²

The US drone strikes in Pakistan, the killing of Osama bin Laden by US forces in the territory of Pakistan¹⁰⁶³ the bombing campaign of the United States against ISIS in Syrian territory,¹⁰⁶⁴ and the August 2015 drone strike of the

¹⁰⁶¹ Daniel Bethlehem, 'Principles relevant to the scope of a state's right of self-defense against an imminent or actual armed attacks by non-state actors' (2012) *The American Journal of International Law*, 7, para 10-12

¹⁰⁶² Ashley S. Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense' (2012) *Va. J. Int'l L.* 483, 486

¹⁰⁶³ Stephen M. Pezzi, 'The Legality of Killing Osama bin Laden' (*Harvard Law School National Security Journal*, 16 May 2011) < <http://harvardnsj.org/2011/05/the-legality-of-killing-osama-bin-laden/> > accessed 5 August 2016

¹⁰⁶⁴ The US claims that self-defence applies because 'the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself' see Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, United Nations Security Council, S/2014/695 < http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf > accessed 5 August 2016

United Kingdom against two British citizens in Syria¹⁰⁶⁵, are examples of relatively clear and direct invocation of the principle to justify the use of force. A state under imminent or actual attack, can use force against another state legally responsible for the armed attack carried out by a non-state actor. This qualifies as an act of aggression where non-state actors are sent by or act on behalf of the State.¹⁰⁶⁶ The ICJ confirmed this position in the Nicaragua case:

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'.¹⁰⁶⁷

The position appears to be equally clear where the victim state secures the consent of the host state prior to using force within its territory.¹⁰⁶⁸ This

¹⁰⁶⁵ Harriet Moynihan, 'UK Drone Strike on ISIS Raises Legal Questions' (*Chatham House*, 15 Sep 2015) < <https://www.chathamhouse.org/expert/comment/uk-drone-strike-isis-raises-legal-questions> > accessed 5 August 2016

¹⁰⁶⁶ Art 3 (g), UN General Assembly, 3314 (XXIX) Definition of Aggression, A/RES/29/3314, 14 December 19

¹⁰⁶⁷ Nicaragua case (n 663) Para 195; Gray (n 1017) 199

¹⁰⁶⁸ Deeks (n 1062) 492; US use of armed drones in Yemen and Somalia with the consent of the states see A. Warren, I. Bode, *Governing the Use-of-Force in International Relations: The Post 9/11 US Challenge on International Law* (Palgrave Macmillan 2014), (Governmental consent to drone strikes became certain with President Hadi but previous Yemeni President Saleh has also consented for US drone strikes); Human Rights Watch, 'A Wedding That Became a Funeral US Drone Attack on Marriage Procession in Yemen' (Feb 2014) 6 <

https://www.hrw.org/sites/default/files/reports/yemen0214_ForUpload_0.pdf > accessed 5 August 2016 ("[current]Yemeni official said that, "There is coordination between the Yemeni and the US governments, but we don't really know how things are processed on the American side. This is an area that has to be addressed"); According WikiLeaks cables Yemeni President Saleh has given the US an 'open door on terrorism', pledging 'unfettered access to Yemen's national territory for US counterterrorism operations' see US Embassy Cables: 'Bomb Al-Qaida Where You Want, Yemen Tells US, but Don't Blame Us if They

Strike Again' *The Guardian* (4 December 2010) < <https://www.theguardian.com/world/us-embassy-cables-documents/225085> > accessed 5 August 2015; Somali President Mohamed stated that: 'The US has a right to bombard terrorist suspects who attacked its embassies in Kenya and Tanzania' see 'US Somali Air Strikes "Kill Many"' *BBC News* (9 Jan 2007) <

<http://news.bbc.co.uk/1/hi/world/africa/6243459.stm> > accessed 5 August 2016; Much more explicitly, Somali Defence Minister Abdihakim Haji Mohamud Fiqi stated that drone strikes were 'welcome[d] against al-Shabab' see Robert Young Pelton, 'Enter the Drones' (*Somalia Report*, 7 June

scenario becomes complicated when the host state is either unable or unwilling to stop the non-state actor to use its territory for violent purposes. Several commentators support the victim states right to use force in self-defence where the host state.¹⁰⁶⁹ While not the first to address the topic, Ashley Deeks was the first commentator to examine the unable and unwilling doctrine in detail in an essay published in 2012. Deeks identifies key principles and argues that before resorting to lethal force, the victim state should:

- i. prioritise consent or cooperation with the host state;
- ii. request the host state to address the threat within a reasonable time;
- iii. reasonably assess the host state's control and capacity in the target region;
- iv. reasonably assess the host state's means to suppress the threat and assess past dealings with the host.¹⁰⁷⁰

The requirement of necessity is relevant here because these measures are intended to ensure that force is only used if the host state has been given ample opportunity to deal with the threat before using force in its territory. Similarly, Dinstein identifies the parameters of the test as follows:

- I. The victim state must only use force in response to an armed, and not anticipatory;
- II. A repetition of the attack has to be expected;

2011) < http://somalireport.com/index.php/writer/139/Robert_Young_Pelton > accessed 5 August 2016

¹⁰⁶⁹ Claus Kreß, 'The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against 'IS' in Syria' (*Just Security*, 17 Feb 2015) < <https://www.justsecurity.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/> > accessed 5 August 2016; Deeks (n 1062); Bethlem (n 104); Heller argued that mainly Western legal scholars and states are developing, defending, and popularising the doctrine see Kevin Jon Heller, 'The Absence of Practice Supporting the "Unwilling or Unable" Test', (*Opinio juris*, 17 Feb 2015) < <http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/> > accessed 5 August 2016; Yoram Dinstein, *War, Aggression and Self-Defence*, (Cambridge University Press, 5th ed, 2011), 272 ("Dinstein notes that the victim state is 'entitled' to use force where the host is 'unable or unwilling'"); Ivan Shearer, 'A Revival of the Just War Theory?' in Michael N Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, 2007) 15 ("Shearer describes the unable and unwilling doctrine as highly persuasive")

¹⁰⁷⁰ Deeks (n 1062) 490

- III. The victim state ‘must verify that ... [the host state] is either unable or unwilling to take the necessary action within its territory to remove the likelihood of such further attacks’;
- IV. The victim state must first seek the consent of the host state, unless such request would be futile *prima facie*; and
- V. The use of force must be the last resort, so that less intrusive remedies must first be undertaken.¹⁰⁷¹

Under these constraints, the unable and unwilling test looks reasonable and a useful addition to international law because it seeks to balance the rights of the victim state with the host states. The territorial sovereignty of the host state will only be violated if it is unable or unwilling to deal with the threat. Moreover, international law obliges states not to aid or abet terrorists.¹⁰⁷² The Friendly Relations Declaration provides that states are required to:

Refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.¹⁰⁷³

Under these circumstances, other commentators have justified the extraterritorial use of force against non-state actors. For instance, Stahn has maintained that state sovereignty is compatible with the use of force against a host state who is unable or unwilling to act.¹⁰⁷⁴ Similarly, Sofaer argues that a host state breaches its obligations under international law when it fails to prevent attacks emanating from its territory; in that situation the victim state has ‘no option for ending the threat ... short of violating in some manner the territorial integrity of the State that has violated its own international

¹⁰⁷¹ Dinstein (n 1069) 275

¹⁰⁷² Corfu Channel Case (Merits) [1949] ICJ Rep 4, para, 22 (In the Corfu Channel case, the ICJ noted that states are under an ‘obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’)

¹⁰⁷³ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV), 25th sess, 1883rd mtg, UN Doc A/Res/2625 (24 October 1970)

¹⁰⁷⁴ Carsten Stahn, ‘Terrorist Acts as “Armed Attack”’: The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism’ (2003) *The Fletcher Forum of World Affairs*, 47

responsibilities'.¹⁰⁷⁵ However, this approach is at odds with Art 2(4) of the UN Charter. The Art 2(4) expressly prohibits the use of force and does not support forcible action against a state 'where the non-state actors are not an organ of the state, but where the host state has failed to comply with its customary law obligations'.¹⁰⁷⁶ Cassese has argued that, even if state has failed to prevent an attack from its territory, if the attack is not 'the State's act...there can be no question of a forcible response to it'.¹⁰⁷⁷

Some commentators argue that a restrictive reading of Art 2(4) justify the 'unable and unwilling' test. For instance, according to Shearer, Art 2(4) only prohibits the use of force against the 'territorial integrity or political independence of any state', and force used to counter 'a manifest illegality or injustice', is justified.¹⁰⁷⁸ Such loose interpretation of Art 2(4) remains controversial because it undermines other core articles of the Charter.¹⁰⁷⁹ Dinstein has explained that the phrase 'territorial integrity or political independence' were added for emphasis, not for the purpose of restricting the prohibition.¹⁰⁸⁰

Deeks, a staunch advocate of unable and unwilling doctrine, relies on neutrality law to defend it.¹⁰⁸¹ Neutrality law obliges 'neutral state to ensure that belligerents do not violate its territory. If the neutral state is unable or unwilling to prevent violations of its neutrality by a belligerent, then the other belligerent is entitled to use force on the neutral state's territory.'¹⁰⁸² The major problem in Deeks reliance on neutrality law is that the laws on neutrality

¹⁰⁷⁵ Abraham D Sofaer, 'Terrorism, the Law, and the National Defense' (1989) *Military Law Review* 89, 106-107

¹⁰⁷⁶ Gareth D Williams, 'Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the 'Unwilling or Unable' Test' (2013) < <http://www.austlii.edu.au/au/journals/UNSWLJ/2013/25.html> >accessed at 2 Dec 2017

¹⁰⁷⁷ Antonio Cassese, 'The International Community's "Legal" Response to Terrorism' (1989) *International and Comparative Law Quarterly* 589, 597

¹⁰⁷⁸ Ivan Shearer, 'A Revival of the Just War Theory?' in Michael N Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, 2007), 10-11

¹⁰⁷⁹ Article 1(1) of the UN Charter provides that the purpose of the United Nations is to maintain international peace and security, to suppress acts of aggression, and to bring about the settlement of disputes which might lead to a breach of the peace. Article 2(3) provides that members must settle their disputes by peaceful means.

¹⁰⁸⁰ Dinstein (n 1069) 90 quoted in Gareth D William, 'Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the 'Unwilling or Unable' Test' (2013) < <http://www.austlii.edu.au/au/journals/UNSWLJ/2013/25.html>

¹⁰⁸¹ Deeks (n 1062) 495

¹⁰⁸² Williams (n 1076)

only apply to international armed conflicts between belligerent states.¹⁰⁸³ As a consequence, it could be argued that neutrality laws provide little or no legitimacy to the 'unwilling or unable' doctrine.¹⁰⁸⁴

The unable or unwilling doctrine may lead to abuses by strong states, Dawood Ahmed has shown how, in the vast majority of cases, there is an obvious imbalance of power between the state initiating and the state being subjected to the use of force.¹⁰⁸⁵ Tzouwala has argued that, in virtually all cases, the state deemed 'unwilling or unable' is a state of the Global South, strengthening the view that the doctrine is biased.¹⁰⁸⁶ Certainly, there are few cases in which non-western states have also invoked the unable or unwilling doctrine, but even in these cases a weaker territorial state is targeted.¹⁰⁸⁷

Additionally, it is important to note that, to date, the UNSC has not endorsed the 'unwilling or unable' test. Following the 9/11 attacks, the Security Council passed Resolution 1373. Its preamble reads:

The need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts¹⁰⁸⁸

McDonnell has interpreted the Resolution as not allowing the use of force against non-state actors in states that breach the resolution. It simply

¹⁰⁸³ Ntina Tzouvala, 'TWAII and the "Unwilling or Unable" Doctrine: Continuities and Ruptures' (2016) 5

¹⁰⁸⁴ Kevin Jon Heller, 'Ashley Deeks' Problematic Defense of the "Unwilling or Unable" Test' (*Opinio Juris*, 15 Dec 2011) < <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> > accessed 6 August 2016

¹⁰⁸⁵ Ahmed Dawood, 'Defending Weak States against the "Unwilling or Unable" Doctrine of Self-Defense' (2013) *J. INT'L L. & INT'L REL.* 1, 18

¹⁰⁸⁶ Tzouvala (n 1079) 2; Kevin J. Heller, 'The Seemingly Inexorable March of "Unwilling or Unable" through the Academy', (*Opinio Juris*, 6 March 2015) (Heller also pointed that its mainly Western scholars that are defending this doctrine) Israeli invasion of Lebanon See Yaroslav Shiryayev, 'The Right of Armed Self-Defence in International Law and Self-Defence Arguments Used in the Second Lebanon War' (2008) 3 *ACTA SOCIETATIS MARTENSIS* 80; US drone strikes in Pakistan Yemen and Somalia, See David Cortright, Rachel Fairhurst and Kristen Wall, *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press 2015) 103; Robert Mandel, *Coercing Compliance: State-Initiated Brute Force in Today's World* (Stanford University Press 2015) 38 (US argues that it targets non-state actors in these states because states are unable or unwilling to deal effectively with the threat)

¹⁰⁸⁷ Turkey's invasion of Northern Iraq, See Sebnem Arsu & Stephen Farrell, 'Turkey Says Its Raids in Iraq Killed 150 Rebels', *New York Times* (26 Dec 2007), < <http://www.nytimes.com/2007/12/26/world/europe/26turkey.htm> > accessed at 6 August 2016; Ethiopia against Somalia, See Getachew Metaferia, *Ethiopia and the United States: History, Diplomacy, and Analysis* (Algora publishing 2009) 140; Russia against Georgia See Theresa Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defence Post-9/11' (2011) *American journal of International law* 244, 255-57

¹⁰⁸⁸ SC Res 1373, UN Doc S/Res/1373 (28 September 2001)

condemns the attack and states that any force must be used 'in accordance with the Charter'.¹⁰⁸⁹ In other words, it is possible to interpret Resolution 1373 as not adding anything to the international normative framework regulating the use of armed force.

There is not enough state practice to assert that the unable or unwilling doctrine has become part of customary international law. In response to the terrorist bombing of US embassies in Nairobi and Dares-Salaam, the US launched attacks against Al-Qaeda training camps in Afghanistan and bombed suspected chemical plant in Sudan, in 1998. The US relied on Art 51 of UN Charter to justify aerial strikes and made no reference to the 'unwilling or unable' test.¹⁰⁹⁰ The reaction from states was mixed. Most Western states and US allies including UK, Germany, Israel and New Zealand supported the action. France and Italy showed moderate acceptance. Iran, Russia, Pakistan, Iraq and China condemned the action.¹⁰⁹¹ Turkey has used force against PKK militants operating in northern Iraq on numerous occasions.¹⁰⁹² Turkey justified its actions by explaining that the Iraqi government was unable to prevent PKK attacks to Turkey from Northern Iraq; this rationale is close to the unable and unwilling doctrine.¹⁰⁹³ Turkey's unilateral action was criticised by Iraq¹⁰⁹⁴, the

¹⁰⁸⁹ Thomas Michael McDonnell, 'Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists' (2012) 44 *George Washington International Law Review* 243, 268–9

¹⁰⁹⁰ Michael N Schmitt, 'Responding to Transnational Terrorism under the Jus ad Bellum: A Normative Framework' in Michael N Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff 2007) 164; UN Doc S/1998/780, 20 August 1998 (US)

¹⁰⁹¹ Tom Ruys, *Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press 2010) 426–427

¹⁰⁹² Christine Gray and Simon Olleson, 'The Limits of the Law on the Use of Force: Turkey, Iraq and the Kurds' (2001) *Finnish Yearbook of International Law* 355, 357–91

¹⁰⁹³ As Iraq has not been able to exercise its authority over the northern part of its country since 1991 for reasons well known, Turkey cannot ask the Government of Iraq to fulfil its obligation, under international law, to prevent the use of its territory for the staging of terrorist acts against Turkey. Under these circumstances, Turkey's resorting to legitimate measures which are imperative to its own security cannot be regarded as violation of Iraq's sovereignty. No country could be expected to stand idle when its own territorial integrity is incessantly threatened by blatant cross-border attacks of a terrorist organization based and operating from a neighbouring country, if that country is unable to put an end to such attacks. The recent operations of limited time and scope were carried out within this framework" See UN Doc S/1995/605 (24 July 1995); Ruys (n 1087) 430 at foot note 343

¹⁰⁹⁴ Iraq has persistently objected to Turkey's actions, claiming that they are in breach of international law, See Abdul Amir A Al-Anbari, Letter Dated 13 October 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, UN Doc S/23141 (14 October 1991); Abdul Amir A Al-Anbari, Letter Dated 16 October 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, UN Doc S/23152 (17 October 1991); Gray (n 671) 143

Arab League and the Non-Aligned Movement.¹⁰⁹⁵ In 2002, Russia explicitly justified the use of force against Georgian-based Chechen rebels by reference to the 'unwilling or unable' test.¹⁰⁹⁶ The US White House spokesman, Ari Fleischer, condemned Russian actions. He stated that:

United States is deeply concerned about credible reports that Russian military aircraft indiscriminately bombed villages in northern Georgia on August 23, resulting in the killing of civilians ...The United States... deplores the violation of Georgia's sovereignty.¹⁰⁹⁷

Therefore, the US did not accept Russia's use of force in the based on the unable and unwilling doctrine. Its reluctance in justifying Operation Neptune Spear on the grounds of Pakistan's unwillingness to use force against Bin Laden suggests that even US is not convinced that the doctrine is legitimate.¹⁰⁹⁸ State practice can only become customary law if it is constantly and uniformly applied by relevant states.¹⁰⁹⁹ The mixed reaction of the international community to different use of armed force explained by the 'unable or unwilling' doctrine reveals that it has not gained the status of customary international law.¹¹⁰⁰ Heller has stressed that, 'there is no

¹⁰⁹⁵ Gray *ibid*, 142; Nizar Hamdoon, Identical Letters Dated 14 June 1997 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General and to the President of the Security Council UN Doc S/1997/461 (16 June 1997)

¹⁰⁹⁶ "The Chechen Republic where international terrorist organisations....has for a long time remained a source of extremism and terrorism in our country's territory. The continued existence in separate parts of the world territorial enclaves outside the control of national governments, which, owing to the most diverse circumstances, are unable or unwilling to counteract the terrorist threat is one of the reasons that complicate efforts to combat terrorism effectively....." See UN Doc S/2002/1012; Gray *ibid*, 230

¹⁰⁹⁷ White House Press Release, August 24, 2002, Russian Bombing of Georgia < <http://2001-2009.state.gov/p/eur/rls/prsr/2002/13002.htm> > accessed 6 August 2016

¹⁰⁹⁸ Williams (n 1076) 637

¹⁰⁹⁹ Asylum Case (Colombia v Peru) (Judgment) [1950] ICJ Rep 266, 276–7 (ICJ held that customary law requires the 'constant and uniform usage ... by the States in question')

¹¹⁰⁰ Jordan, Bahrain, Qatar, and the UAE rejected Turkey's repose to PKK. They stated "We strongly condemn the repeated actions of Turkish armed forces violating the territorial integrity of Iraq under the pretext of fighting guerrilla elements hiding inside Iraqi territory. ... We also reject the so-called 'hot pursuit' measures adopted by Turkey to justify such actions that are abhorrent to international law and to the norms of practice amongst States" See Ruys (n 1087) 431; Arab League formally rejected the "unwilling or unable" test in the context of Israel's attacks on Hezbollah in Lebanon See Ruys (n 1087) 453; Presentation of the Arab League, (13 Sep 2012) < <http://www.arableagueonline.org/hello-world/#more-1> > accessed at 6 August 2016 (Jordan, Bahrain, Qatar and UAE rejected unable and unwilling doctrine after 9/11 as well because they were members of Arab League) ; Heller concluded that: "US and UK clearly support the "unwilling or unable" test; Jordan, Bahrain, Qatar, and the UAE are likely basing their willingness to attack ISIS in Syria on Syrian consent; Iraq has a completely opportunistic approach to the "unwilling or unable" test; and France, Denmark, and Belgium seem to reject the test, even if they have not done so

‘consistent practice’ that supports the ‘unwilling or unable’ test, and scholars need to be careful not to put states in the ‘unwilling or unable’ camp simply because they are willing to use armed force against a non-state actor’.¹¹⁰¹

However, it would be disingenuous to ignore the evolution of international law and international relations in the face of global terrorism. However, it remains uncertain whether the ‘unwilling or unable’ will become a settled customary rule in future. There is a possibility that ‘the world reaction to the conflict against ISIS in Syria will help resolve the uncertain status of the unwilling or unable standard for force against non-state actors in third-party territory’.¹¹⁰² In any case, the burden of proof lays on the side claiming the existence of new customary law, that is, on those defending the unwilling or unable doctrine. They must show sufficient state practice and *opinio juris* to establish that states can use force against other states even if states are not responsible for the actions of non-state actors.¹¹⁰³

It has been argued that the ‘effective control’ test established by the ICJ does not reflect current customary law, but some level of attribution, akin to aiding and abetting is necessary.¹¹⁰⁴ In order to rely on the unable and unwilling doctrine as legal basis for targeted killing in Pakistan, the US needs to prove that Pakistan is supporting or controlling terrorist in its territory who pose an imminent threat to the US. Further, the US would also need to establish that it is necessary to use force against these individuals in FATA. As discussed in previous chapters necessity is linked with immediacy, which means the US can only legally use force against non-state actors in foreign state if they pose an imminent threat to the US. To date, the US has not provided any clear evidence that those targeted in FATA pose an imminent threat to it. As argued

explicitly” See Kevin Jon Heller, ‘Do Attacks on ISIS in Syria Justify the “Unwilling or Unable” Test?’ (*Opinio Juris*, 14 Dec 2014) < <http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/> > accessed at 6 August 2016

¹¹⁰¹ Kevin Jon Heller, ‘The Absence of Practice Supporting the “Unwilling or Unable” Test, (*Opinio Juris*, 17 Feb 2015) < <http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/> > accessed 5 July 2018

¹¹⁰² Jens David Ohlin, ‘The Unwilling or Unable Doctrine Comes to Life’ (*Opinio Juris*, 23 Sep 2014) < <file:///F:/Unable%20or%20Unwilling/Opinio%20Juris%20%C2%BB%20Blog%20Jens%20David%20The%20Unwilling%20or%20Unable%20Doctrine%20Comes%20to%20Life%20-%20Opinio%20Juris.html> > accessed 6 August 2016

¹¹⁰³ Heller (n 1097)

¹¹⁰⁴ Christian J. Tams, ‘The Use of Force against Terrorists’ (2009) *European Journal of International Law*, 385-388

above, the US is relying on the 'unable and unwilling' doctrine without justifying the core requirements. This demonstrates that 'powerful states continue to employ this ill-defined doctrine to forward their interests mostly at the detriment of the territorial integrity of other inevitably less powerful states'.¹¹⁰⁵ This blatant undermining of Art 2(4) may gradually lead to the erosion of sovereignty and the world order on which the UN Charter is based. In order to maintain such order, a possible solution could involve actions of the UNSC when the host state does not consent and is unable or unwilling to prevent the threat. This would give territorial state the opportunity to contest victim state's allegations; it would force weaker states to improve domestic security and would ultimately prevent unilateral abuses by powerful states.¹¹⁰⁶ The careful assessment of state consent and unable or unwilling doctrine shows that the US has weak legal justifications for using drones in tribal areas of Pakistan. Not all of the US drone strikes were illegal as reportedly some were carried out with state consent, those carried out without consent of Pakistan may have violated Art 2(4) of the UN Charter.

The mainstream debate focuses primarily on the legal issues related with US drone strikes in tribal areas of Pakistan, but remarkably little attention has been given to the problems associated with on-going pseudo-colonialism in the tribal areas of Pakistan. The violence exercised by the Pakistani state in FATA must be address to fully comprehend the US own actions. The US did not rely on drones to take out Bin Laden in Pakistan; they used Special Forces to kill him. It could be argued that drones were unsuitable because it was a kill/capture mission and drones do not give target any opportunity to surrender.¹¹⁰⁷ Another plausible explanation may be related to the geographic scope of the consent provided by Pakistan for drone strikes, restricted to tribal areas of Pakistan. It has been estimated that between 2004 and 2016, 72 percent of 392 strikes hit targets in North Waziristan, and 23 percent hit targets in South Waziristan.¹¹⁰⁸ Occasionally, the US extended the scope of

¹¹⁰⁵ Williams (n 1076)

¹¹⁰⁶ Dawood (n 1085) 23-30

¹¹⁰⁷ CNN, 'How U.S. forces killed Osama bin Laden' (3 May 2011) < <http://edition.cnn.com/2011/WORLD/asiapcf/05/02/bin.laden.raid/> > accessed 7 August 2016

¹¹⁰⁸ The Long War Journal, 'Charting the data for US airstrikes in Pakistan 2004 – 2016' < <http://www.longwarjournal.org/pakistan-strikes/> > accessed 7 August 2016

strikes and reportedly used drones in settled areas including the Hangu district (2013)¹¹⁰⁹ and Bannu (2008).¹¹¹⁰ These strikes, especially in Bannu, have been perceived by Pakistan as expanding the ‘theatre of drone warfare’ outside the tribal region, making them visible to the general public and subject to harsh criticism from citizens and the media.¹¹¹¹ Following the drone strike in Bannu, the then US Ambassador Anne W. Patterson issued this blunt (and secret) assessment:

Even politicians who have no love lost for a dead terrorist are concerned by strikes within what is considered mainland Pakistan. As the gap between private GOP acquiescence for U.S. action and public condemnation grows, Pakistani leaders who feel they look increasingly weak to their constituents could begin considering stronger action against the U.S....¹¹¹²

FATA is governed by rules and administrative arrangement that sets it apart from the rest of Pakistan, making its population vulnerable with limited or non-existent access to justice.¹¹¹³ The following section will argue that residents of FATA continue to be treated as pseudo-colonies six decades after the independence of Pakistan.

4.7 FATA state of exception

A major development during Raheel Sharif’s tenure was that Pakistan became the Fifth country in the World to develop its own armed drones.¹¹¹⁴ The Pakistani Army operations with drones have caused substantial collateral damage but, contrary to the hostile reaction to US drone operations, they have not been contested domestically. There is no condemnation of

¹¹⁰⁹ The Express Tribune, ‘Drone strike in Hangu kills 6, injures 8’ (21 Nov 2013) < <http://tribune.com.pk/story/634776/drone-attack-in-hangu-kills-eight-injures-three/> > accessed 7 August 2016

¹¹¹⁰ BBC News, ‘Pakistan protest to US ambassador’ (20 Nov 2008) < http://news.bbc.co.uk/1/hi/world/south_asia/7738966.stm > accessed 7 August 2016

¹¹¹¹ Baqir Syed, ‘US strike crosses ‘red line’ on Baluchistan’ *Dawn News* (23 May 2016) < <https://www.dawn.com/news/1260044> > accessed at 7 July 2018

¹¹¹² WikiLeaks, ‘REACTION TO ALLEGED DRONE ATTACKS IN BANNU’ (24 Nov 2008) < https://wikileaks.org/plusd/cables/08ISLAMABAD3677_a.html > accessed at 7 August 2016

¹¹¹³ Pakistan’s Tribal Areas: Appeasing the Militants, International Crisis Group, (2006) 3

¹¹¹⁴ The New American Foundation, ‘World of Drones: Military’ < <http://securitydata.newamerica.net/world-drones.html> > accessed at 31 July 2016

disproportionate or indiscriminate killing of people living in FATA.¹¹¹⁵ The military has cheerfully labelled drones 'force multiplier'.¹¹¹⁶ This suggests that much of the political controversy over drones in Pakistan derives more from the US violating its sovereignty than from the technology itself.

Referring to Israel, the US President, Obama, stated:

There's no country on earth that would tolerate missiles raining down on its citizens from outside its borders.¹¹¹⁷ The obvious does not apply to Pakistan, a country that has tolerated, and even expressly consented, to missiles raining down on its citizens from outside its borders. Pakistan has also become the first country whose military has used armed drones to eliminate militants in its territory.¹¹¹⁸ With the exception of the 23 May 2016 drone strikes in Baluchistan against Afghan Taliban chief Mullah Akhtar, the Pakistani-led drone strikes have been confined to FATA.¹¹¹⁹ Because there is evidence that militants are present in Baluchistan, in the US has repeatedly sought permission from Pakistan to use drones in this area, but Pakistan has refused any access to areas other than FATA.¹¹²⁰ The most obvious reason is that FATA is a semi-autonomous region provides sanctuaries to terrorists have serious repercussions for the Pakistan and global security.¹¹²¹ The extremism in FATA as it exists today did not develop overnight but has been shaped by

¹¹¹⁵ Charlie Mole, 'Pakistan military air strikes kill hundreds, including civilians, over past six months' (*The Bureau of investigative journalism*, 23 June 2014) < <https://www.thebureauinvestigates.com/2014/06/23/pakistan-military-air-strikes-kill-hundreds-including-civilians-over-past-six-months/> > accessed 31 July 2016

¹¹¹⁶ Salman Masood, 'Pakistan says its drones kill 3 militants' *The New York Times* (7 Sep 2015) < <http://www.nytimes.com/2015/09/08/world/asia/pakistan-drone-strike.html> > accessed 31 July 2016

¹¹¹⁷ Jennifer Lipman, 'Obama on Israel: 'No country on earth' would tolerate rockets' (18 Nov 2012) < <http://www.thejc.com/news/israel-news/91377/obama-israel-no-country-earth-would-tolerate-rockets> > Also see Video < <https://www.youtube.com/watch?v=m-L68WTDsik> > accessed 7 August 2016

¹¹¹⁸ Baqir Sajjad Sayed, 'Pakistan's home-made drone kills 3 terrorists in Shawal, (The Dawn, 8 Sep 2015) < <http://www.dawn.com/news/1205552> > accessed 7 August 2016

¹¹¹⁹ Baqir Sajjad Sayed, 'US strike crosses 'red line' on Balochistan, *The Dawn* (23 May 2016) < [http://www.dawn.com/news/1260044/us-strike-crosses-red-line-on-balochistan?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+dawn-news+\(Dawn+News\)](http://www.dawn.com/news/1260044/us-strike-crosses-red-line-on-balochistan?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+dawn-news+(Dawn+News)) > accessed 7 August 2016

¹¹²⁰ Usama Butt and N. Elahi, *Pakistan's Quagmire: Security, Strategy, and the Future of the Islamic-nuclear Nation* (Bloomsbury Academic 2010) 67-69; Declan Walsh, 'Strategic Baluchistan becomes a target in war against Taliban' *The Guardian* (21 Dec 2009) < <https://www.theguardian.com/world/2009/dec/21/us-taliban-balochistan-strategy-pakistan> > accessed 7 August 2016

¹¹²¹ V. G. Julie Rajan, *Al Qaeda's Global Crisis: The Islamic State, Takfir and the Genocide of Muslims* (Routledge 2015) 246-247

its colonial past and by draconian policies implemented by Pakistan. Therefore, any objective discussion about FATA necessitates not only understanding of the area, but also requires understanding how FATA became a lawless zone.

The tribal areas in the Northwest are in international limelight due to its continuing significance for the political situation in both Afghanistan and Pakistan. The flow of Afghan refugees in tribal areas of Pakistan during the Afghan-Soviet war has naturally connected this area to the war in Afghanistan. FATA received around 3 million refugees fleeing from Soviet military operations. Pakistan received financial aid from the US and Saudi Arabia to assist with the flow of refugees. This aid was channelled to Mullas in madrassas in FATA where Afghan Mujahedeen studied. In addition to this, Afghan Mujahedeen residing in FATA received arms from the US, Pakistan and Saudi Arabia.¹¹²² The porous border between Pakistan and Afghanistan allowed them to cross border with no hurdle. When Soviet forces withdrew, Afghanistan collapsed and civil wars broke out. The state of lawlessness in Afghanistan had a direct impact on FATA because a many Afghan mujahedeen who were residing in FATA introduced the culture of gun and the heroin trade in the territory.¹¹²³ A majority of Mujahedeen were trained and operated from tribal areas of Pakistan during the 1980s.¹¹²⁴ Various jihadi groups, Al-Qaeda and Taliban were formed and trained from FATA.¹¹²⁵ After the US invasion of Afghanistan, the Afghan Taliban, Al-Qaeda militants and local Pakistani militants took shelter in the tribal areas.¹¹²⁶ Pakistan's most dangerous militant group Tehrik-e-Taliban Pakistan (TTP) was officially formed in 2007 but its members got involved in an insurgency against US-NATO troops and against Pakistani army (in 2002) when General Musharraf sent Pakistani troops in Khyber Tribal agency for the first time in 55 years.¹¹²⁷

¹¹²² Samir Puri, *Pakistan's War on Terrorism: Strategies for Combating Jihadist Armed Groups since 9/11* (Routledge 2011)

¹¹²³ Susan S Wadley, *South Asia in the World: An Introduction* (Routledge 2014) 222

¹¹²⁴ Moeed Yusuf, *Pakistan's Counterterrorism Challenge* (Georgetown University Press 2014) 64

¹¹²⁵ Frank Clements, *Conflict in Afghanistan: A Historical Encyclopedia* (ABC-CLIO 2003) 14

¹¹²⁶ Paul B. Rich and Isabelle Duyvesteyn, *The Routledge Handbook of Insurgency and Counterinsurgency* (Routledge 2012) 229

¹¹²⁷ Brian Glyn Williams, *Predators: The CIA's Drone War on al Qaeda* (Potomac Books 2013) 44; Shabana Fayyaz, "Towards A Durable Peace in Waziristan", Brief No 10, (Bradford, Pakistan Security Research, 23 April

4.7.1 The state of governance in FATA from August 1947-May 2018

A lot of academic work has focused on the situation of marginalisation and vulnerability of indigenous peoples and minorities from different perspectives.¹¹²⁸ But no study among the many that exist on the use of drones has addressed the link between persons belonging to minorities and their consideration as legitimate targets.¹¹²⁹ This section will argue that the tribal areas in Pakistan have suffered specially from the consequences of the Afghan conflict due to its unique status. Pakistan became a sovereign state after 1947 but kept intact the special status of FATA under Articles 246-247 of its 1973 Constitution.¹¹³⁰ The area is a part of Pakistan but the state has no writ over it and it is governed by so called tribal customary law. As a result FATA continues to be governed by the 1901 Frontier Crimes Regulation 1901.¹¹³¹ This special status has turned FATA into something like a state of exception. Pakistan has never claimed full sovereignty over the tribal areas. According to Article 247 of the Constitution of Pakistan:

Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Majlis-e-Shoora (Parliament) by law otherwise provides. No Act of Majlis-e-Shoora (Parliament) shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs, and

2007) ("The first military operation by the army was conducted in a village in South Waziristan along the Durand Line in June 2002. The army...entered a village in the vicinity of Azam Warsak in the agency."); Farhat Taj, *Taliban and Anti-Taliban* (Cambridge Scholars Publishing, 2011) 87

¹¹²⁸ Cathal Doyle and Joshua Castellino, 'Who Are 'Indigenous Peoples? An Examination of Concepts Concerning Group Membership in the United Nations Declaration on the Rights of Indigenous Peoples' in Weller M. & J. Hohmann (eds.) *The UN Declaration on the Rights of Indigenous Peoples A Commentary* (Oxford: Oxford University Press, 2018); Cahal Doyle, *Indigenous Peoples, Title to territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge, 2014); Joshua Castellino (ed), *Global Minority Rights* (Routledge 2017).

¹¹²⁹ Pashtuns or Pakhtuns are described as minority or indigenous people of Pakistan by minority rights group international the report highlights the current problems of region mentions human rights violations by Taliban insurgents and Pakistani military operations but fails to mention human rights violations that occurred as a result of US drone strikes See Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples, Pakistan Pashtuns* < <https://minorityrights.org/minorities/pashtuns-2/> > accessed 2 November 2018

¹¹³⁰ Art 26 (a)(i) and (c) See THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN < <http://www.parliament.am/library/sahmanadrutyunner/pakistan.pdf> >

¹¹³¹ Federally Administered Tribal Areas, Administrative system < <https://fata.gov.pk/Global.php?ild=29&fid=2&pId=25&mId=13> > accessed at 7 August 2016

no Act of Majlis-e-Shoora (Parliament) or a Provincial Assembly shall apply to a Provincially Administered Tribal Area

The special legal status of the tribal areas has its root in British colonial rule. The British Empire governed FATA with coercion, bribery and regular armed intervention.¹¹³² Britain stationed troops in FATA and governed the area indirectly through political agents and tribal elders or Maliks.¹¹³³ The political agent is a senior bureaucrat who conducts judicial and administrative functions.¹¹³⁴ The political agent was the most powerful person in FATA. He grants tribal elders the status of Malik and may unilaterally cancel their status. Britain funded these agents generously without performing any audits.¹¹³⁵ A major share of these funds was allocated to Maliks who controlled their tribes either by bribery or force. Robert Bruce the Deputy Commissioner of Derajat Division in 1889-1890, selected the Maliks.¹¹³⁶ The main responsibility of Maliks was to follow the orders of British Empire and control local population and prevent them from rebelling against the British Empire, in the name of peace and tranquillity. Britain also introduced collective punishment; an entire tribe could face severe punishments if their leaders (Maliks) refused to obey British Empire's orders.¹¹³⁷ This included mass detention, seizure of property and forcibly cutting off that tribe from rest of the tribes.¹¹³⁸ The political agents operated under a draconian legal regime introduced by the British Empire in

¹¹³² Zahid Hussain, 'The Scorpion's Tail: The Relentless Rise of Islamic Militants in Pakistan', 16; Claude Rakisits, 'The evolution of Pakistan's Taliban', in Ashutosh Misra and Michael E Clarke, *Pakistan's stability paradox: Domestic, Regional International Dimensions* (Routledge 2013) 139

¹¹³³ Shaw, I.G.R., and Akhter, M. 'The unbearable humanness of drone warfare in FATA, Pakistan' (2012) *Antipode: A Radical Journal of Geography* 1490, 1495; Tanguay-Renaud, Francois, 'Post-Colonial Pluralism, Human Rights & (and) the Administration of Criminal Justice in the Federally Administered Tribal Areas of Pakistan' (2002) 6 *Sing. J. Int'l & Comp. L* 541, 548

¹¹³⁴ Ashtoush Mishra, 'Pakistan's triadic politics and chronic political instability: is democracy the panacea?' in Ashutosh Misra and Michael E Clarke, *Pakistan's stability paradox: Domestic, Regional International Dimensions* (Routledge 2013) 2

¹¹³⁵ Sayed Waqar Ali Shah, 'Political Reforms in the Federally Administered Tribal Areas of Pakistan (FATA): Will it End the Current Militancy?' (Jan 2012) *Heidelberg Papers in South Asian and Comparative Politics*, Working Paper No. 64, 3 <
http://archiv.ub.uniheidelberg.de/volltextserver/13063/1/Heidelberg_Papers_64_Ali_Shah.pdf >
accessed 7 August 2016

¹¹³⁶ Lal Baha, 'N-WFP Administration Under British Rule 1901-1919' (Islamabad, National Commission on Historical and Cultural Research 1978) 34

¹¹³⁷ Shah (n 1135) 3

¹¹³⁸ C. Christine Fair and Sarah J. Watson, *Pakistan's Enduring Challenges*, (University of Pennsylvania Press, 2015), 85

1872 and known as the 1901 Frontier Crime Regulations or FCR.¹¹³⁹ The FCR establishes a system of limited government and special powers over tribal areas. The FCR, still in force today, deprives the tribes of social, political and economic rights recognised under IHRL and domestic legislation. While law is meant to protect the welfare of persons, the FCR only imposes obligations on people and fails to provide fundamental human right to citizens. In place of regular Pakistani law FATA is governed by FCR. Pakistan inherited the FCR at its foundation in 1947 and it still operates. The FCR was and remains a regressive legislation, designed to keep it a semi-autonomous region. FATA region has no police, courts or public services. Trials are conducted not in courts but in jirgas, law enforcement is not provided by police but by tribal militias.¹¹⁴⁰ The FCR has no provision for the physical and economic safety of the people. The lack of due process under FCR is of critical concern. There is no concept of independent judiciary. The political agent is the most influential person: he selects the members of the Jirga, but the recommendations of Jirga are non-binding on him and he is 'the ultimate authority and final arbiter to initiate trial, prosecute offenders, and award punishments'.¹¹⁴¹ Women and lawyer cannot appear before Jirga and, since independence, people of FATA are judged by a system that permits 'na wakil (no lawyer), na dalil (no argument) and na apil (no appeal)'.¹¹⁴² Justice Cornelius, in the case *Sumunder v State* (1954) labelled FCR proceedings as 'obnoxious to all recognised modern principles governing the dispensation of justice'.¹¹⁴³ The tribal administration is not obliged under FCR to audit its accounts and expenditures. Other than corrupt tribal leaders, the Pakistani army has become a permanent stakeholder in the FATA region. The Army and the government collectively handle funds allocated by the Pakistani

¹¹³⁹ Shah (n 1135) 4

¹¹⁴⁰ Fair and Watson (n 1138) 86

¹¹⁴¹ Ziad Haider, 'Mainstreaming Pakistan's Tribal Belt: A Human Rights and Security Imperative', (2009), Discussion paper #09-01, Belfer Center Student Paper Series, Harvard Kennedy School < <http://belfercenter.hks.harvard.edu/files/xstandard/Student%20discussion%20paper%200901.pdf> > accessed 7 August 2016

¹¹⁴² Ibid 7

¹¹⁴³ Hussain, "Testing FCR on the Touchstone of the Constitution," FCR: A Bad Law Nobody Can Defend, 59.

Federal government for the development of FATA. Both Army and tribal leaders have deprived the people of FATA of their basic rights.¹¹⁴⁴

The situation of citizens in FATA deteriorated when the Pakistani military got sweeping powers in the area under the action in aid civil power regulation 2011.¹¹⁴⁵ The new legislation that was passed in 2008 gave extra-judicial powers to the military. The Act authorises the military to detain terror suspects indefinitely during its operations in FATA and provincially administered areas.¹¹⁴⁶ In 2010, Amnesty International called FATA a 'human-rights-free zone' where four million tribesmen were trapped under brutal Taliban rule and abandoned by central government.¹¹⁴⁷ In 2012, Amnesty international's report highlighted numerous cases of torture and extrajudicial execution of tribal citizens where Pakistani armed forces acted in total impunity.¹¹⁴⁸

In this context, the US drone strikes and Pakistan's military operations against militants have resulted in the displacement of millions of people in FATA. In her report, Netta Crawford, has highlighted that: 'millions of Pakistanis have been on the move, attempting to escape violence since 2004. In 2009, more than 3 million Pakistanis were internally displaced in the northwest region of Pakistan, many staying in approximately 30 camps for internally displaced people'.¹¹⁴⁹ According to UNHCR's estimations, the operation Zarb-e-Azab which started in 2014 displaced about a million people only from North Waziristan.¹¹⁵⁰ After living in camps for months, on 31 March 2015, the first internally displaced persons (IDPs) were allowed to return to their area.

¹¹⁴⁴ Mazhar Ali Khan, 'Social, Political and Economic Implications of Frontier Crimes Regulation 1901, in FATA, Pakistan' (2014) Asian Journal of Social Sciences and Humanities, 255

¹¹⁴⁵ The Actions (in Aid of Civil Power) Regulation, 2011 < <http://www.isj.org.pk/the-actions-in-aid-of-civil-power-regulation-2011/#sthash.jBjckq.dpuf> > accessed at 20 Dec 2016

¹¹⁴⁶ Aqil Shah, *The Army and Democracy* (Harvard University Press 2014) 234

¹¹⁴⁷ Amnesty International, 'Pakistan: Millions suffering in 'human rights-free zone' in North-West of country' (10 June 2010) < <http://www.amnesty.org.uk/press-releases/pakistan-millions-suffering-human-rights-free-zone-north-west-country> > accessed 7 August 2016

¹¹⁴⁸ Amnesty International, 'The hands of cruelty' abuses by armed forces and Taliban in Pakistan's tribal Areas' (2012) < <https://www.amnesty.ch/de/laender/asien-pazifik/pakistan/dok/2012/im-nordwesten-regiert-hand-des-grauens/bericht-the-hands-of-cruelty-abuses-by-armed-forces-in-pakistans-tribal-areas--dezember-2012.-93-seiten> > available 7 August 2016

¹¹⁴⁹ Neta C. Crawford, 'War-related Death, Injury, and Displacement in Afghanistan and Pakistan 2001-2014' (22 May 2015) Watson Institute for International studies, 17 < <http://watson.brown.edu/costsofwar/files/cow/imce/papers/2015/War%20Related%20Casualties%20Afghanistan%20and%20Pakistan%202001-2014%20FIN.pdf> > accessed at 7 August 2016

¹¹⁵⁰ "Nearly 860,000 displaced by military operations in Zarb-e-Azb in North Waziristan and Khyber Agency (UNHCR, 16/03/2015). There were already 1.1 million IDPs in Khyber Pakhtunkhwa and FATA as of mid-December 2013" See 'Global Emergency Overview' (acaps June 2015) 91-94

However, this permission came with unpleasant conditions. Military forced tribesmen to accept the so-called 2015 Social Agreement North Waziristan, also known as Samaji Mohada NWA 2015, with the political administration. The eight-page 'social agreement' contains a highly controversial annex that has to be signed by each displaced family that wants to return. The agreement forces the people of North Waziristan to take an 'oath of loyalty' on the country's constitution, as well as to pledge once again their allegiance to local customs and especially the Frontier Crimes Regulation (FCR).¹¹⁵¹ This agreement resembles the concept of collective punishment of tribes introduced by British raj in 1901: 'British gave tribes freedom to govern themselves, but imposed collective retribution for crimes committed by individual members. Penalties included the burning of villages, exile of tribesmen and economic blockade'.¹¹⁵² Likewise the document holds the tribes collectively responsible for keeping militants out of their respective areas and obliges them to aid the government in chasing 'anti-state elements'. The agreement also makes tribes responsible for protecting their areas by forming militias. According to the agreement, the government will strip tribesmen of their citizenship if they fail to cooperate with the state in the fight against militants. Their homes and businesses may also be seized or destroyed.¹¹⁵³ These special laws only apply to tribesmen in FATA, while the rest of the Pakistani provinces are regulated under the regular regime that is consistent with IHRL. FATA citizens were unfairly and criminally segregated. They were blamed for rejecting progress, and fundamental human rights

¹¹⁵¹ Siegfried O. Wolf, 'Will North-Waziristan turn into a Jihadist hub after Operation Zarb-e-Azb again?' (June 2015) South Asia Democratic Forum, 2 < <http://sadf.eu/new/wp-content/uploads/2015/06/Wolf-S.O.-SADF-Comment-Nr.5-JUNE-20151.pdf> > accessed 7 August 2016

¹¹⁵² Amir Mohammed, 'Justice denied, 2004' (*News Line*) < <http://newslinemagazine.com/magazine/justice-denied/> > accessed 7 August 2016; IRIN, 'Displaced Pakistanis caught between the Taliban and army', (24 June 2015) < <http://www.irinnews.org/report/101668/displaced-pakistanis-caught-between-the-taliban-and-army> > accessed 7 August 2016; Helena Rytövuori Apunen, *The Regional Security Puzzle Around Afghanistan* (Verlag Barbara Budrich 2016) 88

¹¹⁵³ Qasim Nauman and Sadaf Dawar, Displaced Families Returning to Pakistan Region, *The Wall Street Journal* (1 August 2015) < <http://www.wsj.com/articles/displaced-families-returning-to-pakistan-region-1427912913> > accessed 7 August 2016

when in reality they were never given a choice to accept or reject these laws.¹¹⁵⁴

The state of exception that started in the colonial period continues today because instead of addressing the colonial wrongs imposed on local population by powers outside the region, the Pakistani state collaborated with foreign powers in inflicting collective military violence on FATA residents. For instance Pakistan, with the support of US and Saudi Arabia, trained mujahedeen in the FATA region in the teachings of violent jihad to politicised young people, radicalised and Islamised. Furthermore, the huge influx of refugees from Afghanistan, and the arrival of jihadis from all over the world eroded earlier tribal social organisation and propitiated the creation of safe haven for terrorists. The long porous and uncontrolled Pakistani-Afghan border enabled the Afghans to cross it at their own will during the Soviet invasion. The mujahedeen, trained by the CIA and the Pakistani military: 'involved the local tribesmen in the proxy war and the Afghan affairs to the extent that presently both Pakistan and Afghan governments failed to convince them to stop their support to jihadis against the established authorities'.¹¹⁵⁵ After the heavy bombing of Tora bora, Afghan Taliban and Al-Qaeda members took refuge in FATA. Both groups 'hijacked the traditional tribal society and introduced a jihadi mind-set in the region'.¹¹⁵⁶ They killed the Maliks and political agents who were pro-state. It is estimated that: 'About two hundred of the Maliks, or leaders, of the Mehsud and Ahmadzai Wazir tribes in South Waziristan, who had acted as bridge between the Pakistani government and the tribes, were either killed, forced to leave the area, or made to keep silent. In FATA more than 100 Maliks were assassinated since 2004 on suspicion of spying for the US or for the government and many others left Waziristan to find shelter in the cities'.¹¹⁵⁷ The whole fabric of the Pashtun society was disturbed. Al-Qaeda exploited the situation and recruited a large number of unemployed tribesmen for its future operations. These new

¹¹⁵⁴ Shahzaib Khan, 'FATA's belated decolonisation' *The Tribune Express* (3 June 2018) < <https://tribune.com.pk/story/1726184/6-fatas-belated-decolonisation/> >

¹¹⁵⁵ Sayed Wiqar Ali Shah, 'Political Reforms in the Federally Administered Tribal Areas of Pakistan (FATA): Will it End the Current Militancy?' Working Paper No. 64 (2012) South Asia Institute, 11

¹¹⁵⁶ *ibid*

¹¹⁵⁷ Dr. Muhammad Akbar Malik, 'ROLE OF MALIK IN TRIBAL SOCIETY: A DYNAMIC CHANGE AFTER 9/11' (2013) Annual Research Journal, 106

mercenaries supported the Afghan jihad by crossing the border with Pakistan to attack the US and NATO troops stationed in Afghanistan.¹¹⁵⁸ Marginalisation of people in FATA resulted in the creation of a militant movement that the state is now unable to control. Attempts to control the militancy through military operations and drone attacks have only further angered the people who for more than a century have lived a suppressed life due to its exceptional legal status and lack of any political will to develop the region.¹¹⁵⁹

4.7.2 FATA Merger to KPK

In past both civilian and military governments in Pakistan have tried to reform FATA.¹¹⁶⁰ Amongst various alternatives, the two options were discussed more widely in Pakistan. One to give the status of FATA as a separate independent province and second a merger of FATA with KP.¹¹⁶¹ Then finally on 24 May 2018, Pakistan's National Assembly passed a constitutional amendment bill allowing the merger of the FATA with the KP province¹¹⁶² and, on 31st May 2018, the President of Pakistan signed the bill that completes the merger of FATA-KPK.¹¹⁶³ There are different opinions and thoughts on the success of this merger. Opponents of merger argue that it will deteriorate situation in FATA and destroy tribal customs and traditions.¹¹⁶⁴ Arguably the mainstreaming of FATA is a first step in the right direction. This merger has scrapped the FCR and brought the region under jurisdiction of the Pakistani

¹¹⁵⁸ Shah (n 1155) 14

¹¹⁵⁹ Susan S Wadley, *South Asia in the World: An Introduction* (Routledge 2015) 225

¹¹⁶⁰ Ministry of foreign affairs of Pakistan, Report of the Committee on FATA reforms (8 August 2016)

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<http://www.safron.gov.pk/safron/userfiles1/file/Report%20of%20the%20Committee%20on%20FATA%20Reforms%202016%20final.pdf> > accessed 2 November 2018

¹¹⁶¹ Ashrafuddin Pirzada 'PJDP demands separate province for Fata' *The News* (22 Dec 2017) < <https://www.thenews.com.pk/print/259277-pjdp-demands-separate-province-for-fata> > Samiullah Randhawa, 'All stakeholders consulted before FATA reforms: KP Governor' *Pakistan today* (17 April 2017) < <https://www.pakistantoday.com.pk/2017/04/17/all-stakeholders-consulted-before-fata-reforms-kp-governor/> > accessed 2 Nov 2018

¹¹⁶² Dawn News, 'National Assembly green-lights Fata-KP merger by passing 'historic bill'' (24 May 2018) < <https://www.dawn.com/news/1409710> > accessed 24 May 2018

¹¹⁶³ The Nation, 'President signs Fata-KP merger Bill into law' (1 June 2018) < <https://nation.com.pk/01-Jun-2018/president-signs-fata-kp-merger-bill-into-law?show=836> > accessed 2 June 2018

¹¹⁶⁴ Syed Noruzzaman, 'Debate on Pakistan's FATA has no end in sight' *Tehelka* (25 March 2018) < <http://tehelka.com/debate-on-pakistans-fata-has-no-end-in-sight/> > accessed 2 November 2018

law and courts. FATA can no longer be called 'illaqa-e-ghair' (no-go area or strange land); instead it is now part of 'proper Pakistan'. However the integration of tribal customs into the KP government is a complex task and must be handled judiciously.

This merger further raises questions on the use of US drone strikes and what the Pakistani response to them will be. Any new US drone strikes will create a difficult situation for the civil-military establishment of Pakistan. Previously, Pakistan had no complete control over the semiautonomous region of FATA. The people of KPK may demand stronger action against such strikes; they can resort to courts in a context where the Peshawar High Court declared drone strikes illegal in 2013.¹¹⁶⁵ It seems unlikely that the US will respect Pakistan's sovereignty and avoid any drone strike in KPK simply because now it is under complete control of Pakistan. The US has already disregarded these 'boundaries' by an airstrike in Baluchistan, was part of mainland Pakistan. Therefore it could be assumed that there will be no major shift in the US policy after the merger of FATA and KPK, especially when it comes to high value targets.

The situation is different from a Pakistani perspective. The main purpose of this merger was to establish peace and the continuation of the US drones will hinder the peace process. There would be enormous amount of domestic pressure on the Pakistani government to stop further US strikes.

4.8 Conclusion

The careful examination of the US relations with Pakistan shows the complexity of the legality of the US drone strikes in FATA. The lack of transparency from both sides makes it difficult to make authoritative claims on the legality and legitimacy of these strikes. Nonetheless, the aggressive stance of the current Pakistani government against drone strikes reveals that the US has taken unilateral military action against non-state actors in Pakistan and has violated international law. Additionally, a main controversial aspect

¹¹⁶⁵ IN THE PESHAWAR HIGH COURT, PESHAWAR JUDICIAL DEPARTMENT, Writ Petition No. 1551-P/2012, 11/04/2013, < http://www.peshawarhighcourt.gov.pk/image_bank/Mr_Justice_Dost_Muhammad_Khan/wp1551-12.pdf > accessed at 2 June 2018

remains centred on the uncertainty of the targets in the FATA area. The US is at war with Al-Qaeda, the Taliban and associated forces, but the groups the US is targeting in Pakistan are not part of Al-Qaeda. The following chapter will discuss the major groups targeted by the US in FATA and will examine their relationship with Al-Qaeda.

Chapter 5: Al-Qaeda affiliates

Introduction

After 9/11, the US claimed that ‘we’ were at war with Al-Qaeda, Taliban and associated forces. Since then, the US military and intelligence operations have relied on the concept of ‘associated forces’ of Al-Qaeda to add militant groups to the list of who can be killed or captured as potential threats to the nation. While the elements of Al-Qaeda that were present in Afghanistan immediately after September 11 were a legitimate target, it is less clear that ‘associated forces’ of Al-Qaeda outside Afghanistan are part of Al-Qaeda. If these ‘associated forces’ are part of Al-Qaeda, the US may have legal grounds to target them outside Afghanistan providing an armed conflict exists, or in the absence of armed conflict, they pose an imminent threat to the US. But if these so called ‘associated forces’ are not part of Al-Qaeda, targeting them outside Afghanistan would require the recognition of a separate armed conflict and a separate *jus ad bellum* justification for the use of force. The US is targeting terrorist groups or organisations with varying degree of closeness to Al-Qaeda in multiple territories based in Yemen, Somalia, Pakistan and Syria. Some have argued that Al-Qaeda has ‘very loose ties’ with these groups, resembling to a typical ‘confederation of likeminded fellow travellers, many of whom are fighting separate armed conflicts in different regions of the globe’.¹¹⁶⁶ Therefore it is important to inquire whether or not or to what extent these forces are controlled by Al-Qaeda to determine if they are part of Al-Qaeda. The chapter will argue that an overly broad and flexible criterion for establishing a link between Al-Qaeda and other terrorist organisations may be counterproductive because it will expand the scope of war and will allow the US to target individuals under the law of armed conflict where technically they should be relying on International human rights law.

¹¹⁶⁶ Jens David Ohlin, ‘Targeting cobelligerents’ in *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford University Press 2012) 60, 75; Craig Martin, ‘Going Medieval: Targeted Killing, Self-Defense and the Jus ad Bellum Regime’, in *Targeted Killings: Law and Morality in an Asymmetrical World*, (Oxford University Press 2012) 223, 245– 46 (Craig highlighted that groups with nominal Al-Qaeda ties do not have much in common)

5.1 Security Council's response to the 9/11 attacks

Immediately after the September 11 attacks, the United Nations Security Council (UNSC) passed a resolution condemning the attack. Most importantly, it recognised, for the first time, an inherent right of self-defence as an appropriate response to terrorism.¹¹⁶⁷ In its next resolution on the matter, the Security Council required every member state to change its domestic terrorism laws.¹¹⁶⁸ The Resolution 1373 introduced a global plan to fight terrorism,¹¹⁶⁹ obliging all states to crack down against financing of terrorism and other support to international terrorism.¹¹⁷⁰ It also required that states shared information and intelligence related to terrorism. It called on states to pass anti-terrorism laws, prevent suspected terrorists from traveling across international borders, and ordered the screening of asylum seekers for possible terrorist ties.¹¹⁷¹ The resolution 1373 was a 'revolutionary resolution' because it was the first time that the Security Council forced all UN member states to revise national laws to comply with an international standard.¹¹⁷² The effects of the Resolution 1373 clearly go beyond the Al-Qaeda and Taliban regime. It imposed general legal obligation upon states, either with regard to terrorism or any other threat. Although this solution was passed as a result of the 9/11 attacks, it is applicable to all instances of terrorism that constitute a threat to peace and security.¹¹⁷³ The Security Council also imposed financial and travel sanctions as well as an arms embargo against Al-Qaeda, the Taliban and associated individuals and entities.¹¹⁷⁴

In 2015, the UNSC unanimously passed Resolution 2249 condemning terrorist attacks by the Islamic State of Iraq and the Levant (ISIL). The

¹¹⁶⁷ Resolution 1368 (2001)

¹¹⁶⁸ Resolution 1373 (2001)

¹¹⁶⁹ Kim Lane Scheppelle, 'The International Emergency After 9/11, The United Nations coordinates a global plan to fight terrorism' (2006) American Bar Association < https://www.americanbar.org/content/dam/aba/publishing/insights_law_society/interemergency.aucthcheckdam.pdf > accessed 19 Dec 2017

¹¹⁷⁰ Resolution 1373 (2001) para 1-2

¹¹⁷¹ Resolution 1373 (2001) para 4

¹¹⁷² Scheppelle (n 1169); Mark Leon Goldberg, 'How the UN responded to the 9-11 attacks' (11 Sep 2012) < <https://www.undispatch.com/how-the-un-responded-to-the-9-11-attacks/> > accessed 22 Dec 2017

¹¹⁷³ Vesselin Popovski and Trudy Fraser, *The Security Council as global legislator* (Routledge 2014)

¹¹⁷⁴ Resolution 1390 (2002); Resolution 1989 (2011); Resolution 1988 (2011)

resolution 2249 urges member states to 'take all necessary measures, in compliance with international law' against ISIL and to eradicate the group's safe havens in Iraq and Syria.¹¹⁷⁵ Resolution 2249 condemns all terrorist groups (Al-Nusra Front and all other individuals, groups, undertakings and entities associated with Al-Qaida) but clearly pinpointed ISIS as the major challenge. ISIS was declared a 'global and unprecedented threat to international peace and security'.¹¹⁷⁶

These resolutions recognised the threat terrorism posed to international community but have not allowed states to use unilateral force against terrorist groups if they do not pose any threat to them. Thus, in the absence of state consent, the US may use force in self-defence against 'associated forces' extraterritorially if: a) they are controlled by Al-Qaeda and pose a threat to the US and its allies; b) they individually pose a direct and imminent threat to the US, whether or not they are linked with Al-Qaeda.

5.1.1 Authorisation for the use of military force (AUMF)

The concept of 'associated forces' does not exist in the 2001 AUMF itself. The AUMF does not explicitly name its targets. Instead:

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons¹¹⁷⁷

Though not explicitly named, the 'organisations' referred to in the AUMF are widely understood to represent Al-Qaeda and the Afghan Taliban. There is no mention of Al-Qaeda associates, affiliates or of new groups who might join the fight. Nevertheless, since 2001, successive US Presidents have invoked AUMF to use force against other groups they determine are connected to Al-Qaeda, and in places far beyond the original Afghanistan battlefield.

¹¹⁷⁵ Resolution 2249 (2015)

¹¹⁷⁶ Peter Hilpold, 'The fight against terrorism and SC Resolution 2249 (2015): towards a more Hobbesian or a more Kantian International Society?' (2015) *Indian Journal of international law* 535

¹¹⁷⁷ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)

The US seeks the justification for the broader application of AUMF in the well-established concept of co-belligerency in the laws of war.¹¹⁷⁸ The gist of the US argument is that AUMF gives authority to apply force not only to Al-Qaeda and Taliban forces, but also to all groups that join the fight against the US alongside these forces. We can call those groups ‘associated forces’ of Al-Qaeda. The US defines associated forces as a group that is ‘(1) an organised, armed group that has entered the fight alongside Al-Qaeda and (2) is a cobelligerent with Al-Qaeda in hostilities against the US or its coalition partners.’¹¹⁷⁹

At face value, it seems to provide clear guidelines for determining which groups might be classified as ‘associated forces’. Yet, upon closer examination, it becomes clear that the term cobelligerent is not explained properly. The key question here is to determine the standards to determine who are these co-belligerents? Does it include only those who have sworn allegiance to Al-Qaeda and who are controlled by Al-Qaeda, or can the US lawfully target other groups? Does it matter whether those groups have engaged in active hostilities, or can the US also use lethal force against groups who have merely supported Al-Qaeda in its conflict? Even after 16 years of war international law has no answers for these questions.

The term co-belligerent, a fairly informal term, has no precise definition. It is a label for entities or states that have joined an armed conflict on the side of one of the parties.¹¹⁸⁰ There is little to no international law content elaborating further on what types of activities would suffice to make an organisation a co-belligerent. The term itself does not explain when a non-state armed group becomes a party to the armed conflict. Taking guidance from other sources of international law this chapter explores which group can be considered associated forces or co-belligerents of Al-Qaeda using the control test established by the International Court of Justice (ICJ). Although the control

¹¹⁷⁸ The Framework Under U.S. Law for Current Military Operations: Hearing Before the S. Comm. on Foreign Relations, 113th Cong. (2014) (statement of Stephen W. Preston, Gen. Counsel, Department of Defence)

¹¹⁷⁹ Report on associated forces, (2014) <
https://www.aclu.org/sites/default/files/field_document/drone_tk3_Report_on_Associated_Forces.pdf> accessed 10 Dec 2017

¹¹⁸⁰ Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959) 531 (defining co-belligerent as “a fully fledged belligerent fighting in association with one or more belligerent powers”

test set forward by the ICJ is applicable to states because it determines whether the acts of groups or individuals within the territory of a state can be attributed to another state, the study will apply the test on non-state actors. The ICJ's interpretation of international responsibility remains the most authoritative when determining attribution of acts in international law. The first part of the chapter briefly explains the control test developed by International courts.

5.2 The control tests put forward by the ICJ

The ICJ has set forward the control test in the Nicaragua case¹¹⁸¹ to determine whether the acts of groups within the territory of a state can be attributed to another state. The International Criminal Tribunal for Yugoslavia (ICTY) applied a different test in its Tadic¹¹⁸² case, although the ICTY was dealing with a problem of jurisdiction rather than responsibility. The ICJ has maintained its position in two subsequent important cases, namely the Armed Activities case¹¹⁸³ and the Genocide Convention case¹¹⁸⁴.

5.2.1 The Nicaragua case and ICJ jurisprudence

In the Nicaragua case the Court had to decide whether to uphold Nicaragua's claim that the US had 'devised the strategy and directed the tactics of the *Contras* forces, and provided direct combat support for its military operations'.¹¹⁸⁵ The Court determined that the acts of *Contras* were not attributable to the US. According to the Court's reasoning, the US had not 'created' the *Contras* nor it provided 'direct and critical combat support to them'. The US was responsible for financing, training, equipping, arming and organising them.¹¹⁸⁶ Thus, despite the US's wide-ranging influence over the *Contras*, the ICJ held that the *Contras* were not part of the US government

¹¹⁸¹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgement, I.C.J. Reports 1986, p. 14

¹¹⁸² Prosecutor v Tadic case (IT-94-1-A), Appeals Chamber of ICTY, Judgement of 15 July 1999

¹¹⁸³ Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement, I.A.C.J Reports 2005, p. 168

¹¹⁸⁴ Application of the Convention on the prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, I.C.J. Reports 2007, p. 43

¹¹⁸⁵ Nicaragua (n 1181) (para, 102)

¹¹⁸⁶ Nicaragua ibid (para, 108)

because it did not exercise effective control over them. In this case, the ICJ identified two levels of control: strict control and effective control.

5.2.2 Strict control test

The strict control test is based on 'complete dependence'. The Court enquired 'whether or not the relationship of the contras to the United States government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government'.¹¹⁸⁷ The ICJ identified three requirements of strict control:

- (1) The entity must be completely dependent on the outside power.
- (2) This complete dependence must extend to all fields of activity of the secessionist entity.
- (3) The outside power must actually have made use of the potential for control inherent in that complete dependence, i.e. it must have actually exercised a particularly high degree of control.

An entity will only be considered a *de facto* organ of the outside power according to the 'strict control' test if all three requirements are fulfilled.¹¹⁸⁸

The strict control test is extremely demanding in terms of evidence and it requires proving the complete dependence of the group. Complete dependence means that the entity is 'lacking any real autonomy' and is 'merely an instrument' or 'agent' of the outside power through which they are acting.¹¹⁸⁹ Generally, close political, military, economic, ethnic or cultural relations between the outside power and the entity, and the provision of logistical support in the form of weapons, training and financial assistance do not in itself establish a relationship of complete dependence. This is so even if the entity and the outside power share largely complementary military or political objectives.¹¹⁹⁰ In addition, 'common objectives may make the entity

¹¹⁸⁷ Nicaragua *ibid* (para, 62 and 109); Application of the Convention on the prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports (2007) p. 43 (hereafter, Genocide Convention case).

¹¹⁸⁸ Talmon Stephen, 'The responsibility of outside powers for the acts of secessionist entities' (2009) *International and comparative law quarterly* 493, 498

¹¹⁸⁹ *ibid* 499

¹¹⁹⁰ *ibid*

an ally, albeit a highly dependent ally, of the outside power, but not necessarily its organ'.¹¹⁹¹

The ICJ identified two factors from which complete dependence may be inferred. Firstly, complete control may be established where a state created and organised the entity.¹¹⁹² Complete dependence on the outside power is also demonstrated if the varied forms of assistance for instance, financial assistance, logistic support, supply of intelligence and arms provided by state are crucial to the pursuit of the entity's activities. The entity is completely dependent upon the state if it cannot conduct its activities without the multi-faceted support of the outside power.¹¹⁹³

According to the ICJ an entity can be completely dependent on a state in the beginning but that situation can mutate. In this case the ICJ found that the *Contras* were initially completely dependent on the US, but that changed later, as the *Contras* activity continued despite the termination of US's military aid.¹¹⁹⁴ Also in cases where the state and the non-state actor have different strategic options, a state of complete dependence cannot be presumed.¹¹⁹⁵ Secondly, the entity must be completely dependent on the allegedly responsible state in 'all fields'. It must be shown that the entity received support from the outside state in 'all or the great majority of...activities'.¹¹⁹⁶ Thirdly, the state must have actually exercised a particularly high degree of control over the entity. In other words, the state must have devised or planned the strategy and operations of the entity. In addition, the coordination of activities will not amount to control.¹¹⁹⁷ So the mere provision of funds, intelligence, advisers or logistic support for non-state actors may not suffice to establish attribution.¹¹⁹⁸

It can be argued that the test is very stringent and it is very difficult in any case to satisfy the high threshold, unless the states are only responsible for acts of their own administration

¹¹⁹¹ *ibid*

¹¹⁹² Nicaragua (n 1181) Para 93, 94 and 108

¹¹⁹³ *ibid* Para 109, 110, 111

¹¹⁹⁴ *ibid* Para 110,111

¹¹⁹⁵ Bosnian Genocide (n 5) para 394.

¹¹⁹⁶ Nicaragua (n 1181) para 109; Bosnian Genocide (n 5) para 391.

¹¹⁹⁷ Nicaragua *ibid* para 110; Bosnian Genocide para 393. ; Nicaragua *ibid* para 102–106, 108 and 110

¹¹⁹⁸ Nicaragua *ibid* para 103

5.2.3 Effective control test

Unlike the strict control test, the effective control test is based on partial dependence allowing attribution of acts for specific acts of private individuals and groups. The provision of financial assistance, logistic and military support, supply of intelligence, selecting targets and planning may infer partial dependency.¹¹⁹⁹ General control over the entity is not enough; the state must be able to control the beginning of the operation, the way it is carried out, and its completion.¹²⁰⁰

The ICJ held that the US was only responsible for its own conduct in relation to the *Contras*: 'by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State'.¹²⁰¹ None of these acts were imputable to the US because the US did not effectively control their activities.¹²⁰²

The 'effective control' test is based on partial dependency and evidential requirements that are less strict than that for the 'strict control' test. However, it remains extremely difficult in practice to prove that a state exercises effective control over the activities of another non-state or state actor. The ICTY Appeals Chamber did not follow the jurisprudence of the ICJ largely for this reason, and instead developed a different control tests, requiring a lower degree of control.¹²⁰³

5.2.4 The overall control test proposed by the ICTY in Prosecutor v Tadic

In the Tadic case, the ICTY had to decide whether the accused were guilty of grave breaches of the Geneva Conventions during the armed conflict in Bosnia and Herzegovina. Its own jurisdiction depended, inter alia, on whether the acts of the armed forces of the Bosnian Serbs operating within the territory

¹¹⁹⁹ Nicaragua *ibid* para 112

¹²⁰⁰ Nicaragua *ibid* para 115

¹²⁰¹ Nicaragua *ibid* holding, para 3

¹²⁰² Nicaragua *ibid* holding, para 9

¹²⁰³ Prosecutor v Tadic (para 124); Also see headings 2.5.3 and 2.5.4

of Bosnia could be attributed to Yugoslavia (an outside power).¹²⁰⁴ In this case, the Appeal Chamber did not rely on the Nicaragua test and argued that it was inconsistent with the logic of state responsibility.¹²⁰⁵ It claimed that, 'the principles of international law concerning the attribution to states of acts performed by private individuals are not based on rigid and uniform criteria'.¹²⁰⁶ The Chamber argued that the rationale behind the whole system of state responsibility is to 'prevent states from escaping international responsibility by having private individuals carry out tasks that may or should not be promoted by state officials...states are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct'.¹²⁰⁷ The Court criticised the strict evidence requirement set out by the control test introduced by the ICJ and asserted that the law on state responsibility 'is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that states entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives'.¹²⁰⁸

The ICTY formulated the overall control test for attributing the acts of militarily organised groups to states. The overall control test lowered the threshold of control required for attributing responsibility to the state. 'Under the overall control test, general not specific instructions are not necessary whereas, under the effective control test, they would be'.¹²⁰⁹ The test requires: 'that the state wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity'.¹²¹⁰

The ICJ did not support the overall control test. In two subsequent decisions, the 2005 Armed Activities case and the 2007 Bosnian Genocide case, it reaffirmed the effective control test. The ICJ asserted '...a state is responsible only for its own conduct...the 'overall control' test is unsuitable, for it stretches

¹²⁰⁴ Tadic *ibid* para 87

¹²⁰⁵ Tadic *ibid* paras 14, 5, 115

¹²⁰⁶ Tadic *ibid* para 117

¹²⁰⁷ Tadic *ibid* para 117

¹²⁰⁸ Tadic *ibid* para 120

¹²⁰⁹ Kristen E Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) *Melbourne Journal of International Law* 329

¹²¹⁰ Tadic (n 1203) para 131

too far, almost to breaking point...'¹²¹¹ According to Book, 'the ICJ's adherence to the effective control standard in the Bosnian Genocide case indicates its belief that there is a universal standard of effective control that applies to questions of attribution in all contexts, unless primary norms or *lex specialis* dictate otherwise.'¹²¹²

Therefore it seems to be no consensus in international jurisprudence in relation to the preferable control test to be applied.

5.2.5 The preferable control test to explore Al-Qaeda's relationship with terrorist organisations

Currently, the US is using force against groups that provide a certain level of support to Al-Qaeda, even if they do not first initiate direct attacks on the US. Al-Qaeda is a decentralised organisation that has a web of affiliates with different levels of connection to the specific conflict with the US. Regional groups like Al Shabaab in Somalia or Tehrik-i-Taliban in Pakistan may have shared resources, or even ideology, with Al-Qaeda, but may nevertheless be focused primarily on a localised fights rather than attacking the US.

In the context of this thesis, the chosen test to explore Al-Qaeda's link with these terrorist groups or organisations is the effective control test put forward by the ICJ in Nicaragua¹²¹³ for two reasons. First it was accepted by the ICTY in Tadic that the effective control test ought to be applied to 'private individuals' or 'unorganised groups'. As Al-Qaeda is an unorganised armed group that lacks a centralised command structure, the effective control test is suitable. Second, the narrow scope of the effective control test, will filter out the groups who do not work alongside Al-Qaeda against the US.

The US is targeting several distinct organisations in Yemen, Somalia and Pakistan. Assessing Al-Qaeda's relation with each of those entities is beyond

¹²¹¹ Genocide case (n 5) para 406

¹²¹² Boon (n 1209) 9

¹²¹³ Art 7, 15 and 59 of International Law Commission's draft articles on international law organisations (2011) identify when the actions of organisation can be attributable to another organisation. But this study will not rely on them to explore Al-Qaeda's relation with other organisations for two reasons. First, these articles are secondary rules in so far as they only conform a general set of rules that regulates the conditions for responsibility to rise. Second, the articles do not provide a clear definition or criterion of control. The control test given by the ICJ in Nicaragua case gives detailed conditions when an act of a non-state actor could be attributed to another state with the help of control test.

the scope of this study. Therefore, the study will explore Al-Qaeda's relationship with Tehrik-i-Taliban Pakistan, Haqqani Network, Al-Shabab in Somalia and Al-Qaeda in Arabian Peninsula in Yemen by utilising the effective control test as paradigm.

5.3 Al-Qaeda after 9/11

The global jihad movement, originated from Afghanistan in the 1980s. It was at that time when Osama bin Laden and Ayman al-Zawahiri set up Al-Qaeda in Peshawar, Pakistan.¹²¹⁴ After the end of the Soviet war, in 1992, the jihadis who joined the Afghan war returned to their home countries. Conversely but Bin Laden, who had temporarily stayed in Arabia and Sudan moved back to Afghanistan in 1996 and allied with the Taliban. There, Al-Qaeda set up camps where jihadi fighters in large numbers from all over the world received training.¹²¹⁵ Initially, Al-Qaeda declared jihad against secular Muslim regimes and focused on destabilising local governments. But gradually Al-Qaeda, that has evolved organically throughout its existence,¹²¹⁶ directed its jihad against Western states with special focus on the US.¹²¹⁷

In Afghanistan, Al-Qaeda operated as a centralised organisation with bureaucratic structures, job descriptions, payrolls and a hierarchical structure with centralised command.¹²¹⁸ However, Al-Qaeda suffered heavy losses after the US invasion of Afghanistan. Its members scattered across the globe and merged with local jihadis creating franchise of likeminded groups. Al-Qaeda has undergone an extraordinary process of diffusion and fragmentation and

¹²¹⁴ Martin Rudner, 'Al Qaeda's Twenty-Year Strategic Plan: The Current Phase of Global Terror' (2013) *Studies in conflict and terrorism* 953, 954; See generally Andrew Moran, 'Terrorism' in Peter Hough, Shahin Malik, Andrew Moran and Bruce Pilbeam, *International Security Studies: Theory and Practice* (Routledge 2015) 154

¹²¹⁵ Rudner *ibid* 954-955

¹²¹⁶ Peter Bergen, *Holy war: Inside the secret world of Osama Bin Laden* (Free Press 2002); The 9/11 Commission report

¹²¹⁷ Tod Hoffman, 'Al Qaeda Declares War: The African Embassy Bombings and America's Search for justice' (2014) (Attacks against US embassies in Kenya and Tanzania in 1998 by Al-Qaeda); USS Cole bombing < <https://www.fbi.gov/history/famous-cases/uss-cole-bombing> > (Attack against the USS Cole in Yemen by Al-Qaeda in 2000); Martin Rudner, *Al Qaeda's Twenty-Year Strategic Plan: The Current Phase of Global Terror*, *Studies in conflict and terrorism*, 2013, 953-980, 955 (Then the 9/11 attack on the US happened)

¹²¹⁸ The 9/11 Commission Report at p. 55-57

has suffered a metamorphosis due to internal and external pressures. Several factors explain the fragmentation of Al-Qaeda. The primary reason of the decentralisation of Al-Qaeda was the intense and sustained effort by the US and its allies to kill or capture the Al-Qaeda members. Marc Sageman, a leading terrorism expert, argues, 'We can no longer talk about Al-Qaeda as a centralised organisation. In the wake of the closure of the training camps in Afghanistan, the halt of financial transfers, and the detention or death of key personnel, Al-Qaeda Central has receded in importance'.¹²¹⁹

Some argue that the decline in major terrorist attack against the West indicates that Al-Qaeda is defunct. For instance, in 2012, Peter Bergen asserted that Al-Qaeda was defeated because the CIA drone policy in Afghanistan successfully eliminated 28 Al-Qaeda key members. Bergen defended that since 9/11 the only terrorist attack launched by Al-Qaeda was the 7/7 London bombing that killed 52 commuters.¹²²⁰ Another terrorism expert, Javier Jordan, has stressed that the deployment of CIA drones in Afghanistan has weakened Al-Qaeda and as a result, the organization has been unable to either launch serious terrorist attacks against the US since 2007 nor to control or direct its affiliates.¹²²¹ The Global Terrorism Database (GTD) shows that, since 2008, Pakistan has only suffered one terrorist attack conducted by Al-Qaeda Central.¹²²²

Conversely, others commentators such as Hoffman, argue that Al-Qaeda is still relevant. He believes the core of Al-Qaeda survived by cooperating with local jihadis in other states and forming affiliations with them. He rejects the view that Al-Qaeda has loose connections with its affiliates. According to him, relations between Al-Qaeda and its affiliates are quite intimate and well structured. Al-Qaeda may be decentralised but is still united through local

¹²¹⁹ Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* (University of Pennsylvania Press 2008) 31

¹²²⁰ Bergen, Peter: 'Time to declare victory: Al Qaeda is defeated' *CNN* (27 June 2012) < <http://security.blogs.cnn.com/2012/06/27/time-to-declare-victory-al-qaeda-is-defeated-opinion/> > accessed 10 Dec 2017

¹²²¹ Javier Jordán, 'The Effectiveness of the Drone Campaign against Al-Qaeda Central: A Case Study' (2014) *Journal of Strategic Studies* 4 < <http://www.ugr.es/~jjordan/AlQaedaDronesPakistan.pdf> > accessed 10 Dec 2017

¹²²² "The Global Terrorism Database" < <http://www.start.umd.edu/gtd/search/Results.aspx?search=al+qaeda+central&sa.x=0&sa.y=0&sa=Search> > accessed 10 Dec 2017

jihadi groups in South Asia (Pakistani Taliban and Haqqani Network), Yemen (AQAP) and Somalia (Al-Shabab) that are operating closely with the Al-Qaeda.

Therefore, there are at least two contradicting hypothesis; one sustaining that Al-Qaeda is defunct today because it is a decentralised organisation with limited military capacity. And, on the other hand, the belief that Al-Qaeda is decentralised, but still poses a significant threat because it has managed to maintain its presence via its affiliates or adherents.

Indeed, it would be wrong to say that Al-Qaeda is irrelevant merely because it is inoperative and has failed to carry out major attacks against Western objectives since the 7/7 attacks. The quantity of terrorist attacks is only useful in measuring the terrorist group's military capacity. However, it fails to measure the group's ability to influence others. It is a fact that a terrorist group can become more resilient if it is decentralised and carries out attacks via affiliates. The question we are trying to address is whether Al-Qaeda controls these groups. If Al-Qaeda is controlling the groups targeted by the US outside active warzones, there are grounds to assert that Al-Qaeda poses a significant threat to the US and these groups are legitimate targets. Thus, the legality of the US targeted killing of these groups in undeclared warzones depends on Al-Qaeda's control over them.

5. 4 Al-Qaeda's relationship with Tehrik-i-Taliban (TTP) Pakistan

The Tehrik-i-Taliban Pakistan (TTP) was officially formed in December 2007, when various distinct FATA'S tribal groups joined together.¹²²³ Many of these groups had fought alongside Afghanistan's resistance in the 1980s, or with the Afghan Taliban in the 1990s.¹²²⁴ It is important not to confuse TTP with Afghan Taliban. It is often wrongly assumed that Pakistani Taliban are affiliates or another branch of Afghan Taliban in Pakistan pursuing similar objectives. The TTP and the Afghan Taliban are two distinct entities with different goals. The leadership of the 'Afghan Taliban has never endorsed the formation or activities of the TTP. The Afghan Taliban, led by late Mullah

¹²²³ See Sana Jamal and M. Ahsan, 'TTP-Analyzing the Network of Terror' (2015) International Relations Insights & Analysis < <http://www.ir-ia.com/reports/IRIA-TTP.pdf> > accessed 19 Dec 2017

¹²²⁴ Hassan Abbas, 'A profile of Tehrik-i-Taliban' (2008), CTC SENTINEL, .2

Omar, have always openly disassociated themselves from the TTP because of their different goals and objectives'.¹²²⁵ For instance, the Taliban spokesman Zabihullah Mujahid, told the Dawn News in Pakistan that, 'We have no concern...Taliban movement in Pakistan. Ours is an Afghan movement and we do not support militant activity in Pakistan... Baitullah is a Pakistani and we...have nothing to do with his appointment or his expulsion. We did not appoint him and we have not expelled him.'¹²²⁶

On the other hand, the TTP leadership has always given the impression that the organisation has close ties with the Afghan Taliban. For instance, they adopted the name 'Taliban' to get quick recognition and support of Pashtuns of the tribal areas.¹²²⁷ Baitullah Mehsud created this transregional movement,¹²²⁸ aligning himself with local disaffected groups to produce a network of militants across the Federally Administered Tribal Areas (FATA) and Khyber Pakhtunkhwa (KPK) region. The TTP is an umbrella movement where various groups came together to act collectively against the offensives of the Pakistani military, which it accuses of being apostate and an instrument of US/NATO imperialism.¹²²⁹ Another objective of the TTP is to control the country by establishing Sharia law across Pakistan.¹²³⁰

The TTP is an extremely decentralised organisation. Although there is a central body (Shura) and a president (Emir), most decisions are made at the local level. Each agency has a commander, a subcommander, and leaders at the village and town levels.¹²³¹ Not all members of the TTP are ideological extremists. They have different reasons for joining TTP. Unemployment is high in FATA and most of the men from FATA have joined TTP for economic reasons. Young men who joined TTP in FATA received Rs 15-20,000 per

¹²²⁵ Khurram Iqbal, 'Tehrik-e-Taliban Pakistan: A Global Threat' (2010) *Conflict and Peace Studies*, 3

¹²²⁶ The Dawn, 'Baitullah is on his own say Afghan Taliban', (29 Jan 2008) < <https://www.dawn.com/news/938123> > accessed 10 Dec 2017

¹²²⁷ Iqbal (n 1225) 4

¹²²⁸ Abbas (n 1224)

¹²²⁹ Imtiaz Ali, 'Khyber Tribal Agency: A new hub of Islamist militancy in Pakistan' (2008) *Terrorism Monitor*; Siddique, Q, 'Tehrik-e-Taliban Pakistan: An attempt to deconstruct the umbrella organization and the reasons for its growth in Pakistan's North-west' (2008) *Danish Institute for International Studies*, 20-21

¹²³⁰ Bajoria, J, 'Pakistan's New Generation of Terrorists' (2011) *Council on Foreign Relations* < <https://www.cfr.org/background/pakistans-new-generation-terrorists> > accessed at 13 Dec 2017

¹²³¹ Shehzad H Qazi, 'An extended profile of the Pakistani Taliban' (2011) *Institute for social policy and understanding*, 3 and 8

month (£100-120).¹²³² Some are criminals and are lured by the incentive of drug supply, money and guns. Yet others are angry and aggrieved relatives of those killed by US drone strikes and in military operations conducted by the Pakistani army.¹²³³ The movement remains fractured and rebel infighting is not uncommon. Militant groups have fought each other for control of criminal networks¹²³⁴, economic reasons and differences over religious opinion.¹²³⁵

Yusafzai has stressed that, on paper, the TTP appears to be an impressive terrorist organisation whose members are united against a similar cause, but reality is quite different. According to him:

Though members of militant Islamic groups such as the Pakistani Taliban and other jihadis have almost the same anti-United States and pro-Al-Qaeda worldview, they are not especially disciplined when it comes to organisational matters. Difficulty in this area explains the existence of so many extremist factions operating under different leaders and commanders who sometimes express conflicting opinions on domestic and international issues.¹²³⁶

Yousafzai has also highlighted the traditional tribal rivalry within the TTP:

The tribal nature of some of the Taliban groups soon became evident when militants in North Waziristan warned the Mehsud-led Taliban in neighboring South Waziristan not to launch attacks against the Pakistan Army in their part of the tribal region. The warning came from Hafiz Gul Bahadur, the emir of the Taliban in North Waziristan.... Hafiz Gul Bahadur was particularly furious when Mehsud's men started firing rockets into the army's camp at Razmak, a town in North Waziristan, during the recent fighting between the military and the Mehsud-commanded militants. It was also evident that Hafiz Gul Bahadur and his Taliban fighters failed to abide by one of the major decisions of the

¹²³² *ibid*

¹²³³ N Elahi and Usama Butt, *Pakistan's Quagmire: Security, Strategy, and the Future of the Islamic-nuclear Nation*, (Bloomsbury Academic 2010) 135-136

¹²³⁴ The group leaders also kill rival tribal leader. For example, in 2008 Baitullah Mehsud assassinated tribal leaders loyal to Mullah Nazir see Hassan Abbas, *Pakistan's troubled frontier*, (Brookings Institution Press 2009) 33, 120

¹²³⁵ Shuja Nawaz, 'FATA the most dangerous place' (2009) Centre for strategic and international studies, 18

¹²³⁶ Rahimullah Yousafzai, 'The impact of Pashtun tribal differences on the Pakistani Taliban' (2008) Terrorism Monitor

TTP by refusing to coordinate attacks on the security forces in North Waziristan to help ease pressure on the Taliban fighting under Mehsud's command in South Waziristan. This failure defied a Taliban decision that every Taliban group was required to come to the assistance of others in its area of operation that were under attack from the Pakistan Army.¹²³⁷

The group leaders that formed TTP are from different tribes and past tribal rivalries have kept them apart. Although they work side-by-side, their relations are uneasy and uncertain. This explains that groups work under separate command structure.¹²³⁸ TTP participating militants follow the instruction of local commanders and the local commanders runs his affairs autonomously. After the fall of the Afghanistan's Taliban government in 2001, many Al-Qaeda leaders spilled into Northwest Pakistan. In FATA, 'Al-Qaeda got protection and sanctuary from local clerics and tribal members from the Mehsud and Wazir tribes' many of who supported Taliban in Afghanistan since the 1990s.¹²³⁹ But Al-Qaeda never managed to run its terrorist activities smoothly in FATA. Al-Qaeda members were forced to leave South Waziristan where it had opened its training camps after Pakistani military mounted a major incursion in the area.¹²⁴⁰ Al-Qaeda members relocated from to North Waziristan and established their training camps.¹²⁴¹ The exact number of Al-Qaeda training camps in North Waziristan is unknown, but according to a report in February 2007:

The training camps had yet to reach the size and level of sophistication of the Al-Qaeda camps established in Afghanistan under Taliban rule but groups of 10 to 20 men are being trained at the camps and the Al-

¹²³⁷ ibid

¹²³⁸ ibid

¹²³⁹ ibid 782

¹²⁴⁰ Mohammed Khan and Carlotta Gall, 'Accounts after 2005 London bombings point to Al-Qaeda role from Pakistan' *The New York Times* (13 August 2006) <

<http://www.nytimes.com/2006/08/13/world/europe/13gaeda.html> > accessed 12 Dec 2017

¹²⁴¹ M Morgan, *The Impact of 9/11 on Politics and War: The Day that Changed Everything?* (Palgrave Macmillan 2009) 94

Qaeda infrastructure in the region is gradually becoming more mature.¹²⁴²

Nonetheless and despite of being able to run small sized training camps in North Waziristan, Al-Qaeda failed to carry out successful attacks against the West mainly because of pressure from spies working for the Pakistani military, ISI and other agencies. It also lacked financial and military resources.¹²⁴³ Al-Qaeda's frustration is evident from a letter written by Al-Zawahiri to Abu Musab. Al-Zawahiri wrote: 'the real danger [towards the mujahidin] comes from the agent Pakistani army that is carrying out operations in the tribal areas looking for mujahedeen'.¹²⁴⁴

Officials in the US and Pakistan have often described the TTP as an affiliate of Al-Qaeda. For instance, the then Ambassador-at-large for counterterrorism, Daniel Benjamin, declared at a state department briefing:

The TTP and Al-Qaeda have a symbiotic relationship; TTP draws ideological guidance from Al-Qaeda, while Al-Qaeda relies on the TTP for safe haven in the Pashtun areas along the Afghan-Pakistani border. This mutual cooperation gives TTP access to both Al-Qaeda's global terrorist network and the operational experience of its members. Given the proximity of the two groups and the nature of their relationship, TTP is a force multiplier for Al-Qaeda.¹²⁴⁵

The then interior minister of Pakistan called TTP an extension of Al-Qaeda.¹²⁴⁶ According to him, 'There is a close connection [between the two outfits], and that there are similarities between Al-Qaeda and the TTP... If Al-Qaeda is to move in a tribal area, they have to look to the TTP to get a refuge... The TTP is a host to Al-Qaeda and is their mouthpiece.'¹²⁴⁷

The TTP leaders have also approved Al-Qaeda's actions and shared its ideology. The late TTP Chief commander, Baitullah Mehsud, supported Al-

¹²⁴² New York Times, 'Terror Officials See Al-Qaeda Regaining Power' (19 February 2007)

¹²⁴³ Rohan Gunaratna and Anders Nielsen, 'Al-Qaeda in the tribal areas of Pakistan and beyond' (2008) *Studies in Conflict & Terrorism* 775, 800

¹²⁴⁴ Letter from al-Zawahiri to al-Zarqawi, (11 October 2005) < <https://fas.org/irp/news/2005/10/dni101105.html> > accessed 15 Dec 2017

¹²⁴⁵ Charlie Savage, 'U.S. Adds Legal Pressure on Pakistani Taliban' *New York Times* (1 Sep 2010) < <http://www.nytimes.com/2010/09/02/world/asia/02talib.html> > accessed 14 Dec 2017

¹²⁴⁶ Daily Times, 'TTP is an extension of Al-Qaeda: Rehman' (2 Sep 2008)

¹²⁴⁷ *ibid*

Qaeda's global jihad. In the course of his first-ever interview, on 28 January 2008, Baitullah told Al Jazeera television network:

Our main aim is to finish Britain, the US and to crush the pride of the non-Muslims. We pray to God to give us the ability to destroy the White House, New York and London. And we have trust in God. Very soon, we shall be witnessing jihad's miracles.¹²⁴⁸

A few months later, the TTP spokesperson, Maulvi Omer, insisted in a video interview that:

There is no difference (between Al-Qaeda and Taliban). The formation of the Taliban and al Qaeda was based on an ideology. Today, Taliban and al Qaeda have become an ideology. Whoever works in these organizations, they fight against kafir (infidel) cruelty. Both are fighting for the supremacy of Allah and his Kalma. However, those fighting in foreign countries are called Al-Qaeda, while those fighting in Afghanistan and Pakistan are called Taliban. In fact, both are the name of one ideology. The aim and objectives of both the organisations are the same.¹²⁴⁹

5.4.1 Who were the targets of TTP?

Another way to understand the objectives of a terrorist group is to see who their targets are. The table given below shows the number of terrorist attacks by the TTP for the period 2007-2016.¹²⁵⁰ Between 2006 and 2016 the TTP has carried out 735 terrorist attacks within Pakistan. Terrorists targeted Pakistani military, government, citizens, religious scholars, businesses, educational and religious institutions, media, and civil society organisations. None of these attacks were directed against the US or its allies. This indicates

¹²⁴⁸ Nick Schifrin, 'More Dangerous Than Osama' *abc news* (28 Jan 2008) < <http://abcnews.go.com/Blotter/story?id=4199754&page=1> > accessed 13 Dec 2017

¹²⁴⁹ Herschel Smith, 'Interview with Taliban Spokesman Maulvi Omar' (30 August 2008) < <http://www.captainsjournal.com/2008/08/30/interview-with-taliban-spokesman-maulvi-omar/> > accessed 13 Dec 2017

¹²⁵⁰ The study gathered data of terrorist attacks by the TTP from 2007-2016 from University of Maryland terrorism database. Table has only included confirmed terrorist attacks carried out by the TTP. It has not included any "suspected" terrorist attack.

that despite the rhetoric, the TTP does not pose any threat to the US or its allies and is only interested in obtaining control in tribal areas of Pakistan.

Year	Country	Terrorist Groups that are involved/claimed responsibility ¹²⁵¹	Target group	Number of attacks
2007	Pakistan	TTP	<ul style="list-style-type: none"> • Military • Private citizens 	1
2008	Pakistan	TTP	<ul style="list-style-type: none"> • Military • Private citizens • Business • Media • Police • Government • NGO • Educational institutions 	35
2009	Pakistan	TTP	<ul style="list-style-type: none"> • Military • Private citizens • Business • Media • Police • Government • NGO • Educational institutions 	39
2010	Pakistan	<ul style="list-style-type: none"> • TTP • Lashkar-e-Jhangwi 	<ul style="list-style-type: none"> • Military • Private citizens • Business • Media • Police • Government • NGO 	57

¹²⁵¹ The other groups mentioned in the table did not conduct joint operations with Taliban. They either claimed responsibility for the attacks or Pakistani military or government officials attributed the attacks to them.

			<ul style="list-style-type: none"> • Educational institutions • Terrorist non-state militias • Religious institutions and scholars 	
2011	Pakistan	TTP	<ul style="list-style-type: none"> • Military • Private citizens • Business • Media • Police • Government • NGO • Educational institutions • Terrorist non-state militias • Religious institutions and scholars 	47
2012	Pakistan	<ul style="list-style-type: none"> • TTP • Jundullah • Lashkar-e-Taiba 	<ul style="list-style-type: none"> • Military • Private citizens • Business • Media • Police • Government • NGO • Educational institutions • Terrorist non-state militias • Religious institutions and scholars 	151

2013	Pakistan	<ul style="list-style-type: none"> • TTP • Hizb al-Tahrir al-Islami Mujahideen Ansar • Sipah-I-Mohammed • Jundallah • Lashkar-e-Jhangvi • Jaish Usama • Taliban 	<ul style="list-style-type: none"> • Military • Private citizens • Business • Media • Police • Government • NGO • Educational institutions • Terrorist non-state militias • Religious institutions and scholars 	114
2014	Pakistan	<ul style="list-style-type: none"> • TTP • Lashkar-e-Taiba • Lashkar-e-Islam • Jundallah • Taliban • Jamaat-ul-Ahrar • Halqa-e-Mehsud • Lashkar-e-Jarrar • Al-Qaida in the Indian Subcontinent, • Islamic Movement of Uzbekistan • Balochistan Liberation United Front • Orakzai Freedom Movement • Baloch Waja Liberation Army 	<ul style="list-style-type: none"> • Military • Private citizens • Business • Media • Police • Government • NGO • Educational institutions • Terrorist non-state militias • Religious institutions and scholars 	164
2015	Pakistan	<ul style="list-style-type: none"> • TTP • Lashkar-e-Jhanvi • Lashkar-e-Islam • Khorasan Chapter of the Islamic State 	<ul style="list-style-type: none"> • Military • Private citizens • Business • Media • Police 	110

		<ul style="list-style-type: none"> • Jundallah • Al-Qaida in the Indian Subcontinent, 	<ul style="list-style-type: none"> • Government • NGO • Educational institutions • Terrorist non-state militias • Religious institutions and scholars 	
2016	Pakistan	<ul style="list-style-type: none"> • TTP • Lashkar-e-Jhangvi • Lashkar-e-Islam • Khorasan Chapter of the Islamic State • Baloch Liberation Army • Jaish-e-Islam • Jundallah 	<ul style="list-style-type: none"> • Military • Private citizens • Business • Media • Police • Government • Educational institutions 	17

5.5 Al-Qaeda's relationship with Haqqani Network

The Haqqani Network (HN) is a Sunni Islamist militant organisation based in Federally Administered Tribal Areas (FATA) in Pakistan. Mujahideen commander Jalaluddin Haqqani formed HN in the late 1970s.¹²⁵² The HN belongs to the Zadran qaum (tribe), who are mostly based in Paktia and Khost provinces in the East of Afghanistan.¹²⁵³ The Haqqanis are considered the most lethal and sophisticated insurgent group targeting the US and Afghan forces in Afghanistan.¹²⁵⁴ Financial records of the HN obtained by the US military have demonstrated that the group gathers funds through various channels, including their collaboration in kidnap-for-ransom schemes with

¹²⁵² Counterterrorism guide, 'Haqqani Network' <

https://www.dni.gov/nctc/groups/haqqani_network.html > accessed at 19 Dec 2017

¹²⁵³ Stanford University, 'Mapping terrorist organisation, Haqqani Network' <

<http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/363> > accessed at 20 Dec

2017

¹²⁵⁴ Counterterrorism guide (n 1252)

other terrorist groups. They smuggle goods and have invested in real estate. They are also involved in drug supply. They are tied to large money laundering operations. They have ownership stakes in construction firms, transport, import-export business; they receive funds from ideological supporters in Pakistan and from Gulf region.¹²⁵⁵ A 2010 US Treasury Department's report showed that the HN has also collected payments from Al-Qaeda.¹²⁵⁶

The HN is a family-run network that operates semi-autonomously within the wider Taliban federation. The Haqqanis maintain distinct command and control, and lines of operations.¹²⁵⁷ The HN is a remarkably small organisation at the top, with less than a dozen key players, mostly all of them relatives of the founder, Jalaluddin Haqqani.¹²⁵⁸ From the 1970s, the HN has forged relationships with both state and non-state actors, including senior Al-Qaeda members, members of the TTP, wealthy private donors from the Gulf States, and officials of Pakistan's Inter-Services Intelligence (ISI). All these actors were supporting HN because they had interest in gaining influence in Afghanistan.¹²⁵⁹ The HN established close relationship with Osama Bin Laden in the 1980s and even allowed him to open his first training camp in the territory under their control in Afghanistan.¹²⁶⁰ The training manuals used by HN for operations on the field features religious propaganda and praise for Al-Qaeda.¹²⁶¹ They also provided shelter and protection to Al-Qaeda and foreign fighters in North Waziristan in exchange of money or to multiply its force.¹²⁶² Although HN is closely associated with Al-Qaeda but they are not known to

¹²⁵⁵Gretchen Peters, 'Haqqani Network Financing: The Evolution of an Industry' (2012) HARMONY PROGRAM, THE COMBATING TERRORISM CENTER AT WEST POINT, 1
< https://ctc.usma.edu/wp-content/uploads/2012/07/CTC_Haqqani_Network_Financing-Report_Final.pdf > accessed at 20 Dec 2017

¹²⁵⁶ US Department of the treasury, "Treasury Targets Taliban and Haqqani Leadership: Treasury Designates Three Financiers in Afghanistan and Pakistan", (22 July 2010) < <https://www.treasury.gov/press-center/press-releases/Pages/tg782.aspx> > accessed at 15 Dec 2017

¹²⁵⁷ ibid

¹²⁵⁸ ibid 24

¹²⁵⁹ Brown, Vahid and Don Rassler, *Fountainhead of Jihad: the Haqqani nexus, 1973-2012* (Oxford University Press 2013)

¹²⁶⁰ "Interview with Steve Coll," *Frontline*, PBS

¹²⁶¹ Bill Roggio, 'Haqqani Network Releases Video of Training Camps' (*Long War Journal*, 17 Nov 2011) < http://www.longwarjournal.org/archives/2011/11/haqqani_network_rele.php > accessed 15 Dec 2017

¹²⁶² Jeffery Dressler, 'The Haqqani Network from Pakistan to Afghanistan' (2010) Afghanistan Report 6, 37

seek goals beyond Pakistan and do not provide recruits or resources to Al-Qaeda in its broader ambitions.¹²⁶³

The relationship between ISI and TPP is extremely controversial. Allegedly, some individuals from ISI have provided 'extensive support, including safe harbor and access to weapons, to the HN, enabling the group to expand.'¹²⁶⁴ In 2011, Admiral Mike Mullen, then chairman of the US Joint Chiefs of Staff, called the Haqqanis a 'veritable arm' of the ISI.¹²⁶⁵ However, contrary to these claims the relationship between HN and the ISI is complex and tense. For instance, a senior Pakistani religious figure who has close ties to Haqqani has calimed that, 'there is difference between having a relationship and being under control...They have a relationship with the ISI, but they are not under their control.'¹²⁶⁶ Likewise, Shuja Pasha, Director of ISI admitted there was 'contact' with Haqqani but not command and control.¹²⁶⁷ The ISI's support for HN has never been direct. Some ISI officials have provided small amounts of funding and training to HN fighters but their biggest role is limited to protection and intelligence.¹²⁶⁸ The two sides have only cooperated when it has suited them. The ISI has perceived the Haqqanis as slightly more reliable allies than the Taliban ever were.¹²⁶⁹ The Haqqanis's open support for TTP (a group that has repeatedly targeted ISI and Pakistan military installations, killing dozens of intelligence officers and military personnel) and the Islamic Jihad Union (IJU), a terrorist group that carried out attacks against Pakistani soldiers in Swat¹²⁷⁰) demonstrates divergent interests of ISI and the HN. Haqqanis contacts with Al-Qaeda are troubling for Pakistan because Al-Qaeda poses

¹²⁶³ John Rollins, 'Al Qaeda and affiliates: Historical perspective, global presence and implications for US policy' (2011) Congressional Research Service, 7

¹²⁶⁴ Counter extremism project , Haqqani Network, <https://www.counterextremism.com/threat/haqqani-network>

¹²⁶⁵ The Haqqani Network blacklisted, The Economist (15 Sep 2012) < <http://www.economist.com/node/21562974> > accessed at 16 Dec 2017

¹²⁶⁶ Peters (n 1255)

¹²⁶⁷ Philip H. J. Davies and Kristian C. Gustafson, *Intelligence Elsewhere: Spies and Espionage Outside the Anglosphere* (Georgetown University Press 2013) 116

¹²⁶⁸ Peter Bergen and Katherine Tiedemann, *Talibanistan: Negotiating the Borders Between Terror, Politics, and Religion* (Oxford University Press 2013) 145

¹²⁶⁹ The Economist, 'The Pakistani army's complex relationship with jihadists' (1 Oct 2011) < <http://www.economist.com/node/21531042> > accessed 16 Dec 2017

¹²⁷⁰ Ronald Sandeep, 'The Islamic Jihad movement' (14 Oct 2008) The NEFA Foundation

security threat to Pakistan by propagating anti-Pakistan propaganda.¹²⁷¹ Moreover, the relationship between HN and Pakistan deteriorated drastically after the Peshawar attack¹²⁷² and, in 2015, Pakistan officially outlawed the HN.¹²⁷³

5.5.1 Who were the targets of HN?

The table below shows the total number of terrorist attacks by the HN between 2006 and 2016.¹²⁷⁴ During this period, the HN has allegedly carried out 65 terrorist attacks that were, for the most part, confined to Afghanistan and directed against Afghan forces, government, citizens, businesses, religious scholars, educational and religious institutions and media.¹²⁷⁵ Haqqanis were not involved in any attack against Western forces or targets outside Afghanistan. There is no credible evidence suggesting that Al-Qaeda played direct role in these attacks. This indicates that unlike Al-Qaeda Haqqanis do not have global ambitions. Instead, their ambitions are national, they want to force the US or its coalition partners to leave Afghanistan; they also aim at having a say in Afghan politics.

Year	Country	Terrorist Groups that are involved/claimed responsibility ¹²⁷⁶	Targeted Groups	Number of terrorist attacks
2006	Afghanistan	Haqqani Network	<ul style="list-style-type: none"> • Government • Private citizens 	3

¹²⁷¹ Brown, Vahid and Don Rassler, *Fountainhead of Jihad: the Haqqani nexus, 1973-2012* (Oxford University Press 2013)

¹²⁷² BBC News, 'Pakistan Taliban: Peshawar school attack leaves 141 dead' (16 Dec 2014) < <http://www.bbc.co.uk/news/world-asia-30491435> > accessed at 15 Dec 2017

¹²⁷³ Mehreen Zehra-Malik, 'Pakistan bans Haqqani network after security talks with Kerry' (Reuters 16 Jan 2015) < <https://www.reuters.com/article/us-pakistan-militants-haqqani/pakistan-bans-haqqani-network-after-security-talks-with-kerry-idUSKBNOKP1DA20150116> > accessed 16 Dec 2017

¹²⁷⁴ The study gathered data of terrorist attacks by the HN from 2006-2016 from University of Maryland terrorism database. Table has only included confirmed terrorist attacks carried out by the HN. It has not included any "suspected" terrorist attack.

¹²⁷⁵ Allegedly HN was involved in a terrorist attack in Pakistan see Haqqani group behind attack on Pakistan police station," *Gulf News* (3 March 2013); University of Maryland, Global terrorism database, < <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=201302270018> > accessed at 20 Dec 2017

¹²⁷⁶ Taliban did not conduct joint operations with the HN. In most cases Taliban claimed responsibility for the attacks but in rest Afghan military or government officials attributed the attacks to HN.

			and property	
2007	Afghanistan	Haqqani Network	Police	1
2008	Afghanistan	Haqqani Network	<ul style="list-style-type: none"> • Government • Military • Private Citizens & Property • Journalists & Media 	5
2009	Afghanistan	Haqqani Network	Government	1
2010	Afghanistan	Haqqani Network	<ul style="list-style-type: none"> • Military • Private Citizens & Property 	3
2011	Afghanistan	Haqqani Network	<ul style="list-style-type: none"> • Government • Military • Police, • Private Citizens & Property • Airport and aircrafts • Business 	6
2012	Afghanistan	<ul style="list-style-type: none"> • Haqqani Network • Taliban 	<ul style="list-style-type: none"> • Government • Military • Police • Private Citizens & Property • Airport and aircrafts • Business 	24
2013	<ul style="list-style-type: none"> • Afghanistan • Pakistan 	<ul style="list-style-type: none"> • Haqqani Network • Mahaz Fedai Tahrik Islami Afghanistan 	<ul style="list-style-type: none"> • Government • Military • Police • Private Citizens 	3

		<ul style="list-style-type: none"> • Lashkar-e-Taiba 	<ul style="list-style-type: none"> • & Property 	
2014	Afghanistan	<ul style="list-style-type: none"> • Haqqani Network • Taliban 	<ul style="list-style-type: none"> • Government • Military • Police • Private Citizens & Property • Journalist and media 	6
2015	Afghanistan	<ul style="list-style-type: none"> • Haqqani Network • Taliban 	<ul style="list-style-type: none"> • Government • Military • Police • Private Citizens & Property • Journalist and media 	8
2016	Afghanistan	<ul style="list-style-type: none"> • Haqqani Network • Taliban 	<ul style="list-style-type: none"> • Government • Private Citizens & Property • Journalist and media • Educational institutions 	5

5.6 Al-Qaeda's relationship with the Al-Qaeda in Arabian Peninsula (AQAP)

AQAP was officially launched in 2009 when Al-Qaeda militants in Yemen merged with its Saudi counterpart to create AQAP.¹²⁷⁷ Most of the Jihadis who are active in Yemen today are those who took part in the Afghan war against the Soviet occupation in the 1980s. After the war, many mujahedeen were not

¹²⁷⁷ Counter extremism project, 'Al-Qaeda in the Arabian Peninsula (AQAP)' < <https://www.counterextremism.com/threat/al-qaeda-arabian-peninsula-aqap> > accessed at 20 Dec 2017

allowed to return to their home countries and settled in Yemen by joining Yemeni veterans of the Afghan war.¹²⁷⁸ These mujahedeen had support of the then late President Saleh. Saleh reportedly hired these mujahedeen to fight his enemies, from secessionists in the south to Marxists. The unstable political environment, powerful tribal system, weak economy and mountainous geography of Yemen provided safe haven to these extremists.¹²⁷⁹ This volatile environment enabled Al-Qaeda to operate and maintain its presence in the country since the 1990s.¹²⁸⁰ In 2000, Al-Qaeda launched an attack on the USS Cole.¹²⁸¹ But the attack on the US forces from Yemen does not mean that the Al-Qaeda has sustained presence there. According to one observer, the Cole attack, 'appears to have been more an example of opportunism than a sign of an enduring Al-Qaeda presence in Yemen'.¹²⁸² Al-Qaeda's influence gradually declined in Yemen following the Cole bombing as the organisation failed to establish durable ties within the country.¹²⁸³ However, the situation changed after a dramatic prison break in which some two dozen extremists, including future AQAP leaders Nasir al-Wahayshi and Qasim Al-Raymi, escaped.¹²⁸⁴ Within a year's time, the escapees formed a new organisation known as 'Al-Qaeda in the Land of Yemen' which carried out a few terrorist attacks against the West but mainly targeted local government officials and Yemen's security services and military.¹²⁸⁵ The new group developed substantial ties with local tribal leaders in provincial areas who were already resistant to central government control.¹²⁸⁶ The new group eventually became known as AQAP when two prominent Saudis, who had formerly been held at Guantanamo,

¹²⁷⁸ Combating Terrorism Center, A False Foundation? AQAP, Tribes and Ungoverned Spaces in Yemen, (2011), p. 22 <

<http://www.dtic.mil/dtic/tr/fulltext/u2/a550461.pdf> > accessed at 20 Dec 2017

¹²⁷⁹ Stanford University, Mapping Terrorist organisations, Al-Qaeda in the Arabian Peninsula < <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/19> > accessed at 21 Dec 2017

¹²⁸⁰ *ibid*

¹²⁸¹ 9/11 Commission Report, 180,190-193 (It was attack against the US Naval vehicle by Al-Qaeda)

¹²⁸² Combating Terrorism Center, 'A False Foundation? AQAP, Tribes and Ungoverned Spaces in Yemen' (2011) 22 <

<http://www.dtic.mil/dtic/tr/fulltext/u2/a550461.pdf> > accessed at 20 Dec 2017

¹²⁸³ *ibid* 35

¹²⁸⁴ Gregory D. Johnsen, 'Tracking Yemen's 23 Escaped Jihadi Operatives' (27 Sep 2007)

Part 1, Jamestown Found, Terrorism Monitor < <https://jamestown.org/program/tracking-yemens-23-escaped-jihadi-operatives-part-1/> > accessed at 25 Dec 2017

¹²⁸⁵ Combating Terrorism Center (n 1282) 37

¹²⁸⁶ *ibid* 41-45

joined them.¹²⁸⁷

5.6.1 AQAP's targets

The table below provides the figures of the total number of terrorist attacks carried out by the AQAP between 2004 and 2016.¹²⁸⁸ During this period, AQAP has carried out total 661 terrorist attacks globally. Its focus remains local and most attacks have been directed towards Yemeni military, government, citizens, businesses, educational and religious institutions, religious scholars, media, and NGOs. The small scales of terrorist attacks against the West were attributed to individuals with loose connections with the AQAP and suggest that the organisation does not pose significant threat to the Western countries.¹²⁸⁹ The first incident that is linked to AQAP occurred in 2009. A man named Abdulhakim Muhammad shot two soldiers outside a military recruiting station in the US. One of the soldiers was killed and the second was injured. Initially, Muhammad denied any affiliation with known organisations but later claimed that he was a soldier for Al-Qaeda and that the attack on the military recruiting station was 'a Jihadi attack'. Muhammad had spent time in Yemen, returning four months before the attack.¹²⁹⁰ In December 2009, a second terrorist attack took place in the US, by a would-be suicide bomber, identified as Umar Farouk Abdulmutallab. He was on board of Northwest Flight 253 travelling from Amsterdam when he detonated a device attached to his body. The assailant was wounded and damage was done to the aircraft but no other injuries or casualties were reported. The AQAP claimed responsibility for the failed attempt.¹²⁹¹ In a third failed terrorist attack, AQAP used parcels carrying explosive devices on board. UK counter-

¹²⁸⁷ *ibid* 13

¹²⁸⁸ The study gathered data of terrorist attacks by the AQAP from 2004-2016 from University of Maryland terrorism database. Table has only included confirmed terrorist attacks carried out by the AQAP. It has not included any "suspected" terrorist attack.

¹²⁸⁹ Peter Bergen and Bruce Hoffman, "Assessing the terrorist threat", A report of the Bipartisan policy centre's National Security preparedness group (2010) 9-10

¹²⁹⁰ University of Maryland, Global terrorism database, <

<https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=200906010028> > accessed at 23 Dec 2017

¹²⁹¹ University of Maryland, Global terrorism database, <

<https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=200912250024> > accessed at 22 Dec 2017

terrorism officials located and safely defused an improvised explosive device.¹²⁹²

The latest incident attributed to the AQAP occurred in France in January 2015. Two assailants stormed the offices of Charlie Hebdo, a satirical magazine, and opened fire on journalists that killed 12 people. The AQAP claimed responsibility for the incident, explaining its rationale as retaliation for the magazine's depiction of Prophet Muhammad.¹²⁹³ Interestingly, IS also claimed responsibility for this event. The AQAP's unsubstantiated claim and lack of any other credible evidence may suggest that this attack was carried out by a few radicalised individuals who were only distantly affiliated to a group, be it IS or AQAP.¹²⁹⁴

Year	Country	Terrorist Groups that are involved/claimed responsibility ¹²⁹⁵	Target Groups	Total Attacks
2004	Saudi Arabia	AQAP	<ul style="list-style-type: none"> • Government (Diplomatic) • Military • Private Citizens & Property • Business 	4
2005				0
2006	Saudi Arabia	AQAP	Property	1
2007				0

¹²⁹² University of Maryland, Global terrorism database, < <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=201010290009> > accessed at 25 Dec 2017

¹²⁹³ Joshua Keating, 'France Was on Edge Over Terrorism Even Before the Charlie Hebdo Attack' *Slate* (7 Jan 2015) < http://www.slate.com/blogs/the_world/_/2015/01/07/france_was_on_edge_over_terrorism_even_before_the_charlie_hebdo_attack.html > accessed 23 Dec 2017

¹²⁹⁴ Charlie Winter, 'AQAP vs ISIS: Who was really behind the Charlie Hebdo attacks?' *Middle East Eye* (13 Jan 2015) < <http://www.middleeasteye.net/columns/aqap-vs-isis-who-was-really-behind-charles-hebdo-692115745> > accessed 22 Dec 2017

¹²⁹⁵ According to this data the AQAP did not conduct joint operations with other terrorist groups. In some cases AQAP claimed responsibility for the attacks and in rest Yemeni government or military officials attributed the attacks to them.

2008				0
2009	<ul style="list-style-type: none"> • Yemen • US • Saudi Arabia 	AQAP	<ul style="list-style-type: none"> • Airports and Aircraft • Government • Police 	3
2010	<ul style="list-style-type: none"> • Yemen • UK • UAE 	AQAP	<ul style="list-style-type: none"> • Airports and Aircraft • Utilities • Religious institutions and figures • Private citizens property 	8
2011	Yemen	AQAP	<ul style="list-style-type: none"> • Military • Police • Government • Private Citizens and Property 	11
2012	Yemen	AQAP	<ul style="list-style-type: none"> • Tourist • Military • Utilities • Private Citizens and property • Government 	111
2013	Yemen	AQAP	<ul style="list-style-type: none"> • Military • Police • Government • Private Citizens and Property • Journalist and Media • Non-state Militias/terrorists • Maritime • Business • Telecommunications • Utilities • NGO 	86
2014	Yemen	AQAP	<ul style="list-style-type: none"> • Military • Police 	238

			<ul style="list-style-type: none"> • Government • Private Citizens and Property • Journalist and Media • Non-state Militias/terrorists • Maritime • Business • Utilities • NGO • Airport and aircraft • Educational institutions 	
2015	<ul style="list-style-type: none"> • Yemen • France 	<ul style="list-style-type: none"> • AQAP • Hadramawt Province of the Islamic State • Adan-Abyan Province of the Islamic State • Al-Islah Party • Houthi extremists • Shabwah Province of the Islamic State • Supporters of Abd Rabbuh Mansur Hadi • Lahij Province of the Islamic State 	<ul style="list-style-type: none"> • Military • Police • Government • Private Citizens and Property • Journalist and Media • Non-state Militias/terrorists • Maritime • Business • Utilities • NGO • Airport and aircraft • Educational institutions • Religious institutions/scholars 	120
2016	Yemen	<ul style="list-style-type: none"> • AQAP • Lahij Province of the Islamic State 	<ul style="list-style-type: none"> • Military • Police • Government • Private Citizens and 	79

		<ul style="list-style-type: none"> • Adan-Abyan Province of the Islamic State • Hadramawt Province of the Islamic State 	<ul style="list-style-type: none"> • Property • Journalist and Media • Non-state Militias/terrorists • Maritime • Business • Educational institutions • Religious institutions/scholars 	
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5.7 Al-Qaeda's relationship with Al-Shabaab

Al-Shabaab's origin can be traced back to the Al-Ittihad al-Islami, a militant Salafi group that gained prominence in the 1990s during the civil war in Somalia. The militants belonging from Al-ittihad al-Islam sought to establish a 'Greater Somalia' with the aim of imposing Sharia law, by joining the Islamic Courts Union (ICU). Subsequently, the ICU was defeated by the then Somali government and Ethiopian troops.¹²⁹⁶ The Ethiopian invasion of Somalia in 2006 had a profound effect on the rise of Al-Shabaab.¹²⁹⁷ Inadequate governance allowed Al-Shabaab to operate unfettered in large safe heavens throughout the South region of Somalia. Al-Shabaab built training camps, established a system of taxation and extortion to raise funds and provided basic governmental services to gain popular support. This strategy bolstered its recruiting and gave them safe space to operate.¹²⁹⁸

Al-Shabaab has taken up arms against the Federal Government of Somalia and its backers in the African Union Mission in Somalia.¹²⁹⁹ Whilst its influence has fluctuated due to military operations against its members, it continues to

¹²⁹⁶ Robert Anthony Waters Jr, *Historical Dictionary of United States-Africa Relations*, (Scarecrow Press 2009) 260

¹²⁹⁷ Jeffrey Gettleman, 'Ethiopian Troops Said to Enter Somalia, Opening New Front Against Militants' *New York Times* (21 Nov 2011) A4

¹²⁹⁸Stanford University, 'Mapping Militant organisations' < <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61#cite31> > accessed 20 Dec 2017; Rob Wise, "'Al Shabaab" AQAM Futures Project Case Study Series", (2011) Center for Strategic & International Studies/Homeland Security & Counterterrorism Program Transnational Threats Project

¹²⁹⁹ Al-Shabaab primarily targets Somali government and military and AMISOM troops that support Somali forces in their operations against Al-Shabaab (AMISOM Military Component < <http://amisom-au.org/mission-profile/military-component/> >)

control large swathes of territory in central and southern Somalia.¹³⁰⁰ Al-Shabaab has faced internal discords regarding the scope of their actions, with a faction supporting that operations should remain confined to the national borders and others promoting the extension of their network beyond Somalia, including the possibility of becoming members of global terrorist brands, such as Al-Qaeda (AQ) and the Islamic State (IS).¹³⁰¹

While their focus remains local, they have kept a positive relationship with Al-Qaeda. They have endorsed each other's movement and Al-Shabaab has offered refuge to Al-Qaeda members in the region.¹³⁰² Al-Shabaab has also altered its propaganda to portray Somalia as a front in the global struggle against the West and has incorporated some Al-Qaeda members in the organisation.¹³⁰³ Al-Shabaab and its media wing, the Katai'b Foundation, have created number of websites denouncing the 'far enemy'-the US and the African Union governments.¹³⁰⁴

Al-Shabaab's quest to become part of the larger global terrorist network may be more strategic than driven by ideology. By becoming part of a big brand it has sought to boost its legitimacy and recognition, which in turn may make it more appealing to potential recruits, both in Somalia and abroad.¹³⁰⁵ Additionally, Al-Shabaab's members have travelled abroad to train with Al-Qaeda.¹³⁰⁶ In 2009, Al-Shabaab released a video formally pledging allegiance to Al-Qaeda.¹³⁰⁷ Al-Qaeda explicitly accepted Al-Shabaab in 2012 and formally announced a merger between the two organisations. The video included a clip of Ayman al Zawahiri himself welcoming Al-Shabaab aboard.¹³⁰⁸

¹³⁰⁰ Al-Shabaab, *Origins, Current Status, and a Look into the Future*, Other solutions (9 Nov 2015)

¹³⁰¹ *ibid*; Al-Shabaab as a Transnational Security Threat, March 2016, *Fostering Resilience, Regional Integration and Peace for Sustainable Development*, p. 11; Will McCants, 'A Tangled Net Assessment of al-Qaeda' *Jihadica* (19 April 2012) < <http://www.jihadica.com/a-net-assessment-of-al-qaeda/> > ("[I]t is not clear that the entire organisation has agreed with the al-Qaeda merger.")

¹³⁰² Jacqueline Page 'Jihadi Arena Report: Somalia - Development of Radical Islamism and Current Implications' (22 March 2010) International Institute for Counter-Terrorism

¹³⁰³ Rob Wise (n 1298) 4

¹³⁰⁴ Rob Wise *ibid* 7

¹³⁰⁵ Al-Shabaab, "Origins, Current Status, and a Look into the Future", (9 Nov 2015) Other solutions

¹³⁰⁶ *Ibid* ; Christopher Harnisch, 'The Terror Threat from Somalia: The Internationalization of Al Shabaab' (12 Feb 2010), *Critical Threats Project*, American Enterprise Institute

¹³⁰⁷ *ibid*

¹³⁰⁸ JM Berger, "Al Qaeda's Merger." *Foreign Policy* (15 Feb 2012) <

<http://foreignpolicy.com/2012/02/15/al-qaedas-merger/> > accessed at 22 Dec 2017; Nelly Lahoud 'The Merger of Al-Shabab and Qa'idat al-Jihad' (2012) *CTC Sentinel*, 1–2

5.7.1 Who are the targets of Al-Shabaab?

The table below shows the available data on the number of terrorist attacks carried out by Al-Shabaab between 2005 and 2016.¹³⁰⁹ Within those years, Al-Shabaab carried out terrorist attacks in Somalia, Ethiopia, Kenya and Congo. Most of them were concentrated in Somalia against Somali military and government officials, citizens, businesses, educational and religious institutions, religious scholars, media, and NGOs. Al-Shabaab was not involved in any terrorist attack against the US or its allies. The available data reveals that Al-Shabaab was solely responsible for almost all the attacks. In brief, no evidence suggests that Al-Shabaab poses a threat to Western countries in general and the US in particular.

Year	Country	Terrorist Group that are involved/claimed responsibility ¹³¹⁰	Target Group	Number of attacks
2005	Somalia	Al-Shabaab	Military	2
2006				0
2007	<ul style="list-style-type: none"> • Somalia • Ethiopia 	Al-Shabaab	Military	5
2008	<ul style="list-style-type: none"> • Somalia • Ethiopia • Kenya 	<ul style="list-style-type: none"> • Al-Shabaab • Hizbul al Islam • Ogaden National Liberation Front 	<ul style="list-style-type: none"> • Military • Government • Private Citizens and property • NGO • Terrorists/Non-state militias • Transportation • Religious 	15

¹³⁰⁹ The study gathered data of terrorist attacks by Al-Shabaab from 2005-2016 from University of Maryland terrorism database. Table has only included confirmed terrorist attacks carried out by the Al-Shabaab. It has not included any “suspected” terrorist attack.

¹³¹⁰ According to this data Al-Shabaab allegedly conducted joint operation with Ogaden National liberation Front on one occasion. In other cases Al-Shabaab did not collaborate with any other terrorist group. Not all attacks were claimed by Al-Shabaab, the Somali officials attributed some attacks to Al-Shabaab. < <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=201406020037> > accessed 30 Dec 2017

			<ul style="list-style-type: none"> institution/scholar Police Journalist Airport/aircraft 	
2009	Somalia	<ul style="list-style-type: none"> Al-Shabaab Hizbul al Islam Ogaden National Liberation Front 	<ul style="list-style-type: none"> Military Government Private Citizens and property NGO Terrorists/Non-state militias Transportation Religious institution/scholar Police Journalist Airport/aircraft 	31
2010	Somalia	Al-Shabaab	<ul style="list-style-type: none"> Military Government Private Citizens and property Terrorists/Non-state militias Police Journalist Airport/aircraft 	17
2011	<ul style="list-style-type: none"> Somalia Kenya 	Al-Shabaab	<ul style="list-style-type: none"> Military Government Private Citizens and property NGO Terrorists/Non-state militias Transportation Religious institution/scholar Police Journalist Airport/aircraft 	58

2012	<ul style="list-style-type: none"> • Somalia • Kenya 	Al-Shabaab	<ul style="list-style-type: none"> • Military • Government • Private Citizens and property • NGO • Terrorists/Non-state militias • Transportation • Religious institution/scholar • Police • Business • Journalist • Airport/aircraft 	173
2013	<ul style="list-style-type: none"> • Somalia • Kenya • Congo • Ethiopia 	<ul style="list-style-type: none"> • Al-Shabaab • Allied Democratic Forces 	<ul style="list-style-type: none"> • Military • Government • Private Citizens and property • NGO • Terrorists/Non-state militias • Transportation • Religious institution/scholar • Police • Business • Journalist • Airport/aircraft 	219
2014	<ul style="list-style-type: none"> • Somalia • Kenya 	<ul style="list-style-type: none"> • Al-Shabaab • Ogaden National liberation Front 	<ul style="list-style-type: none"> • Military • Government • Private Citizens and property • NGO • Terrorists/Non-state militias • Transportation • Religious institution/scholar • Police 	598

			<ul style="list-style-type: none"> • Business • Journalist • Airport/aircraft 	
2015	<ul style="list-style-type: none"> • Somalia • Kenya 	Al-Shabaab	<ul style="list-style-type: none"> • Military • Government • Private Citizens and property • NGO • Terrorists/Non-state militias • Transportation • Religious institution/scholar • Police • Business • Journalist • Airport/aircraft 	372
2016	<ul style="list-style-type: none"> • Somalia • Kenya 	Al-Shabaab	<ul style="list-style-type: none"> • Military • Government • Private Citizens and property • NGO • Terrorists/Non-state militias • Transportation • Religious institution/scholar • Police • Business • Journalist • Airport/aircraft 	526

It is clear that there is some sort of relationship between Al-Qaeda and these terrorist organisations. In terms of legal responsibility the question is not whether they support each other or share the same ideology, but to whom the military operations of these organisations can be attributed. Have these organisations been involved in any attack against the West controlled by Al-

Qaeda? The following section bases the analysis of the relationship between Al-Qaeda and these organisations on the 'control test' devised by the ICJ in Nicaragua and subsequent jurisprudence.

5.8 Al-Qaeda's control over these organisations under strict control test

Under strict control test Al-Qaeda will only be responsible for acts of these organisations if:

1. They are completely dependent on Al-Qaeda
2. The complete dependence of these organisations on Al-Qaeda extends to all fields of their activities
3. Al-Qaeda exercises a high degree of control over them

These organisations will only be completely dependent on Al-Qaeda if they lack any autonomy and are working as an agent of Al-Qaeda. It requires them to be following orders from Al-Qaeda without the ability of making independent decision. Most of these organisations and Al-Qaeda have common objectives that make them allies, not affiliates. Occasional coordination of activities and cooperation including provision of funds, intelligence, advisers and logistic support is not equivalent to control.

TTP and Al-Qaeda share the same ideology and goals, and the TTP has provided sanctuary to Al-Qaeda in FATA. Further there is evidence that occasionally, Al-Qaeda provides military and financial assistance to the TTP members but there is no evidence suggesting that the TTP cannot conduct its activities without the support of Al-Qaeda. To sum, Al-Qaeda is not an entity on which TTP is completely dependent.

Likewise the HN has managed to keep close ties with the TTP, Al-Qaeda and multiple foreign fighters operating in North Waziristan.¹³¹¹The HN has also carried out lethal attacks against the US forces in Afghanistan. However, it is still not clear whether Al-Qaeda itself was involved in those attacks against

¹³¹¹ Gretchen Peters (n 1255)

the US and NATO forces.¹³¹²Mainly Haqqani's have either carried out those attacks on their own or jointly with Afghan Taliban.¹³¹³Therefore its activities cannot be attributed to Al-Qaeda.

Al-Qaeda's main target is West but AQAP has directed almost all of its attacks against Yemeni civilians, government officials, military and the establishment.¹³¹⁴Bearing this in mind, is AQAP best understood to be part and parcel of the Al-Qaeda or a wholly distinct organisation that simply shares historic ties, branding, goals, and enemies? The late AQAP emir Al-Wahayshi (who died in the US drone strike in 2015)¹³¹⁵publicly pledged *bayat* to Ayman al Zawahiri, the post-Bin Laden leader of Al-Qaeda, promising 'obedience in good and hard times, in ease and difficulty.'¹³¹⁶ However, there is little evidence that the Al-Qaeda senior leadership exercised detailed control over AQAP's operational activities.¹³¹⁷

Some of the Bin Laden's letters obtained from the Abbottabad raid showed some contacts between AQAP and Al-Qaeda. In June 2010 Bin Laden sent a letter to leaders of AQAP and AQIM requesting support for Yunis-al-Mauritani and Shaykh Yunis. In this letter, Bin Laden asked the leaders of AQAP and AQIM to listen 'whatever he asks of him' and to provide financial support.¹³¹⁸Arguably, this kind of contact between Bin Laden and AQAP are not enough to establish control of Al-Qaeda over AQAP, particularly when Bin

¹³¹² Stanford University 'Mapping terrorist organisation, Haqqani Network' < <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/363> > accessed at 20 Dec 2017; University of Maryland 'Global terrorism database' < <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=201302270018> > accessed at 20 Dec 2017

¹³¹³ *ibid*

¹³¹⁴ Stanford University 'Mapping Militant organisations, Al-Qaeda in Yemen' < <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/23#note39> > accessed 27 Dec 2017; University of Maryland 'Global terrorism database' < <https://www.start.umd.edu/gtd/search/Results.aspx?page=10&search=AQAP&count=100&expanded=no&charttype=line&chart=overtime&ob=GTDID&od=desc#results-table> > accessed at 20 Dec 2017

¹³¹⁵ BBC News, 'Yemen al-Qaeda chief al-Wuhayshi killed in US strike' (16 June 2015) < <http://www.bbc.co.uk/news/world-middle-east-33143259> > accessed 20 Dec 2017

¹³¹⁶ Al Wuhayshi's statement was translated by the SITE Institute see Bill Roggio, 'AQAP Leader Pledges Oath of Allegiance to Ayman al Zawahiri' (26 Jul 2011) Long War Journal

¹³¹⁷ Gregory D Johnsen, 'The Impact of Bin Laden's Death on AQAP in Yemen' (May 2011) CTC Sentinel, 9

¹³¹⁸ Daveed Gartenstein-Ross, 'Al Qaeda in the Islamic Maghreb and Al Qaeda's Senior Leadership, Gunpowder & Lead' (20 January 2013) < <http://www.defenddemocracy.org/media-hit/al-qaeda-in-the-islamic-maghreb-and-al-qaedas-senior-leadership/> > accessed 19 Dec 2017

Laden himself was losing his grip over the organisation.¹³¹⁹ Undoubtedly, Al-Qaeda and AQAP share ideology, but not similar goals, because most of the AQAP's attacks were directed at the Yemeni government in retaliation for security crackdowns against the group.¹³²⁰

Al-Shabaab merged with Al-Qaeda but the merger has not resulted in a unified organisation. This so-called merger is insignificant because Al-Shabaab continues to identify itself and operate as a separate organisation. The terrorist affiliates remain organisationally distinct after announcing a merger, and their aim is to gain publicity.¹³²¹ Alex Gallo has claimed that Al-Qaeda today acts as a 'financial adviser and facilitator and provides the ideological coherence within the global jihadist movement'.¹³²² For instance, Al-Qaeda's representatives in East Africa provide guidance on advanced training courses for elite forces, snipers, information technology or budgetary issues.¹³²³ This approach serves Al-Qaeda well because it allows the organisation to take credit for operations while remaining unburdened by the actual cost of waging war.¹³²⁴ There is some evidence suggesting that Al-Qaeda members have been integrated into Al-Shabaab's command structure.¹³²⁵ However, operational control of Al-Shabaab's forces is reportedly divided geographically between independent Somali commanders in the Bay and Bkol regions, the southern parts of Somalia, and in the Northern regions of Somalia.¹³²⁶ This indicates that even Al-Shabaab's leaders are not in complete control of the organisation and regional leaders work autonomously

¹³¹⁹ Imtiaz Gul, *Pakistan: Before and After Osama* (Lotus 2012) ; Peter Bergen, 'An isolated Osama bin Laden struggled to keep his bodyguards' *CNN* (2 June 2016) < <http://edition.cnn.com/2016/03/01/opinions/osama-bin-laden-letters-bergen/index.html> > accessed 19 Dec 2017

¹³²⁰ Stanford University, 'Mapping militant organisations, Al-Qaeda in Yemen' < <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/23#note39> > ; University of Maryland, Global terrorism database < <https://www.start.umd.edu/gtd/search/Results.aspx?page=10&search=AQAP&count=100&expanded=no&charttype=line&chart=overtime&ob=GTID&od=desc#results-table> > accessed at 20 Dec 2017

¹³²¹ Barak, Mendelsohn, *The Al-Qaeda Franchise* (Oxford University Press 2016) 30

¹³²² Norman Cigar and Stephanie E. Kramer, *Al-Qaeda after ten years of wars* (Marine Corps University Press 2011) 73

¹³²³ *ibid*

¹³²⁴ *ibid*

¹³²⁵ Rob Wise, "'Al Shabaab" AQAM Futures Project Case Study Series' (2011) Center for Strategic & International Studies/Homeland Security & Counterterrorism Program Transnational Threats Project

¹³²⁶ *ibid* 7

in their areas. In this situation, the integration of a few members of Al-Qaeda fails to establish complete dependency of one group over them. Al-Shabaab decided to merge with Al-Qaeda because they needed multifaceted support of foreign militants to pursue their local ambitions.¹³²⁷

5.8.1 Al-Qaeda's control over these organisations under effective control test

Using the less stringent 'effective control' test, the actions of these organisations can only be attributed to Al-Qaeda if it is established that Al-Qaeda controls the attacks from beginning to end. There is no evidence showing that Al-Qaeda has managed to control the affairs of any of these organisations. Thus it cannot be said that they are affiliates of Al-Qaeda. Their relationship can be at best explained as that of an ally but no more than that. The following section addresses the legal consequences that may be associated to the provision of assistance among them.

5.9 State responsibility on assistance to foreign forces

This section explores the legal implications that can be derived from the cooperation amongst these groups in the light of rules governing international responsibility. Working with the presumption that the ILC Articles on State Responsibility largely enshrine customary law, actions of non-state actors will be assessed under the same rules. This exercise does not intend to convey any conclusion on the personality of non-state actors or the applicability of the rules on State responsibility on them, but may nonetheless constitute the only fruitful approach in the quest of finding a valid ground to lawfully target terrorist group assisting Al-Qaeda.

According to article 16 of the Articles on State Responsibility, expressly accepted as a reflection of international customary law by the International Court of Justice,¹³²⁸ State is responsible for wrongful acts committed by a third

¹³²⁷ University of Maryland, Global terrorism database, < <https://www.start.umd.edu/gtd/search/Results.aspx?page=28&search=al%20shabaab&count=100&expanded=no&charttype=line&chart=overtime&ob=GTIDID&od=desc#results-table> > accessed 17 Dec 2017

¹³²⁸ *Bosnia and Herzegovina v Serbia and Montenegro* (2007) para 420 reads "reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule"

State if four conditions are met:

1. The State aids or assists another State in the commission of an internationally wrongful act;
2. There must be a sufficient nexus between the assistance and the principal wrong
3. The assisting State has knowledge of the circumstances of the internationally wrongful act; and
4. The recipient State's act would also be wrongful if committed by the assisting State.

It is important to know that responsibility under Article 16 is not responsibility for the internationally wrongful act committed by the assisted state, but responsibility for assisting that state to commit the internationally wrongful act. The acting state is primarily responsible in each case and the assisting State has only a supporting role. It is therefore a secondary responsibility, arising from the fact that a state facilitated the wrongful act. States aiding or assisting recipient state are not co-perpetrators or co-participants in an internationally wrongful act.¹³²⁹ The ILC Commentary implies that the liability of the assisting state will be lower than the responsibility of the principal, since 'the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act'.¹³³⁰

Terms 'aid or assistance' are not defined in Art 16, but most agree that it covers a wide range of activity.¹³³¹ It includes provision of material aid such as weapons; logistical and technical assistance; financial support; provision of territory to launch attacks; or the transfer of intelligence.¹³³² The support must

¹³²⁹ Commentary of draft article for state responsibility, para 1

¹³³⁰ *ibid*; Graefrath argues that in general it may be assumed that participation by aid entails a lesser degree of responsibility than equal participation in the wrongful act. Graefrath, B, 'Complicity in the Law of International Responsibility' (1996) *Revue Belge de Droit International*, 380

¹³³¹ Miles Jackson, *Complicity in International Law* (Oxford University Press 2015) 153; Neta Crawford, 'State Responsibility: The General Part' (2012) 402; Helmut Philip Aust, 'Complicity and the Law of State Responsibility' (2011) 239; Lowe 'Responsibility for the Conduct of Other States' (2002) 5–6

¹³³² Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (2016) Research paper < <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf> > accessed at 28 June 2017

consist on material assistance excluding moral support, encouragement to do a wrongful act or expression of approval.¹³³³

A second condition requires a causal relationship between the material assistance provided and the internationally wrongful act.¹³³⁴ The assistance must contribute 'significantly' to the commission of the wrongful act, limiting further the scope of responsibility.¹³³⁵ The meaning of 'significant contribution' is not explained in article 16 or the ILC commentaries. A paper published by the Chatham House has clarified the terminology by reference to practical examples drawn from armed conflict and counterterrorism:

[If] State A provides a military base to State B, which State B uses to refuel its aircraft en route to carrying out an armed attack against State C in breach of international law on the use of force. Without the ability to refuel at the base in State A, it would be much more difficult for State B to reach its target. In this case, it would appear that State A significantly contributed to State B's principal act, because State A's contribution makes it materially easier for State B to carry out the principal act in each case.¹³³⁶

It then goes on to give example where assistance may not be enough to count as significant contribution:

State A is assisting State B with building up its capacity for law enforcement. It provides State B with 10 jeeps for its police to undertake traffic control and other policing activities in its capital. In the event, this frees up State B's other jeeps, which are then used to carry out human rights violations on a rebel group elsewhere in its territory. Here, although State A's assistance has made some form of contribution to the principal act, the connection between the two is much more remote. It is doubtful whether the provision of assistance that leads to a freeing up of resources by the recipient state to carry out

¹³³³ ILC Commentary, 'Introduction to Chapter IV', para (9), 147; Crawford (n 1331) 403-04; Aust (n 1331) 221.

¹³³⁴ ILC *ibid*

¹³³⁵ *ibid* para 3-5

¹³³⁶ Moynihan (n 1332) Para 25

violations in other areas is sufficient to meet the significant contribution threshold under Article 16.¹³³⁷

These examples indicate that the state's assistance will only be relevant in terms of raising international responsibility if it is possible to draw a strong link between aid and wrongful act. A third condition requires the assisting state to know its assistance or aid may be used to carry out an internationally wrongful act. Paragraph 5 of the Commentary specifies that no responsibility arise unless the assisting state, 'intended ... to facilitate the occurrence of the wrongful conduct.'¹³³⁸ However, a state cannot avoid responsibility if it 'makes a deliberate effort to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality'.¹³³⁹

The ILC Commentary further provides that the State may also incur responsibility if 'it provides material aid to a State that uses the aid to commit human rights violations'.¹³⁴⁰ However if the assistance has contributed only to a minor degree, if at all, to the damage caused by the wrongful act, the assisting State's responsibility is confined to the consequence flowing from its own conduct.¹³⁴¹

5.9.1 Liability of non-state actors for supporting Al-Qaeda

If we apply the rule of Art 16 on non-state actors then they will be responsible for wrongful acts if these four conditions are met:

The non-state group aids or assists another group in the commission of an internationally wrongful act;

- There must be a sufficient nexus between the assistance and the principal wrong
- The assisting group has knowledge of the circumstances of the wrongful act; and
- The recipient group's act would also be wrongful if committed by the assisting group.

¹³³⁷ *ibid* Para 26

¹³³⁸ *ibid* Para 5

¹³³⁹ *ibid* Para 24

¹³⁴⁰ *ibid* Para 9

¹³⁴¹ *ibid* Para 10

It is relatively easy to satisfy condition one, three and four. A state can easily fulfil condition one by showing that a particular group has been either assisting Al-Qaeda in some way or taking assistance from them (non-state groups facilitating Al-Qaeda by providing shelter to its members). Condition three and four are automatically satisfied because undoubtedly these non-state actors are fully aware that their actions or any terrorist attack carried out by Al-Qaeda is unlawful.

The presence of the second condition is difficult to prove. In any case, the responsibility of the aiding group will be limited to the consequences deriving from their cooperation, but the actions of the main acting organisations are not attributable to the assisting group. There is convincing evidence that the TTP has provided shelter to Al-Qaeda in the tribal areas in exchange of some sort of support from Al-Qaeda members for its terrorist activities in Pakistan. If we apply the rules of international responsibility to terrorist groups, the TTP is only responsible for the provision of safe heaven if it has significantly contributed to any given wrongful act. There is no evidence suggesting that Al-Qaeda was able to plan or conduct major terrorist attack from FATA. Al-Qaeda's members were dispersed after 9/11 and few thousand low level members of Al-Qaeda were not strong enough to plan a major terrorist attack against the US or its allies. Therefore, the US may not be able to justify its targeted killing of the TTP under the principles governing article 16.

A similar conclusion is reached in relation to the HN. Allegedly, HN has provided shelter to Al-Qaeda members in North Waziristan in exchange of money or other assistance. Providing shelter did not dramatically increased Al-Qaeda's capability in attacking or planning against the West. I cannot be proved either that Al-Qaeda members benefiting from HN support were involved in major terrorist attack against the US. Extreme measures such targeted killing cannot be justified against HN members when their involvement in Al-Qaeda's actions is uncertain.

Similarly, AQAP has provided financial and military assistance to the Al-Qaeda. But there is no evidence suggesting that this assistance helped Al-Qaeda in carrying out any major attack against US. Therefore US cannot justify its targeted killing of AQAP members on the basis that their help significantly contributed in an attack against the US.

Al-Shabaab provided shelter and also took few members of Al-Qaeda in their group. However this assistance has not bolstered Al-Qaeda's capabilities in any ways. To date there is no evidence that Al-Qaeda was able to carry out major attack against the US with the help of Al-Shabaab. Therefore US may not be able to hold Al-Shabaab responsible for the activities of Al-Qaeda where Al-Shabaab's contribution is only minor.

5.10 Conclusion

Prior to 2001, Al-Qaeda was considered a small band of revolutionary terrorists with limited capacity to conduct attacks against Western targets in Middle East and Africa. The September 11 attacks dramatically changed this perception. Al-Qaeda became, on the eyes of the international community, an active organisation with presence across the globe pursuing the clear and precise strategy to defeat the West. The unprecedented level of cooperation among the law enforcement bodies of States and the coordination of intelligence services that ensued following the attacks has debilitated considerably Al-Qaeda's operational capabilities. Although, Al-Qaeda members are not completely eradicated and a small core of leaders protected by local tribes and the Taliban, survive in Afghanistan and Pakistan, they are subjected to continuous prosecution, key leaders have been eliminated and there is no global network run directly by Al-Qaeda.¹³⁴²

Progressively, terrorist attacks by Al-Qaeda against the West have become unusual and terrorist attacks against non-Western states have rose drastically¹³⁴³ and the 'majority of deaths from terrorism have occurred outside the West'.¹³⁴⁴ The groups that are often associated with Al-Qaeda have very weak ties with it, yet they are labelled as Al-Qaeda affiliates or associates. It is a mistake to use the term Al-Qaeda affiliates or associates as liberally as the US or its allies do: 'Labels frame the way we see the world and eventually influence policies. Using the wrong words to describe problems that we need

¹³⁴² *ibid* 3-4

¹³⁴³ Lazaro Gamio and Tim Meko, 'How terrorism in the West compares to terrorism everywhere else' *Washington Post* (16 July 2016) < <https://www.washingtonpost.com/graphics/world/the-scale-of-terrorist-attacks-around-the-world/> > accessed 10 Dec 2017

¹³⁴⁴ Moran (n 1214) 155

to understand distorts public perceptions and exacerbates the situation'.¹³⁴⁵ Transnational terrorism is a real threat that has been addressed by the Security Council on various occasions.¹³⁴⁶ It is important to understand the true nature of threat posed by these organisations. Linking all the attacks to Al-Qaida has become a convenient way for the US and its allies to justify their targeted killings policies with drones or the presence of Special Forces in undeclared warzones. Al-Qaeda's role should not be overestimated or underestimated but it is important to note that all the terrorist attacks occurred in the West after 9/11 were not controlled or planned by Al-Qaeda from distant lands. In fact, the terrorist attack that is often described as an 'Al-Qaeda plot' have been planned in the West (See the table below).¹³⁴⁷ Organisations, which the US and its allies are targeting in Pakistan, Yemen and Somalia, pose little or no threat to the US. Arguably pursuing terrorists in foreign lands is a flawed strategy. The data strongly suggests that the US and other countries targeting terrorist abroad, could be more effective by focusing on domestic counterterrorism measures.

¹³⁴⁵ Jason Burke, 'The myth of the 'lone wolf' terrorist' *The Guardian* (30 March 2017) < <https://www.theguardian.com/news/2017/mar/30/myth-lone-wolf-terrorist> > accessed 6 July 2018

¹³⁴⁶ See section "Security Councils response to 9/11 attacks"

¹³⁴⁷ Mitchell D Silber, *The Al Qaeda Factor: Plots Against the West* (University of Pennsylvania Press 2011)

Table showing attacks in Western territories since 9/11

Year	Country	Terrorist Group/individual	Link with Al-Qaeda	Number of Victims
2004	Spain	Self-radicalised group ¹³⁴⁸	No	190
2005	UK	Self-radicalised group ¹³⁴⁹	No	56
2011	Germany	Lone wolf ¹³⁵⁰	No	2
2012	France	Lone wolf ¹³⁵¹	No	3
2013	UK	Lone wolf ¹³⁵²	No	1
2014-2017	<ul style="list-style-type: none"> • Belgium • France • Germany • Sweden • Spain • UK • USA 	ISIS inspired attacks ¹³⁵³	No	At least 400

¹³⁴⁸ Madrid bombing was wrongly attributed to Al-Qaeda but it was an act of terrorism carried out by group of individuals who were inspired by Al-Qaeda see Scott Atron, *Talking to the Enemy: Religion, Brotherhood, and the (Un)Making of Terrorists* (Ecco Press 2010); Jason Burke, 'Talking to the enemy review' (*Guardian*, 2010) < <https://www.theguardian.com/books/2010/oct/24/scott-atran-talking-to-the-enemy-review> >

¹³⁴⁹ There was no credible evidence that London Subway and bus bombers (7 July 2005) has ever "met significant Al Qaida figures" (para 46, 48, 49) or received training in "training camps" operating in remote areas of Pakistan and Afghanistan (para 47). There is as yet no firm evidence to corroborate this claim or the nature of Al Qaida support, if there was any. But, the target and mode of attack of the 7 July bombings are typical of Al Qaida and those inspired by its ideologies (para 55). The explosives they used were homemade and required no expertise (para 59, 60) No external organisation linked to Al-Qaeda provided them funds the group was self-financed (para 63, 64) < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228837/1087.pdf >

¹³⁵⁰) In Germany on 2 March 2011 a self-radicalised Islamic extremist Arid Uka shot dead two U.S. airmen and injured two others at Frankfurt airport after apparently being inspired by a fake internet video purporting to show American atrocities in Iraq see <https://www.cbsnews.com/news/trial-opens-in-attack-on-us-airmen-in-germany/> >

¹³⁵¹ In France on 19 March 2012 one man has shot dead a teacher and three children at a Jewish school in the French city of Toulouse. He was a self-styled Islamist who got radicalised by watching and reading stuff about Palestine children being killed by Israeli soldiers. Although he claimed to be a mujahid of Al-Qaeda French authorities confirmed that there is no evidence which suggest he has links with Al-Qaeda < <http://www.nytimes.com/2012/03/30/world/europe/toulouse-killers-path-a-bitter-puzzle.html?mtrref=undefined&gwh=4D5D120E3BF766B029B3BEE6046BBC5D&gwt=pay> >

¹³⁵² On 22 May 2013, a British soldier Lee Rigby was attacked and killed by Michael Adebolajo. He acted alone and was not part of any organisation. He said during the trial that I love Al-Qaeda but there was no evidence that Al-Qaeda played any role in it < <http://www.bbc.co.uk/news/uk-25301907> >

¹³⁵³ <http://wgno.com/2016/03/22/isis-has-inspired-over-70-terrorist-attacks-in-20-countries/>

Conclusion

The purpose of this study is three-fold. First, it highlights the implications of the US reliance on drone strikes for counterterrorism purposes outside warzones, in eroding legal frameworks by normalising exceptional measures. The Bush, Obama and Trump's administrations have been shaped by the 9/11 attacks, resulting in policies, legislations and practices akin to a state of exception. Seventeen years later, the legitimisation of extra-legal measures in the name of national security shows no signs of abating. There is no geographic boundary in the fight against terrorism and the list of enemies has expanded to include not only Al-Qaeda, the Taliban and its affiliates- but also ISIS and its associated forces. The reinterpretation of the term 'imminent' by the US -and also the UK- in the context of the legal framework regulating the use of armed force, implies justifications for pre-emptive self-defence, and the *de facto* elimination of the imminent threat requirement. Under this loose interpretation, states would be allowed to use force against unspecified and distant threats, targeting objectives outside areas of active hostilities.

The design of the US targeted killing policies intentionally conceals the authorship of the organisation or agency conducting lethal drone operations by blending the activities of military and intelligence agencies. The integration of these state services has blurred the boundaries between traditional military activities and covert operations. The amalgamation complicates any oversight and often results in lack of accountability.

The US does not have a monopoly on the use of armed drones in conflicts. If its interpretation of international rules gain support, further state practice modelling the US drone policies is likely to follow. The international standards the US is setting for drone use may serve US interests for the time being but prove counterproductive in the long run if adopted by other states. Currently, the UK drone policy seems greatly influenced by the US. The UK's case may serve as one example of how the US government's non-transparent drone practices can affect decision-making of other governments. At present, this may not appear an extremely problematic development for the US because the UK is an ally sharing the same security interests. However, the situation can change drastically if US enemies were to utilise drones, for their own

purposes and following the questionable drone policies formulated by the US. The current US policies are setting a significant precedent and require scrutiny to ensure their compliance with international law.

The second objective of this thesis is to untangle the arguments supporting the legality of the use of drones advanced by the US through the analysis of the legal frameworks regulating the right to self-defence, as well as applicable human rights law and international humanitarian law. The second and third chapters highlight the clambering use of lethal force extraterritorially against non-state actors even when the alleged first attack cannot be attributed to the territorial state, contradicting well-established ICJ jurisprudence. The use of force against non-imminent threats has been justified by the 'unable or unwilling' doctrine. This reinforces theoretical legal basis for pre-emptive uses of armed force, where the imminent threat requirement becomes vacuous and reverts the legal regime on the use of force to the aggressive and lawless pre-Charter era. A 2018 statement by former UK Foreign Minister Boris Johnson, explaining drone strikes as 'payback for jihadist atrocities' confirms the revival of pre-Charter rules.¹³⁵⁴ This statement suggests that the UK has employed drone strikes as reprisals rather than legitimate acts of self-defence.

Thirdly, this study proves the internal and international political dimensions determining the use of drone strikes in specific geographical regions. Focusing on Pakistan, where the consent of the government to drone strikes has fluctuated and, when present, has affected particularly vulnerable tribal areas, illustrates further the weaknesses and problematic dimensions of the drone strike policies. The thesis demonstrates that the use of lethal force against groups or individuals unaffiliated to Al-Qaeda in undeclared war zones is not only unlawful but also counterproductive.

Pakistan's consent to the US drone strikes has been vague due to unstable US-Pakistan relations and the internal struggle for power between the civil and military powers. Pakistan has always been a key player in the US war on terrorism because of its geographical proximity, historical and cultural ties with Afghanistan. Current knowledge suggests that Pakistan never provided a

¹³⁵⁴ Oliver Wright, 'Drone strikes are 'retribution for atrocities' *The Times* (26 July 2018) < <https://www.thetimes.co.uk/article/drone-strikes-are-retribution-for-atrocities-boris-johnson-suggests-p8rg90db7> > accessed at 27 July 2018

blanket consent to US drone strikes within its territory. Instead, strict conditions were attached to those strikes, which were frequently violated by the US. Even the strikes carried out with Pakistan's consent can be categorised as unlawful if they failed to meet the necessary and proportionate requirements explained above.

The thesis questions the validity of the 'unable and unwilling' doctrine using the Pakistani case-study. The US has justified its strikes policies by arguing that either the Pakistani state is incompetent in preventing terrorist attacks emanating from former FATA territories against the US, or that Pakistan is tolerating terrorist activities in tribal regions. The US's position in this regard is not baseless. It is true that Pakistan has failed to govern its tribal regions, and in October 2001 few hundred high to low level Al-Qaeda members crossed Afghan border and received shelter in FATA. Clearly Al-Qaeda's presence in FATA damages Pakistan's reputation, but it does not provide US with any solid legal ground for its drone strikes in FATA. Even if the 'unable or unwilling doctrines' is considered accepted as a legitimate/lawful basis for the use of armed force, the US must demonstrate that Pakistan is actively controlling these terrorist organisations. The mere presence of Al-Qaeda members in FATA does not give the US a blank cheque to use drones.

The final chapter explores the main organisations targeted by the US in Pakistan, Yemen and Somalia. Since 9/11 the US has expanded the scope of drone strikes by targeting Al-Qaeda associates outside areas of active hostilities. Relying on the ICJ jurisprudence and the Nicaragua test, the thesis has analysed the question of international responsibility and attribution by exploring the organisational links between Al-Qaeda and targeted groups by the US. If the group satisfies the effective control test criterion then it could be considered an Al-Qaeda's associate and perhaps a legitimate target.

In addition, the study has explored the objectives of these groups by observing their targets. The selection of targets is strategically vital for the purpose of these attacks if they are to provoke the authorities. Hence, if a group is engaged in a civil war their targets would be local government

officials or civilians. Conversely, if the groups are targeting 'far enemy'¹³⁵⁵ then their attacks would be directed at foreign governments and civilians. The choice of targets demonstrates whom they want to influence and what their objective is. Using the data gathered by the University of Maryland it is possible to demonstrate that most terrorist attacks by groups targeted by the US, have been directed against their own government/civilians or against regional players. This is the case of TTP and Haqqani network. However AQAP and Al-Shabaab targeted regional players (Saudi Arabia, UAE, Ethiopia, Kenya, Congo) who were actively targeting these groups in Yemen and Somalia. Only AQAP was allegedly involved in minor scale attacks against Western countries (UK, US and France). Even in these cases it was not confirmed if individuals were actual members of AQAP and that the attacks were directed, planned and controlled by AQAP. Media reports and official statements of security officers have indicated that attacks were most probably carried out by home grown terrorists with no links with AQAP.

Targeting groups who pose no threat to the US is not only illegal but counterproductive. It expands the warzone, prolongs the war and destabilises local governments. Accordingly, the extraterritorial targeting of terrorists who pose no threat to the US is a flawed strategy and must be reviewed. Lone wolves who are mostly self-radicalised have carried out most terrorist attacks affecting Western targets. An approach focusing actual threats should strengthen local counterterrorism measures and halt the extraterritorial use of force against individuals or groups who do not have capacity to target the US or its allies.

It is imperative that the US or any state engaging in counterterrorism activities rely on transparent policies. Publicly available information on the current drone policies would remove many of the issues associated with internationally wrongful acts outlined in this thesis.¹³⁵⁶ The US should specify the groups targeted under the umbrella of 'Al-Qaeda associates or affiliates' as well as the criteria followed to include terrorist groups in this category. This

¹³⁵⁵ Fawaz A. Gerges, 'The Far Enemy: Why Jihad Went Global' (*Foreign Affairs*, 2005) < <https://www.foreignaffairs.com/reviews/capsule-review/2005-11-01/far-enemy-why-jihad-went-global> > accessed 4 August 2018

¹³⁵⁶ Loren DeJonge Schulman, 'Behind the magical thinking: Lessons from policymaker relationships with drones' (*Centre for a New American Security*, July 2018) 3

will provide grounds to determine individual membership to Al-Qaeda and will distinguish between individuals who were inspired by Al-Qaeda or declared their allegiance to the group from those operating under its command and control.

Any drone policy should remove the authority to decide on strikes from the CIA and JSOC in order to facilitate accountability. For the same purpose, the US government should publish details of casualties resulting from each drone strike. The information released during the Obama administration was insufficient and probably misleading. The broad definition of 'combatant' the US seems to rely on is probably at the origin of a low count of casualties (and a violation in itself of international law). The respect to the principle of distinction, necessity and proportionality requires available data on the activities engaged by the person targeted, his active participation in hostilities and location. The US should accept the ICRC's Interpretive Guidance on Direct Participation in Hostilities as it provides greater protection to civilians.

The analysis of the deployment of drone strikes in the territory of Pakistan demonstrates that any rigorous research on the use of lethal drones, requires understanding of the host state. The research on the use of drones tends to focus on the practice of the targeting state, particularly the US and ignores the economic, social and political considerations of the host state where targeted groups are located. The thesis has explored the geo-political factors determining the Pakistani involvement with the Taliban, Al-Qaeda and the United States through time. The 'unwilling or unable' doctrine only serves to justify attacks where the host state is in a particularly vulnerable position, or where they are complicit through consent. In the case of Pakistan, strikes have been deployed with and without the governmental consent. The strong institutional position the military retains, the ties with non-state groups that have been seen as strategically beneficial to consolidate the position of Pakistan in relation to India and the vulnerability of the tribal areas most affected by the drones, are fundamental in understanding the current drone strikes. Further research in the role of host states will further knowledge on the circumstances conducing to becoming a targeted host state.

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