

The legality of targeted-killing operations in Pakistan

Yolandi Meyer^{*}

Abstract

Since 2001 legal scholars have been struggling with the legality and legitimacy of the United States of America's "war on terror" and its accompanying policy of targeted killings. The consequent application of the policy of targeted killing in Pakistan is especially controversial due to questions regarding the authority of the United States of America to conduct these operations in Pakistani territory. This article considers various aspects of the American policy of targeted killings in Pakistan. These include the background of the policy, the various international legal frameworks applicable to the practice, and aspects of accountability and legality of the practice of targeted killings. Furthermore, the overall legality of the practice in Pakistan is considered, as well as accountability issues, should this practice be found to be illegal in terms of international law. In conclusion, this article finds that, although this practice in Pakistan could be illegal in certain instances, the problem can only be solved through increased political pressure on violating states and enforcement of the existing legal framework.

INTRODUCTION AND BACKGROUND

'Between war and peace there is nothing'.¹

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

^{*} LLD Candidate. Researcher: Centre for Human Rights, University of Pretoria.

¹ See Grotius 'De jure belli ac pacis', Bk III Ch xxi 1, i quoting Cicero, 8 Phillipian Speeches Ch 1.

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

It has become evident in the past few centuries that the face of war and warfare changes at such a pace that creating measures to regulate conduct during hostilities is now, as much as it has always been, a game of catch up.³ Moreover, the phenomenon of war is a concept which is ever changing and always developing from one war to the next.⁴ One example is the United States' self-proclaimed 'War on Terror', which has pushed the boundaries of conventional conflicts, whether classified as armed conflict under international humanitarian law or not.

After the September 11 attacks on the United States in 2001, President George Bush, as commander-in-chief of the armed forces of the USA, launched the pursuit of what he called a global 'War on Terror'.⁵ He also launched a targeted killing campaign against suspected Al Qaeda members,

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

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

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

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

and amongst other things, authorised the military to detain and target any person who might be a threat to the United States.⁶ In an address to a joint session of Congress on 20 September 2001, President Bush stated: ‘Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.’⁷ Furthermore, when President Bush addressed the American people on the evening of 9/11 he stated: ‘We will make no distinction between the terrorists who committed these acts and those who harbour them.’⁸

The Obama administration has in recent years discontinued use of the phrase ‘War on Terror’ and rejected the notion that the US is involved in a ‘global war’. However, the Obama administration still maintains that the targeted killing policy as a counter-terrorism measure is an integral part of the USA’s foreign policy and national security.⁹ With regard to targeted-killing operations, especially in Pakistan, it seems that the Obama administration has not only continued the targeted killing policy, but also intensified it. President Obama has stated:

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

The ‘War on Terror’ and America’s accompanying political policies and measures of enforcement have been heatedly debated among international

⁶ Human Rights Watch <http://www.hrw.org/news/2001/12/19/q-us-targeted-killings-and-international-law> (last accessed 2 December 2012).

⁷ CNN http://articles.cnn.com/2001/09/20/us/gen.bush.transcript_1_joint-session-national-anthem-citizens/4?s=PM:US (last accessed 20 November 2012).

⁸ Bush ‘Statement by the President in his address to the nation’ 11 September 2001 <http://edition.cnn.com/2001/US/09/11/bush.speech.text/> (last accessed 5 February 2013).

⁹ Vlasic ‘Assassination & targeted killing – a historical and post-Bin Laden legal analysis’ (2012) 43 *Georgetown Journal of International Law* 259–315 citing Ackerman ‘Obama aide declares end to war on terrorism’ *Washington Independent* (6 August 2009) <http://washingtonindependent.com/54152/obama-aide-declares-end-to-war-on-terrorism> and Priest ‘Bush’s “war” on terror comes to sudden end’ *Washington Post* 23 January 2009) <http://www.washingtonpost.com/wp-dyn/content/article/2009/1/22/AR2009012203929.html>.

¹⁰ Anderson *Targeted killing* Hoover Institute (11 May 2011) <http://www.hoover.org/publications/defining-ideas/article/5281> (last accessed 5 February 2013).

legal scholars.¹¹ Although the American policy of targeted killings has

¹¹ Radsan & Murphy 'The evolution of law and policy for CA targeted killing' (2012) 5 *Journal of National Security Law & Policy* 339 440 citing 'Pub Comm Against Torture in Israel v Gov't of Israel HCJ 769/02 (11 December 2005) available at: http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (last accessed 9 October 2013). (Israeli High Court decision subjecting targeted killing in armed conflict to various procedural and substantive controls suggested by human rights law). For a congressional hearing focusing on the use of drones for targeted killing, see 'The rise of the drones II – examining the legality of unmanned targeting' hearing before the Subcomm on Nat'l Sec and Foreign Affairs of the H Comm on Oversight and Gov't Reform, 111th Cong 2d Sess (2010) (including testimony from Professors Mary Ellen O'Connell, William C Banks, David Glazier, and Kenneth Anderson). For other commentary, see Melzer *Targeted killing in international law* (2008) 442–444 (providing a detailed survey and assessment of targeted killing under international humanitarian law, international human rights law, and the law governing interstate use of force); Alston Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Study on Targeted Killings, UN Doc A/HRC/14/24/Add.6 (2010) (assessing the legality of targeted killing generally, criticising, in particular, elements of the United States' CIA drone campaign against Al Qaeda and the Taliban); Anderson 'Targeted killing in US counterterrorism strategy and law' in Wittes (ed) *Legislating the war on terror: an agenda for reform* (2009) (focusing on self-defence as a rationale for targeted killing of terrorists); Banks & Raven-Hansen 'Targeted killing and assassination: the US legal framework' (2003) 37 *University of Richmond Law Review* 667, 749 (concluding that US law treats targeted killing 'as a permissible but tightly managed and fully accountable weapon of national self-defence'); Blum & Heymann 'Law and policy of targeted killing' (2010) 1 *Harvard National Security Journal* 145 (discussing difficulties of pigeonholing targeted killing of terrorists into the traditional models of armed conflict or law enforcement and suggesting limits on targeted killing should ultimately be 'respectful of the values and considerations espoused' by both models); Chesney 'Who may be killed? Anwar al-Awlaki as a case study in the international legal regulation of lethal force' (2010) 13 *Yearbook of International Humanitarian Law* 3 (assessing the legality of the United States targeting Anwar al-Awlaki, a dual Yemeni-American citizen, under the UN Charter, IHL, and IHRL regimes); Fisher 'Targeted killing, norms, and international law' (2007) 45 *Columbia Journal of Transnational Law* 711 724 (predicting evolution of a legal norm permitting targeted killing in some circumstances); Guiora 'Targeted killing as active self-defence' (2004) 36 *Case Western Reserve Journal of International Law* 319, 334 (concluding 'targeted killing is a legitimate and effective form of active self-defence'); Kretzmer 'Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?' (2005) 16 *European Journal of International Law* 171 (contending that IHL should borrow elements of IHRL to provide greater protection against improper targeting of suspected terrorists); Murphy & Radsan 'Due process and targeted killing of terrorists' (2009) 31 *Cardozo Law Review* 405 (contending that CIA drone strikes against non-citizens located outside the United States implicate due process under the US Constitution); Murphy 'The international legality of US military cross-border operations from Afghanistan into Pakistan' (2009) 85 *Naval War College International Law Studies* 109 (assessing the legality of US incursions into Pakistan to attack Al Qaeda and the Taliban); Paust 'Self-defence targetings of non-state actors and permissibility of US use of drones in Pakistan' (2010) 19 *Journal of Transnational Law & Policy* 237 (concluding that a state may, as a matter of self-defence, legally target non-state actors directly involved in armed attacks); O'Connell 'The choice of law against terrorism'

attracted considerable international attention over the past few years, the modern concept of the practice of targeted killing can perhaps be traced as far back as the 1940s. In 1943 President Franklin D Roosevelt ordered the killing of Admiral Yamamoto, the man believed to be responsible for the attack on Pearl Harbour.¹² In recent times, however, the formal policy of targeted killings was first assumed by the Israeli government in the year 2000, when it began targeting alleged Palestinian terrorists in the Occupied Territories.¹³

US targeted-killing operations in Pakistan only started in 2004 with the killing of Nek Muhammad Wazir near Wana in Pakistan.¹⁴ To a large extent, criticism of the US drone programme increased when the US commenced operations in areas around the border between Afghanistan and Pakistan. Many scholars argue about whether the USA has the authority under international law to conduct these operations in Pakistan. The USA claims that it has such authority, based primarily on the fact that it is engaged in an armed conflict with Al Qaeda, and, secondly, that it has the right to exercise self-defence against these forces in response to attacks by Al Qaeda on the USA and its people.¹⁵

In Afghanistan, for example, these arguments are valid, because the United States is involved in an armed conflict with Al Qaeda in Afghanistan, and Afghanistan has given its consent to conduct these operations in its

(2010) 4 *Journal of National Security Law & Policy* 343 (concluding that the United States is not in an armed conflict with Al Qaeda and that “[p]eacetime criminal law, not the law of armed conflict is the right choice against sporadic acts of terrorist violence”); O’Connell ‘Unlawful killing with combat drones: a case study of Pakistan 2004–2009’ in Bronitt (ed) (forthcoming) *Shooting to kill: the law governing lethal force in context* (concluding that CIA drone attacks in Pakistan are illegal); Radsan & Murphy ‘Measure twice, shoot once: higher care for CIA targeted killing’ 2011 *University of Illinois Law Review* 101 (proposing that IHL principles require the CIA to be certain of its targets beyond reasonable doubt and that CIA drone strikes should receive independent review); Solis ‘Targeted killing and the law of armed conflict’ (2007) 60 *Naval War College Review* 127 134–136 (concluding that targeted strikes against civilians are legal only if: (a) the civilian is directly participating in hostilities, and (b) the attack was authorized by a senior military commander).

¹² David ‘Fatal choices: Israel’s policy of targeted killing’ (2002) 51 *Mideast Security and Policy Studies* 1 2.

¹³ Alston Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on targeted killings A/HRC/14/24/Add.6 (2010) 1 4 (hereafter Alston report).

¹⁴ O’Connell n 11 above ‘citing <http://www.nytimes.com/2004/06/19/world/the-reach-of-war-militants-ex-fighter-for-taliban-dies-in-strike-in-pakistan.html>.

¹⁵ See note 76 below.

territory.¹⁶ However the United States cannot make the same arguments in the case of US operations in Pakistan, as the claims to the existence of an armed conflict in this territory and of a right to self-defence cannot be made with a sufficient degree of legal certainty. The position might, however, be different in the Federally Administered Tribal Areas or FATA as will be discussed later in this work.

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

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

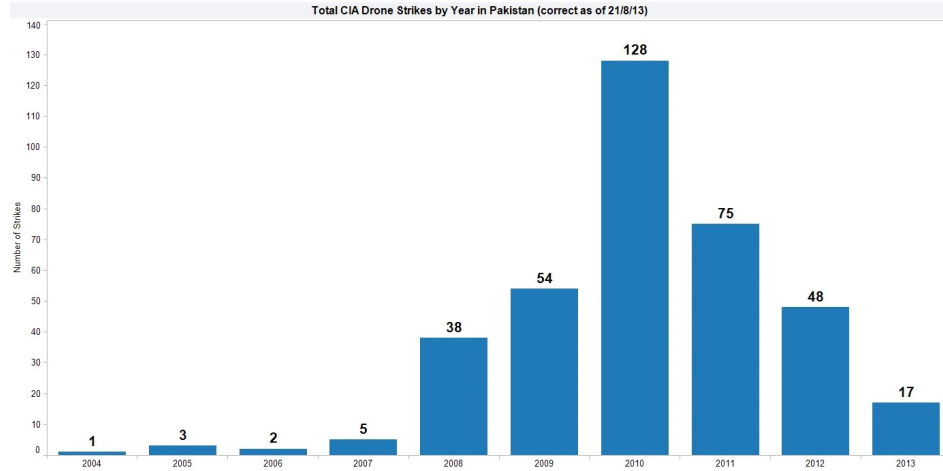
¹⁶ Rock ‘Yesterday’s laws, tomorrow’s technology: the laws of war and unmanned warfare’ (2011) 24 *New York International Law Review* fn 108 citing Mayer ‘The Predator War’ *The New Yorker* 26 October 2009 36 (suggesting that the United States runs two drone programmes, one in Afghanistan and Iraq run by the military that is an extension of conventional warfare, and one by the CIA that is not).

¹⁷ O’Connell ‘Unlawful killing with combat drones: a case study of Pakistan, 2004–2009’ (2009) *Notre Dame Law School Legal Studies Research Paper* No 09–43 1 2.

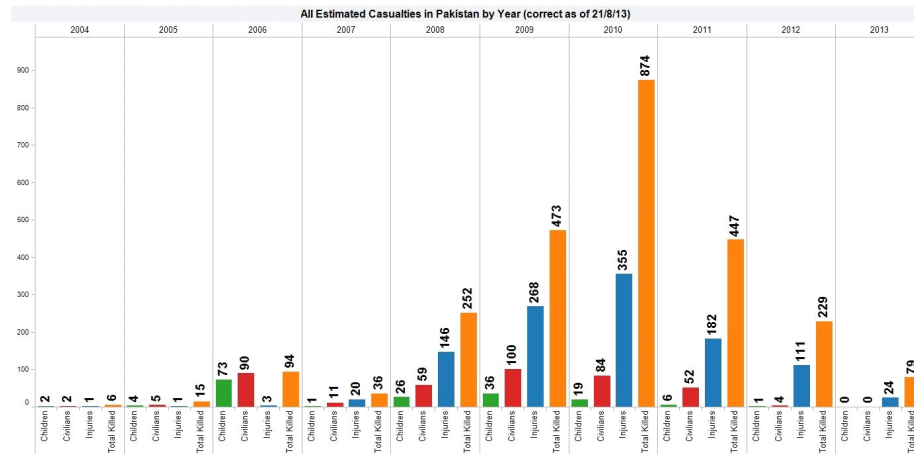
¹⁸ *Ibid.* Kelly *Officials: Bin Laden running out of space to hide* June 2009 NPR available at: <http://www.npr.org/templates/story/story.php?storyId=104938490> (last accessed 9 October 2013).

¹⁹ The Bureau of Investigate Journalism available at: <http://www.thebureauinvestigates.com/2012/07/02/resources-and-graphs/> (last accessed 27 August 2013).

THE BUREAU OF INVESTIGATIVE JOURNALISM



THE BUREAU OF INVESTIGATIVE JOURNALISM



Even though we have witnessed a steady decline in strikes in Pakistan, drone operations often do not have the intended effect of deterring terrorist activities. In the case of Pakistan, they appear to lead to an increased number of military recruits for terrorist organisations, as the attacks lead to retaliation and a desire for revenge.²⁰ It seems that as one leader or member of a terrorist group is killed, several others are ready to take his place, and

²⁰ O’Connell n 17 above at 15.

in fact are eager to do so with a newfound drive to avenge those members who have been killed.²¹ In this sense the US drone operations almost become a type of ‘whack-a-mole’ exercise – as one leader or member is eliminated, several others pop up to take his place.²²

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

LEGAL FRAMEWORKS REGULATING THE PRACTICE OF TARGETED KILLINGS

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

The United Nations Charter addresses inter-state use of force and the issue of self-defence in article 2(4) and article 51, respectively. From the provisions in article 51 and article 2(4) it follows that one of the justifications by a state to use force in the territory of another state is self-defence under article 51 of the UN Charter, by consent from the other state, or by authority granted by the Security Council under Chapter 7. Special authorisation by the Security Council is, however, not relevant here, as it did not in fact grant any such authority to the USA in the case of Pakistan.

It has also been established that, in terms of international law, an armed attack need not emanate from another state; non-state armed groups are included within the purview of article 51.²⁴ However, the inclusion of non-state actors under this provision is controversial and certain authors argue that the inclusion is contrary to the purpose of the Charter and leads to

²¹ *Id* at 11.

²² See Hajjar ‘State of the drones’ *Middle East Research and Information Project* 13 February 2013 at http://www.merip.org/newspaper_opeds/oped021313 (last accessed 9 July 2013).

²³ Note 19 above.

²⁴ Wong ‘Targeted killings and the international legal framework with particular reference to the US operation against Osama Bin Laden’ (2012) 11 *Chinese Journal of International Law* 127 136 citing Case concerning armed activities on the territory of the Congo (*Democratic Republic of the Congo v Uganda*) Judgment 19 December 2005 (2005) ICJ Reports 168, 223, par 146.

increased attacks on a global scale against non-state actors under the guise of self-defence.²⁵

Another important justification for using self-defence against actors in a foreign territory is that of consent by the state in whose territory the attacks are taking place.²⁶

The US government contends that its actions fall within the exception of self-defence under article 51. However, if the states in which these targeted-killing operations take place did not consent to the use of force within their territories, the United States' actions could constitute a *prima facie* breach of article 2(4) of the Charter and of the sovereignty of these states.²⁷ If we consider the example of Pakistan, the US government has publicly admitted that it had not obtained, or even sought to obtain, consent from Pakistan to engage in targeted-killing operations within Pakistani territory, and the former president of Pakistan has concurred.²⁸ However, it seems that the Pakistani government condemns certain strikes in public yet praises them in private.²⁹

The existence of an armed conflict to which IHL applies

According to Harold Koh, former US State Legal Advisor, two justifications exist for the US policy of targeted killings: the USA is engaged in an armed conflict with Al Qaeda and its associated forces; and the USA is acting in self-defence in response to attacks by Al-Qaeda against the USA and its people.³⁰ In addition, in the case of *Hamdan v Rumsfeld*³¹ the United States Supreme Court held that, at the very least, the treatment of suspected Al Qaeda members and Yemeni citizens apprehended in Afghanistan, should be governed by common article 3 of the Geneva Conventions of 1949. This would imply a state of non-international armed conflict between the USA

²⁵ Masferrer (ed) *Post 9/11 and the state of permanent legal emergency: Security and human rights in countering terrorism* (2012).

²⁶ Deeks 'Consent to the use of force and international law supremacy' (2013) 54/1 *Harvard International Law Journal* 1 10.

²⁷ Rogers & McGoldrick 787.

²⁸ *Ibid.*

²⁹ Nawaz 'Drone attacks inside Pakistan wayang or willing suspension of disbelief?' (2011) 79 *Georgetown Journal of International Affairs* 79–80.

³⁰ Wong 127 129–130. See also speech by H Koh at the Annual meeting of the American Society of International Law, Washington DC, 25 March 2010 available at: (www.state.gov/s/l/releases/remarks/139119.htm).

³¹ *Hamdan v Rumsfeld* 548 US 557 (2006)

and Al Qaeda.³² I shall now consider international legal norms to evaluate whether the position of the US government indeed reflects the true state of affairs.

With regard to IHL, common article 3 of the Geneva Conventions of 1949 and Additional Protocol II to the Geneva Conventions, govern non-international armed conflicts.³³ The Protocol clearly states that it does not apply to ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature...’³⁴ It is the argument of the American government that its conflict with Al Qaeda is governed by article 3 of the Geneva Conventions. Some scholars, however, disagree and argue that the conflict between the United States and Al Qaeda is too sporadic to meet the relevant standard for a non-international armed conflict, as set out above.³⁵ For instance in the *Tadic* case it was stated that for a conflict to constitute a non-international armed conflict there has to be protracted violence by non-state groups and these groups must be organised.³⁶

There are also scholars who argue that the policy and subsequent practice of targeted killing are more representative of law enforcement mechanisms than acts occurring during armed conflict. The rationale behind this argument is that targeted killings, like law enforcement mechanisms, are based on individual guilt rather than the status of a person, which is critically important in an armed conflict situation where someone can be classified as either civilian or combatant, and targeted in accordance with such status.³⁷ However, unlike law enforcement, with targeted killings there are no guarantees of due process in the form of a fair trial or proper assessment of guilt by an objective third party.³⁸

³² Rogers & McGoldrick 778 779.

³³ Article 1(1) of Additional Protocol II to the Geneva Conventions.

³⁴ Common Article 3 of the Geneva Conventions of 1949, Additional Protocol II to the Geneva Conventions of 1949.

³⁵ Rogers & McGoldrick 778 779. Also see *Final report on the meaning of armed conflict in international law*, International Law Association Use of Force Committee (August 2010) at <http://www.ila-hq.org> (last accessed 12 December 2013).

³⁶ Qualification of armed conflicts at RULAC http://www.geneva-academy.ch/RULAC/qualification_of_armed_conflict.php (last accessed 12 September 2013) also see *Prosecutor v Tadic* Case IT-94-1-A. 38 ILM 1518 (1999). International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999.

³⁷ Blum & Heymann ‘Law and policy of targeted killings’ (2010) 1 *Harvard National Security Journal* 145 148.

³⁸ *Ibid.*

Scholars are also critical of IHL being applied in the conflict between the United States and Al Qaeda because of a certain threshold of violence not having been attained. Scholars like Paulus and Vashakmadze argue that:³⁹

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

It is generally accepted that IHL allows states greater scope to target and kill than does International Human Rights Law (IHRL). This may very well be the reason why the US government is more inclined to classify these killings as subject to IHL, which provides greater protection to a state under international law.⁴⁰

International human rights law

If the practice of targeted killings were to be classified as a law enforcement mechanism, as opposed to an element of armed conflict, the relevant legal regime applicable would be IHRL rather than IHL.⁴¹ In law-enforcement operations governed by IHRL, one has the authority to kill only if the target poses a serious and immediate threat to the life of another person; any killing in the absence of such authority would amount to an extra-judicial killing.⁴² Therefore, a killing in a law enforcement operation must meet the requirements of necessity and proportionality. In terms of IHRL, a targeted killing could by its very nature not be lawful because it has, as its principal aim, deliberate killing without regard to necessity or proportionality.⁴³

The relevant treaty provision applicable with regard to the issue of the right to life is article 6(1) of the International Covenant on Civil and Political Rights (ICCPR).⁴⁴

In terms of article 2(1): ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to

³⁹ Paulus & Vashakmadze ‘Asymmetrical war and the notion of armed conflict—a tentative conceptualisation’ (2009) 91/873 *International Review of the Red Cross* 95 118.

⁴⁰ Radsan & Murphy ‘The evolution of law and policy for CIA targeted killing’ (2012) 5 *Journal of National Security Law & Policy* 339 449.

⁴¹ Radsan & Murphy 339 448.

⁴² *Ibid.*

⁴³ Alston Report par 32–33.

⁴⁴ Article 6(1) of the International Covenant on Civil and Political Rights.

its jurisdiction the rights recognised in the present Covenant ...⁴⁵ The United States' government claims that the provisions of the ICCPR do not apply because the attacks are being launched from outside of US territory. It also claims that the ICCPR has no extraterritorial application and cannot apply together with IHL in light of the fact that the latter is the *lex specialis*.⁴⁶ However, the Human Rights Committee has made clear that the ICCPR applies to any situation of armed conflict where IHL is applicable, and the two legal regimes are complementary.⁴⁷

The Human Rights Committee declared in General Comment 31:⁴⁸

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

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

Therefore, in order to determine the potential liability of the United States in terms of the ICCPR, one has to determine whether or not the targets of these operations were in the effective control of the United States.

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

Another issue which should be discussed, albeit not in great detail for purposes of the current study, is the issue of airspace sovereignty and the applicability of the Chicago Convention.⁴⁹ This Convention, which applies only in peacetime, provides definite rules which can assist in determining whether the United States' current operations in Pakistan are lawful under international law. The applicable provisions of this Convention are set out below:

⁴⁵ *Id* at art 2(1).

⁴⁶ Wong 127 158.

⁴⁷ Human Rights Committee General Comment 31 UN Doc CCPR/C/21/Rev 1/Add 13 (2004) par 10. See also Wong 127 158.

⁴⁸ *Ibid*.

⁴⁹ The Convention on International Civil Aviation 7 December 1944.

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

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

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

The conclusion to be drawn from the relevant sections of this Convention is that the US would have had to have the express consent of the government of Pakistan to be able to justify its various targeted-killing operations on Pakistani territory. As stated earlier, the United States has previously stated that it has never sought or received consent from Pakistan to conduct such operations on Pakistani territory.⁵⁰

Targeted killing and assassination

A number of scholars have formulated definitions of targeted killing, and certain of these definitions contain common elements. From these various definitions it is possible to distinguish certain elements that form an integral part of what constitutes a 'targeted killing', namely the killing must be individualised, premeditated, and intentional.⁵¹

The domestic regulation of assassination started with the promulgation by US President Ford of an Executive Order banning assassination. This order was later incorporated into Executive Order 12333 (1981), which was eventually signed by President Ronald Reagan.⁵² However, the order, which remains in effect to this day, does not provide a sufficiently comprehensive definition of 'assassination'. Therefore, it could be difficult for the public in general, and US agents conducting these operations in particular, to determine whether the conduct of the United States with regard to targeted killings constitutes illegal acts or not.⁵³

⁵⁰ Rogers & McGoldrick 778 787.

⁵¹ Notes 10 and 12 above.

⁵² *Ibid.*

⁵³ Melzer n 11 above at 46.

Part 2.11 of Executive Order 12333, which prohibits assassination, provides as follows: ‘No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.’⁵⁴ As demonstrated by the wording, the Executive Order was poorly drafted as it provides no guidance as to what actions constitute ‘assassination’, leaving US agents with an overly broad scope of interpretation. In fact, the provision is so ambiguously drafted that one must ask whether the ambiguity might not have been intentional, given that no responsible lawmaker could have conjured up so vague a definition for so important a crime.

In terms of other American legal writings, a distinction can be drawn between peacetime assassination and wartime assassination. Peacetime assassination is defined as the ‘killing of a selected individual, both politically motivated and illegal’. Wartime assassination is defined as the ‘treacherous killing of a selected individual belonging to the adversary’.⁵⁵ The definition of wartime assassination is echoed to some extent in the definition provided in US Field Manual 27-10 (1956) which states: ‘It is especially forbidden to kill or wound treacherously an individual belonging to the hostile nation or army.’⁵⁶

The ‘murder by treachery’ prohibition is also contained in the Brussels Declaration (1874), article 23(b) of The Hague Regulations and the Oxford Manual on the Law of War.⁵⁷

One can ultimately conclude that peacetime assassination has a political focus and is illegal. Wartime assassination involves targeting a specific individual by utilising treacherous means, which will also amount to an illegal act.⁵⁸ It can therefore be said that assassination is merely one form of targeted killing, one that is illegal whether conducted in times of peace or times of war under circumstances involving treachery.

⁵⁴ www.archives.gov/federal-register/codification/executive-order/12333.html#2.11 (last accessed 25 September 2012).

⁵⁵ Melzer n 11 above at 46.

⁵⁶ *Id* at 47–49.

⁵⁷ Vlasic citing Schmitt ‘State-sponsored assassination in international and domestic law’ (1992) 17 *Yale Journal of International Law* 629 citing *The laws of war on land* (1880) (UK).

⁵⁸ *Id* at 280.

THE LEGALITY OF TARGETED-KILLING OPERATIONS IN PAKISTAN

The main justifications by the United States for conducting targeted-killing operations in Pakistan, are the contentions that it is engaged in an armed conflict with Al Qaeda and associated forces in Pakistan; and the United States has the right to exercise its right to self-defence against Al Qaeda forces as a response to the various terrorist attacks launched against the United States.⁵⁹

When one considers the argument regarding the existence of an armed conflict, it would be difficult for the United States to argue convincingly that the events of 9/11 and subsequent terrorist attacks against it, constitute a complete shift to an armed conflict paradigm where IHL would be applicable. Article 3 of the Geneva Conventions, which governs non-international armed conflicts, does not apply to ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.’⁶⁰ Some scholars therefore argue that terrorist attacks against the United States by Al Qaeda are too sporadic to be regulated by this Convention, and therefore the United States’ actions in Pakistan do not constitute an armed conflict as the United States government claims.⁶¹

However institutions such as the International Committee of the Red Cross (ICRC) are of the opinion that the determination whether the US’s actions constitute an NIAC, should be considered on a case-by-case basis. In certain instances a case could be made for the existence of an NIAC between US forces and terrorist groups where the relevant requirements for this type of conflict have been met. Caution should, however, be exercised in this instance as certain terrorist groups that associate themselves with Al Qaeda, lack the organised structure required to qualify as co-belligerents if Al Qaeda were, in these cases, to be considered as belligerents in an NIAC.⁶²

⁵⁹ Rogers & McGoldrick 778 779 see also ‘US airstrikes in Pakistan called ‘very effective’’ *CNNPolitics.com* May 2009 at: <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/> (last accessed 25 January 2013).

⁶⁰ www.archives.gov/federal-register/codification/executive-order/12333.html#2.11 (last accessed 25 September 2012).

⁶¹ Melzer n 11 above.

⁶² General Assembly Report A/68/150 by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Professor Christof Heyns par. 65–66 citing ICRC ‘International Humanitarian Law and the challenges of contemporary armed conflicts’ 2011 10–11.

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

Pursuant to IHRL norms, one can consider legality in terms of instruments such as the ICCPR.⁶³ The Human Rights Commission has stated in General Comment 31, that if a state party had effective control over a subject, the ICCPR would apply regardless of whether the situation occurred within a state party's jurisdiction.⁶⁴ The former UN Special Rapporteur, Philip Alston, in a May 2010 Report stated: 'Outside the context of armed conflict, the use of drone [s] for targeted killing is almost never likely to be legal.'⁶⁵ Alston has stated that the only instances in which targeted killings could be legal in a law enforcement paradigm, would be when a state acts in anticipatory self-defence against a non-state actor, and when the capture of a suspected terrorist is impossible.⁶⁶ However, this becomes problematic when states such as the United States, or possibly even other states eventually acquiring drone technology, take this notion to an extreme and launch attacks on suspected terrorists in foreign countries all over the world.⁶⁷ This position was further elaborated by the UN Special Rapporteur on Human Rights and Counter-Terrorism, Ben Emmerson, after a three day trip to Pakistan to investigate targeted-killing operations and their legal effects.⁶⁸ In a statement released on 15 March 2013, Emmerson stated that US operations in Pakistan are clearly in violation of Pakistani sovereignty, and therefore illegal, considering that Pakistani government officials reported to him that the attacks were taking place without Pakistan's

⁶³ Human Rights Committee General Comment 31 UN Doc CCPR/C/21/Rev. 1/Add 13 (2004) par. 10. See also Wong 127 158 and 'Pakistan's legal fight to end the drone war' at: www.aljazeera.com/indepth/opinion/2011/12/20111213112743546541.html (last accessed 5 March 2013).

⁶⁴ Human Rights Committee General Comment 31 UN Doc CCPR/C/21/Rev 1/Add 13 (2004) par 10. See also Wong 127 158.

⁶⁵ Alston Report par 85.

⁶⁶ *Id* at par 86.

⁶⁷ See Vlastic n 9 above citing 'Drone strikes are police work, not an act of war?' *Reuters* 5 July 2011 available at: <http://blogs.reuters.com/afghanistan/2011/07/05/drone-strikes-as-police-work-not-an-act-of-war/> (last accessed .13 July 2013).

⁶⁸ Pakistan: Statement by the UN Special Rapporteur on human rights and counter-terrorism at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13148&LangID=E> (last accessed 10 April 2013).

consent. The Pakistani government also stated that the attacks are counter-productive, and that the state itself is neither unwilling nor unable to deal with the threat of terrorism; it needs only to be given the opportunity to develop and enforce strategies to deal with such threats on its territory.⁶⁹

In this light, one can now reconsider article 51 of the UN Charter and the issue of self-defence, together with the 'unwilling-or-unable test'. Most states consider this test to be appropriate in determining the legality of the use of force in another state. The test provides that the use of force in self-defence is only permitted without consent, if the state in which force is to be used is unwilling or unable to deal with the specific threat.⁷⁰ From Emmerson's principles and the statement above, one may conclude that Pakistan is quite willing and able to deal with this threat. Therefore, Pakistan should not only be accorded the necessary respect for its sovereignty, but should also be accorded the opportunity to deal with the threat on its own territory without unwarranted interference from other states.

The Federally administered tribal areas

Another issue which poses legal questions is the situation in the Federally Administered Tribal Areas or FATA. This region between the borders of Afghanistan and Pakistan, acts as a type of buffer zone between the two states. North and South Waziristan in this region, is also the area where most drone strikes take place and where Al Qaeda, the Afghan Taliban, and the TTP (Tehreek-e-Taliban Pakistan) have their main bases.⁷¹

The FATA, with limited influence and control by the government of Pakistan, has become a breeding ground for illegal activities and is, therefore, the perfect base for terrorist groups such as Al Qaeda conducting illegal activities inside FATA and the neighbouring states. In defence of US actions, certain scholars argue that FATA is an 'ungoverned territory', and that US security interests are more important than the legal boundaries of 'ungoverned territories'.⁷² However, this is a very dangerous stance to take as it could lead to all territories with questionable and unstable administration regimes, becoming an uncontrolled area where foreign states

⁶⁹ *Ibid.*

⁷⁰ Deeks "'Unwilling or unable': toward a normative framework for extraterritorial self-defence' (2012) 52(3) *Virginia Journal of International Law* 483 486.

⁷¹ Nawaz 'Drone attacks inside Pakistan Wayang or willing suspension of disbelief?' (2011) 79 *Georgetown Journal of International Affairs* 79 80.

⁷² *Id* at 82–83.

exert greater control over the area than would otherwise legally be allowed. It is also argued that a case for the existence of a NIAC between the United States and terrorist groups such as Al Qaeda can be made in certain cases. In my opinion such a case can possibly be made when considering the situation in FATA. The altercations between US forces and terrorist groups in FATA, appear to be a result of a spill over of the conflict in Afghanistan between US forces and terrorist groups like the Taliban in that region. However, some of these groups move into Pakistani territory leading to attacks on them by the US in Pakistan which the Pakistani government then denounces. The Pakistani government has also concluded numerous ceasefire agreements with these militant groups and denounced US attacks against them on Pakistani territory.⁷³

ACCOUNTABILITY UNDER INTERNATIONAL LAW

An issue which makes determining accountability particularly difficult is the fact that targeted-killing operations by the United States are conducted not only by military forces, but also by state actors such as the Central Intelligence Agency (CIA).⁷⁴ After the events of 9/11, Congress established a Commission the main task of which was to investigate these terrorist attacks and to create a possible plan of action in response. In 2004 the Commission recommended that the Department of Defence (DOD) take ‘lead responsibility for directing and executing paramilitary operations, whether clandestine or covert’ so that all legal responsibility could fall under a single entity.⁷⁵ This was done to ensure that domestic laws were complied with and that it would be easier for Congress to oversee operations if all responsibility and authority fell under a single entity or department.

However, the CIA currently plays a far greater role in targeting specific individuals than originally envisaged. In fact, the only actor within the DOD still actively involved in these covert operations (along with the CIA), is the Joint Special Operations Command (JSOC). Apart from conducting covert operations such as night raids, JSOC’s role and accountability are limited –

⁷³ Breau, Aronsson & Joyce *Discussion paper 2: drone attacks, international law and the recording of civilian casualties of armed conflict* Oxford Research Group June 2011 11–12

⁷⁴ See American Civil Liberties Union website at: <http://www.aclu.org/blog/tag/drones> (last accessed 22 July 2013).

⁷⁵ *Id* at 2 citing *The 9/11 Commission Report* 415 (2004), at: <http://www.911commission.gov/report/911Report.pdf> (last accessed 9 October 2013).

in contrast to that of the CIA.⁷⁶ It has also been stated by a former federal prosecutor and former assistant general counsel at the CIA, John Radsan, that the CIA makes all final decisions on whether to launch strikes from its headquarters in Langley, Virginia.⁷⁷

The fact that these two entities cooperate on certain missions makes it difficult to determine accountability as they have different legal obligations and operating procedures. Some argue that this cooperation is not in fact coincidental, but is deliberately aimed at confusing the issue of accountability for their actions.⁷⁸

Taking into account that the CIA has such seemingly extensive authority, without meaningful Congressional oversight, to launch drone attacks, it is even more alarming when one considers the so-called ‘signature strikes’ – as opposed to personality strikes – often conducted by the CIA. In terms of the ‘signature-strike procedure’, the CIA targets ‘groups of men who bear certain signatures, or defining characteristics, associated with terrorist activity, but whose identities aren’t known’.⁷⁹ These strikes have been described as ‘heavily suspect’ in a report released by Stanford and New York Universities.⁸⁰ The United States Congress, too, has voiced concerns and has requested more information. In a letter to President Obama in 2012, Congress expressed concern over the possible increase in civilian casualties

⁷⁶ *Id* at. 2 Also with reference to Bin Laden killing, JSOC forces were responsible for the night raid operation which led to the killing of Bin Laden on 2 May 2011 in Islamabad Pakistan.

⁷⁷ See O’Connell n 17 above at 1 21 citing interview with John Radsan, Professor of Law and Director of National Security Forum, William Mitchell College of Law, in University of Notre Dame Law School (Oct. 8, 2009); see also Murphy & Radsan ‘Due process and targeted killing of terrorists’ (2009) 31 *Cardozo Law Review* 405 412–14.

⁷⁸ Alston ‘The CIA and targeted killings beyond borders’ (2011) *Public Law & Legal Theory Research Paper Series Working Paper No. 11–64 New York University School of Law* see discussion on page 52–54 citing Singer ‘Double-hatting around the law: The problem with morphing warrior, spy and civilian roles’ *Armed Forces Journal* 1 June 2010 at: <http://www.armedforcesjournal.com/2010/06/4605658/> regarding the issue of ‘double-hatting’ where the lines between spy, combatant and civilian activity are blurred when one cannot establish who is doing what and therefore who should be accountable.

⁷⁹ Heller ‘One hell of a killing machine: signature strikes and international law’ (2013) 11 *Journal of International Criminal Justice* 89 citing Klaidman *Kill or capture: the war on terror and the soul of the Obama presidency* (2012) at 41.

⁸⁰ *Id* at 90 citing Stanford Law School International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *Living under drones: Death, injury and trauma to civilians from US drone practices in Pakistan* September 2012 103.

and the negative image it could create of US policy and practice.⁸¹ According to Heller, it would seem that most signature strikes are unlawful in terms of both IHL and IHRL.⁸² One may conclude, therefore, that the problem in Pakistan appears to be that the operations are, in the main, conducted by the CIA, but that they should rather (if at all!) be conducted by the DOD – the only entity with clear guidelines and restrictions governing military operations. Peter Bergen, a CNN national security analyst, stated:

US military lawyers (would) ensure that the strikes conform to the laws of war, whereas in Pakistan, whatever vetting process the CIA observes remains opaque. In Afghanistan and Iraq, the US military also tends to pay compensation for accidental civilian deaths, whereas Pakistani civilians in the tribal areas can seek little legal or material recourse from the United States when their relatives are slain.⁸³

Recently, however, a case has arisen in which a Pakistani citizen sought to sue the CIA in a Pakistani court based on the ‘wrongful death’ of two of his relatives – who had no links whatsoever with the Taliban – resulting from a US drone strike in Pakistan. The complainant was Kareem Khan, a journalist from North Waziristan, a semi-autonomous tribal area in Pakistan. He claimed 500 million dollars in damages from the US Secretary of Defence, the Director of the CIA, and the CIA Station Chief in Islamabad.⁸⁴ Assisting him in this claim is his attorney, Islamabad based lawyer Shahzad Akbar, who is himself assisted by Pakistan based NGO ‘Foundation for Federal Rights’ (FFR), and UK-based NGO ‘Reprieve’. In July 2011 these two NGO’s filed a motion seeking the arrest of the then CIA Legal Director, John Rizzo, and the then CIA Station Chief in Pakistan, Jonathan Banks. This led to Banks eventually fleeing Pakistan.⁸⁵

⁸¹ *Ibid.* Citing letter from the Honourable D Kucinich to President Obama, 12 June 2012 available at: <http://www.justforeignpolicy.org/node/1219>.

⁸² Heller n 79 above at 89.

⁸³ Birkenthal ‘US drone strikes in Pakistan: a strategic analysis’ (2011–2012) *Claremont McKenna College Keck Centre for International and Strategic Studies Jack Stark Fellowship in Security Studies* 16 citing Bergen & Tiedemann ‘The effects of the US drone program in Pakistan’ *Foreign Affairs* July/August available at: <http://www.foreignaffairs.com/articles/67939/peter-bergen-and-katherine-tiedemann/washingtons-phantom-war> (last accessed 9 October 2013).

⁸⁴ ‘Pakistani man threatens to sue CIA if not compensated for relatives’ death’ www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112903499.html (last accessed 26 February 2013).

⁸⁵ ‘Pakistan’s legal fight to end the drone war’ *Aljazeera* www.aljazeera.com/indepth/opinion/2011/12/20111213112743546541.html (last

David Glazier, professor at Loyola Law School and former Navy surface warfare officer, stated during congressional testimony in 2010 that CIA drone pilots could in theory be 'liable to prosecution under the law of any jurisdiction where attacks occur for any injuries, deaths or property damage they cause'.⁸⁶ However, there are numerous challenges in bringing such a case before an American court, let alone a foreign court. Nevertheless, Khan's lawyer has taken the view that CIA officials could be prosecuted for murder in Pakistan because they are not members of the military and do not have diplomatic immunity.⁸⁷

On 9 May 2013 the Peshawar High Court in Pakistan issued a ruling regarding US drone strikes on targets located in Pakistan. The court ruled that these strikes were in violation of state sovereignty and in 'blatant violation of Basic Human Rights' and Geneva Convention provisions. The Pakistani government was ordered to ensure an end to further drone strikes; to request the Security Council or General Assembly to adopt a resolution effectively condemning the strikes; and to request the UN Secretary General to 'constitute an independent War Crime Tribunal' to deal with this matter.⁸⁸ The court also found that drone strikes in Pakistan violate article 2(4) of the UN Charter which prohibits 'the threat or use of force against the territorial integrity or political independence of any state...'. If consent was given by the Pakistani government for the execution of these strikes, article 2(4) would naturally not apply. However, the court stated that even if oral consent were given, written consent was necessary for the strikes to be lawful – and, clearly, no such consent had been given.

accessed 5 March 2013).

⁸⁶ Statement by David Glazier, Professor of Law Loyola Law School Los Angeles, before the United States House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs, Hearing on rise of the drones II: Examining the legality of unmanned targeting April 28, 2010 5 found at https://www.fas.org/irp/congress/2010_hr/042810glazier.pdf (last accessed 22 July 2013).

⁸⁷ See O'Connell n 17 above, 21 citing Interview with Radsan, Professor of Law and Director of National Security Forum, William Mitchell College of Law, in University of Notre Dame Law School 8 October 2009; see also Murphy & Radsan 'Due process and targeted killing of terrorists' (2009) 31 *Cardozo Law Review* 405 412–14.

⁸⁸ Horowitz & Rogers 'Case watch: a court in Pakistan addresses US drone attacks' *Open Justice Society Initiative* 28 May 2013 at: <http://www.opensocietyfoundations.org/voices/case-watch-court-pakistan-addresses-us-drone-attacks> (last accessed 10 June 2013).

The court did not elaborate on why written consent would be necessary, or which process was to be followed in obtaining this consent. Furthermore, the court decided that the killing of civilians in Pakistan violated both IHL and IHRL, but it did not provide any specific reasons why it relied in any way on IHL to resolve the legal dispute at hand. The court also did not explain why IHRL had been breached or how the duties of the United States under the ICCPR had been triggered.⁸⁹

In the final analysis, the court held that the United States had breached IHL, IHRL, and Pakistani sovereignty in its operations, and ordered the United States to compensate the victims' families. It also ordered the government of Pakistan to prevent future attacks against its people.⁹⁰ Despite the fact that many important and valid points were made in the judgment, unfortunately the court did not offer sufficient legal bases for most of its assertions. It is, for this reason, of scant precedential value and might come under heavy scrutiny in future.

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

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

CONCLUSION

After analysing the current international framework applicable to the practice of targeted killing, it is clear that the legal regime currently in place can meet the demands of regulating this practice. By attempting to supplement the already adequate body of international law regulating this

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

practice, one risks unwarranted fragmentation of international law. It seems that the crux of the problem regarding targeted killing is enforcement. One can imagine the challenge international lawyers face in attempting to enforce international law in this context, especially considering the fact that the main violator of these laws is also the most powerful state in the world.

International law, despite what many scholars would claim, seems too often to be a power game where the strongest makes the rules and the weakest is bound by them. Increased pressure on the stronger states is therefore vital. We have already seen the power of such pressure on the Obama Administration by Congress, as well as different states and organisations demanding better oversight and control.⁹¹ It is doubtful whether altering or adding to international norms will either improve or ensure enforcement. However, increasing international pressure on the United States might just be the straw that finally breaks the camel's back.

⁹¹ 'Global opinion of Obama slips, international policies faulted' 13 June 2012 at: <http://www.pewglobal.org/2012/06/13/global-opinion-of-obama-slips-international-policies-faulted/> 'Europe urged to face up to the issue of drones' 24 May 2013 at: <http://www.internalvoices.org/international-issues/item/152-europe-urged-to-face-up-to-the-issue-of-drones> 'Obama restricts drone strikes overseas' 23 May 2013 at: <http://articles.latimes.com/2013/may/23/news/la-pn-obama-restricts-drone-strikes-overseas-20130523> 'Obama faces bipartisan pressure on drone big brother fear' 8 Mar 2013 at: <http://www.bloomberg.com/news/2013-03-08/obama-faces-bipartisan-pressure-on-drone-big-brother-fear.html> (last accessed 29 July 2013).