Targeted Killing of Suspected Terrorists

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Minor dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in International Law (LL.M.) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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Signed by candidate

Atilla Kisla 13th September 2015

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I. Introduction

> "Now I prefer cloudy days when the drones don't fly. When the sky brightens and becomes blue, the drones return and so does the fear. Children don't play so often now, and have stopped going to school. Education isn't possible as long as the drone circles overhead."[1]
>
> Zubair Rehman (13 years old), Congressional Hearing, 29 October 2013

In the past decade, targeted killing, predominantly carried out by drones, has become a common tool in the "war on terrorism".

In 2000, the Israeli government adopted a policy of "targeted killings" regarding Palestinians who were suspected of being members of a terrorist group within the occupied territories. In accordance with this policy, Israel used drones to kill suspected terrorists such as Hussein Abayat[2] or Ahmed Yassin.[3]

In November 2002, a car travelling in Yemen was destroyed by an unmanned Predator drone controlled by the United States.[4] This resulted in the killing of Ali Qaed Senyan al-Harithi and five other suspected members of al-Qaeda.[5] In Pakistan between 2004 and 2014 approximately 400 airborne unmanned drone strikes were carried out with the intent to kill suspected terrorists.[6] The number of similar drone strikes in Yemen in the period 2002 to 2014 is estimated at between 67 and 79.[7]

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[1] Karen McVeigh "Drone strikes: Tears in Congress as Pakistani family tell of mother's death", *The Guardian*, 29 October 2013, available at http://www.theguardian.com/world/2013/oct/29/pakistan-family-drone-victim-testimony-congress (last accessed: 25 December 2014).

[2] Alan Philips "Israeli rocket kills Fatah militant", *The Telegraph*, 10 November 2000, available at http://www.telegraph.co.uk/news/worldnews/middleeast/israel/1373950/Israeli-rocket-kills-Fatah-militant.html.

[3] Israel Ministry of Foreign Affairs "IDF strike kills Hamas leader Ahmed Yassin", 22 March 2000, available at http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/sheikh%20yassin%20killed%20in%20idf%20attack%2022-mar-2004.aspx (last accessed: 25 December 2014).

[4] Jane Mayer "The predator war" *The New Yorker*, 26 October 2009; Greg Miller "C.I.A. said to use outsiders to put bombs on drones", *LA Times*, 13 February 2009.

[5] Ibid.

[6] The Bureau of Investigative Journalism "Get the Data: Drone Wars", available at http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/ (last accessed: 25 March 2015).

[7] Ibid.

The lawfulness of these attacks on suspected terrorists is considered highly controversial under international law.

In this paper, I examine the legitimacy of targeted killing under different areas of international law. Owing to the specific characteristics of targeted killing by means of drones, this area does not easily fit into the known frameworks of international law. Therefore, I discuss targeted killings in terms of:

- The Law-Enforcement Model
- The Right of Self-Defense
- International Humanitarian Law.

In each case I refer to the targeted killings perpetrated by the United States in Pakistan and Yemen. The situation in these states differs from that of the past decade in Afghanistan, where the United States designated the state as a so-called "hot" battlefield.[8] Within this examination, I investigate whether Pakistan and Yemen indeed constitute a so-called "hot" battlefield.

In order to examine the legitimacy of targeted killing, I define the elements of this method of killing as examined in this paper in chapter II. I use the definition of the legal advisor to the International Committee of the Red Cross (ICRC), as well as the findings of the *United Nations Report on Extrajudicial, Summary or Arbitrary Executions*.

In Chapter III, the application of the law-enforcement model to the issue of targeted killing is scrutinised. I discuss the application of the law-enforcement model, which is fundamentally designed for domestic relationships between the state and individuals. This model is based mainly on human rights. I

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[8] See Department of Justice *White Paper on the Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al Qa'ida or an Associated Force* (hereinafter: *White Paper*), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (last accessed: 12 January 2015) at 3; see also John Brennan, Assistant to the President for Homeland Security and Counterterrorism "Strenghtening our security by adhering to our values and laws", 16 September 2011, available at http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an (last accessed: 5 March 2015). The term "hot battlefield" is explained further in Chapter III.4.

examine whether international human rights law applies to situations of targeted killing and, furthermore, whether a state that acts outside its territorial borders is bound by international human rights law. In this context, the paper focuses on the right to life and examines the universal status of the right to life. Thereafter, I illustrate requirements under which targeted killing may be lawful in terms of the law-enforcement model.

In Chapter IV, the issue of targeted killing in respect of the right to self-defense is discussed. In this instance I concentrate on the cases of targeted killings perpetrated by the United States in Pakistan and Yemen, where the "war on terrorism" was transferred from Afghanistan. This paper puts particular emphasis on the geographical limitation of the right of self-defense.

Chapter V subsumes targeted killings of suspected terrorists under the armed conflict model, which is designed for times of war. The decisive point here is the application of the law of armed conflict. Therefore, the paper discusses targeted killings under the model of an international and non-international armed conflict. Furthermore, this paper illustrates the difficulties that result from applying the armed conflict model to such killings.

Chapter VI discusses the need for a new model with regard to the conduct of targeted killing. I illustrate the weak points of all models presented and propose new models in respect of these type of killing in Chapter VII. I present standards that a wholly new model should contain in order to cover the issue of targeted killings of suspected terrorists and provide innocent civilians with the protection they need. I outline measures required to be taken before a practicable result can be found. However, I also point out the risks that may result from establishing a new model.

II. A Definition of Targeted Killing

First, I define the term "targeted killing" as it is examined in this paper. There is "no settled definition" for the concept of targeted killing.[9] However, the legal advisor to the ICRC, Nils Melzer, suggests the key elements of such a definition.[10] These elements have been endorsed by scholarship[11] and the UN Rapporteur on Extrajudicial, Summary or Arbitrary Executions.[12]

According to Melzer, the definition comprises five cumulative elements.[13] The first element is the use of lethal force against human beings.[14] This element also covers innovative means of lethal force such as weapons disguised in an umbrella or poisoned letters.[15]

The second element is the "intent, premeditation and deliberation to kill".[16] This means that the intent must be to kill the targeted person.[17] Premeditation requires that the intent must be "based on a conscious choice".[18] Moreover, "deliberation" means that the "targeted person must be the aim of the operation".[19]

Furthermore, according to Melzer, the definition requires an element of selection.[20] In this context, the targeted person must be selected

[9] Jake William Rylatt "An evaluation of the US policy of 'targeted killing' under international law: The case of Anwar al-Aulaqi (Part 1)" (2013) 44 *Cal. W. Int'l L.J.* 39 at 41.
[10] Nils Melzer *Targeted Killing in International Law* (2008) 3–9.
[11] See Meagan S. Wong "Targeted killings and the international legal framework: With particular reference to the US operation against Osama Bin Laden" (2012) 11 *CJIL* 127 at 128; see also Benjamin R. Farley "Targeting Anwar al-Aulaqi: A case study in U.S. drone strikes and targeted killing" (2012) 2 *Am. Univ. Nat'l Secc. L. Brief* 57 at 60; Amos Guiora "Targeted killing as active self-defence" (2004) 36 *Case W. Res. J. Int'l L.* 319 at 322.
[12] Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions "Study on targeted killings" (28 May 2010) *Int'l L. Comm'n*, U.N. Doc. A/HRC/14/24/Add. 6, para 1.
[13] Melzer (note 10) 3.
[14] Ibid.
[15] Brian Sang YK "Clearing some of the fog of war over combating terrorists on the frontiers of international law: Targeted killing and the international humanitarian law" (2011) 1 *African Yearbook on Int'l. Humanitarian L.* 1 at 7.
[16] Melzer (note 10) 4.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid; see also David Ennis "Pre-emption, assassination and the war on terrorism" (2005) 27 *Campbell L. Review* 253 at 255.

individually.[21] This element distinguishes targeted killings from "unspecified or random targets".[22]

The fourth element requires the "lack of physical custody".[23] This requirement can be used to distinguish targeted killing from judicial sentences or extra-judicial executions.[24]

The fifth element is the "attribution to a subject of international law".[25] In most of the cases targeted killings will be attributed to states.[26] However, according to Melzer, this does not exclude the possibility that targeted killings may also be attributed to non-state actors for very limited purposes and only in certain situations.[27] Melzer argues that such an attribution can result from the premise that "international law regulates, prohibits or penalizes the use of force by them".[28]

The above-mentioned elements can also be found in the report of the United Nations Human Rights Council regarding extrajudicial, summary and arbitrary executions, which defined targeted killing as

> "the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator".[29]

For the purposes of this paper I also adopt a working definition of terrorism, even though the definition of a "terrorist" or "terrorism" is still not settled and both terms remain highly controversial. This paper does not intend to enter into a discussion about the definition of terrorism and I adopt the definition of the UN Security Council Resolution 1566 that defines an act of terrorism as:

[21] Ennis (note 20) 255.
[22] Ibid.
[23] Melzer (note 10) 4.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Alston (note 12) para 1.

> "[Any] criminal act, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act …"[30]

The prevention and punishment of criminal acts constitutes an essential part of the law-enforcement model. Therefore, I examine whether targeted killing of suspected terrorists may be subsumed under the law-enforcement model.

III. The Law-Enforcement Model

The law-enforcement model

> "includes the totality of international rules, which balance the collective interest in enforcing public security, law and order against the conflicting interest in protecting individual rights and liberties".[31]

Under the law-enforcement model, a terrorist is considered a "suspect" or a "criminal". Based on that premise, a terrorist should therefore enjoy the same rights as a suspect or criminal.

1. Application of the Law-Enforcement Model

Targeted killing of suspected terrorists constitutes a significant part of the "war against terrorism". When states classify targeted killings as "extrajudicial executions", this "implies that the relevant legal model is the law-enforcement model".[32] Supporters of the application of the law-enforcement model argue that targeted killings are not part of an armed conflict and therefore do not fall

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[30] United Nations Security Council Resolution 1566, 8 October 2004, S/Res/1566, para 3.
[31] Melzer (note 10) 89.
[32] David Kretzmer "Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence?" (2005) 16(2) *EJIL* 171 at 176.

under the regime of International Humanitarian Law (IHL).[33] Furthermore, it is argued that the military status of a suspected terrorist is uncertain under IHL and therefore such persons cannot constitute a definite military target under the IHL regime.[34]

Owing to the absence of armed conflict and the uncertainty regarding the military status of suspected terrorists, Melzer argues that targeted killings cannot be covered by the *ius in bello*, but have to be subsumed under the law-enforcement model.[35] The issues regarding the military status of a suspected terrorist and the existence of an armed conflict under IHL are examined further below.

However, due to the fact that targeted killings almost always occur outside the territory of the targeting state, the question arises of how far the law-enforcement model can apply outside the territory of that state. The law-enforcement model is domestically oriented, unless universal jurisdiction was to constitute the legal basis.[36] Therefore, one may argue that this model reaches its limits with the territory or jurisdiction of each state. By way of contrast, Melzer argues that territorial jurisdiction is not decisive for the application of the law-enforcement model.[37] He bases his argument for the application on the concept of “conduct and effect”. This concept applies when a state is exercising authority or power in a state where targeted killing occurs.[38] Melzer further states that territorial considerations are decisive for the “international lawfulness of a State’s exercise of jurisdiction”, but not for the “generic qualification as law enforcement”.[39] The qualification as an act of law enforcement ought therefore to be construed widely and should to apply to any vertical exercise of power or authority by a state over an individual.[40]

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[33] See Melzer (note 10) 224.
[34] Ibid.
[35] Ibid.
[36] See Kretzmer (note 32) 185–186.
[37] Melzer (note 10) 224.
[38] Ibid at 88.
[39] Ibid at 223.
[40] Ibid.

Melzer justifies the extension of application beyond the borders of the targeting state by arguing that particular international human rights apply universally.[41] However, he falls short in reasoning why the law-enforcement model should apply in the case of targeted killings. He struggles to explain why his approach should apply when the targeting state has no effective control over the territory in which the targeted killing occurs. He simply assumes the application of the model without naming the exact legal basis for the vertical exercise of power, namely, targeted killing. According to Melzer, it appears to be that because international human rights law applies, the law-enforcement model also applies automatically.[42] His approach here lacks a clear legal basis that legitimates the killing of suspected terrorists by drones outside the territory of the targeting state.

Nevertheless, one might argue that the legal basis for legitimacy is founded on the protection of universal human rights within the targeting state. This is examined further below. Here one may consider the protection of the right to life of the population within the targeting state as a basis of legitimacy. However, one has to consider that targeted killing – based on such assumptions – appears to undermine principles of international law such as state sovereignty or the prohibition on use of force under article 2(4) of the United Nations (UN) Charter.[43] A foundation on which to base the legitimacy for targeted killing should therefore be more precise than a mere reference to the protection of human rights. If such acts by states violate state sovereignty or the prohibition on the use of force, the question arises whether such acts may be justified under the right of self-defense (*jus ad bellum*). I discuss the legality of targeted killings under the right of self-defense further below. For the sake of argument, I assume that the law-enforcement model applies.

The law-enforcement model is governed by principles that are derived from human rights law.[44] It sets up very narrow limitations within which the use of lethal force may be lawful.[45] Every action has usually to be balanced against

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[41] Ibid at 124.
[42] Ibid at 138.
[43] Article 2(4) of the UN Charter.
[44] Melzer (note 10) 89.
[45] Kretzmer (note 32) 180.

rights or standards as “the right of every person to life and to due process of law”.[46] Any conduct that violates these basic principles and takes place outside the judicial framework could be considered an unlawful extrajudicial execution.[47] This analysis of the law-enforcement model concentrates on human rights standards and omits the issues concerning state sovereignty.

The application of the paradigm of international human rights law to targeted killings raises a number of issues that are examined further below. First, it has to be discussed whether international human rights law applies to the conduct of a state outside its borders. Secondly, whether situations can exist under which targeted killing is permissible. Thirdly, I examine the targeted killings of suspected terrorists perpetrated by the United States in Pakistan and Yemen under the law-enforcement model.

2. Application of International Human Rights Law to a State’s Actions Outside its Territory

Targeted killings may violate the right to life. The focus of this paper is therefore on the right to life within the framework of human rights.

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) states that “every human being has the right to life”.[48] Furthermore, article 2 of the ICCPR determines that a state party is bound to the rights of the ICCPR “within its territory and subject to its jurisdiction”.[49] The right to life is also protected under article 2 of the European Convention on Human Rights (ECHR) and article 2(1) of the American Convention on Human Rights (ACHR).[50]

The European and the American conventions state that all persons subject to the state party’s jurisdiction enjoy the legal protection of human rights.[51]

[46] Ibid.
[47] Amnesty International “Israel and the occupied territories: Israel must end its policy of assinations”, 4 July 2003, at 1.
[48] Article 6 of the International Covenant on Civil and Political Rights, 23 March 1976.
[49] Article 2 ICCPR.
[50] Article 2(1) of the European Convention on Human Rights, 3 May 2002 and article 4 of the American Convention of Human Rights, 22 November 1969.
[51] Article 1 ECHR and article 1 ACHR.

However, the term “subject to jurisdiction” is not defined in any of the above-mentioned conventions and is therefore open to interpretation.

In this regard, the European Court of Human Rights (ECtHR) held in the *Bankovic* case that the application of the ECHR is limited to the territory of the state party exercising its jurisdiction.[52] The Court held that the victims of the bombing, carried out by the states representing the North Atlantic Treaty Organisation (NATO) in Kosovo, were not subject to the jurisdiction of those same NATO states.[53] According to the ECtHR, an exception to the territorial limitation can be made only in situations where the state exercises all or some governmental powers in the territory of another state with that state’s consent, invitation or when it exercises effective control over an occupied territory.[54]

Under the approach of the ECtHR, suspected terrorists who were killed by drones were not within the territory of the targeting state and therefore not subject to its jurisdiction. In the end, one may conclude that a state would not be bound by the provisions of the ICCPR, ECHR or ACHR as long as the violation occurs outside its territory and not against one of its own citizens.

By way of contrast, the United Nations Human Rights Committee (UNHRC), in its interpretation of the ICCPR, developed a wider approach than the ECtHR, in terms of which any state action will be regarded as subject to that state’s jurisdiction.[55] Following this approach, the killing of suspected terrorists in a foreign state would be subject to the targeting state’s jurisdiction and, therefore, the rights of the ICCPR would also apply to the targeted persons.

The issue of jurisdiction concerning the application of human rights is therefore controversial. However, assuming that none of the above-

[52] *Bankovic v Belgium*, ECtHR, Decision as to the Admissibility, 14 November 2000, paras 61,63 and 65.
[53] Ibid.
[54] See *Loizidou v Turkey* (Preliminary Objections), ECtHR, 23 March 1995, para 62.
[55] UNHRC, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, para 10.

mentioned human rights conventions were to apply, one may raise the question whether the right to life for individuals outside the targeting state may be derived from another source. Therefore, this paper concentrates on the non-conventional character of the right to life. In the next part, I examine whether the right to life has become a rule of customary international law or a peremptory norm (*jus cogens*).

Customary international law is essentially the result of state practice which is based on a conviction that this practice is required by the law – the so-called *opinio juris.*[56]

The *jus cogens* "protects fundamental collective values and interests which are of elementary importance for the whole international community and give rise to obligations *erga omnes"*.[57] In general, any violation of peremptory norm is unlawful and cannot become lawful under any circumstances.[58]
According to article 53 of the Vienna Convention on the Law of Treaties (VCLT)

> "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[59]

This article may be regarded as authoritative for the existence of *jus cogens* rules.[60]

The UN Human Rights Commission concluded in its comment that an arbitrary deprivation of life is an example of the breach of a peremptory

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[56] Melzer (note 10) 180; see also article 38(1)(*b*) of the ICJ Statute.
[57] International Law Commission "Responsibility of states for internationally wrongful acts" (2001) Commentary to Draft article 26, para 4, at 208; James Crawford *Brownlie's Principles of Public International Law* 8ed (2012) 515; Lauri Hannikainen *Peremptory Norms (Jus Cogens) in International Law* (1988) 4.
[58] See Hannikainen (note 57) 6; see also International Law Commission (note 57) 208.
[59] Article 53 of the Vienna Convention on the Law of Treaties, 23 May 1969.
[60] Hannikainen (note 57) 3.

norm.[61] Furthermore, the UN Special Rapporteur for the Former Yugoslavia, Tadeusz Mazowiecki, concluded in his report that article 6 of the ICCPR has become *jus cogens.*[62] The Inter-American Committee on Human Rights (IACtHR) concluded in the *Villagran Morales* case that the right to life has a *jus cogens* nature and that it is the foundation for the exercise of other rights.[63] In addition, a large number of scholars support the view that the right to life has become a peremptory norm of international law.[64]

Moreover, the Human Rights Committee concluded that the basic rights of human persons

> "are *erga omnes* obligations and that … there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms."[65]

This also supports the view that the right to life has become a *jus cogens* rule or one of customary international law.

The committee describes the right to life also as a non-derogable right.[66] The International Court of Justice (ICJ) concluded in the *Barcelona Traction* case that basic human rights give rise to obligations *erga omnes*.[67] The conclusion in this case is that *erga omnes* obligations support the customary character of the right to life.

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[61] UNHRC, General Comment No. 24, General Comment in issues relating to reservations made upon ratification or accession to the Covenant or Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994, para 10.
[62] Tadeusz Mazowiecki, Special Rapperteur of the UN Commission on Human Rights, Report in the Situation of Human Rights in the Territory of the former Yugoslavia, 17 November 1992, para 129.
[63] *Villagram Morales v Guatemala,* IACtHR Judgment of 19 November 1999 para 139.
[64] See Yoram Dinstein "The Right to Life, Physical Integrity, and Liberty" in L. Henkin (ed) *The International Bill of Rights – the Covenant on Civil and Political Rights* (1981) 114,115; see also Paul Gormley "The right to life and the rule of non-derogability: Peremptory norms of *jus cogens*" in Ramcharan (ed.) *The Right to Life in International Law* (1985) 120**;** see also Nigel Rodley *The Treatment of Prisoners under International Law* (1999) 178–179.
[65] UNHRC (note 55) para 2.
[66] UNHRC, General Comment No 29, Derogations during a State of Emergency, 31 August 2001, para 7.
[67] *Case Concerning the Barcelona Traction, Light and Power Company, Limited,* ICJ Judgment, 5 February 1970 (hereinafter: *Barcelona Traction* case) para 34.

The decisions by several human rights courts and committees set out above – as well as the prevailing academic position – support the view that the right to life has become a peremptory norm. Even if one may argue that the right to life has not become a peremptory norm, it is difficult to deny that the right to life is not protected from arbitrary deprivation under customary international law. The protection of the right to life under major human rights treaties such as the ICCPR, ECHR or ACHR and the high number of state parties make the denial of a customary nature of that right very questionable. The customary nature of the right to life is also confirmed by number of scholars.[68] For the purpose of this paper I accept that the right to life is a rule of customary international law and *ius* cogens. Therefore, this right is not suspended by the fact that targeted killing occurs outside the territory of the acting state. As a peremptory norm or a rule of customary international law, any violation of the right to life may be unlawful. This raises the question whether the targeted killings perpetrated by the United States in Pakistan and Yemen may violate a *jus cogens* rule or customary international law, which would be unlawful. Therefore, I examine whether targeted killing is a violation of the right to life in the next part.

3. Permissibility of Targeted Killing under the Law-Enforcement Model

First, the suspected terrorists are not the only individuals who may benefit from the status of the right to life as a peremptory norm or as customary international law. In scrutinising these situations, one has to consider that the peremptory or customary international law character of the right to life also protects the right to life of individuals in the targeting state. This "duty to protect" against potential terrorist attacks may be used by states such as the United States as a basis for justifying their actions in Pakistan or Yemen. In this regard, there may be exceptional circumstances which may not lead to an unlawful violation of the right to life. Exceptional circumstances are described by the ECHR as "absolute necessity" and by the ICCPR as "non-arbitrary".

[68] See Kretzmer (note 32) 185; see also Yoram Dinstein "The right to life, physical integrity, and liberty" in L. Henkin (ed.) *The International Bill of Rights – the Covenant on Political and Civil Rights* (1981) 114, 115; Gormley (note 64) 120; Rodley (note 64) 178–179.

In article 2(2) the ECHR requires an "absolute necessity" test in order to determine when the use of lethal force will not violate the right to life under article 2(1).[69] In this context, article 2(2) sets up a catalogue for when the use of lethal force may be absolutely necessary:

> "(a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."[70]

The ECtHR has not yet had the chance to address the issue of targeted killings. However, the Court set out that the test of necessity must be strict one.[71] In determining whether the use of lethal force was necessary, one has to raise the questions whether the use of lethal force is an absolute requirement, or whether milder measures are available in order to protect the threatened persons.[72]

By way of contrast, article 6(1) of the ICCPR states that "no one shall be arbitrarily deprived of his life".[73] The ACHR or the African Charter on Human and Peoples' Rights (ACHPR) also use the expression "arbitrarily".[74]

The ICCPR does not contain any definition of "arbitrary" under article 6.[75] The main purpose behind not defining "arbitrary" was to avoid any endorsement to kill.[76] However, the material scope of arbitrariness may be determined by review of the decisions by the human rights committees, commissions and courts to the ICCPR, ACHR and ECHR. Nevertheless, the commissions and committees also have difficulties in determining the scope of "arbitrary" against the backdrop of targeted killing or in scrutinising the

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[69] Article 2 of the ECHR.
[70] Article 2(2) of the ECHR.
[71] *McCann v UK*, ECtHR, 27 September 1995, para 149.
[72] Kretzmer (note 32) 178.
[73] Article 6(1) of the ICCPR.
[74] Article 4(1) and (2) of the ACHR; article 4 of the ACHPR.
[75] Melzer (note 10) 92.
[76] Kevin Boyle "The concept of the arbitrary deprivation of life" in Bertrand G. Ramcharan (ed.) *The Right to Life in International Law* (1985) 221.

lawfulness of targeted killings under the model of international human rights law.[77]

In its report concerning the targeted killing of Palestinians in Israel the UNHRC stated that:

> "The Committee is concerned by what the State party calls 'targeted killings' of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6. While noting the delegation's observations about respect for the principle of proportionality in any response to terrorist activities against civilians and its affirmation that only persons taking direct part in hostilities have been targeted, the Committee remains concerned about the nature and extent of the responses of the Israeli Defense Force (IDF) to Palestinian terrorist attacks.
>
> The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted."[78]

This extract does not clear the fog regarding the arbitrariness of targeted killing. It merely concludes that the deterrent and punishment effect of targeted killing raises an issue under article 6 of the ICCPR. Furthermore, it omits the issue of how far these types of killing as pre-emptive measures

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[77] See Inter-American Commission on Human Rights *Report on Terrorism and Human Rights*, 22 October 2002, available at http://www.cidh.oas.org/Terrorism/Eng/exe.htm; see also *Alejandre et al v Cuba*, IACiHR, 29 September 1999; *McCann v UK*, ECHR, 27 September 1995.
[78] UNHRC *Concluding Observations of the Human Rights Committee on Report of Israel,* 21 August 2003, CCPR/CO/78/ISR, para 15.

violate this same article.[79] Nevertheless, the report concludes that all measures to arrest must be exhausted before deadly force is employed.[80] One may infer from that wording that the committee allowed for the use of deadly force in the case of an imminent attack.[81]

The *Report on Terrorism and Human Rights* by the Inter-American Commission on Human Rights (IACiHR) also illustrates the difficulties in the material scope of "arbitrary" under article 6 of the ICCPR. The commission concluded:

> "The state may resort to force only against individuals that threaten the security of all, and therefore the state may not use force against civilians who do not present such a threat. The state must distinguish between the civilians and those individuals who constitute the threat."[82]

According to this statement, there must be a threat to the security of all. However, the report is confusing when it bases its argumentation on the status of a person as civilian or a person who constitutes a threat. This status is relevant only under the regime of IHL, where the principle of distinction exists.[83] Under the law-enforcement model, the status of an individual is irrelevant.[84]

However, the practice by the UNHRC, the IACiHR and IACtHR suggest four criteria/situations for when the deprivation of life may be regarded as arbitrary.

First, the deprivation of life is arbitrary when no sufficient legal basis for it exists.[85] That legal basis or law is not sufficient if it "does not strictly control and limit the circumstances in which a person may be deprived of his life by

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[79] Kretzmer (note 32) 180.
[80] UNHRC *Concluding Observations of the Human Rights Committee on Report of Israel* (note 78).
[81] See Ibid.
[82] *Report on Terrorism and Human Rights* (note 77) para 90.
[83] Kretzmer (note 32) 181.
[84] Ibid.
[85] Melzer (note 10) 100.

the authorities of a State".[86] In this context, the lack of a sufficient legal basis by the domestic law contrary to internationally binding standards may in itself amount to a violation of the right to life.[87] An effective protection of the right to life cannot be guaranteed by the existence of extra-legal killings.[88]

Secondly, if the use of lethal force was not absolutely necessary or unavoidable to maintain law and order or to protect collective security, a deprivation of life is arbitrary.[89] Any use of lethal force that exceeds the minimum necessary to achieve the legitimate purpose, also constitutes an arbitrary deprivation of life.[90] Furthermore, any deprivation of life of a person who does not pose a threat at the time of the deprivation must be regarded as arbitrary.[91]

Thirdly, a deprivation of life is arbitrary when the use of lethal force is disproportionate.[92] This standard requires proportionality between the "deprivation of life" and the actual danger.[93] In this instance, a merely political motive would not constitute an actual danger and therefore its "removal" may be regarded as arbitrary.[94]

Fourthly, a deprivation of life is arbitrary if it does not meet the standard of precaution."[95] A "deprivation of life" may be considered as arbitrary when precautionary measures could have been taken, but were not considered.[96] These measures can be warnings given or the opportunity to surrender

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[86] Ibid.
[87] *Suarez de Guerrero v Columbia*, UNHRC, 31 March 1982, paras 13.1–13.3.
[88] Ibid.
[89] *Alejandre et al. v Cuba*, IACiHR, 29 September 1999, paras 37, 42; *Report on Terrorism and Human Rights* (note 77) paras 87, 88.
[90] Ibid; see also *Suarez de Guerrero v Columbia* (note 87) para 13.1.
[91] *Alejandre et al. v Cuba*, IACiHR, 29 September 1999, para 42; IACiHR "Report on terrorism and human rights" (note 77) para 90.
[92] See *Report on Terrorism and Human Rights* (note 77) para 87; see also Melzer (note 10) 101.
[93] Melzer (note 10) 101.
[94] *Alejandre et al v Cuba*, IACiHR 29 September 1999, paras 37, 42; *Suarez de Guerrero v Columbia* (note 87) para 13.1; *Report on Terrorism and Human Rights* (note 77) paras 87, 88.
[95] Melzer (note 10) 101.
[96] Ibid.

offered.[97] Furthermore, mere suspicion cannot justify a suspension of due process principles where the deprivation of life is concerned.[98]

However, even though one can refer to the standards of identifying an arbitrary deprivation of life, the question arises in how far these standards may be applicable under a situation of targeted killing in practice. In what follows, I focus on standards of necessity and proportionality with regard to the goals of the law-enforcement model.

The law-enforcement model is designed to prevent and to deter criminal acts.[99] The prevention of criminal acts, however, cannot be achieved by simply eliminating every potential perpetrator.[100] Under this model, prevention is meant to be reached by subjecting criminal acts to a criminal process.[101] The threat of legal sanctions and the enforcement of criminal law against those who break the law fulfil the purpose of deterrence.[102] The main issue of concern here is that targeted killing takes place outside the jurisdiction of the targeting state. In these circumstances it is not possible for the state to take preventive measures, which are primarily developed for its own domestic use. Assuming that the host state is unable or unwilling to conduct measures of law enforcement, one may question whether such circumstance might justify a suspension of due process rights by the targeting state. In practice, the United States has shown that it is eager to suspend due process rights – as set out in the Fifth Amendment to the Constitution – in the case of targeted killings.[103] According to the Department of Justice's *White Paper*, due process rights of a US citizen may be suspended in a case of absolute necessity.[104]

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[97] *Suarez de Guerrero v Columbia* (note 87) para 13.2; *Alejandre et al v Cuba*, IACiHR, 29 September 1999, para 42.
[98] *Suarez de Guerrero v Columbia* (note 87) paras 13.1–13.3.
[99] Kretzmer (note 32) 178.
[100] Ibid.
[101] Ibid.
[102] Fionnuala Ni Aolian "The politics of force: Conflict management and sate violence in Northern Ireland" (2012) *Minnesota Legal Studies Research Paper No. 12–12*, at 187.
[103] *White Paper* (note 8) 5–6.
[104] Ibid.

The *White Paper* states that the standard of “absolute necessity” is met if there is an imminent threat and no milder means could achieve the desired result.[105] In essence, such an approach corresponds with the idea of necessity under the law-enforcement model that the threat of violence must be so imminent that attempting to arrest the perpetrator would still allow him or her to carry out the threat.[106] Therefore, the use of force can be regarded as necessary only when there is “no feasible possibility of protecting the prospective victim by apprehending the suspected perpetrator”.[107] However, according to the *White Paper*, the imminent threat “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”.[108] This approach does not follow a logical interpretation, nor is it in line with the illustrated interpretation by international human rights committees or commissions. An imminent threat that does not have to be immediate appears to be a simple contradiction. This case illustrates the difficulties of applying the necessity test. Owing to the high burden of proof, states may try to weaken the requirement of an imminent threat simply by adopting a illogical definition of immediacy.

Aside from this extraordinary application of “imminent threat” under the *White Paper*, the question still persists whether a situation in which the host state is unable or unwilling to arrest the suspected terrorist could constitute a case of absolute necessity and thereby justify the use of lethal force.[109] In addition, one has to question whether it would fulfil the requirement of necessity if there is strong evidence of a future terrorist attack in the victim state. In this regard, it is noticeable that even in the case of an apparent threat to civilians, such a case would not automatically justify the use of lethal force in order to kill that person and remove the threat.[110] According to the *White Paper*,

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[105] Ibid.
[106] See *Alejandre et al v Cuba*, IACiHR, 29 September 1999, para 42; IACiHR “Report on terrorism and human rights“ (22 October 2002), para 90; *Suarez de Guerrero v Columbia* (note 87) para 13.1; Melzer (note 8) 101; Rodley (note 64) 182–188.
[107] Kretzmer (note 32) 179.
[108] See *White Paper* (note 8) 7.
[109] See Ibid.
[110] Melzer (note 10) 229.

however, the mere fact that a state that is unwilling or unable to arrest the suspected terrorist justifies the use of lethal force in a foreign state.[111]

Furthermore, the requirement of proportionality is difficult to fulfil under a situation of targeted killing. Targeted killing may not be permissible when the expected harm is disproportionate to the gravity of threat or offence that it aims to remove.[112] Notably, even the intention to arrest may not justify the use of lethal force and risk the life of the suspected person.[113] Targeted killing may never become the "end" in itself under the law-enforcement model, but must rather constitute the means to achieve a different, legitimate purpose.[114] By way of contrast, such circumstances may justify the use of force in a situation of armed conflict.[115]

The above-mentioned situations and requirements of absolute necessity and proportionality remain vague and it is not clear to what extent there can be a lawful case of targeted killing from the perspective of the right to life. One may argue, however, that in a case where the threat of violence might not be imminent, but the use of lethal force would constitute the last possibility to prevent the terrorist attack, targeted killing may not constitute an arbitrary deprivation of life.[116]

However, one should bear in mind that the inability to apprehend the suspected terrorist cannot automatically result in a licence to kill.[117] Such an assumption would simply violate the rights of an individual as a suspect. Furthermore, the existence of a situation where lethal force constitutes the only possible way of preventing a terrorist attack leaves a large space for interpretation. This again may be exploited by the targeting state in justifying its acts and calls concurrently for an independent institution to review each

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[111] *White Paper* (note 8) 2.
[112] Melzer (note 10) 232.
[113] Ibid.
[114] Ibid at 233.
[115] Ibid.
[116] Michael Schmitt "Counter-terrorism and the use of force in international law" (2002) 32 *Israel Yrbk on HR* 53 at 110.
[117] Kretzmer (note 32) 182.

case. The necessity and proportionality test has therefore to be strict in order to comply with the protection of the right to life.

In the end, under the law-enforcement model, the right to life is protected by customary international law. This essential human right may be limited only if such a deprivation of life is not arbitrary and fulfils the requirements of legal basis, necessity, proportionality and precaution; all these requirements having to be assessed on a case-by-case basis. Against the backdrop of customary international law, I wish to emphasise that any violation of this rule not fulfiling the before-mentioned requirements, is unlawful.

4. Targeted Killings Perpetrated by the United States in Pakistan and Yemen

The situation in Pakistan and Yemen differs from "ordinary" battlefields such as Afghanistan or Iraq.[118] The programme of targeted killings perpetrated by the United States in Pakistan and Yemen illustrates that the targeting state does not even consider the law-enforcement model.[119] In this situation, the *White Paper* is extremely important as it describes the legal framework under which it may be lawful to kill a US citizen by means of a drone in a foreign state.[120] In the reverse situation, one may assume that the United States will not set the threshold any higher in the case of lethal force against non-citizens. The *White Paper* considers the *ius ad bellum* and the *ius in bello* as a legal basis for any use of lethal force.[121] Therefore, the question that has to be answered is whether the law-enforcement model applies to the targeted killings by the United States in Pakistan and Yemen.

First, the identification of a terrorist as a criminal supports the view that the law-enforcement model has to apply.[122] In terms of this model, a terrorist is a criminal.[123] This conclusion also complies with current definitions or various

[118] See *White Paper* (note 8) 3.
[119] See *White Paper* (note 8).
[120] Ibid.
[121] Ibid at 2, 3.
[122] Kretzmer (note 32) 176.
[123] Melzer (note 10) 174.

drafts concerning the term "terrorism".[124] Moreover, these definitions of terrorism share the lowest common factor of describing terrorism as a "criminal act".[125] This categorisation of a criminal act supports the view that the law-enforcement model is eminently suited to the programme of targeted killing of suspected terrorists.

Secondly, the situation in Yemen and Pakistan differs from that in Afghanistan. The difference is that the United Sates classifies Afghanistan as a so-called "hot" battlefield where IHL rules apply.[126]

John Brennan stated in his address on "Strengthening our Security by Adhering to our Values and Laws" that the United States is at "war" with al-Qaeda which also operates in states such as Yemen and Pakistan.[127] In defining the geographical scope of that "war", Brennan concludes that the authority to use force is not solely restricted to "hot" battlefields such as Afghanistan.[128] The *White Paper* uses Brennan's remark as the authority for extending the geographical scope of the use of force to zones outside active hostilities.[129] These two sources illustrate that Afghanistan constitutes a "hot" battlefield and that states such as Yemen and Pakistan illustrate quite another situation, which does not qualify as a "hot" battlefield.

The term "hot" battlefield is not defined under IHL.[130] Daskal sets out characteristics of that term, which are close to the definition of the "zone of military operations" under the Geneva Conventions.[131] Under the Geneva Conventions, the term "zone of military operations" requires actual or planned troop movement.[132] The constitution of a "zone of military operations" does not require the occurrence of actual fighting under the conventions.[133]

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[124] See Convention for the Prevention and Punishment of Terrorism, 16 November 1937, League of Nations, Doc.C546M.383; see also: "International Convention for the Supression of the Financing of Terrorism" (9 December 1999) 2178 *ILM* 229.
[125] Ibid.
[126] See Brennan (note 8); *White Paper* (note 8) 3.
[127] Brennan (note 8).
[128] Ibid.
[129] *White Paper* (note 8) 3.
[130] Jennifer C. Daskal "The geography of the battlefield: A framework for detention and targeting outside the 'hot' conflict zone" (2012) 161 *U. Penn. L. Rev.* 1165 at 1202.
[131] Ibid.
[132] Oscar M. Uhler *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (1958) 163.
[133] Ibid.

The US Supreme Court concluded that the presence of a large number of troops supported the finding that Afghanistan constituted a zone of "active combat".[134]

However, planned or actual troop movement by the United States does not characterise the situation in states such as Pakistan and Yemen. Therefore, neither of these states constitute a "hot" battlefield under the characteristics described by Daskal. Moreover, that conclusion complies with the statement by Brennan and the *White Paper* that the situation in Pakistan and Yemen is outside a "hot" battlefield.

Lubell argues that there is no situation of armed conflict in Yemen and Pakistan.[135] Owing to the fact that an armed conflict does not exist beyond any doubt in these states, and they do not constitute a so-called "hot" battlefield, international human rights law has to apply. This law is designed primarily to apply outside the times of war. The fact that there is no time of war in these territories bars the application of IHL as *lex specialis* in such cases.[136] Therefore, due to the lack of *lex specialis* of IHL, the law-enforcement model has to apply in situations such as Pakistan and Yemen.

As mentioned above, well-founded arguments an the application of the law-enforcement model exist. Such an assumption affects the status of suspected terrorists and restrictions for the targeting state significantly.

The law-enforcement regime does not endanger the life of those innocent civilians who are not even consciously living in a so-called "hot" battlefield zone. As is discussed further below, the armed conflict model does put the lives of innocent civilians outside the area of hostilities in jeopardy by extending the scope of the armed conflict model.

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[134] *Hamdi v Rumsfeld*, 542 US 507, 521 (2004)(plurality opinion).
[135] Noam Lubell *Extraterritorial Use of Force against Non-State Actors* (2011) 255–257.
[136] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 8 July 1996, ICJ Rep 226 (hereinafter: *Nuclear Weapons* case*)* para 24.

I will now examine whether the programme of targeted killings carried out by the United States in Yemen and Pakistan is permissible under the law-enforcement model.

In determining whether the programme is lawful, we have to consider five points. First, there must be a sufficient legal basis for the targeted killing of suspected terrorists in Pakistan and Yemen.[137] A sufficient legal basis requires a domestic law that strictly controls and limits the use of lethal force.[138] However, there is no US domestic law that sets up the framework of targeted killings in foreign states by the United States. Therefore, there is no satisfactory legal basis for targeted killings of suspected terrorists by the United States in states like Pakistan and Yemen.

Secondly, assuming that there was a sufficient legal basis for the sake of this examination, the law-enforcement model requires an absolute necessity to maintain law and order.[139] The necessity test requires that the use of lethal force must be "strictly unavoidable".[140] This means that if there are other means, which would have the same outcome, the use of lethal force does not meet the requirement of necessity.[141] In addition, an imminent threat and strong evidence of a terrorist attack must exist.[142] Furthermore, damage and injuries to human life have to be minimised by the targeting state.[143]

Whether the attacks in Pakistan and Yemen were "strictly unavoidable" has to be assessed on a case-by-case basis, which goes beyond the purpose of this paper. Considering the loss of civilian life,[144] one may question whether the United States was really serious in its efforts to minimise the threat. The assessment of the threat, however, constitutes an area beyond the scope of this paper. Owing to the lack of non-classified evidence regarding an imminent threat, one may argue that the necessity requirement under the

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[137] See Chapter III.3.
[138] Melzer (note 10) 225.
[139] See Chapter III. 3.
[140] Melzer (note 10) 228.
[141] Ibid.
[142] See Chapter III.3.
[143] Ibid.
[144] The Bureau of Investigative Journalism (note 6).

law-enforcement model is not met in the case of the targeted killings in Pakistan and Yemen.

Thirdly, the drone attacks must be proportionate. This requires proportionality between the "deprivation of life" and the actual danger.[145] The danger of suspected terrorists in Pakistan and Yemen may only be judged on a case-by-case basis.

The number of total deaths caused by targeted killing in Pakistan is estimated at between 2 442 and 3 942.[146] At the same time, the number of civilians killed is estimated at between 421 and 960.[147] That means that 17% to 24% of the individuals who were killed were civilians. The percentage of civilians killed by drone attacks in Yemen amounts to 15%.[148] These statistics illustrate that there is significant damage to civilians in these states and a serious threat to the right to life. In this context, it is questionable in how far an actual danger exists. The extent of civilian casualties indicates that the actual threat must be of a very high intensity to justify the loss of civilian life. One may argue that such conduct might be justified under the concept of anticipatory self-defense. However, I want to emphasise that this concept sets up very strict limitations, which will be examined further below.[149] Owing to the high number of civilian casualties and the unspecified danger, I regard the programme of targeted killings carried by the United States in Pakistan and Yemen as disproportionate.

Fourthly, targeted killing of suspected terrorists in Pakistan and Yemen has to fulfil the requirement of precaution. Precaution requires that the security set-up, or the operation as such, has to be planned, organised and controlled so as to minimise the resort to lethal force to the greatest extent possible.[150] Any determination regarding the target must be subject to constant

[145] Melzer (note 10) 233.
[146] The Bureau of Investigative Journalism (note 6).
[147] Ibid.
[148] Ibid.
[149] See Chapter IV. 3. a.
[150] Melzer (note 10) 236.

scrutiny.[151] Owing to the requirements of precaution, which are wholly dependent on each case, the fulfilment of that requirement can be decided only on a case-by-case basis.

In summary, then, the application of the law-enforcement model to cases in Pakistan and Yemen shows that there is definitely no clear domestic legal basis for the conduct of targeted killing. Furthermore, the scrutiny of necessity and proportionality has shown that it is highly questionable whether these requirements are met in the case of these states. Therefore, I assume that the targeted killing programme by the United States in Pakistan and Yemen is unlawful under the law-enforcement model.

Based on this assumption, the question arises, whether such a conduct constitutes a violation of the prohibition on the use of force under article 2(4) of the UN Charter. Furthermore, the question arises, whether such a use of force can be justified. Leaving aside the possibility of a justification by the Security Council under Chapter VII of the UN Charter, I examine the legality of targeted killing under the right of self-defense below.

IV. Targeted Killing of Suspected Terrorists under the Right of Self Defense

Should targeted killing not fall under the law-enforcement model, or be unlawful under such a model, one may consider whether it may be legal under article 51 of the UN Charter, the right of self-defense. Again, I focus my examination on the targeted killings perpetrated by the United States in Pakistan and Yemen. Furthermore, I concentrate on controversial issues, which are the possibility of an armed attack by a non-state actor, anticipatory or pre-emptive self-defense, and the territorial limitation of the right of self-defense.

[151] Ibid.

Article 2(4) of the UN Charter states that:

> "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."[152]

The targeted killings perpetrated by the United States in Yemen and Pakistan indisputably do constitute a use of force within the meaning of article 2(4) of the UN Charter. In the case of Yemen, its president declared his consent to US drone strikes on Yemeni territory. [153] Nevertheless, it remains questionable in how far that consent has an impact on the killings that were conducted before that consent was given. This official consent dates from 2012, whereby targeted killing has been conducted since 2002. In the case of Pakistan there appears to be no consent to the conduct of targeted killing.[154]

Assuming that there is no consent from a state regarding the use of force by a foreign state on its territory, that force may be justified under article 51 of the UN Charter, namely, the right of self-defense. Here the *White Paper*[155] is once again relevant. One aspect of the US justification for the use of lethal force against its own citizen in another state is the right of self-defense.[156]

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[152] Article 2(4) of the UN Charter.
[153] Greg Miller "Yemeni president achknowledges approving U.S. drone strikes", *The Washington Post*, 29 September 2012, available at http://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-afff-d6c7f20a83bf_story.html (last accessed: 2 January 2015).
[154] Greg Miller & Bob Woodward "Secret memos reveal explicit nature of U.S.–Pakistan agreement on drones", *The Washington Post*, 24 October 2013, available at http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html (last accessed: 16 April 2015).
[155] *White Paper* (note 8).
[156] Ibid at 1.

1. Armed Attack under Article 51 of the UN Charter

Article 51 requires that an “armed attack occurs against a Member of the United Nations”[157] before the right to self-defense can be claimed.

According to the *Nicaragua* and *Oil Platforms case* only “most grave” forms of the use of force may qualify as an armed attack which would allow the use of force in self-defense.[158] Here also, the quality and quantity of the attack must be examined.[159] Moreover, the ICJ concluded in the *Oil Platforms case* that, in determining the requirement of an armed attack, one has to consider the attackers’ intention, the amount of force used and the gravity of resulting harm.[160]

One may argue that the 9/11 attack itself constitutes the severe gravity required by article 51 of the UN Charter. Alternatively, one may argue the “cumulative approach”[161] after which attacks by al-Qaeda before 11 September 2001 would constitute an armed attack under article 51. At this point, one may also discuss whether the high number of attacks by al-Qaeda constituted a threat that might justify the use of anticipatory or pre-emptive self-defense in Pakistan and Yemen. This is also examined in further detail below. For the purpose of this paper, I assume that the attack of 9/11 itself constitutes an armed attack under article 51 of the UN Charter. Therefore, the requirement of an “armed attack” is fulfilled in the case of al-Qaeda operating from Afghanistan on 11 September 2001.

2. Armed Attack by a Non-State Actor

The wording of article 51 of the UN Charter does not require that the armed attack must come from a state.[162] However, the ICJ held in the *Wall case* that the right of self-defense under article 51 requires the attribution of a terrorist

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[157] Article 51 of the UN Charter.

[158] *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) ICJ Judgment (Merits), 27 June 1986, (hereinafter: *Nicaragua case*) para 195; *Oil Platforms case* (*Iran v US*) (2003) ICJ Rep 161, (hereinafter: *Oilplatforms case*) paras 62–64.

[159] *Nicaragua case* (note 158) para 195

[160] *Oil Platforms case* (note 158) paras 62–64.

[161] Ibid para 64.

[162] See article 51 of the UN Charter.

attack to a state.[163] The ICJ confirmed that conclusion in the *DRC v Uganda case*.[164]

By way of contrast, there has also been some support for the view that an armed attack might come from a non-state actor.[165] In this case, Dinstein argues that the attacks on the United States of 9/11 rather confirmed the UN Charter, due to the fact that the right of self-defense against a non-state actor already existed prior to the attack and refers to the 1986 Operation El Dorado Canyon, when the United States launched air strikes against Libya.[166] Furthermore, the separate opinions by Higgins, Kooijmans and Buergenthal JJ in the *Wall case* argue that in terms of the wording of article 51 and following the attitude of the Security Council towards the "9/11" terrorist attacks, the article does not limit the armed attack as arising from a state.[167]

According to the ICJ judgments in the *Wall case, DRC v Uganda* and *Nicaragua case*, the attacks by al-Qaeda cannot constitute an armed attack under article 51 of the UN Charter. Following this approach, one has to consider whether the al-Qaeda attacks could be attributed to Afghanistan. This again, would raise the issue of state attribution, which is beyond the scope of this paper.

By way of contrast, according to the separate opinions[168] in the *Wall case* and the wording of article 51, the attacks by al-Qaeda constitute an armed attack under this article. This is a highly controversial aspect of the right of self-defense. However, in order to continue with the current examination I assume that the armed attack may come from a non-state actor and therefore justifies an act of self-defense, notwithstanding that it is

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[163] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ Advisory Opinion, 9 July 2004, (hereinafter: *Wall case)* para 139.

[164] *Armed Activities on the Territory of the Congo (DRC v Uganda)*, ICJ Judgment, (hereinafter: *DRC v Uganda*) 19 December 2005, para 143.

[165] See Koojimans J Seperate opinion in *Case Concerning Armed Activities on the Territory of the Congo*, ICJ Judgment, para 36.

[166] Yoram Dinstein *War, Aggression and Self Defence* (1988) Cambridge University Press, Cambridge 221.

[167] *Wall* case (note 162) Separate opinion of Higgins J, para 33; Separate opinion of Kooijmans J, para 35; Separate opinion of Buergenthal J, para 6.

[168] Ibid.

questionable as to whether an armed attack may come from a non-state actor.

Based on these assumptions, the United States had the right to carry out an act of self-defense against al-Qaeda in Afghanistan. It is still questionable whether this right of self-defense may be extended to the territory of Yemen and Pakistan.

3. Conditions and Scope of the Right of Self-Defense

The main conditions for an act of self-defense can be derived from the *Caroline case*.[169] An act of self-defense has to meet the requirements of immediacy, necessity and proportionality.

a. Immediacy

According to the *Caroline case,* the pending attack has to be "instant, overwhelming, leaving no choice of means, and no moment for deliberation".[170]

In the case of an ongoing attack, where the victim state defends itself immediately, this criterion is irrelevant.[171] However, targeted killings perpetrated by the United States in Yemen in Pakistan and Yemen constitute a different situation. The armed attack, which triggered the right of self-defense, occurred in 2001 and was directed from the territory of Afghanistan. The United States has continued to conduct targeted killings until today. Therefore, it is questionable whether an armed attack carried out in 2001, may still justify an act of self-defense in 2014. Schmitt concludes that, if the act of self-defense occurs too long after an armed attack, such conduct is

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[169] *29 British and Foreign State Papers* "*Caroline case*" (1837) at 1137.
[170] Ibid.
[171] Michael Schmitt "Targeted killing and international law: Law enforcement, self defence, and armed conflict" in Roberta Arnold & Noelle Quenivet (eds*) International Humanitarian and Human Rights Law: Towards a New Merger in International Law* (2008) 533.

unlawful.[172] As a result, he considers such an act to be retaliatory and not defensive.[173]

Following the approach by Schmitt, the fact that the United States continues to conduct targeted killings ten years after the armed attack took place, constitutes a retaliatory act that is unlawful and may therefore not meet the requirement of immediacy.

However, the targeted killing carried out by the United States may meet the requirement of immediacy from the perspective of anticipatory or pre-emptive right of self-defense. These constructions do not require an occurred armed attack in order to use force under the right of self-defense. Anticipatory self-defense requires a threat that is instant, overwhelming, leaving no choice of means, and no moment for deliberation.[174] The concept of pre-emptive self-defense goes even further and allows the use of force in a situation without any instant and overwhelming threat.[175]

A number of targeted killings of suspected terrorists occur under a situation without an armed attack and without meeting the criteria of instant and overwhelming threat.[176] Under the expansive right of pre-emptive or anticipatory self-defense, targeted killings carried out by the United States in Pakistan and Yemen may meet the requirement of immediacy.

Under the construction of anticipatory self-defense, it is still questionable whether an attack is likely to occur. Schmitt argues that this requirement would be met when there is a reasonable belief that a terrorist attack will occur.[177] It is not certain whether a reasonable belief of an attack can be constituted in the case of al-Qaeda bases in Pakistan and Yemen. Based on

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[172] Ibid at 535.
[173] Ibid.
[174] Malcolm N. Shaw *International Law* 6ed (2008) 1191.
[175] Michael Bothe "Terrorism and the egality of pre-emptive force" (2003) 14 *EJIL* 209 at 227; Michael Reismann & Andrea Armstrong "The past and future of the claim of pre-emptive self-defense" (2006) 100 *AJIL* 525 at 526.
[176] Mark Mazzetti & Eric Schmitt "Terrorism case renews the debate over drone hits", *The New York Times*, 12 April 2015, available at http://www.nytimes.com/2015/04/13/us/terrorism-case-renews-debate-over-drone-hits.html?_r=0 (last accessed: 13 August 2015).
[177] Schmitt (note 171) 533.

this assumption, the situation in these territories by no means constitutes a threat that is instant, overwhelming, leaving no choice of means, and no moment for deliberation and does not fulfil the requirement of immediacy.

However, the programme of targeted killings carried out by the United States may fulfil the requirement of immediacy under the construction of pre-emptive self-defense. I wish to emphasise, however, that the existence of such an extensive right of self-defense is highly controversial.[178] Apart from the "Bush Doctrine", which argues in favour of pre-emptive self-defense, scant support for this has been found in state practice and academic literature.[179] In contrast, the concept of anticipatory self-defense is less controversial and more accepted, due to its requirement of an pending attack that has to be "instant, overwhelming, leaving no choice of means, and no moment for deliberation", which goes back to the *Caroline case*.[180] In this context, Schmitt states that

> "self-defense is permissible only in the last window of opportunity a state has to effectively defend itself against an attack that is highly likely to occur."[181]

The *White Paper* also requires an "imminent threat of violent attack against the United States" in order to use lethal force in a foreign state.[182] However, the definition of "imminent" in this context is set out in the *White Paper* as follows*:*

> "… the condition that an operational leader presents 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."[183]

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[178] Noam Lubell *Extraterritorial Use of Force against Non-State Actors* (2011) 55.
[179] Yoram Dinstein *War, Aggression and Self-defense* (2012) 196–197; James Crawford *Brownlie's Principles of International Law* 7ed (2008) 733–734.
[180] *Caroline* case (note 169).
[181] Schmitt (note 171) 537.
[182] *White Paper* (note 8) 3.
[183] Ibid at 7.

That definition appears to be too wide and not to comply with a logical interpretation of “imminent”. Against the backdrop that the right of self-defense is an exceptional situation, which may harm individuals who are not involved in the conflict, such a definition does not comply with idea of self-defense. Furthermore, such an interpretation is not congruent with the approach of academic scholars.[184]

If we accept the assumption that there is no need for an instant and overwhelming situation in order to meet the requirement of immediacy, targeted killings may fulfil this requirement. However, the academic critique and state practice on pre-emptive self-defense suggest that this construction is highly artificial. It appears that this construction was developed particularly to justify use of force under an extraordinary situation. It may result in a misuse of the requirement of immediacy and could change the ordinary character of the right of self-defense.

In the end, targeted killings of suspected terrorists depend on the scrutiny of “reasonable belief” of a threat by the US forces. Such a scrutiny bears the risk that a “reasonable belief” of a threat may be accepted more easily in order to justify the requirement of immediacy. Eventually, the requirement of immediacy has to be examined on a case-by-case basis of each targeted kill. However, I wish to emphasise that only under the concept of anticipatory self-defense may targeted killings be lawful. The concept of pre-emptive self-defense bears the risk of misuse, due to its very wide interpretation of immediacy and is therefore not in conformity with the nature of the right self-defense, which results in its unlawfulness.

b. Necessity

Any act in self-defense has to meet the requirement of necessity. According to the *Oil Platforms case*, the act of self-defense must be necessary to prevent a further armed attack or to remove the threat of an armed attack.[185]

[184] See Schmitt (note 171) 537.

[185] *Oil Platforms case* (note 158) paras 74–76.

In cases of targeted killing carried out by the United States against al-Qaeda in Pakistan and Yemen

> "self-defense against a non-State actor is necessary only if the attack cannot be repelled or averted by the State from whose territory the non-State group operates".[186]

The state conducting targeted killing in a foreign state must therefore prove that the territorial state is unable or unwilling to prevent any operations of the non-state actor.[187] This test can also be found in the *White Paper*.[188] According to Lubell, the necessity test requires that each host state must be unwilling or unable to put an end to the armed attack.[189] Furthermore, the necessity test must be assessed in the context of a threat of a potential armed attack in the future, which leads to the debate on anticipatory or pre-emptive self-defense.[190] Lubell concludes that a necessity, based on pre-emptive self-defense, is possibly unlawful.[191]

In Yemen, it is unclear whether the government gave its consent for targeted killings within its territory before 2012.[192] If no consent was given by the Yemeni government, targeted killing of suspected terrorists by the United States does not meet the requirement of necessity and is therefore unlawful.

The situation in Pakistan is also unclear. There is some evidence that the Pakistani government received classified briefings on drone strikes from 2007 until 2011.[193] It is also not clear whether there was tacit consent or even any consent whatsoever.[194] The spokesman for Pakistan's Foreign

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[186] Claus Kress "Some reflections on the international legal framework governing transnational armed conflicts" (2010) 15(2) *Journal of Conflict and Security Law* 245 at 250.
[187] Ibid.
[188] *White Paper* (note 8) 2.
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] Lubell (note 135) 256; see also Miller (note 153).
[193] Greg Miller & Bob Woodward "Secret memos reveal explicit nature of U.S.–Pakistan agreement on drones", *The Washington Post*, 24 October 2013, available at http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html (last accessed: 16 April 2015).
[194] Ibid.

Ministry stated: "We regard such strikes as a violation of our sovereignty as well as international law."[195]

Even had consent been given for drone strikes between 2007 and 2011, it is questionable whether such consent can be used for the period prior to 2007. According to the current government, such consent seems to be non-existent after 2011.[196] Moreover, there is no evidence that either Pakistan or Yemen is unwilling or unable to remove the threat, which argues against the fulfilment of the necessity requirement. The situation in Pakistan and Yemen has to be decided on a case-by-case basis, which is beyond the scope of this paper. I emphasise, however, that even if there is or was consent, it is highly questionable whether the threat of future attacks can be removed by killing suspects.

c. Proportionality

Another requirement of the act of self-defense is proportionality, in terms of which any measures taken to avert a threat must be proportionate. Kress calls for a more stringent standard of proportionality due to the fact that self-defense is conducted against a non-state actor.[197] Schmitt argues that in the case of terrorism, striking an entire terrorist cell may be justified – even if not mandated – to remove the imminent attack in question.[198] Lubell argues that there can be a territorial limitation to the requirement of proportionality.[199] He claims that in the case of multiple terrorist bases in different states, multiple acts of self-defense in different states would each have to be proportional, once the requirement of necessity and armed attack or imminent threat of potential armed attacks are met in each state.[200] This possibility was also raised during the Falklands/Malvinas conflict of 1982.[201]

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[195] Ibid.
[196] Ibid.
[197] Kress (note 186) 250.
[198] Schmitt (note 171) 535.
[199] Lubell (note 135) 67.
[200] Ibid.
[201] See Rosalyn Higgins *Problems and Process: International Law and How We Use It* (1994) 232; Christopher Greenwood "The relationship between *ius ad bellum* and *ius in bello*" (1983) 9 *Review of International Studies* at 221 at 223-224.

Against the backdrop of the purpose of the proportionality requirement, the approaches by Kress and Lubell insist on the standard that the measures taken must be balanced against the removal of the threat. By way of contrast, Schmitt argues that striking the terrorist cell alone might be proportionate in itself. The approaches, those of Kress and Lubell, on the one hand, appear be favourable due to their conformity with the nature of proportionality. Schmitt, on the other hand, does not require the removal of an imminent threat and appears to endanger the principle of proportionality when the target is a terrorist cell. Under his approach, targeting a terrorist cell would be proportional under any circumstances.

Under Lubell's approach, the situations in Pakistan and Yemen themselves do not meet the requirement of an armed attack and it is questionable if the requirement of necessity is met in each state. Therefore, any act of self-defense is not proportionate in this instance.

Based on the assumption that the programme of targeted killings carried out by the United States is an incident of pre-emptive self-defense, this assumption raises some very important questions. The threat under the concept of pre-emptive self-defense is very vague and often not identifiable. Conversely, it is questionable in how far a removal of such a threat can be assessed which again endangers the principle of proportionality. Therefore, based on the assumption that targeted killing is conducted as pre-emptive self-defense, such actions are not proportional. This also explains why Schmitt does not call for a removal of the threat.

Eventually, the requirement of proportionality regarding the drone strikes by the United States in Pakistan and Yemen has to be scrutinised on a case-by-case basis, which is beyond the scope of this paper.

d. The Territorial Limitation of the Right of Self-Defense

The conduct of targeted killings by the United States in Yemen and Pakistan raised another very important point regarding the right of self-defense. Assuming that the United States is at "war" with al-Qaeda and its affiliates

due to the attacks of 9/11, one has to remember that these attacks were conducted by a terrorist group based in Afghanistan at that time.[202] For this reason, the United States invaded the state of Afghanistan in 2001.[203] As already stated above, one may argue that the attacks of 9/11 constitute an armed attack under article 51 of the UN Charter and therefore trigger the right of self-defense. For the sake of this paper I have assumed that such an armed attack might come from a non-state actor.[204] However, this raises the question whether such a right of self-defense may simply be transferred to other countries where that terrorist group is based or whether the right of self-defense is geographically limited to the state from whose territory the non-state armed attack occurs, which is supported by few scholars.[205]

On one hand, Kress argues that the right of self-defense is geographically limited to the state from whose territory the armed attack occurs.[206] It is argued that article 51 of the UN Charter has an inter-state character that aims to justify the use of force by a state on the territory of another state in order to repel an armed attack from a non-state actor.[207] Moreover, the gravity of violence or threat must be scrutinised for each state itself in order to determine whether the requirement of an armed attack under article 51 has been fulfilled.[208] Therefore, the mere presence of a terrorist group in a state is not sufficient reason to attack that state. Lubell comes to the same conclusion when he recognises that the right of self-defense must be limited by assessing each situation in each territory.[209] The only point of divergence between Kress and Lubell is that the latter does not recognise an in-built geographical limitation on the right of self-defense and therefore sets up the limitation within the proportionality test.[210] Both commentators, however, recognise the same tool for limiting the scope of the right of self-defense.

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[202] See Council on Foreign Relations "U.S. war in Afghanistan" (2014), available at http://www.cfr.org/afghanistan/us-war-afghanistan/p20018 (last accessed: 17 April 2015).
[203] Ibid.
[204] See Chapter IV. 2.
[205] See Kress (note 186); Lubell (note 135).
[206] Kress (note 186) 250.
[207] Kimberly Trapp "Back to basics: Necessity, proportionality, and the right of self-defence against non-state terrorist actors" (2007) 56 *International and Comparative Law Quarterly* 141 at 146.
[208] Kress (note 186) 250.
[209] Lubell (note 135) 67.
[210] See Lubell (note 135) 67; Kress (note 186) 250.

On the other hand, one may argue that there is no geographical limitation on the right of self-defense. Kress states that in reality there is only one non-state actor against whom self-defense is directed and that it is not important whether that non-state actor is operating from more than one state's territory.[211] Schmitt argues that although territorial integrity is an essential foundation of international relations, it is not unlimited and conditional.[212] Against that backdrop, Security Council Resolution 1373 requires states to prevent the commission of terrorist attacks and deny safe haven to those who finance, plan, support or commit terrorist acts.[213] Furthermore, according to the 1954 Draft Code of Offences against the Peace and Security of Mankind, the toleration of the use by armed bands as a base of operations may amount to an offence against peace and security.[214] This was also reflected by the 1994 Declaration on Measures to Eliminate Terrorism.[215] Schmitt concludes that, if a sanctuary state is tolerating terrorist groups within its territory, that state's territorial integrity may be limited, which leads to the "non-consensual penetration" of territorial integrity and sovereignty.[216] This argument simply results in a permission of targeted killing without any territorial limitations under the right of self-defense.

This view is also reflected by the US position on the issue of targeted killing where al-Qaeda constitutes the non-state actor.[217] The US Department of Justice argues that the use of military force need not be restricted to "hot" battlefields such as Afghanistan.[218] Furthermore, the United States argues that the Authorisation for the Use of Military Force (AUMF)[219] would not provide a geographical limitation based on the *Hamdan* case[220] and therefore

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[211] Kress (note 186) 250.
[212] Schmitt (note 171) 539.
[213] Security Council Resolution 1373, U.N. Doc. S/Res/1373 (2001), 28 September 2001.
[214] Draft Code Offences against the Peace and Security of Mankind (1954) 2 *Y.B. Int'l L. Comm.* 150, U.N. Doc. A/CN.4/SER/A/1954/Add.1.
[215] United Nations General Assembly "Declaration on Measures to Eliminate International Terrorism", 9 December 1994, U.N. Doc. A/Res/49/60, paras 4–5, Annex para 5(*a*).
[216] Schmitt (note 171) 540.
[217] See *White Paper* (note 8) 3.
[218] Ibid.
[219] See Authorization for the Use of Military Force, 107th Congress Joint Resolution, 18 September 2001.
[220] This case concerned Salim Ahmed Hamdan, a citizen of Yemen, who was considered an "unlawful combatant" by the U.S. administration. In 2001, Hamdan was captured during the

the use of force, in the form of targeted killing, shall not be bound by a geographical limitation. The *White Paper* bases its argumentation on a domestic case[221] and simply assumes its application and compliance with international-law standards.[222] However, such an extension of the geographical limitation of the right of self-defense puts territories that do not constitute a so called "hot" battlefield in jeopardy. Moreover, it does not correspond with the idea as the right of self-defense of an exceptional and strictly limited right.[223]

A suspension of geographical limitation does not therefore comply with the standards of the right of self-defense. Furthermore, targeted killing that occurs in the territory of a state where the terrorist group is merely located, cannot be justified with the right of self-defense. The situation in each state – in this case Pakistan and Yemen – must meet the requirement of an armed attack, immediacy, necessity and proportionality. It is not clear whether these countries are unable or unwilling to prevent operations of al-Qaeda. Based on the requirements of immediacy, necessity and proportionality, neither is evidently fulfilled in this case. If we apply the approach that the right of self-defense has to be geographically limited, then we see that neither state meets the requirement to justify an attack. Therefore, the right of self-defense cannot be extended to the territory of Pakistan or Yemen.

V. The Armed Conflict Model under IHL

The law of armed conflict distinguishes between an International Armed Conflict (IAC) and a Non-International Armed Conflict (NIAC).[224] The regime of armed conflict can be triggered only by the existence of an armed conflict, whether international or non-international.[225] Therefore, this chapter examines whether targeted killing can be subsumed under the armed conflict

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invasion of Afghanistan: *Hamdan v Rumsfeld*, 548 US (Kennedy J concurring) (hereinafter: *Hamdan* case) at 631.

[221] Ibid.

[222] *White Paper* (note 8) 3.

[223] Kress (note 186) 250–252.

[224] Shaw (note 174) 1191.

[225] Ibid at 1190.

model. I also examine the existence of an armed conflict regarding the US cases of targeted killing and whether targeted killing is permissible under this model.

1. Definition of an International Armed Conflict and Non-International Armed Conflict under the IHL Regime

The Geneva Conventions and Additional Protocols do not contain a definition of the concept of an armed conflict.[226] However, the drafters of these conventions and protocols deliberately left out a detailed definition of that term in order to prevent a too restrictive application of the IHL regime.[227]

In 1960, Jean Pictet defined an armed conflict as "any difference arising between States and leading to the intervention of members of armed forces".[228] This definition was not well accepted and was criticised due to its focus on international armed conflicts and the exclusion of non-international armed conflicts.[229]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) stated in the *Tadic* case 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."[230]

Furthermore, on the temporal scope of the applicability of IHL, the ICTY concluded that:

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[226] Ibid.

[227] Jelena Pejic "Status of conflict" in Elizabeth Wilmshurst & Susan Breau (eds) *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 85.

[228] Jean Pictet "The Geneva Conventions of 12 August 1949, Commentary, Third Geneva Convention Relative to the Treatment of Prisoners of War" (1960) at 23.

[229] Sang (note 15) 11.

[230] *Prosecutor v Dusko Tadic*, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No IT-94-A (hereinafter: *Tadic case*) para 70.

> "international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peaceful settlement is achieved."[231]

Regarding the geographical applicability of IHL, the ICTY stated that:

> "international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."[232]

IHL differentiates between an international and non-international armed conflict. The international armed conflict is defined by common article 2 of the Geneva Conventions, which covers "all cases of declared war or of any other any other armed conflict which may arise between two or more of the High Contracting Parties".[233] An armed conflict within the meaning of article 2 also exists when one of the parties denies the existence of a state of war.[234] It makes no difference how lengthy the conflict, the extent of the slaughter or how numerous the participating forces are.[235] In case of the Israeli–Palestinian conflict, the Israeli Supreme Court concluded in the *Targeted Killings* case that an armed conflict between an occupying state and a non-state entity constitutes an international armed conflict.[236] However, this conclusion was not confirmed by other cases on targeted killings before the Court and the armed conflict was later classified as a non-international armed conflict by that same Court.[237]

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[231] Ibid.
[232] Ibid.
[233] Common article 2 of the Geneva Conventions of 1949.
[234] Shaw (note 174) 1091.
[235] Pictet (note 228) 23.
[236] *The Public Committee against Torture in Israel et al. v The Government of Israel,* Israel HCJ Judgment, 14 December 2006, HCJ 769/02 (hereinafter: *HCJ PCATI v Israel*) para 16.
[237] *Israel HCJ Barake v Minister of Defence* HCJ 9293/01 56(2) PD 509; *Israel HCJ Almandi v Minister of Defence* HCJ 3451/02 56(3) PD 30; *Israel HCJ Ajuri v Minister of Defence* 56(3) PD 352 at 358.

Non-international armed conflicts are governed by common article 3 of the Geneva Conventions.[238] This article covers

> "all situations of sufficiently intense or protracted armed violence between identifiable and organized armed groups regardless of their place of occurrence, as long as they are not of interstate character".[239]

Furthermore, Additional Protocol II (AP II) to the Geneva Conventions of 12 August 1949 defines non-international armed conflict as armed conflicts:

> "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[240]

By way of comparison with the Geneva Conventions, the AP II gives a more detailed definition of a non-international armed conflict. However, it is questionable whether AP II is also binding on states which are not a party to that treaty. Leading commentators have concluded that some provisions might have become customary international law, even if there is no consent on the selection of provisions.[241] Therefore, parts of the AP II have a customary character, however, it is unclear which provisions of this protocol have become customary international law.

Moreover, the ICTY developed a definition of a non-international armed conflict in the *Tadic case*.[242] The ICTY concluded that a non-international

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[238] Shaw (note 174) 1190.
[239] Melzer (note 10) 261.
[240] Article 1(1) of the AP II to the Geneva Conventions of 12 August 1949; 8 June 1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts,
[241] See Theodor Meron *Human Rights and Humanitarian Norms as Customary International Law* (1989) 72; Antonio Cassese "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law" (1984) 3 *UCLA Pacific Basin LJ* 55 at 112-113; Christopher Greenwood "Customary law status of the 1977 Geneva protocols" in A.J.M. Delissen & G.J. Tanja (eds) *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven* (1991) 93.
[242] *Tadic case* (note 230) para 70.

armed conflict can also exist where a state is not involved and there is a protracted armed violence between organised armed groups within a state.[243] A fair amount of the literature suggests that this finding reflects or creates new customary international law.[244] For the purpose of this paper, I accept this view and regard the *Tadic* decision as customary international law.

In recent years, there has been the call to remove the distinction between an international and a non-international armed conflict, due to the special situation of transnational terrorist groups and networks.[245] The ICTY has already stated in the *Tadic case* that in modern warfare distinquishing between international and non-international armed conflicts no longer makes sense.[246] However, state practice and *opinio juris* do not support this view.[247] The distinction between international and non-international therefore remains decisive under the paradigm of IHL.

In this regard, the US government suggested at one point that the conflict with al-Qaeda would constitute a new category of an armed conflict, because the traditional armed conflict model would be unable to cover the issue of a conflict against a transnational terrorist group.[248] It is questionable, however, whether a new model is the right step when the international community still lacks a common definition of terrorism.[249] Therefore, this paper examines targeted killing only under the known distinction of international and non-international within the scope of IHL.

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[243] Ibid.
[244] Cf Kress (note 184) 260, 271; David Kretzmer "Rethinking the application of IHL in non-international armed conflicts" (2009) *42 Israel Law Review 8*; Roozbeh B Baker "Customary international law in the 21st century: Old challenges and new debates" (2010) 21(1) *EJIL* 173 at 184–198.
[245] Sang (note 15) 12.
[246] *Prosecutor v Dusko Tadic* ICTY Appeals Chamber, Judgement, 15 July 1997, para 97.
[247] Antonio Cassese *International Criminal Law* 3ed (2013) 61.
[248] Melzer (note 10) 245; Cf. Roy S. Schöndorf "Extra-state armed conflicts: Is there a need for a new legal regime?" (2004) 37(1) *New York University Journal of International Law and Politics* 1.
[249] Cf. Ben Saul "Definition of 'terrorism' in the UN Security Council: 1985–2004" (2005) 4(1) *Chinese Journal of International Law* 141 at 157–161.

2. The Requirement of Armed Conflict in the "War on Terrorism"

As previously stated, the form of a transnational terrorist group does not fit easily into the classic model of armed conflict. If we accept the concept of transnational terrorism, we need to reconsider the dichotomy of international and non-international armed conflicts.[250] The bottom line, however, is that there has to be an armed conflict within the meaning of IHL before the law of armed conflict becomes applicable.

a. Parties to the Conflict

An "armed conflict" requires "parties to the conflict" to be identifiable by objective criteria.[251] After the attacks of 9/11 in 2001 the United States declared a "war on terrorism".[252] It is highly questionable whether the "war on terrorism" fulfils the requirements of an armed conflict. However, that "war", as a global enterprise with an uncertain duration and uncertain frontlines, was integrated into the *National Security Strategy 2002* of the United States.[253] Moreover, the 2002 strategy shows that at this time the United States was already describing the "war on terror" as a different kind of armed conflict with global effects that has to be fought on "many fronts" which are not exclusively within the state of the United States.[254]

It is questionable, however, in how far the requirements for a "party to the conflict" are met in the case of the "war on terrorism". The expression of "party to the conflict" requires that two or more organised groups of individuals have to be identifiable on an objective basis and that the organised groups must resort to armed violence which reaches the relevant threshold of an armed conflict.[255]

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[250] See Sang (note 15) 13.
[251] Melzer (note 10) 262.
[252] George W. Bush: "America and our friends … stand together to win the war on terrorism", White House press statement: Statement by the President in Address to the Nation, 11 September 2001; George W. Bush: "The deliberate and deadly attacks … were more than acts of terror. They were acts of war", White House press statement, 12 September 2001.
[253] United States White House *National Security Strategy for the United States of America* (2002): "The United States of America is fighting a war against terrorists of global reach. ... The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time." 5.
[254] Ibid.
[255] Melzer (note 10) 262, 263.

From a legal perspective, the mere declaration of a “war on terrorism” by the United States does not fulfil the requirements of the constitution for an armed conflict under IHL.[256] First, its duration is unpredictable and its frontlines are not clearly defined.[257] Secondly, the 2002 *National Security Strategy* does not specify the non-state actor constituting the enemy in the “war on terror”[258] – merely stating that “the enemy is terrorism”.[259]

The problems regarding the requirement of the “parties to the conflict” were addressed by the Obama Administration. They specified the frontlines against the “war on terrorism” in the *National Security Strategy 2010* to be Afghanistan, Iraq, Pakistan and Yemen.[260] Moreover, the 2010 strategy describes a “war” against “al Qa’ida and its affiliates”.[261] One may argue that the reference to “al Qa’ida and its affiliates” is more precise and fulfils the requirement of “parties to the conflict”. However, one may also argue that such an expression is still too vague and not specific enough. For the sake of argument, I accept the view that this requirement is met in the “war on terrorism”.

b. State v Non-State Party as International Armed Conflict

As mentioned above, an international armed conflict generally comprises two High Contracting Parties.[262] Nevertheless, an international armed conflict can also exist when one state acknowledges the non-state actor as belligerent.[263] In this case, it is highly unlikely that the United States would recognise al-Qaeda as a belligerent and acknowledge the rights of a belligerent for its members under IHL. Furthermore, even if the United States were to recognise al-Qaeda as a belligerent, the conflict cannot be considered an

[256] Jean-Philipe Lavoyer *International Humanitarian Law and Terrorism* (2004) 269.
[257] Gabor Rona “Interesting times for international humanitarian law: Challenges from the ‘war on terror’” (2003) 27(2) *The Fletcher Forum of World Affairs* 55 at 64.
[258] Ibid.
[259] United States White House *National Security Strategy* for the United States of America (2002) 5.
[260] United States White House *National Security Strategy* for *the United States of America* (2010) 4, 21.
[261] Ibid at 1.
[262] Common article 2 of the Geneva Conventions of 1949.
[263] Lavoyer (note 256) 262.

international armed conflict within the meaning of common article 2 of the Geneva Conventions, due to the non-state party form of al-Qaeda.[264]

When considering cross-border actions carried out by the United States into foreign territories such as Yemen, Afghanistan or Pakistan, one might argue that, due to the use of lethal force on foreign territory, the requirements of an international armed conflict are met.[265] In this case, the absence of actual fighting would be irrelevant.[266] This approach appears to be strongly artificial and implies that the attacks by the terrorist group would be attributed to the group's host state.[267]

However, the Supreme Court of Israel concluded in the *Targeted Killings* case that Israel acted in a situation of international armed conflict.[268] In this case, the Court based its conclusion on the circumstances of an ongoing occupation by a state and a terrorist group acting in the same area.[269] Such a situation cannot directly be transferred to the situation of the US programme of targeted killings carried out in Pakistan or Yemen as no ongoing occupation by the United States is – or has ever been – in place.

Therefore, the "war on terror" and, especially, that on al-Qaeda in Pakistan and Yemen cannot be considered an international armed conflict under IHL rules.

c. State v Non-State Party as Non-International Armed Conflict

Based on the assumption that "protracted armed violence between governmental authorities and organized armed groups"[270] is part of the definition of a non-international armed conflict, one has to question whether the requirement of "protracted armed violence" is met in the case of the United States against al-Qaeda. On one hand, it is argued that from 1990

[264] Sang (note 15) 14.
[265] Kress (note 186) 253.
[266] Marco Sassoli "Transnational armed groups and international humanitarian law" (2006) *Harvard University Program on Humanitarian Policy and Conflict Research Occasional Papers Series, No. 6*, at 5.
[267] Kress (note 186) 253, 254.
[268] *HCJ PCATI v Israel* (note 236) para 18.
[269] Ibid.
[270] See Melzer (note 10) 261; see also *Tadic* case (note 230) para 70.

until 2001 at least six attacks were carried out on US targets.[271] In addition, since 11 September 2001, several terrorist attacks attributable to al-Qaeda have taken place.[272] Owing to the lack of an agreed definition on the requirement of violence, one may argue that these attacks fulfil the requirement of protracted violence and do not constitute sporadic events. On the other hand, some commentators suggest that six or so attacks over a period of 11 years constitute merely sporadic acts of violence.[273] For the sake of this paper, I follow the approach that the threshold of armed violence has been reached between the United States and al-Qaeda.

Targeted killing is characterised by a state that crosses its borders to kill suspected terrorists within the borders of another state.[274] However, it is contentious whether the "war on terrorism" can be considered as a non-international armed conflict, due to its extra-territorial nature.

One approach in determining a non-international armed conflict recognises that even a conflict between a state and a non-state actor outside the targeting state may be considered as a non-international armed conflict.[275] This approach is supported by common article 3 of the Geneva Conventions, which reflects customary international law[276] in that it covers "the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties".[277] Therefore, article 3 of the Geneva Conventions only requires a conflict within the territory of one High Contracting Party. Furthermore, it does not limit a non-international armed conflict only to those taking place in the territory of a state between its own armed forces and a non-state actor. Under this wide interpretation of a non-

[271] Ruth Wedgewood "Military commissions: Al Qaeda, terrorism, and military commissions" (2002) 96 *AJIL* 328 at 330.

[272] See Jane Dalton "What is war?: Terrorism as after 9/11" (2006) 12(2) *ILSA Journal of International and Comparative Law* 523 at 527–528; Mary Ellen O'Connell "When is a war not a war? The myth of the global war on terror" (2006) 12(2) *ILSA Journal of International and Comperative Law* 535 at 538.

[273] O'Connell (note 272).

[274] See Chapter II.

[275] Sylvain Vite "Typology of armed conflicts in international humanitarian law: Legal concepts and actual situations" (2009) 91 *International Review of the Red Cross* 69 at 89; Rachel Bronson "Cycles of conflict in the Middle East and North Africa" in Michael E. Brown (ed.) *The International Dimensions of Internal Conflict* (1996) 227.

[276] See *Nuclear Weapons case* (note 136) paras 79, 62.

[277] Common article 3 of the Geneva Conventions of 12 August 1949.

international armed conflict, the war on al-Qaeda may constitute this description of conflict. One might argue that, as states such as Afghanistan, Yemen or Pakistan are state parties to the Geneva Convention,[278] each constitutes a High Contracting Party. In line with this approach, the targeted killings in Pakistan and Yemen occur under a non-international armed conflict.

In contrast, a more restrictive approach requires a geographical limitation of the non-international armed conflict, which can be found only within the territorial borders of the targeting state.[279] Supporters of this approach rely on article 1 of the AP II, which limits a non-international armed conflict to the territory of the concerned state.[280] Assuming a geographical limitation of the non-international armed conflict model, Yemen and Pakistan could only constitute a condition of non-international armed conflict, if the situation in each state could be determined as such or if each state gave its consent to a programme of targeted killings carried out by the targeting state.[281] Based on the assumption that neither of these two states constitute a situation of non-international armed conflict or would give their consent, the armed conflict model could not apply here.

Following the wide interpretation based on common article 3, a suspension of a geographical limitation would result in a threat to civilians who live in areas not constituting a so-called “hot” battlefield. Moreover, a suspension of geographical limitation could make the distinction between an international and non-international armed conflict redundant. In the case of a wide interpretation of common article 3, this gives the targeting state a licence to kill without territorial limitations, as long as a terrorist group is present within each targeted state’s territory. Any state in which a terrorist group is active must fear the use of lethal trans-border force against it without even

[278] Cf. International Committee of the Red Cross “Treaties and state parties to such treaties”, available at https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375 (last accessed: 12 August 2015).
[279] Lisa Moir *The Law of International Armed Conflict* (2002) 31, 32.
[280] Article 1(1) of the AP II to the Geneva Conventions of 12 August 1949, 8 June 1977, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts.
[281] Lubell (note 135) 256.

intentionally becoming involved in an armed conflict or constituting a non-international armed conflict.

A comparison of the Geneva Conventions and the AP II reveals that the former are customary international law and are therefore binding upon the whole international community.[282] In contrast, although the AP II is partly customary in character, it does not entirely reflect customary international law and is therefore binding only upon its states parties.[283] The ICJ has also concluded that common article 3 has to do with "elementary considerations of humanity" and therefore comprises a general principle of international law.[284] Furthermore, the mere fact that the actual fighting occurs outside the territory of the concerned state does not mean that it cannot be classified as a non-international armed conflict.[285] At the same time, an armed conflict may not be determined in this manner solely by its occurrence outside the territory of the concerned state.[286]

Nevertheless, regarding the specifics of transnational terrorist groups, common article 3 of the Geneva Conventions appears to be appropriate as it neither requires the involvement of the armed forces of the territorial state nor a political link to the territorial state by any party to the conflict.[287] The *travaux preparatoires* also do not exclude the possibility of a non-international armed conflict occurring in more than a single state.[288]

In addition, the appearance of a non-international armed conflict outside the territory of the concerned state against a non-state actor without the involvement of the territorial state is not a new phenomenon in practice. Examples of this include actions by the United States against the Vietcong in Cambodia, by Israel against Hezbollah in southern Lebanon; by Turkey against the Kurdistan Workers' Party (PKK) in northern Iraq or by Uganda

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[282] *Nicaragua case* (note 158) paras 118–120.
[283] See *Tadic case* (note 230) para 117.
[284] *The Corfu Channel case* (*United Kingdom v Albania*), ICJ Judgment, 9 April 1949, at 4, 22.
[285] Melzer (note 10) 260–261.
[286] Ibid.
[287] Ibid at 258.
[288] Ibid.

against the Lord's Resistance Army (LRA) in Sudan.[289] All these cases support the conclusion that the law of non-international armed conflict is able to cover a situation against a transnational terrorist group, where the concerned state acts outside its territorial borders.[290]

Furthermore, the Supreme Court of the United States confirmed the wider view and concluded in the *Hamdan* case that the conflict between the United States and al-Qaeda is a non-international armed conflict.[291] The Court based its conclusion on the interpretation of common article 3 of the Geneva Conventions.[292] The ECHR has also concluded that the conflict between Turkey and the PKK in Iraq has to be classified as a non-international armed conflict.[293]

Moreover, supporters of the wider approach argue that common articles 2 and 3 are complementary in covering situation of armed conflicts.[294] If a situation of transnational terror were not even covered by common article 3, this would create an area which would not be covered by customary international rules and might lead to arbitrary conduct. However, I examine the need for a new model regarding transnational terrorism further below. For the purpose of additional examination of targeted killing under the law of non-international armed conflict, I assume that the "war on terror" falls under the model of a non-international conflict under common article 3.

3. The Application of the Law of Non-International Armed Conflict to Targeted Killing

One of the fundamental principles of the law of armed conflict is the principle of distinction.[295] The principle of distinction, which reflects customary international law and may be considered as part of *jus cogens*,[296] requires

[289] Ibid at 260.
[290] Sang (note 15) 16.
[291] *Hamdan v Rumsfeld et al.* 548 US, US Supreme Court (2006) at 67.
[292] Ibid.
[293] *Avsar v Turkey*, ECtHR, Judgment of 10 July 2001, para 285.
[294] Melzer (note 10) 258.
[295] *Nuclear Weapons case* (note 136) para 78.
[296] Ibid; International Law Commission "Responsibility of states for internationally wrongful acts" (2001) Commentary to Draft Article 40, para 5.

that the parties to the conflict distinguish between civilians and combatants.[297] An attack may be directed against combatants only and not against civilians.[298] These fundamental principles applicable to international armed conflicts are also recognised as a customary rule in situations of non-international armed conflicts.[299]

a. Persons Subject to Direct Attack

In contrast to a situation of an international armed conflict, the rule whether someone can be lawfully subject to direct attack is less clear under the model of non-international armed conflict. Kretzmer argues that "the use of the term 'civilians' in AP II is based on the assumption there must be 'non-civilians'".[300] Bothe concludes the existence of two categories of persons under the law of non-international armed conflict: fighters and civilians.[301] This leads to the questions: How should a "fighter" be defined under the law of non-international armed conflict, and how may a terrorist fit into that category? One may also question whether a terrorist can be considered as a combatant. In this context, there is no answer and not even an attempt by international instruments to answer the question whether a terrorist may be considered as a combatant.[302] States are unwilling to grant an opposing non-state actor the status of a combatant as such an act would legitimise the non-state actor's conduct, which may lead to undesirable results for the states.[303] However, even if there is no definition of a combatant under a non-international armed conflict, this does not automatically mean that there are no individuals that may be targeted under the law of non-international armed conflict.[304] Should no group or individuals be identified as fighters, the essential principle of distinction would be bypassed and all individuals could be considered as civilians.[305] Therefore, due to the principle of distinction,

[297] Ibid.
[298] Melzer (note 10) 270.
[299] Ibid.
[300] Kretzmer (note 32) 197.
[301] Michael Bothe "Direct participation in non-international armed conflicts" (2004) *ICRC Second Expert Meeting on the Notion of Direct Participation in Hostilities*, 26 October 2004, at 9.
[302] Ibid.
[303] Jean Pictet *Commentary on the Protocol Additional Protocols* (1987) para 4789.
[304] Kretzmer (note 32) 197.
[305] Ibid.

there have to be individuals that may lawfully be targeted in a non-international armed conflict.[306]

A determination as a fighter in a non-international armed conflict may be reached only by identifying the parties to the conflict.[307] While the AP II states that non-international armed conflict has to occur between the armed forces of a High Contracting Party "and dissident armed forces or organized armed groups",[308] common article 3 of the Geneva Conventions does not lay down such a requirement.[309] However, it is agreed that common article 3 requires an organised group to fulfil the requirements set for the parties to the conflict.[310] If we subsume a terrorist under the prerequisites of an organised group, then he or she has to be regarded as a part of an organised group and, therefore, as a person who may be targeted.

At this point we have to differentiate between the privileges of a fighter and their targetability.[311] Being a fighter does not confer the privilege of immunity for conduct during wartime as the status of combatant does.[312] It merely indicates that the other party may target that fighter.[313] This is also the view of the *ICRC Commentary*, which states that "those who belong to armed forces or armed groups may be attacked at any time".[314] The targetable person has therefore to be an "active member" of an organised armed group.[315] This leads to the question: How is an "active member" defined?

The scope of an active member is difficult to define. It appears to be easy in the case of actual combat. However, issues arise in cases where the person concerned is merely a member of the terrorist group or is financially supporting that group. According to common article 3, it is prohibited to use

[306] Ibid.
[307] Ibid.
[308] Article 1(1) of the AP II.
[309] See common article 3 of the Geneva Conventions of 1949.
[310] Moir (note 279) 36.
[311] Kretzmer (note 32) 198.
[312] Ibid.
[313] Ibid.
[314] Pictet (note 303) para 4789.
[315] Kretzmer (note 32) 198.

violence against "persons taking no active part in hostilities".[316] In addition, article 13(3) of the AP II protects civilians "unless for such time as they take direct part in hostilities".[317] One may infer from these two provisions that individuals who take direct part in hostilities may be considered as an "active member" and, therefore, targeted, which will be examined in the next section.

b. Direct Participation in Hostilities

In order to define the scope of direct participation in hostilities, one first has to clarify the meaning of "hostilities". Hostilities are not defined expressly under IHL.[318] The term has been interpreted both permissively and restrictively. The permissive approach covers all activities related to building up military capacity.[319] The restrictive approach to "hostilities" covers only activities that are related to actual combat.[320]

The expression "direct participation in hostilities" is also not clearly defined.[321] Attempts at formulating a definition usually distinguish between "direct participation" and "contribution".[322] As noted by the ICRC:

> "To restrict [direct participation] to combat and active military operations would too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly. The population cannot on this ground be considered to be combatants …"[323]

Schmitt argues that "direct participation" requires activities that result in a direct adverse impact on the enemy and are associated with traditional

[316] Common article 3 of the Geneva Convention.
[317] Article 13(3) of the AP II.
[318] Sang (note 15) 23.
[319] International Committee of the Red Cross and the TMC Asser Institute "Third Expert Meeting on the Notion of Direct Participation in Hostilities" (2005) 19–20.
[320] Michael Bothe, Karl Josef Partsch & Waldemar Solf *New Rules for Victims of Armed Conflict, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) 302.
[321] Jean-Marie Henckaerts & Louise Doswald-Beck *Customary International Humanitarian Law, Volume 1: Rules* (2005) 22.
[322] Sang (note 15) 23.
[323] Yves Sandoz *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) para 1679.

combat activities.[324] That requirement would be met in cases of attacking the enemy, its material or facilities, acting as members of a gun crew or gathering military intelligence in the area of hostilities.[325] He also identifies "contributions" such as media campaigns, political lobbying or decision-making as general war effort that does not result in any direct harm to the enemy.[326]

However, there is still no clarity regarding activities that constitute "direct participation in hostilities" – beside active military operations.[327] In response to this, the ICRC has developed an official interpretive guide in order to determine "direct participation in hostilities", which requires three criteria that have to be met cumulatively:

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*).
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*).[328]

In practice, the ICRC approach to setting up these cumulative requirements has its difficulties.[329] For example, the case of a spiritual leader who is not directly involved in military operations would not meet all the criteria set by the ICRC. The guidance of the ICRC is helpful in cases of persons who are

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[324] Schmitt (note 171) 545.
[325] Ibid.
[326] Ibid.
[327] Melzer (note 10) 336.
[328] Nils Melzer "Interpretive guidance on then notion of direct participation in hostilities under international law" (2009) at 46, available at https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (last accessed: 10 August 2015).
[329] Dapo Akande "Clearing the fog of war? The ICRC's interpretive guidelines on direct participation in hostilities" (2010) 59(1) *International and Comparative Law Quarterly* 180 at 181.

directly involved in a military operation – such as a bomb-maker. However, targeted killings are not always directed at the bomb-maker. Sometimes it is the spiritual leader who is targeted by states.[330] In this context, Melzer states that merely building up military capacity does not amount to "direct participation in hostilities". [331] If an individual were not to fulfil the requirements of the ICRC, he or she is not taking direct part in hostilities, is not a fighter and may therefore not lawfully be targeted. Under the principle of distinction such person would be protected as a civilian from any direct attack.

Schmitt suggests an alternative approach:

> "The civilian must have engaged in action that he knew would harm (or otherwise disadvantage) the enemy in a relatively direct and immediate way. The participation must have been part of the process by which a particular use of force was rendered possible, either through preparation or execution. It is not necessary that the individual foresaw the eventual result of the operation, but only that he knew their participation was indispensable to a discrete hostile act or series of related acts."[332]

In contrast to the approach adopted by the ICRC, Schmitt requires an additional mental element on the part of the engaged civilian. Under the mental element, the civilian does not need to have knowledge of the eventual result of the operation. The decisive point is the knowledge of participation in a hostile act and the knowledge of harming the enemy.

It is widely accepted that an interpretation of "direct participation in hostilities" must be

> "narrow enough to protect civilians and maintain the meaning of the principle of distinction, while broad enough to meet the legitimate need of

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[330] See Elias Groll "AQAP says ist religous leader was killed in Yemen – Drone Strike" *Foreign Policy*, 14 April 2015, available at http://foreignpolicy.com/2015/04/14/aqap_says_its_religious_leader_was_killed_in_yemen_drone_strike/ (last accessed: 12 July 2015).
[331] Melzer (note 10) 344.
[332] Michael N Schmitt "Humanitarian law and direct participation in hostilities by private contractors or civilian employees" (2005) 5 *Chicago Journal of International Law* 511 at 533.

the armed forces to respond to the means and methods of warfare that might be used by civilians."[333]

One may argue that Schmitt's interpretation is appropriate in order to protect the principle of distinction and meets the legitimate needs of the armed forces.[334] Furthermore, his approach reflects international jurisprudence.[335] Applying this approach to the case of targeted killings, a civilian would lose his or her protection by engaging in conduct such as:

- directing, planning and executing acts of violence;
- delivering weapons to an active firing position;
- providing sanctuary to persons executing an attack, immediately preceding an attack or hiding them immediately after an attack, and
- providing communications for purposes of facilitating an attack.[336]

However, Schmitt's interpretation is also less clear-cut in the case of the above-mentioned spiritual leader. In terms of his interpretation, the conduct of the spiritual leader may be classified as "direct participation in hostilities", if he or she:

- knew that the engaged action would harm the enemy in a direct and immediate way;
- enabled the use of force through their participation in the preparation or execution of the act, and
- knew that their participation was indispensable to a discrete hostile act or series of related acts.

The application of Schmitt's interpretation illustrates that it is strongly dependent on mental or subjective requirements. The requirements of knowledge regarding the harm to the enemy or knowledge that the participation was indispensable, set the burden of proof very high in this

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[333] Jean-Francoise Queguiner *Direct participation in hostilities under international humanitarian law* (2005) 3.
[334] Ibid; see also Sang (note 15) 25.
[335] *Prosecutor v Jean Paul Akayesu*, ICTR Judgment, 2 September 1998, Case No ICTR-96-4-T, para 629; *Prosecutor v Strugar*, ICTY Judgment, 31 January 2001, Case No IT-41-02-T, paras 17–21.
[336] Schmitt (note 332) 542–544.

context. However, that assessment is at the discretion of the targeting state, which is not reviewable at the time the decision is made.

Schmitt's approach makes it easier for states to determine that a civilian is directly participating in hostilities and it is wider than the approach by the ICRC. The ICRC approach may be not comprehensive, but leaves less space for interpretation and discretion, which limits the possibility of misuse. It appears to be more appropriate to the determination of when an individual may or may not be subject to direct attacks.

The final decision as to whether a person is directly participating in hostilities has to be made on a case-by-case basis. Nevertheless, the ICRC and Schmitt's approaches are helpful guidelines when interpreting direct participation in hostilities.

c. Temporal Scope of Direct Participation in Hostilities

One of the characteristics of suspected terrorists is that these persons may only temporarily support terrorist groups. Therefore, they do not always form a consistent part of that terrorist group.

In this context, due to conventional and customary IHL, civilians enjoy protection, "unless and for such time as" they directly participate in hostilities.[337] That suspension of protection applies to both international and non-international armed conflicts.[338] However, the wording of "unless and for such time as" in the AP I and AP II raises the question how long direct participation in hostilities lasts. A decisive point here lies in the "revolving door theory" which refers to the great benefit which civilians and/or terrorists can enjoy both as a combatant / fighter and as a civilian.[339] Under the "revolving door theory", terrorists "can remain civilians most of the time and

[337] See article 51(3) of the AP I; see also article 13(3) of the AP II.
[338] Melzer (note 10) 346.
[339] Kretzmer (note 32) 193.

endanger their protection as civilians only while actually in the process of carrying out a terrorist act".[340]

One approach in attempting to define the temporal scope of direct participation in hostilities is the "specific acts" approach. Under this approach, "unless and for such time as" has to interpreted in a restrictive way, so that the civilian protection against direct attack is suspended only for the time of each specific hostile act that contributes to the direct participation in hostilities.[341] This approach was adopted in the jurisprudence of the IACiHR:

> "The persons who participated in the attack on the military base were legitimate military targets *only for such time as they actively participated* in the fighting."[342] (emphasis added)

> "It is important to understand that while these persons forfeit their immunity from direct attack while participating in hostilities, they, nonetheless, retain their status as civilians. Unlike ordinary combatants, once they *cease their hostile acts*, they can no longer be attacked, although they may be tried and punished for all their belligerent acts."[343] (emphasis added)

The same interpretation is also reflected by the *ICRC Commentary* on the AP I and AP II.[344]

Although it appears logical to restrict the suspension of civilian protection to each hostile act, the parties to the conflict would certainly not conduct large-scale hostilities on the basis of the "specific acts" approach.[345] Furthermore, this restrictive approach seems to be practicable only under the premise that

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[340] Ibid.
[341] ICRC/Asser Institute "Direct participation in hostitlities under international humanitarian law" (2005) 59.
[342] *Abella v Argentina (La Tablada),* IACiHR, 18 November 1997, para 189.
[343] IACiHR "Third report on the situation of human rights in Columbia", 26 February 1999, chapter VI, para 55.
[344] Sandoz (note 323) (article 51 of the AP I) para 1944; (article 13 of the AP II) paras 4787, 4789.
[345] Melzer (note 10) 348.

the term "civilian" does not include organised armed actors.[346] In this connection, Melzer states that the "specific acts" approach may be appropriate to avoid

> "mistaken or arbitrary targeting to the maximum extent possible while limiting the risk of abuse of the 'revolving door' of civilian protection to individuals whose involvement in the hostilities is merely unorganized, spontaneous or sporadic and, therefore, cannot pose a significant military challenge to the organized armed forces of the parties to the conflict".[347]

Another approach regarding the determination of the temporal scope of "direct participation in hostilities" is the "affirmative disengagement" approach. Under this approach, civilians lose their protection until they "affirmatively disengage" from "direct participation in hostilities" in an objective manner noticeable to the opposing party.[348]

This approach has found some support in legal doctrine. Schmitt states:

> "If civilians could repeatedly opt in and out of hostilities, combatants victimized by their activities will quickly lose respect for the law, thereby exposing the civilian population as a whole to greater danger … The best approach is therefore the only one that is practical in actual combat operations. Once an individual has opted into the hostilities, he or she remains a valid military objective until unambiguously opting out. This may occur through extended non-participation or an affirmative act of withdrawal. Further, since the individual who directly participated did not enjoy any privilege to engage in hostilities, it is reasonable that he or she assume the risk that the other side is unaware of such withdrawal."[349]

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[346] Ibid.
[347] Ibid.
[348] ICRC/Asser Institute (note 319) 59.
[349] Michael N Schmitt "'Direct participation in hostilities' and 21st century armed conflict" in H. Fischer (ed.) *Crisis Management and Humanitarian Protection* (2004) 510.

Watkin also supports this approach:

> "As long as civilians perform the functions of combatants, such as planning, command, and the actual conduct of operations, they remain liable to attack. There is a danger that the term "for such time" will lead to an interpretation that civilians are only combatants while they carry a weapon and revert to civilian status once they throw down a rifle or return home from a day in the trenches. This has been referred to as a 'revolving door' of protection for certain civilians."[350]

> "In order for humanitarian law to provide effective protection for civilians there can be no revolving door of participation in hostilities … Evidence of a civilian no longer acting like a combatant could include surrender, taking a form of parole, giving up weapons and similar overt credible acts."[351]

During the 2005 ICRC/Asser Expert Meeting on "Direct Participation in Hostilities", the "affirmative disengagement" approach was favoured over the "specific acts" approach due to the latter's too narrow interpretation.[352] However, the "affirmative disengagement" approach was also criticised as impractical.[353] Moreover, one may critique the difficulty and uncertainty in determining whether an individual has objectively disengaged from any direct participation in hostilities. One may also disagree with the notion that the individual bears the risk of a lack of knowledge on the part of the opposing party.[354] In addition, even if the case of a clear declaration of disengagement could be made in one case, such an open disengagement bears the risk of reprisals by the organised armed group from which the person is disengaging.[355] Therefore, the "affirmative disengagement" approach appears unsuitable for the group of unorganised civilians. Furthermore, from a humanitarian perspective, applying this approach would permit a direct

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[350] Kenneth Watkin "Humans in the cross-hairs" in David Wippmann & Matthew Evangelista (eds) *New Wars, New Laws?* (2005) 156.
[351] Ibid at 167.
[352] Melzer (note 10) 349.
[353] Ibid.
[354] Schmitt (note 349) 510.
[355] Melzer (note 10) 350.

attack on unorganised civilians who do not pose a immediate military threat.[356] Therefore, the “affirmative disengagement” approach has to be restricted to organised armed actors and should not apply to unorganised civilians.

Because both approaches produce problems, a comprehensive compromise was developed during the ICRC/Asser Expert Meeting in 2005:

> “[A] wider agreement appeared to emerge that a distinction had to be made between unorganized civilians and ‘non-combatant’ members of organized armed groups on the one hand, and fighting members of such groups on the other. There was preference for applying the ‘specific acts approach’ to unorganized civilians and ‘non-combatant’ members of organized armed groups and the ‘affirmative disengagement approach’ to fighting members of such groups. A determination that affirmative disengagement had taken place would depend on the concrete circumstances of the context and could not be defined in advance.”[357]

This compromise covers the difficulties of the “specific acts” approach and the “affirmative disengagement” approach. Moreover, it reflects the functional “membership” approach illustrated in the next part.

As already mentioned, the “membership” approach combines the “specific acts” approach and the “affirmative disengagement” approach. Furthermore, it is based on the presumption that a member of an organised armed group loses his or her protection from direct attack for the entire time of his or her membership of that group.[358] Only an unorganised civilian may benefit from the “revolving door” possibility under the “membership approach”.[359] This approach was adopted by the Israeli Supreme Court in the *Targeted Killings* case:

[356] Ibid.
[357] ICRC/Asser Institute (note 319) 63.
[358] Melzer (note 10) 350.
[359] Ibid.

> "On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his 'home', and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack 'for such time' as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility …"[360]

Furthermore, the "membership approach" also reflects article 43 of the AP I. This article states that organised armed forces, groups or units under a command responsible to a party to the conflict lose civilian status and become combatants.[361] However, the "membership approach" bears the risk that any member of the organised armed group may be the subject of direct attack at any time, regardless of his or her function within that group. The ICRC/Asser Expert Meeting attempted to address the issue by categorising "fighting members" within the "membership approach".[362] A "fighting member" was described as a member that regularly takes part in hostilities.[363] This would reduce the risk of collateral damage.[364] During the meeting, it was also stated that under the "membership approach", members who have differentiated or geographically separated from the group may be targeted only on the basis of the "specific acts" approach.[365]

The examination of the temporal scope of "direct participation in hostilities" has shown that protection from direct attack is granted only to those civilians who are unorganised and whose participation in hostilities is merely sporadic or spontaneous. Only such civilians may benefit from the "revolving door"

[360] *HCJ PCATI v Israel* (note 236) para 39.
[361] Article 43 of the AP I.
[362] Melzer (note 10) 352.
[363] ICRC/Asser Institute (note 319) 64.
[364] Ibid.
[365] Ibid.

and may regain their protection as civilians as soon as their specific act of hostility ends. The examination above has also shown that members of an organised armed group do not profit from the "revolving door" theory. In this case, there has to be a clear disengagement from that organised armed group in order for them to regain their protection as civilians.

Such an examination of "direct participation in hostilities" has, of necessity, to be conducted on a case-by-case basis for the cases of targeted killings in Pakistan and Yemen.

d. Targeted Killing and Military Necessity under the Armed Conflict Model

Should individuals be lawfully subject to a direct attack, that attack must still meet the requirement of military necessity.[366] Military necessity, as set out in military manuals and emerging jurisprudence, is derived mainly from article 14 of the Lieber Code which states:

> "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the end of the war, and which are lawful according to the modern law and usages of war."[367]

Military necessity permits the use of force under two cumulative requirements:

- the force used is essential to achieving the objective of the war, and
- the force used is in accordance with the rules and general principles of conventional and customary IHL.[368]

These requirements have been confirmed in the *Wilhelm List*[369] and *Nuclear Weapons* cases.[370]

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[366] Melzer (note 10) 397.
[367] Article 14 of the Lieber Code of 1863.
[368] Melzer (note 10) 397.
[369] *UNWCC USA v Wilhelm List and Others* (hereinafter: *Wilhelms List* case*)* (1948) LRTWC Vol. VIII Case No 47 at 66.
[370] *Nuclear Weapons case* (note 136) para 78.

Within the framework of targeted killing, military necessity does not grant a licence to kill without any limitations. Furthermore, the targeted killing must be essential to the

> "achievement of a concrete and direct military advantage without there being any non-lethal alternative which would entail a comparable benefit without unreasonable increasing the security risk of the operating forces or the civilian population".[371]

Again, the assessment of non-lethal alternatives has to be made on a case-by-case basis. Furthermore, the validity of the assessment from the perspective of an academic analysis cannot be comprehensive.[372] The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has also raised doubts about the comprehensive assessment of non-lethal alternatives.[373] An example of this is when Israeli forces opened fire in front of a café without any warning or attempt to arrest the suspected terrorists.[374]

In this context, states should also bear in mind that targeted killings, when employed as a military strategy, should represent a step towards ending the conflict rather than inflaming a critical situation and thereby supporting the opposing party's cause.[375] In this context, cases like the attack on a wedding appear to be questionable against the backdrop that the force used has to be essential to achieve the object of war.[376]

e. Targeted Killing and Proportionality

Proportionality is a long-established principle, which requires that all measures taken must be proportionate to the legitimate goal sought.[377]

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[371] Melzer (note 10) 398; see also: *HCJ PCATI v Israel* (note 236) para 40.
[372] Ibid.
[373] United Nations Commission on Human Rights "Report of Special Rapporteur on extrajudicial, summary or arbitrary executions", Addendum 1, 26 March 2006, at 133.
[374] Ibid.
[375] Ibid.
[376] Democracy Now "Turning a wedding into a funeral: U.S. drone strike in Yemen killed as many as 12 civilians", 21 February 2014, available at http://www.democracynow.org/2014/2/21/turning_a_wedding_into_a_funeral (last accessed: 13 August 2015).
[377] *Prosecutor v Kupreskic et al.,* ICTY Trial Chamber, Judgment, 14 January 2000, para 524.

Whether the terrorist should be a legitimate military target and the killing meet the requirements of military necessity, the targeted killing must still be proportional. The principle of proportionality is also reflected in article 51(5)(*b*) of the AP I that lists types of attack which "are to be considered as indiscriminate":[378]

> "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."[379]

This provision is part of the AP I and applies to international armed conflicts. However, it also reflects the customary rule of proportionality which applies to international and non-international armed conflicts.[380]

Targeted killing may be considered as "damage to civilian objects" or "incidental loss of civilian life" under article 51 of the AP I, when innocent civilians die during an attempt to kill a suspected terrorist.[381] Such acts, if indiscriminate, are prohibited under article 51(5) and may result in disproportionality and unlawfulness.[382] The case of Yemen and Pakistan, for instance, has shown that a large number of targeted killings also resulted in the loss of civilian life.[383] In practice, it is not always clear how the principle of proportionality has to be interpreted or applied.

In this regard, the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia stated:

> "The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the

[378] Article 51 of the AP I to the Geneva Conventions of 1949.
[379] Article 51(5)(*b*) of the AP I to the Geneva Conventions of 1949.
[380] Henckaerts & Doswald-Beck (note 321) 46.
[381] See Democracy Now (note 376).
[382] Kretzmer (note 32) 200.
[383] The Bureau of Investigative Journalism (note 6).

legitimate destructive effect and undesirable collateral effects … It is much easier to formulate the principle of proportionality in general terms that it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective."[384]

This illustrates the difficulties in applying the principle of proportionality. The assessment of the value of innocent human lives as opposed to the military objective has to be done on a case-by-case basis. Such an assessment becomes even more difficult in a case of anticipated collateral damage or anticipated threat.

One cannot deny that a high-value target will justify greater collateral damage than a low-value target.[385] Moreover, "proportionality must be judged on the basis of the information available at the time of the attack, and not on the actual results".[386] In the case of killing or wounding individuals,

> "the burden rests on the state to show either that this could not reasonably have been foreseen, or that even if it could have been foreseen, the necessity of the attack was great enough to justify the risk".[387]

In the final event, the proportionality of each targeted killing must be scrutinised on a case-by-case basis. Although targeted killings claim to be "surgical" warfare,[388] the practice in Pakistan and Yemen has shown that in a large number of cases they caused the death or injury of innocent civilians.[389]

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[384] ICTY *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, available at http://www.icty.org/sid/10052 (last accessed: 2 January 2015) para 48.
[385] See Melzer (note 10) 404.
[386] Kretzmer (note 32) 201.
[387] Ibid.
[388] Nicholas Kendall "'Targeted killings 'under international law'" (2002) 80 *N.C L. Review* 1069 at 1078.
[389] The Bureau of Investigative Journalism (note 6); see also: CNN International "Drone strikes kill, maim and traumatize too many civilians, U.S. study says" available at http://edition.cnn.com/2012/09/25/world/asia/pakistan-us-drone-strikes/ (last accessed: 15 January 2015).

Therefore, one may argue that this “surgical” warfare in Pakistan and Yemen in not proportionate.

VI. The Need for a New Model?

Targeted killing is not an area that can easily be subsumed within a particular model. Any attempt to do so raises a number of issues and it appears to be unlawful under any presented model.

The law-enforcement model has its difficulties in explaining why the targeting state has jurisdiction and why this model should apply to targeted killing at all. It fails to argue why states should be allowed to the use lethal force in a foreign state. There is no legal basis for the use of lethal force of one state in the territory of another under the law-enforcement model. It also fails to explain why a domestic paradigm may apply to an inter-state issue. In this regard, one might argue that there is universal jurisdiction over transnational terrorism. However, there can be no universal jurisdiction if there is no legal definition of terrorism. Regarding the “generic qualification as law enforcement”, the concept based on “conduct and effect” as introduced by Melzer appears to be persuasive.[390]

Moreover, even if the law-enforcement model aims to protect potential victims based on the right to life, it is questionable whether the scope of the right to life justifies an anticipated or pre-emptive use of force. Such constructs do not comply with the strict necessity test, which derives from the international human rights law.[391] Furthermore, the law-enforcement model preserves no answer regarding protracted violence that has reached the level of a non-international armed conflict.

Apart from its difficulties in finding application to the circumstances, the law-enforcement model provides acceptable results, if one is aiming at balancing the rights of the suspects against the rights of potential victims.

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[390] See Melzer (note 10) 88.
[391] See Chapter III. 2.

The scrutiny of targeted killing under the model of the *ius ad bellum* also results in an incomplete coverage of targeted killing.

Against the backdrop of the programme of targeted killings carried out by the United States in Pakistan and Yemen, the examination above illustrated the issue of a geographical limitation of the right of self-defense. One main point in this regard is that the mere presence of a terrorist group is not sufficient to justify targeted killing in the territory where that terrorist group is present. Such circumstances do not fulfil the requirement of necessity and armed attack.

The controversial construction of pre-emptive self-defense is not persuasive and results in a temporal extension to the infinite, due to the wide interpretation of the requirement of immediacy. There may be situations where targeted killing may be justified under the right of self-defense. However, US practice in Yemen and Pakistan over the past 13 years shows approximately 500 confirmed drone strikes.[392] But Yemen and Pakistan do not constitute a so-called “hot” battlefield and neither carried out an armed attack or constituted a threat that was instant, overwhelming, leaving no choice of means and no moment for deliberation.

The examination of targeted killing in the context of the armed conflict model also illustrated five main problems. First, the term, “war on terrorism” is too wide and not specific enough. The United States failed to determine the exact battlefields of the “war on terrorism” in its declaration of “war on terrorism”.[393]

Secondly, examining targeted killing under the model of international armed conflict showed that it cannot apply due to the non-state actor status of terrorist groups.

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[392] The Bureau of Investigative Journalism (note 6).
[393] See United States White House (notes 259, 260).

Thirdly, the application of the model of non-international armed conflict raised the problem of territorial limitation.[394] A suspension of the geographical limitation renders the distinction between an international and non-international armed conflict pointless. Furthermore, it illustrates that the model of non-international armed conflict was not developed for the application on transnational terror and, in particular, targeted killing.

Fourthly, assuming that the non-international armed conflict model were to apply, its application confirms the assumption that the drafters of the Geneva Conventions did not consider transnational terror when they developed provisions on IHL. The application of this model already falls short in determining the status of a terrorist. Expressions such as "unlawful combatant" / "fighter" or the different approaches in interpreting "direct participation in hostilities" appear to be artificial and constructed primarily for the purposes of killing terrorists. These artificial constructions endanger one of the main principles of IHL, namely, the principle of distinction.

Fifthly, the armed conflict model does not contain an answer to states that do not constitute a territory of hostilities. Moreover, it tries to stretch the application of hostilities and puts the life of innocent civilians in jeopardy in order to avoid an extra-legal space. Therefore, even the armed conflict model does not provide a comprehensive coverage of the issue of targeted killing.

In comparing all three models, the law-enforcement model appears to be most promising due to its strict restriction of when lethal force may be used. However, an entirely new model may be preferable, which I introduce in the next chapter.

[394] See discussion in Chapter V. 2. c.

VII. Alternative Models

Owing to the lack of a comprehensive model, Kretzmer attempts to take the best of two worlds, namely, the rules of IHL and international human rights law. I also define a draft of a new model in order to illustrate requirements that a new model must contain if it seeks to cover the issue of targeted killing of suspected terrorists comprehensively.

1. The Mixed Model

Kretzmer proposes a “mixed model” that comprises the law-enforcement model, the armed conflict model and the right of self-defense.[395] This model basically draws a parallel with the requirement of necessity and proportionality under the right of self-defense.[396] He denies the existence of an extralegal space in the case that IHL should not apply.[397] Under the mixed model, states would be bound to international human rights law.[398] Moreover, even if IHL and the law of armed conflict were to apply in a case of targeted killing, Kretzmer assumes that state actions under a non-international armed conflict have to be “constrained by the standards of international human rights law”.[399] Therefore, the arbitrary deprivation of life is prohibited and due process principles must be respected.[400] In this case, Kretzmer admits that there might be situations where the attack may be so imminent that law-enforcement mechanisms must be replaced by the mechanisms of IHL.[401] He argues that any situation must meet the standards for necessity and proportionality,[402] and necessity means that “a state may not use force if there are other means of defending itself”.[403] This requirement is not met in a situation where a possibility of putting the suspected terrorist on trial still exists and that again is strongly dependent on the control of the hosting state.[404] In this context, the necessity test must require that the suspected

[395] Kretzmer (note 32) 203.
[396] Ibid.
[397] Ibid at 202.
[398] Ibid.
[399] Ibid.
[400] Ibid.
[401] Ibid at 203.
[402] Ibid.
[403] Ibid.
[404] Ibid.

terrorist does constitute an imminent threat to the targeting state.[405] Moreover, the necessity test requires that the host state is unwilling or unable to remove the threat.[406]

Kretzmer suggests a proportionality test under the "mixed model" based on three factors:

> "1. The danger to life posed by the continued activities of the terrorists.
> 2. The chance of the danger to human life being realized if the activities of the suspected terrorist are not halted immediately.
> 3. The danger that civilians will be killed or wounded in the attack on the suspected terrorist."[407]

Kretzmer's proposed proportionality test sets up a heavy burden for evaluating the danger posed by terrorist activities and the consequent collateral damage to civilians. This is congruent with his assumption that targeted killing resulting in the death of innocent civilians does not meet the requirement of proportionality.[408]

The above-mentioned tests for necessity and proportionality go beyond the basic requirements for these principles under the armed conflict model. However, these stricter rules of necessity and proportionality comply with the ICJ's conclusion in terms of which human rights treaties continue to apply in time of war, even if the law of armed conflict does constitute the *lex specialis* in that case.[409] Moreover, such a mixed legal framework is nothing new as the ICJ concluded in the *Wall case* that human rights can be used as a gap-filler in the case of a legal *lacuna* under IHL.[410] The question is whether such a legal *lacuna* exists in the case of targeted killing. This, again, leads to the discussion in how far the armed conflict model applies. As shown in this paper, one may interpret the rules on a non-international armed conflict in a

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[405] Ibid.
[406] Ibid.
[407] Ibid.
[408] Ibid.
[409] *Nuclear Weapons case* (note 136) paras 226, 240.
[410] *Wall case* (note 163) 178.

way that there is no legal *lacuna*. In contrast, one may argue that the non-international armed conflict model is not able to cover the issue of extraterritorial killing of suspected terrorist.[411]

Another point of critique is that Kretzmer uses a very narrow interpretation of human rights treaties and therefore concludes that they fail to apply, due to the lack of jurisdiction.[412] However, one may argue that some human rights have reached the status of customary international law or even *jus cogens*.[413] Human rights that are protected under customary international law are binding on any state; this counters any argument about there being a lack of jurisdiction.

In the final event, the "mixed model" is also not persuasive. It is based on the assumption that the paradigm of IHL applies primarily and that international human rights law shall restrict it. However, the assumption that the armed conflict model applies carries the risk that states will use this model to expand their actions in the "war against terrorism". Targeting states appear to be keen of taking advantage from any discretion that they are given under the armed conflict model. Therefore, they will use this model in the absence of a clear indication as to when international human rights law applies; following this line of thinking, states will be keen to disregard the restrictions of international human rights law and will only apply IHL rules.

2. Draft of a New Model

All the introduced models fail to cover targeted killing of suspected terrorists comprehensively. The "mixed model", which attempts to apply the best of two worlds, is also not persuasive. Therefore, in what follows, I set out requirements of a new model that could be designed in the future.

First, such a model should define terms of "terrorism" and "battlefield". One might argue that terrorism is nothing new. However, one cannot deny that the drafters of the Geneva Conventions did not consider transnational terrorism

[411] See Chapter V.
[412] Kretzmer (note 32) 179.
[413] See Chapter III.

when they drafted common article 3.[414] Neither did the drafters envisage drone warfare.[415] The issue of targeted killing in states such as Yemen or Pakistan shows, more than ever, that the international community must come up with a universal definition of terrorism and a terrorist. I assume that such a definition would describe terrorism as a criminal act. Therefore, a terrorist is a criminal. By drawing a parallel with the law-enforcement model, even a criminal has rights. These rights should be suspended in extraordinary situations only and not anytime a state decides it is convenient.

Secondly, the new model must provide a definition for the type of conflict, battlefield and parties. This is the point where a new type of conflict has to be presented. The type of conflict must encompass a situation that is not yet an armed conflict and which is also not a situation of peace. Moreover, the type of conflict must cover the conduct of a state that is acting outside its territory. The parties to the conflict must be at least a state and a non-state actor. This non-state actor may be described as a terrorist organisation. Furthermore, a protracted conflict must exist between the terrorist organisation and the acting state. An indication of that protracted conflict could be the occurrence of terrorist attacks in the past. In addition, the target must be in a remote area when considering targeted killing as a preventative measure. The new model could also apply to times of an imminent threat.

Thirdly, such a model must require a legal basis for the extraterritorial killing. That legal basis must provide strict limitations of immediacy, necessity and proportionality on the targeted killing of suspected terrorists.

In this model immediacy requires that here be an imminent threat to the lives of potential victims in the targeting state. This threat must be credible, which means that the concept of pre-emptive self-defense would not suffice in this case. Furthermore, the threat must be so imminent that the stage of attempt has already been reached or the next conduct will introduce that stage. The exclusion of pre-emptive self-defense can be justified against the backdrop that the targeted terrorists are suspects. A suspect is somebody whose

[414] Uhler (note 132) 28–33.
[415] Ibid.

culpability is not proven and who may benefit from the presumption of innocence.

Targeted killing of suspected terrorists must also meet the requirement of necessity. A parallel could be drawn with the necessity test under international human rights law at this point. Therefore, this requirement is met when there is reasonable and evidential proof of an imminent threat and the host state consents to the use of lethal force within its territory. Furthermore, any conduct of targeted killing must constitute a contribution to the end of “war”.

The requirement of proportionality must also be met. At this point a parallel has to be drawn with the law-enforcement model. There must be an assessment of the potential victims, the removal of threat and the damage to innocent civilian life at the location of the targeted killing.

The establishment of such a model, however, is highly unlikely. A new model or convention of law requires states to be willing to become state parties to or to apply that model. In the case of targeted killing in particular, states will most likely refuse to become party to such a convention and will probably prefer to continue to apply the existing unclear models.

However, the reluctance of states in accepting a new legal model is not automatically a disadvantage. This legal model derives its validity from the need to justify a particular actual scenario. The example of the US programme of targeted killings in Yemen and Pakistan illustrates how an actual set of circumstances may provide the motivation of a need for a new model. In these circumstances the United States may be considered as the hegemon – a state that dominates or controls other states or even their law.[416] This leads to the question: Should any state be in a position of such power that it exerts its influence to change the law? Deriving a legal principle

[416] Jose E. Alvarez “Hegemonic International Law revisited” (2003) 97 *A.J.I.L.* 873 at 873, 880.

from an actual scenario poses high potential risk to the law itself, its compliance by such states and a threat to the justice and security.[417]

VIII. Conclusion

The targeted killing of suspected terrorists contains two decisive elements that form a part of a new condition in international law. First, the technological possibility of targeted killing by drones exists. This technology makes it possible to send an unmanned drone into a foreign state and carry out a targeted kill. Secondly, this new situation is determined by the characteristics of a terrorist – someone who does not play by the usual rules of war and who is extremely difficult to identify. The international community has failed to fill this legal *lacuna* as still no universal definition of a terrorist or terrorism exists.

As presented, each existing model has its difficulties with issue of targeted killing of suspected terrorists. By comparing the three existing models, the law-enforcement model appears to be the one that is the most capable of at the same time protecting both the lives of innocent civilians and the rights of suspected terrorists. This derives from its strict limitation on the permissibility of targeted killing. The only weak point here is finding application regarding the extraterritorial conduct. The other two existing models try to cover the issue through concepts such as pre-emptive self-defense, extension of geographical scopes or artificial construction of “direct participation”. All issues which are highly controversial in any situation.

In examining the programme of targeted killings carried out by the United States in Pakistan and Yemen, it becomes apparent that such conduct is clearly not lawful under any of the existing models.

Based on the development of transnational terrorism and modern warfare, one may argue that there is an actual need for a new model of law. The “mixed model” constitutes a step in that direction in so far as it attempts to

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[417] Cf. Jutta Brunee & Stephen J. Toope “Slouching towards new ’just’ wars: The hegemon after September 11th“ (2004) 51(3) *Netherland International Law Review* 363 at 391, 392.

combine existing rules for the time of peace and war. However, it fails to draw a clear line regarding the application of each model under one model. The "mixed model" and the call for new models are a strong indication of the need for a universal definition of terrorism so that such a definition can be used by existing models of law. The draft of a new model expresses what a new model could look like. However, establishing a new model bears the risk that states will use it merely to justify a factual situation in order to make it lawful. The question is, then, whether international law should follow the hegemony by one state that is establishing facts, which may not simply be subsumed under existing paradigms. This again leads to the question whether one allows that facts establish law, or whether one may apply existing law and accept its results. If international law stands for the protection of innocent civilians, it must resist these temptations of new models and concepts which do not intend to provide that protection. The abolition of existing models and application of customised models will not serve justice or security. Furthermore, the establishment of new models leads to a fragmentation of international law.

The *White Paper* is a good example of how far principles and model of laws are conflated in order to make a particular conduct lawful – essentially deriving law from the facts. If we examine the *White Paper*, it appears that the legal basis is not clear. The United States bases its legal justification for the targeted killing of its own citizens on the right of self-defense and the law of armed conflict. Furthermore, the *White Paper* uses any model that is needed to reach the result of legitimising the targeted killing of suspected terrorists, who are US citizens, in a foreign state.[418] Another result of this conduct by one powerful state is a highly artificial application of the armed conflict model, which leads to constructions such as "unlawful combatant"[419] or "active fighter".[420]

Any new model would have to be developed with the aim of protecting the lives of innocent civilians and the rights of suspected terrorists. Based on that

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[418] *White Paper* (note 8) 2–5.
[419] See *Hamdan* case (note 220).
[420] See Bothe (note 301) 9.

premise, such a new model may be credible and will not simply appear as justifying a particular conduct. I described the standards of such a new model in this paper. The model which comes closest to the proposed new model is the law-enforcement model. Under this model there are also independent organs for review: the human rights courts and committees.[421] Without such a legal credibility, targeted killing of suspected terrorists risks supporting terrorism rather than fighting it. Without a credible test of necessity and proportionality, the host state's population will see civilian casualties as a result, which inevitably arouses fear and hatred against the targeting state.

[421] See Chapter III. 2.

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Abbreviations

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
AUMF	Authorisation for the Use of Military Force
AP I	Additional Protocol I
AP II	Additional Protocol II
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IAC	International Armed Conflict
IACiHR	Inter – American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
IACtHR	Inter – American Court on Human 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
IHL	International Humanitarian Law
LRA	Lords Resistance Army
NATO	North Atlantic Treaty Organisation
NIAC	Non-International Armed Conflict
PKK	Kurdish Workers Party
UN	United Nations
UNHRC	United Nations Human Rights Committee
VCLT	Vienna Convention on the Law of Treaties