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## Targeting the Terrorists: Legal, Strategic, and Political Considerations of Drone Warfare

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*An investigation into the legality, strategic efficiency, and political benefit of  
conducting targeted killings by Unmanned Aerial Vehicles*

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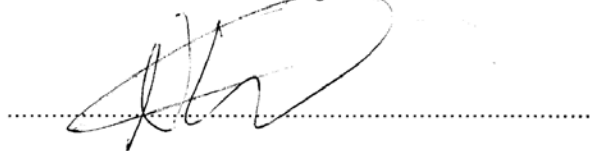
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**Targeting the Terrorists:  
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## *Abstract*

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This thesis engages in an assessment of targeted killing by Unmanned Aerial Vehicles (UAV) in counter-terrorism strategies. By analysing the conduct of the USA and the UAV-programs in Pakistan, Yemen, and Somalia, key lessons-learned are extracted. The tendency across Europe has been an increase in interest in operating armed UAVs and several European states have conducted or cooperated with the USA in UAV-missions leading to the killing of alleged terrorists.

For this reason, research into the legal, strategic and political costs and benefits of applying UAVs in counterterrorism is warranted.

This thesis therefore considers the lawfulness of targeted killings by UAVs under international law, and concludes that the deficiency of transparency and accountability of the American drone programs lead to an undermining of the rule of law and international legal standards. Furthermore, the thesis discusses political and strategic aspects of such a counter-terrorism approach and questions the efficiency of a deterrence-based strategy. The thesis concludes by pointing to the possible deteriorating precedent being set by the American drone programs both in terms of international customary law and of international political legitimacy. The thesis recommends the establishment of a European political and legal framework for operating with UAVs.

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## Introducing drones

When on November 3<sup>rd</sup> 2002 an American Predator drone fired and killed alleged terrorist Qaed Senyan al-Harithi in Yemen, this marked the initiation of the CIA led American drone program of targeted killings<sup>1</sup>, and it marked the beginning of a different and novel approach to Counter-terrorism efforts led by the United States. Although the practice of targeted killing as a part of states' efforts to combat terrorism is hardly new, the relevance of the topic today should be seen in light of the rapid progression in such operations. The entrance onto the stage of the armed Unmanned Aerial Vehicles (UAV), popularly referred to as drones, has expanded the toolbox of counter-terrorism, as they represent an advancement in weapons technology that allows for low-risk missions to areas that were formerly unreachable. The clear strategic appeal of this new technology is easily understood as it limits your own risk and significantly increases the risk for your adversaries. These advantages explain the widespread use of drones in troop protection missions in regular armed conflict zones, but the focus in this context is rather on the advantages obtained when waging combat against the asymmetrical fighting, which characterises terrorism.

However, certain elements in the American drone program are in dire need of attention. Significant legal, political and strategic considerations seem to have been kept within the confinement of the White House and the CIA headquarters in Langley. The vast secrecy, which surrounds the program, has blurred the statistical data and information about the conducted strikes. Subsequently, determining the realities of the conducted strikes and the resulting casualties has been near impossible. Thus, numbers on casualties range from the American Officials claiming they do not exceed “*single digits*”<sup>2</sup> following each strike, to the Bureau of Investigative Journalism reporting between<sup>3</sup> 2562 and 3325 people in Pakistan alone have been killed<sup>4</sup>. Albeit the extent of the targeted killings by American

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<sup>1</sup> A/HRC/14/24/Add.6, 28 May 2010: p.7.

<sup>2</sup> Stanford/NYU-report, 2012: p. 29.

<sup>3</sup> See Infra p. 44.

<sup>4</sup> Stanford/NYU-report, 2012: p. 29.



drones may be hard to fully disclose, certain legal, political and strategic questions in the event of even one single such strike arise. Legal matters, as the right to self-defence of states, as opposed to the very limited possibility of conducting lethal operations against individuals outside of armed conflict have split legal scholars and officials on the lawfulness of such strategies. Regardless of one's stance on the issue, all involved parties ought to always strive towards legal clarification. As then UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston concluded in the recommendations to his report to the Human Rights Council on targeted killings,

*"States should publicly identify the rules of international law they consider to provide a basis for any targeted killings they undertake."*<sup>5</sup>

President Obama publicly addressed the same importance of clear guidelines when addressing the issue of drone warfare outside of conventional warzones, although maintaining and reiterating his conviction as to the lawfulness of the American conduct. However, the creation of advanced technology, the President conveyed, *"demands the discipline to constrain that power -- or risk abusing it."*<sup>6</sup>

The critics of the American drone program point to the questionable definition of armed conflict in which the US asserts its engagement, the criteria for the lawfully targeted individuals, and the lack of transparent procedural safeguards ensuring legality and accuracy of the strikes, as the main violations of the principles of international law.

To disclose the legal ambiguity that surrounds the legality of drones and targeted killings, the thesis at hand will therefore engage in a hypothesis that claims; that *(1) The US drone program of targeted killing is conducted under violation of International law.*

A further element of the legal concern revolves around the customary nature of international law, which, as a supplement to international treaty law, is based on the behavioural patterns of states rather than legal treaties.<sup>7</sup> This, in turn, implies, as the

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<sup>5</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 17.

<sup>6</sup> Remarks of President Obama, 23 May 2013.

<sup>7</sup> Cassese, 2004: p. 59-62.

comprehensive study “Living Under Drones”<sup>8</sup> by Stanford and New York Universities suggests, that the current conduct of the U.S. might be determining for the future of drone warfare. The Stanford/NYU study claimed that “*current US targeted killings and drone strike practices undermine respect for the rule of law and international legal protections and may set dangerous precedents.*”<sup>9</sup>

President Obama also acknowledges this element of international law and stated on the issue, during his Nobel peace prize acceptance speech, that

*“We have a moral and strategic interest in binding ourselves to certain rules of conduct [...] the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight.”*<sup>10</sup>

An additional element pertaining to the legal aspect of drone targeted killings thus revolves around the development of new standards of international customary law. The thesis will therefore also engage in a hypothesis stating; (2) *The US drone Program of targeted killing is continuously altering the norms of international customary law.*

The debate on drone warfare and targeted killings becomes increasingly timely when considering the desire of several European states to acquire the technology.<sup>11</sup> All the more so, if legal standards are set by the American drone program, which possibly constitute violations of international law. It therefore becomes pivotal to thoroughly contemplate on legal issues before the European governments make the decision to acquire and use drones outside of regular armed conflict.

Additional to legal consideration, the political and strategic consequences of drone warfare must also be included in such consideration. The American counter-terrorism efforts through drone targeted killings need to be analysed in depth before making hasty conclusions on their triumph. In favour of the targeted killing strategy are elements such as the short-term detrimental effect to terrorist organisations, through e.g. removing the

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<sup>8</sup> Stanford/NYU-report, 2012.

<sup>9</sup> Stanford/NYU-report, 2012: p. viii.

<sup>10</sup> President Barack Obama remarks acceptance of Nobel Peace prize, 10 December 2009

<sup>11</sup> See infra p. 66-69.

leadership or technical skills or by simple deterrence undertaken with minimal or no risk missions. Against the strategy of targeted killings speak the long-term effects, which have been characterised as counter-productive as some observers claim civilian casualties may radicalise populations at large in countries, which are targeted. Are more terrorists created than are killed in the missions? Furthermore, the political consequences may test the relation to the country in which the operations are undertaken, if, as in the case of Pakistan and the U.S., the countries do not agree on the terms for the permission of the strikes.

Hence, in the light of European countries showing interest in acquiring drones, this thesis will investigate both the legal, strategic and political considerations of targeted killing by armed drones. The American drone program is the largest in both intensity and magnitude. Therefore, by analysing the American drone program in terms of strategic effectiveness and political consequences, it will be possible to determine lessons to be learned.

Aside from assessing the American influence on drone-technology and conduct achieved through setting the legal, political and strategic precedence, this thesis will attempt to grapple the question of American dominance on European military strategy. Through the extensive military transatlantic cooperation, is there a possibility that the United States of America is influencing and altering European states' approach to warfare, and particularly interesting in this context, influencing the strategic thinking about the practice of drones in counter-terrorism efforts?

The key question to be asked in this context is thus based on the contemporary state of affairs concerning drone warfare, which is arguably constructed by the following assumptions; given the questionable legality of the American drone program, given the tendency of European countries obtaining and using drone-technology in new combat zones, given the fact that no European states have determined legal, political or strategic principles for the operation of drones, and given the probability of American influence on European decision-making; hypothesis (3) states; *The American precedence within drone warfare effects European decision-makers and may lead European states to follow the American example without due attention to political and strategic considerations.*

In summary, the central issue, which will constitute the framework for the research in the following pages, takes the American drone program as its point of departure. Through international law, an analysis of the legality of targeted killings by drone strikes will question the lawfulness of such practice and consider the possible consequences for international law principles. Next, the strategic and political concerns surrounding the practice of targeted killings by drone strikes will be considered, in order to provide a comprehensive study of the possible positive and negative impacts on counter-terrorism efforts. The study is undertaken to provide useful insights and recommendations to European states in the midst of acquiring drone-technology. The aim of the present thesis is not to reject the use of drone warfare in counter-terrorism efforts, but is rather to call for serious considerations with regards to the legality of targeted killings and with regards to the strategic and political advantages and disadvantages of drone warfare.

The following question raises these issues and will be answered through the research in this thesis.

## **0.1 Research Question**

What are the consequences of the American drone program and the practice of targeted killings on legal, strategic and political issues, and how are these significant for European acquisition of armed drone technology?

## **0.2 Chapter Overview**

The first chapter in the present thesis addresses the methodological considerations of the undertaken research. Here, the overarching constructivist theory approach of the thesis and key elements of the discursive analysis of the thesis will be presented.

Next, chapter 2 displays the main features of international law relevant to the issue of targeted killings, thus creating a legal framework for the discussion of the lawfulness of targeted killings through drone strikes. The chapter initiates by defining key issues such as a conceptualisation of targeted killing, the introduction of the customary element of international law, and the significant legal distinction between armed conflict and peacetime. A presentation of contemporary discussions of the central legal treaties, UN Charter, the Geneva Conventions and the International Human Rights treaties, leads to chapter 3, in which an assessment of the legality of the American drone program will be undertaken. By comparing the discourses of the Obama-administration and the Critics respectively, conclusions will be drawn as to the legal interpretations of the American drone program.

Chapter 4 introduces hypothesis (3) and leads to chapter 5, which presents the current situation in European states and their acquisition and usage of drone technology.

Through analysing the strategic culture of European states and how they have been altered in the NATO engagement in Afghanistan, Chapter 6 moves on to present a discussion of whether American influence, especially within the field of security, affects European decision-making on strategic and political choices concerning drones. To conclude on hypothesis (3), chapter 7 evaluates the costs and benefits of targeted killings by drones in counter-terrorism. By considering both the long-term and short-term effects of such strategies, an informed debate will enlighten the discussion of the efficiency of targeted killings.

Chapter 8 concludes the thesis by providing a possible answer to the research question and by presenting a range of recommendations for state's conduct with drone warfare. The chapter argues that the development within drone technology and practice necessitates the establishment of a legal doctrine regulating and limiting the conduct of drone targeted killings based on political and strategic public debate and considerations.

## Chapter 1

### 1.0 Methodological Considerations

*The following methodological section serves to introduce the considerations concerning theory of science and the constructivist approach of the thesis. Furthermore, attention will be paid to the challenges of literature and sources, which arise when investigating an area characterised by secrecy including the lack of evidence and data, which inevitably follows. Before embarking on a brief conceptualisation of key proponents, the reflections over deliberate limitations to the scope and investigated field of the research will be presented.*

#### 1.0.1 Epistemological Dichotomy of International Law

The following sub-section reflects upon the theory of science of the present thesis and it outlines what can, and indeed what cannot be delineated when analysing international law through the lens of constructivist theory. When determining whether targeted killings are lawful under international law, no one treaty or convention provides the answer, but rather the treaty law and the customary law – the sum of state’s interpretation of law – becomes the de facto law<sup>12</sup>.

At first sight, law and the constructivist strand of theory of science appears to be an unexpected couple. The positivist approach of the rigid domestic law and its tripartite division of power in Montesquieu’s tradition forms a system in which the law is the law<sup>13</sup>. The monopolised use of force overseeing that the rules determined by the governing institutions are complied to and an independent judicial system to pass judgement in the case of violation leaves little room for constructivist interpretation of the law<sup>14</sup>. The lack, however, of a centralised power institution in the international community fundamentally

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<sup>12</sup> See infra p. 24.

<sup>13</sup> Cassese, 2004: 5.

<sup>14</sup> Cassese, 2004: 5.

alters these principles<sup>15</sup>. The anarchic nature of the inter-state laws and the lack of a centralised international authority have led scholars to claim that international law does not deserve the label “law”<sup>16</sup>. Hence, when states engage in law making in the anarchic international community they do so without the three centralised functions of the tripartite domestic system and instead depend on inter-state cooperation. Antonio Cassese (2004) describes this relation as “*each State, acting together with other states under the impulse of overriding economic, political, or other factors, to set new legal standards or to change them, either deliberately [treaty law] or almost unwittingly [customary law]*”<sup>17</sup>. Here, Cassese also introduces the two means by which states have the ability to influence international law; namely through textual contributions in treaty law or through their actions in customary law. And it is within these two main principles of international law that the pertinence of constructivism emerges - the analysis of the written word and the actions of states, which together construct the discourses that constitute international law. It therefore becomes interesting to analyse the different strands of interpretation of international law, because logically, when different interpretations exist and no central authority has the power to legislate, pass sentence or execute without the involvement of states, conflicts of law and interests emerge. Therefore, the following section introduces a constructivist framework of discursive analysis influenced in particular by the tradition of Laclau and Mouffe (1985).

## 1.1 The Discourses of International Law

To initiate this segment, key elements of Ernesto Laclau and Chantal Mouffe’s theory will be presented, mainly through their work, *Hegemony and Socialist Theory*, (1985)<sup>18</sup>.

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<sup>15</sup> Megret, 2012: p. 64.

<sup>16</sup> Megret, 2012: p. 72.

<sup>17</sup> Cassese, 2004: p. 6.

<sup>18</sup> Laclau & Mouffe, 1985.

### 1.1.1 Discourse, articulation, moments, elements, and the field of discursivity

Laclau and Mouffe define four features of their theory, which determine a given discourse; namely the *moments*, whose connotations are formed through speech, text, and actions *articulating* the moments into a discourse<sup>19</sup>. Further, the discourse is affected by the *field of discursivity*, which consists of *elements* creating an alternative to the discourse<sup>20</sup>. The field of discursivity is thus external to the discourse, and all the elements within are in conflict with said discourse<sup>21</sup>. A contextual example will hinder getting lost in the normative complexity of theory of discourse. In international law, especially within customary law, states compete to formulate law, which follows their individual needs and preferences. If the Obama-administration through the American drone program is indeed in the midst of setting a legal precedence, this constitutes a discourse in the making, in the Laclau and Mouffe understanding. The *moments* of said discourse have been *articulated* through the practice of drone strikes and the manner in which they have been orally presented afterwards, for instance through a speech by the Obama-administration. An example of such a *moment* is found in the international legal definition of a combatant. The Obama-administration has made the claim that Al Qaeda and Taleban have initiated an armed conflict against the U.S., and the individual terrorist may be targeted, as he/she constitutes a combatant of said armed conflict<sup>22</sup>. A different legal interpretation as found for instance in the International Committee for the Red Cross (ICRC) Interpretative Guidance on the Direct Participation in Hostilities, claims that an individual is only a combatant during the participation in each single act of violence<sup>23</sup>. The ICRC thus puts forward a counter-argument, which then constitutes an opposing *element* to the Obama-administration *discourse*. The conflict between two discourses is often labelled the antagonism within

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<sup>19</sup> Laclau & Mouffe, 1985: p. 111.

<sup>20</sup> Laclau & Mouffe, 1985: p. 111.

<sup>21</sup> Laclau & Mouffe, 1985: p. 105.

<sup>22</sup> See infra pp. 41-43.

<sup>23</sup> Melzer, 2009: pp. 366-68.



theory of discursive analysis, or in Laclau and Mouffe's terms, the struggle between the discourse and the discursive field<sup>24</sup>. A crucial element of the antagonism is the creation of hegemony of discourses, which refers in brief to the establishment of a dominating discourse<sup>25</sup>. This concept becomes helpful when analysing the antagonism of international customary law, as it allows for determining the single moments, which constitute the hegemonic discourse and the elements, which constitute the challenging discursive field. The discursive analysis thus aids in determining international customary law.

Both language and actions are determining for discourses in a framework where actors attempt to promote their individual discourse to the status of hegemony. In praxis, this will aid in determining the interpretations of international law and targeted killings by both analysing verbal and oral expressions of opinion and of the actions that have perhaps altered the lawfulness surrounding targeted killings.

The discourses, in Laclau and Mouffe's understanding, are created through both expression and actions; indeed any social interaction can constitute an articulation and thus affect the discourse<sup>26</sup>. The process of articulation implies not only the passive social construction of discourses but rather actors can also consciously affect (articulate) elements or moments<sup>27</sup>. Thereby, through this approach to discourse analysis, it is possible to determine how actors attempt to influence the structures to alter the contemporary understanding, which is highly valuable when assessing the differing interpretations of international treaty and customary law.

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<sup>24</sup> Jørgensen & Philips, 2006: p. 60.

<sup>25</sup> Jørgensen & Philips, 2006: p. 86.

<sup>26</sup> Laclau & Mouffe, 1985: p. 111.

<sup>27</sup> Jørgensen and Philips, 2006: p. 39.

### 1.1.2 Criticism of discursive theory and practical use

Constructivism and discursive theory is often criticised for being abstract, normative and disconnected from empirical realities. Andrew Moravcsik provides one such criticism, which in summary points to the “*characteristic unwillingness of constructivists to place their claims at any real risk of empirical disconfirmation.*”<sup>28</sup>

This is, to a certain extent also true of the approach of Laclau and Mouffe, where critics have pointed to the weakness in their claim that no discourse will ever reach the status of hegemony<sup>29</sup>. According to this logic, one can never conclusively determine the effects of a given discourse, as it may be altered at all times by any actor. Therefore the use of Laclau and Mouffe in the present thesis will solely be based on the four key features presented above. Additionally, this thesis will make the claim that by determining these aspects of the discourses it becomes possible to evaluate current discourses of international customary law and evidently to use this information to project possible outcomes and consequences as a result of either discourse. In practice then, it becomes possible to determine the Obama-administration’s discourse on the legality of targeted killings as well as the future outlook for consequences for international customary law of such conduct.

An important demarcation in this regard, is that the discursive analysis of this thesis to some extent oversimplifies as it only covers two discourses struggling for hegemonic status. While it is perhaps justified to claim that the Obama-administration constitutes a united discourse, the alternative discourse is in this thesis constructed by scholars, journalists, politicians and officials of the UN all of whom differ in their critique of the Obama-administration and are therefore not, as such, united in a common alternative discourse. Crucially though, they come together on at least one issue, namely the call for an open debate on and the creation of a legal framework. In the Laclau and Mouffe tradition, this is described as the relation between the main discourse and the surrounding discursive field. The Critics discourse then, in effect, constitutes the discursive field.

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<sup>28</sup> Moravcsik, 1999: p. 670.

<sup>29</sup> Jørgensen and Philips, 2006: p. 67.

## 1.2 Methodological Challenges

### 1.2.1 Data and literature on Drone killings

The discursive analysis introduced above identifies two discourses; The Obama-administration and the Critics discourse. The literature used as a basis for said discourses is presented below.

When following the general debate on targeted killings by drone strikes the collection of data has posed a significant challenge. The inherent lack of accessible official documents and figures implies that the collection of such data needs to be made through more unconventional sources - unconventional at least in academic writing. Public media, such as the Long War Journal, The Bureau of Investigative Journalism, or The New America Foundation<sup>30</sup> specialize in reporting on issues of security and terrorism<sup>31</sup>. They therefore have access to sources on the ground or indirect sources through local media, for instance in Pakistan. Whilst useful, it has proven impossible to verify such information in other manners than simple comparison between as an example, the three major media mentioned above. Besides information obtained through media and academic scholars, the Critics discourse is based on reports by international institution officials. A pivotal contribution to the debate is thus found in UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Mr Philip Alston's report to the Human Rights Council<sup>32</sup>. This report is repeatedly cited in both academia and journalism and is arguably one of the strongest contributions to the Critics discourse claiming the unlawfulness of the American drone program.

The lack of official governmental documents on policies or guidelines for the conduct in drone warfare poses a similar challenge, as the determination of such policies of conduct has to be based on public speeches, leaked documents or journalistic interviews and

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<sup>30</sup> For a comprehensive evaluation of the three sources, see Stanford/NYU-report pp. 45-47.

<sup>31</sup> Stanford/NYU-report, 2012: pp. 45-47.

<sup>32</sup> A/HRC/14/24/Add.6, 28 May 2010.

analysis with key figures of, e.g. The Obama-administration. This is true also for the European countries and the attempt to determine official standpoints on drone warfare. As one of the key issues evaluated in this thesis is exactly the lack of such national or international legislation or guidelines, it logically becomes impossible to determine through official sources the domestic policies towards the issues.

A pit-fall in an analysis based on such sources is the impossibility of acquiring the primary sources of information, without travelling to the tribal areas of Pakistan or to the White House to conduct interviews with central personnel involved. Both options have been deemed beyond the scope of the work at hand. On this matter, the comprehensive study by Stanford and New York Universities concludes:

*“The foremost challenge the research team faced was the pervasive lack of US government transparency about its targeted killing and drone policies and practices in Pakistan.”*<sup>33</sup>

Throughout the research conducted it has continuously become clearer that the necessity of transparency, accountability, and openness for information and verification of the drone program is crucial.

### 1.2.2 Limitations

The invention and use of drones in armed conflict has not only spurred political, legal and strategic debates, but has also raised eyebrows amongst moral and ethical critics. The voices in the debate vary from B. J. Strawser deeming it unethical to *not* make use of drones as it lowers the overall risk of life<sup>34</sup> to the more traditional positions that there needs to be a reciprocity of risk within warfare in order for it to be morally justified war<sup>35</sup>. The heaviest weighing ethical argument is perhaps the rationality, which claims that the immense decrease in risk will lead governments to lower the threshold for engaging in

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<sup>33</sup> Stanford/NYU-report, 2012: p. 4.

<sup>34</sup> Strawser, 2010: p. 348.

<sup>35</sup> Kahn, 2002: p. 2.

warfare thus increasing the lethal strikes<sup>36</sup>. This temptation may in effect lead to the conduction of more unjust and unethical warfare. The decision to not engage in a further discussion of the moral and ethical consideration is based on the assumption that in ethical and moral terms, the drones do not differ much in comparison to the general development in warfare, exemplified through the fighter jet missions carried out recently in Libya. With anti-aircraft taken out, the risk was almost non-existent<sup>37</sup>, and therefore the moral and ethical considerations seem similar to those pertaining to drone warfare.

Finally, observers have pointed to the fact that it has always been the aim of fighting parties to limit the risk to their own combatants. As such, drones do not present a quantum leap in moral and ethical aspects of warfare. Therefore, as an advance in weapons technology drones are far less interesting than the actual usage of drones, and the legal, political and strategic guidelines, which should guide such use.

### 1.2.3 Conceptualisation

#### *Targeted killings by drone strikes*

The referral in this thesis to targeted killings and drone strikes pertains only to such operations undertaken outside of regular warfare. This therefore limits the thesis from discussing the use of drones in Afghanistan, Iraq or other countries in which parties are engaged in armed conflict. The definition of regular warfare is, however, hard to outline, as political opinion and legal interpretations differ. Therefore this thesis limits itself to analysing and evaluating drone strikes and targeted killings only in reference to states' counter-terrorism efforts. Instances of drones used for ground- or air-troops assistance will not be considered under the following legal, strategic, or political discussions.

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<sup>36</sup> Henriksen & Ringmose, 2013: p. 31.

<sup>37</sup> Henriksen & Ringmose, 2013: p. 31.

## Chapter 2

### 2.0 Contemporary status on the legality of targeted killings

*The following chapter defines the principal elements of international law in regards to targeted killing as a counter-terrorism strategy. The chapter sets out to formulate a legal framework for the conduct of targeted killing through drone strikes based on international treaty and customary law. The treaty law is presented through international legal documents, whereas the customary law is presented mainly through the American drone program. The aim of the section is to investigate hypothesis (1):*

The US drone program of targeted killing is conducted under violation of International law. The chapter sets out with a definition of basic concepts.

### 2.1 Conceptualisation

#### 2.1.1 The legal framework

In order to undertake an assessment measuring the temperature of the international sentiments on the legality of targeted killings, one must first embark on a conceptualisation of the term targeted killing. At the outset, a range of concepts of international law central to the issue of targeted killings will be presented. The vital legal distinction between peacetime and armed conflict is fundamental to understanding the nature of the debate. This stands in direct relation to the difference in categorising civilians and combatants – who is a legal target in war- and peacetime, respectively?

In essence, what is being investigated is who is allowed to target whom and under what circumstances. Are terrorists at war with nation states and thus combatants under the laws of war (Humanitarian Law) or are they international criminals to be tried as civilians and protected by Human Rights, the primary principles of peacetime? The following pages will shed light on the above issues through international legal documents from both

International Humanitarian Law and International Human Rights Law and from scholars and observers of the field.

### 2.1.2 Targeted Killing

Throughout the years, targeted killings have been referred to as assassinations, surgical strikes, executive action or the US military term “wet operation”.<sup>38</sup> Along with the expanded practise of such strikes the rhetoric has been altered into the more morally and ethically neutral term, targeted killing. But as Bryan Jenkins asked rhetorically in 1987 in his contribution to the issue, can one speak of an *unselective* assassination as opposed to the selective assassination?<sup>39</sup>

In the following section, a definition of the term targeted killing will be formulated. In order to fully grasp the contemporary discussions on such a definition, relevant academic scholars and professional observer’s contributions to the debate will be considered. For ease of reference the definition of targeted killing of this thesis will initially be presented following which the reasons for the wording will be discussed. Targeted killing in the context of this thesis refers to *the use of lethal force against an identified individual, not incarcerated, assassinated by and under order of a government command on extraterritorial grounds.*

The definition above includes the phrase “under order of a government command”. This has a very forthright reason as the evaluation of the lawfulness is conducted through international law, which is agreed upon between nation-states and is thus, at least normatively, binding only for states. The human rights aspect of international law seeks to protect the individual, and the focus on states as the alleged perpetrator thus seems merited. In other words, this definition disregards any targeted killings performed by non-state actors.

As a representative of the UN, Special Rapporteur Philip Alston has formulated a most comprehensive definition, which adds the element of the conducting agent claiming to act

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<sup>38</sup> Jenkins, 1987: p. 5.

<sup>39</sup> Jenkins, 1987: p. 5.

under “colour of law” and that said agent does not necessarily belong to a nation-state. *“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 custody of the perpetrator”*<sup>40</sup>

Whilst not in disagreement with the definition, it would seem counterintuitive to include that states act “*under colour of law*” as this is exactly the issue of disagreement; are the waged attacks lawful or not.

Human Rights Watch determines a targeted killing as the intentional lethal strike on behalf of a national government against an individual not incarcerated.<sup>41</sup> HRW distinguishes between legal and illegal targeted killings under IHL by separating acts undertaken in times of conflict and those in peace. This distinction is, as we shall see, not crystal clear within international law.

Gabriella Blum and Philip Heymann (2010) have contributed to the discussion of targeted killings, and among their definitions, one is supplemented by an interesting component. *“Targeted killing – the deliberate assassination of a known terrorist outside the country’s territory (even in a friendly nation’s territory, usually (but not exclusively) by an airstrike.”*<sup>42</sup>

The extraterritorial dimension becomes intriguing, as this is what triggers the discussion of overstepping the sovereignty of other nations by conducting military operations on their ground, as has been the case for the American drone programme thus far. When investigating international law, the international aspect is indeed pivotal to understanding for instance the principle of sovereignty. A final point of clarification revolves around the targeted individual not being incarcerated. This excludes examining the international legal aspects of executions and prisoner of war articles, which are not deemed relevant in the context of this debate.

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<sup>40</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 3.

<sup>41</sup> Human Rights Watch, 2011.

<sup>42</sup> Blum & Heymann, 2010: p. 1.



Still other scholars have contributed to the development of the concept of targeted killings, such as Kenneth Anderson (2009) and Nils Melzer (2009). Common for both these two and the ones mentioned above is the circling around the concept of intended lethality of the strikes against identified individuals.

Hence, in light of the above, for this research targeted killing is defined as *the use of lethal force against an identified individual, not incarcerated, assassinated by and under order of a government command on extraterritorial grounds.*

### **2.1.3 International law – customary nature of law**

International law consists of two aspects; namely treaty law and customary law.<sup>43</sup> Treaty law refers to the “*contractual stipulations entered into by two or more states, and only binding upon the contracting parties*”.<sup>44</sup> Customary law is on the contrary characterised by evolving “*through a spontaneous process and binding upon all international subjects.*”<sup>45</sup> This entails that both the agreed upon treaties and the actions of states are determining for how international law should be interpreted. In the perspective of targeted killings by drones no treaties of international law speak directly thereof. This in turn implies that the evaluation of the lawfulness of such strikes needs to be based on relevant treaties, and as importantly on the general conduct of states. But it leaves much room for interpretation by the individual states, and the consequence of the customary character of international law is determining as no one entity can conclusively determine the lawfulness of such attacks. Special Rapporteur Alston comments on this relation, stating that

*“To the extent that customary law is invoked to justify a particular interpretation of an international norm, the starting point must be the policies and practice of the vast majority*

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<sup>43</sup> Cassese, 2004: p. 6.

<sup>44</sup> Idem.

<sup>45</sup> Idem.

*of States and not those of the handful which have conveniently sought to create their own personalized normative frameworks.*”<sup>46</sup>

In this citation, Alston refers to the US, Russia and Israel, as the *handful*, which have, through their conduct, set new standards for international law.

This aspect is important to bear in mind, when setting out to define how international law determines the legality of targeted killings. A possible aspect therefore is as proscribed by Special Rapporteur Alston; namely that if un-counteracted, the *handful* may indeed succeed in influencing and re-shaping the framework of international law. The crucial effect of customary law underlines the importance of the on-going discursive conflict between the Obama-administration and the Critics as this may be defining for the future of international law.

## **2.2 Creating and Determining the Legal Framework for Targeted Killings**

The following section treats three of the main elements of international law; The Charter of the United Nations, The International Human Rights Regime, and International Humanitarian Law.

### **2.2.1 The Charter of the United Nations**

A crucial element of international law is found in the Charter of 1945 of the United Nations, initially under Article 2 paragraph 4, which states that

*“ 4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”*<sup>47</sup>

This principle of sovereignty between member-states essentially restricts any targeted killing on foreign soil. Only under two exceptions is one state allowed to surpass article 4;

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<sup>46</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 3.

<sup>47</sup> Charter of the United Nations, Chapter I, Article 2 paragraph 4.

namely if the second state consents to the armed intervention or if the first state is acting in self-defence. The self-defence exception additionally has two sub-conditions. Firstly, in direct self-defence, use of armed force is permitted if the second state is responsible for an armed attack against the first state. Additionally, response through armed force is permissible in the event that an armed attack is launched against the first state from within the territory of the second states, and importantly, the second state is either unable or unwilling to halt such an attack.<sup>48</sup>

Applied to the field of targeted killings, these principles entail that such operations are only legal if the ill-fated host country of terrorists invites another country to conduct lethal operations within its borders or if the host country fails to extinguish the threats originating from within its borders. An example for discussion was seen in the American operation to kill Osama Bin Laden. The act was undertaken in a foreign country without the knowledge and thus without the consent of the host country. Therefore a violation of article 2, paragraph 4. However, if one considers the condition of self-defence under article 51 it can be argued that Osama Bin Laden posed a grave threat and that he had furthermore launched an armed attack against the US. A further argument is that Pakistan was unable to answer to the threat of Osama Bin Laden by itself<sup>49</sup>, thus arguably legitimising the American intervention. The at times vague wording of the UN Charter complicates the determination of when countries are in violation of the Charter. An additional clause to the inherent right to self-defence lies in the proportionality and necessity of the state reacting with use of force.<sup>50</sup> These principles entail in broad terms that the military advantage of a violent operation must exceed the possible civilian and military loss of life – ensuring proportionality, and the attack must serve a strategic military aim – conditioning necessity. Two issues that remain undisclosed in discussions of self-defence in response to armed attack are the use of force against non-state actors and when it can be said that an attack from a non-state actor constitutes an “armed attack” within international law. With the

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<sup>48</sup> Charter of the United Nations, Chapter VII, Article 51.

<sup>49</sup> Barnidge, 2010: p. 417.

<sup>50</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 3.

emergence of dangerous non-state actors most significantly in terrorism and the asymmetrical warfare that characterises terrorists' modus operandi it becomes difficult to conclusively determine whether a targeted killing is a lawful response. A final complication arises when terrorists are targeted and killed for planning attacks, which could perhaps comprise an armed assault. Can the mere planning of a terror-attack constitute an imminent threat? As shall be presented later, such interpretative questions predictably have differing answers.

These provisions from the UN Charter were formulated with the aim of restoring and indeed preserving global peace. Once such a peace is broken, other components of international law are to be applied when transferring from *jus ad bellum* to *jus in bello* – guided by international human rights law and international humanitarian law. The rules and principles for going to war as opposed to the rules and principles guiding conduct once at war. One can therefore imagine a scenario under which the reasons for going to war are just – adherence to *jus ad bellum*, but where the parties to the armed conflict violate the laws of war – *jus in bello*. And of course, vice versa.

Subsequently, when assessing whether a targeted killing is lawful under *jus ad bellum* two birds are hit with one stone. It is both determinable whether the targeted killing is part of a just war and whether the operation is to be conducted in an internationally recognised armed conflict or if it is indeed an attack conducted in peacetime. This distinction consequently defines whether human rights principles or humanitarian law should guide actors as to the legality of the targeted killings. This is, however, not to say that human rights are obsolete in times of armed conflict. The legal principle of *lex generalis* ensures that human rights are globally binding at all times. Only in cases where extraordinary protection is needed in times of conflict does the *lex specialis* clause request the application of international humanitarian law<sup>51</sup>. This, in turn, implies that humanitarian law is complimentary to human rights law, if citizens enjoy a better protection in this manner.

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<sup>51</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 10.

The principles relevant to targeted killings of both international human rights and international humanitarian law are presented below in order to complete the framework of international law for the employment of targeted killings.

### 2.2.2 International Human Rights Law

International Human Rights law consists of a broad range of global, international and national regulations and treaties that in sum formulate what is referred to both here and in general as Human Rights. The most significant set of rules are those formulated under the auspices of the United Nations in 1948, namely the Universal Declaration of Human Rights (UDHR). The UDHR was complimented in 1966 by the two covenants on Economic, Social and Cultural Rights (ICESCR) and on Civil and Political Rights (ICCPR) respectively, thus completing what is commonly referred to as the International Bill of Human Rights. Focus when contemplating on the legality of targeted killings most naturally falls on the UDHR and especially on the right to life. Nonetheless the ICCPR provides more comprehensive definitions of the articles put forth in the UDHR, and will thus be the subject of attention in this chapter. This relation is exemplified in the right to life, as the simple “*everyone has the right to life*”<sup>52</sup> in the Universal Declaration merely protects the taking of life in general, whereas the ICCPR provides a more comprehensive coverage supported also by the supplementary articles of the document. In article 6, paragraph 1 the wording elaborates that no one should be arbitrarily deprived of their life<sup>53</sup>. Arbitrarily refers to the fact that a lethal operation in accordance with human rights may only take place as per defined in the international legislation. This entails that “*only in matters of self-defence or immediate necessity of saving more lives*”<sup>54</sup> is a lethal operation lawful. If a government thus conducts a lethal operation it would have to prove that such an

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<sup>52</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948: Article 3.

<sup>53</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948: Article 6,1.

<sup>54</sup> Blum and Heymann, 2010: p. 2.

operation was indeed the last resort. This entails legal proceedings and the right “*to a fair and public hearing by a competent, independent and impartial tribunal established by law*”<sup>55</sup> as prescribed under Article 14 of the ICCPR – the right to a fair trial. At the very least, the deprivation of life must not take place outside of established law and under the oversight of an impartial judicial process. The International Human Rights principles thus leave little leeway for the conduct of lethal operations and targeted killings. The nature of the relationship between the conducting government and the targeted persons becomes one of a criminal case when treated under human rights law in peacetime.<sup>56</sup> This makes it very hard if not impossible for governments to argue for the legitimacy of targeted killings while still adhering to international human rights standards. This is very likely the reason for the reluctance amongst governments conducting lethal operations to refer to human rights.<sup>57</sup> By labelling the struggle against terrorism as an armed conflict, the stricter legal bindings of the right to life are avoided - a theme, which will be discussed and analysed in a later section of this writing.

The right to life in peacetime thus seems too robust to avoid in legitimising targeted killings. The aforementioned Alston report of Special Rapporteur Philip Alston concludes along the same lines when arguing “*a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal.*”<sup>58</sup>

Other elements of the Human Rights principles are also relevant to targeted killing by drones. In 2012, the International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law undertook an investigation in which they conclude that several other articles of the ICCPR are of the utmost relevance in defining targeted killing’s legality, namely: Article 7 on the prohibition on cruel, inhumane, and degrading treatment or punishment; Article 9.1 on the right to liberty and security;

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<sup>55</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966: article 14.

<sup>56</sup> Walter et al., 2003: p. 5.

<sup>57</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 11.

<sup>58</sup> *Idem*.

Article 17 on the right to freedom from arbitrary or unlawful interference with privacy, family and home and Articles 21 and 22 on the right to peaceful assembly and of association<sup>59</sup>. This in effect leads the authors of the report to definitively conclude that targeted killings can by no means be lawful under human rights provisions.<sup>60</sup>

The right to peaceful assembly and the right of association, the report claims, comes under attack, when “*drone strike practices cause individuals to fear assembling in groups [...] out of concern they might be assumed to be engaged in suspicious activity [...]*”<sup>61</sup> and thus innocent individuals become indirectly targeted. Another such case of possible violation is found in the reaction among the local population in areas, which have been targeted by targeted killings via drone-strikes. This is especially true for the FATA-province of Pakistan, where studies show that the local population becomes anxious and frightened when they hear the humming sound of an Unmanned Aerial Vehicle hanging high above them in the air<sup>62</sup>. Through interviews with citizens of the most targeted areas in Pakistan it has become clear that the ever-present possibility of a drone strike causes psychological pressure to an extreme degree.<sup>63</sup> Both articles 7, 9.1 and 17 as mentioned above are potentially violated in such a situation, as living in fear of your life quite possibly constitutes a violation of the right to security and may be an overstepping of the prohibition against cruel, inhumane, and degrading treatment as proscribed in article 7. The jurisprudence of international human rights law has proven several times that threats of a psychological nature qualify as inhumane treatment and thus a violation.<sup>64</sup>

Finally, human rights are violated insofar as states committing lethal operations against individuals are required to ensure they meet their legal obligations in operating transparently and to ensure accountability for alleged rights abuses. A lack of transparency and accountability may lead to a “*virtual and impermissible license to kill*”<sup>65</sup> for states, in

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<sup>59</sup> Stanford/NYU-report, 2012: p. 118.

<sup>60</sup> Stanford/NYU-report, 2012: p. 117.

<sup>61</sup> Stanford/NYU-report, 2012: p. 117.

<sup>62</sup> Stanford/NYU-report, 2012: p. 24.

<sup>63</sup> International Crisis Group, 2013: p. 11.

<sup>64</sup> Imseis, 2001: pp. 328-332.

<sup>65</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 26.

the words of Special Rapporteur Alston. Within the framework of the United Nations the Economic and Social Council Resolution 1989/65 of 24 May 1989 sets the guiding principles for this aspect of human rights. On transparency, the Annex of the resolution conditions in article 9,

*”there shall be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions [...]”*<sup>66</sup>

Same resolution dictates that a clear chain of command be established so as to ensure accountability for any actions leading to the extra-legal, arbitrary or summary executions, and the resolution underlines that nothing, even in circumstances of armed conflict, allows for derogations from such principles<sup>67</sup>. Within the European jurisprudence a ruling from the European Court of Human Rights stated that *“there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities’ adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.”*<sup>68</sup>

The international law is thus clear on a point, which may stand out as mere logic; namely that in determining whether an act of lethal aggression is lawful it is essential to have access to the circumstances and details of such an attack, to be made aware of the orchestrator of the attack, and to determine the reasons for the launch of the attack. The significance of accountability and transparency becomes manifold more important once civilian casualties are involved in such an attack.<sup>69</sup> International human rights thus also provide guidelines as to the legal obligations countries must meet to operate transparently and to ensure accountability for alleged rights abuses.

In summary, International Human Rights principles leave little room for the legal conduct of a targeted killing in counter-terrorism efforts. For an operation of such a nature to be lawful it would entail that the government in question was in fact pursuing the last possible option in assassinating a known individual, thus acting either in self-defence or in an

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<sup>66</sup> Economic and Social Council Resolution 1989/65 of 24 May 1989.

<sup>67</sup> Economic and Social Council Resolution 1989/65 of 24 May 1989.

<sup>68</sup> *Anguelova v. Bulgaria*, 38, 2008, European Court of Human Rights.

<sup>69</sup> Stanford/NYU-report, 2012: p. 123.



attempt to save more lives due to, for instance, an impending attack. Such a scenario is far from unthinkable if a given state has information of an individual contemplating on a terrorist attack, which would potentially claim the life of many innocent. However, following such an attack, an independent and thorough investigation and the presentation of evidence would be necessary to ensure accountability and transparency for targeted killings.

### 2.2.3 International Humanitarian Law

#### *Introduction*

International Humanitarian Law guides and regulates conduct in armed conflict and bases itself on the Geneva Convention and its two additional protocols; the Hague regulations and the Customary rules of war.<sup>70</sup> IHL is often referred to as the laws of war and was created to regulate warfare, *jus in Bello*.<sup>71</sup> In *De Jure Belli ac Pacis*, Hugo Grotius in 1625 formulated what many observers have referred to as the theoretical foundation for the creation of humanitarian law.<sup>72</sup> The result came about in 1864 when the International Committee for the Red Cross initiated the first Geneva Convention, which had as its primary aim to protect the combatants, who often died in the thousands, wounded in the field.<sup>73</sup> With the Geneva (and Hague) rules developed over the years, and especially after World War Two, focus shifted to also include the protection of civilians in hostilities. The expansion of the Geneva rules in 1949 supplemented the first and second convention on the protection of the wounded and sick during land-based warfare and naval battle respectively.<sup>74</sup> Finally, convention III and IV included protection of prisoners of war and the protection of civilians in hostilities.<sup>75</sup> These four conventions form the backbone of the Geneva Convention also referred to as the Red Cross Conventions.

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<sup>70</sup> Committee of the Red Cross Denmark, 2004: 5.

<sup>71</sup> Committee of the Red Cross Denmark, 2004: 5.

<sup>72</sup> Melzer, 2009: p. 3.

<sup>73</sup> Melzer, 2009: p. 4.

<sup>74</sup> International Committee of the Red Cross (ICRC), *Geneva Convention I-IV*, 12 August 1949.

<sup>75</sup> Committee of the Red Cross Denmark, 2004: p. 7.

### *Non-international armed conflict*

The Geneva Convention has been supplemented by additional protocols over time as a result of the technological development and the general development of the nature of warfare. One such supplement is in particular important when discussing the theme of targeted killings, as additional protocol II to the Geneva Conventions speaks of the guiding principles for non-international armed conflict. While Common Article 3 of the Geneva Convention mentions armed conflict of non-international character, the additional protocol clarifies and in many aspects strengthens the definition of non-international conflict and determines the possible parties to such. The intention of the protocol was initially to regulate national civil wars that had reached a certain level of intensity.<sup>76</sup> Today, however, the non-international armed conflict constitutes an important component when determining the legality of targeted killings. In practice, it has been interpreted as a way to define the geographical scope of armed conflict in the asymmetrical warfare that characterises terrorism.

If one accepts the premise of counter-terrorism constituting a struggle against combatants in an asymmetrical non-international armed conflict, International Humanitarian Law presents the principles to which parties to the armed conflict must adhere. In the following section four elements of IHL will be disclosed, as they aid in determining when a violent operation within an armed conflict is indeed lawful. Initially, the determining factors of when a conflict reaches a level of intensity needed to be labelled an armed conflict according to IHL. Next, it will be determined who can be targeted in an armed conflict, namely the distinction between civilian and combatant. Thirdly, it is important to consider who is entitled to wage attacks in an armed conflict. And finally, the principles of proportionality and necessity of attacks in armed conflict will be reviewed. In the context of targeted killings, this will provide insight into whether the war on Al Qaeda classifies as an armed conflict, whether the association of an individual with Al

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<sup>76</sup> Committee of the Red Cross Denmark, 2004: p. 7.

Qaeda or Taleban qualifies for the status of combatant, and whether the CIA is legally accepted to conduct lethal attacks in extraterritorial areas.

### *Armed Conflict and targeted killings*

In essence, three differing possibilities exist for armed conflict within humanitarian law. Firstly, the conflict is categorized as an international armed conflict, determined by “*any difference arising between two States and leading to the intervention of armed forces*”.<sup>77</sup> Furthermore, an international armed conflict involves “*total or partial occupation of the territory of a High Contracting Party [to the Geneva Conventions]*.”<sup>78</sup> This in turn implies that an international armed conflict cannot consist of a state and a non-state actor. This is, however included in the second type of conflict, namely the non-international conflict described under common article 3 of the Geneva Conventions and expanded upon in Additional Protocol II.

A non-international conflict is conditioned under two main factors; it must meet a certain threshold of violence, which is determined by the intensity and duration of said violence. And secondly, a range of categorisation principles for the non-state actor must be met.

### *Non-state armed group*

According to the Additional Protocol II the non-state armed group must be identifiable through referral to a set of criteria. These criteria include a chain of command and a structure within the group to ensure a level of organisation, which enables the group to conduct continued and coordinated military operations.<sup>79</sup> The organisational level of the group must thus be at a level, where the group is itself able to adhere to the Geneva

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<sup>77</sup> International Committee of the Red Cross (ICRC), *Geneva Convention I-IV*, 12 August 1949, Common Art. 2(1).

<sup>78</sup> International Committee of the Red Cross (ICRC), *Geneva Convention I-IV*, 12 August 1949 Common Art. 2(2).

<sup>79</sup> Additional Protocol II to the Geneva Conventions, Article 1.

Conventions and to engage in agreements with the government state to mutually comply with the Geneva standards.<sup>80</sup> Furthermore the group must be partaking in armed and collective anti-state action.<sup>81</sup>

### *Threshold for acts of violence*

According to a commentary of the International Committee for the Red Cross the threshold for the intensity and duration of the violent actions constituting an armed conflict is set relatively higher in comparison to an international armed conflict.<sup>82</sup> The violence must thus supersede the “*level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.*”<sup>83</sup> Considering the jurisprudence of international law on the matter, the International Criminal Tribunal for the Former Yugoslavia (ICTY) case *Prosecutor v. Tadic*, concluded by determining an armed conflict as the “*resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*”<sup>84</sup>

In relation to acts of terrorism this thus entails that the violence must be structured and collectively orchestrated to not merely classify as a sporadic act of violence. The debate of whether or not terrorism can be labelled as an act of a non-international armed conflict is vigorous, and includes the view of Kelisiana Thynne, legal adviser at the International Committee of the Red Cross (ICRC), who notes that terrorist attacks “*over a period of time that may themselves be relatively minor if carried out in a systematic way, can result in their being determined part of an armed conflict or establishing an armed conflict.*”<sup>85</sup> Thynne continues to, argue that “*the armed conflict is occurring within and as a result of*

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<sup>80</sup> International Committee of the Red Cross (ICRC), *Geneva Convention I-IV*, 12 August 1949, Common Art. 3.

<sup>81</sup> *Idem.*

<sup>82</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 17.

<sup>83</sup> Additional Protocol II to the Geneva Conventions, Article 1.

<sup>84</sup> *Prosecutor v Tadic*, ICTY Case No. IT-94-1-T, 2 October 1995.

<sup>85</sup> Thynne, 2009: p. 161.

*the war in Afghanistan, al-Qaeda and the US are parties to that armed conflict, with the conflict being a non-international armed conflict.”*<sup>86</sup>

### *The geography of non-international armed conflict*

Thynne thereby introduces a new element to the debate as the definition and perhaps limitation to a non-international armed conflict has revolved around a geographical confinement. A non-international armed conflict has inherently taken place within the auspices of a national government combating an internal non-state group. While Thynne considers the conflict to be the result of the US invasion of Afghanistan and the targeting of the Taleban, other scholars view the war in Afghanistan as the US government lawfully responding to the violent action, 9/11, of a non-state group, Al Qaeda, but in a 3<sup>rd</sup> party country. As Eyal Benvenisti (2010), argues the “*transitional warfare [...] or armed conflicts between state military forces and foreign non-state actors that take place beyond state borders*”<sup>87</sup> have changed the reality and thus the political and legal means to defend should change accordingly. The wording in the Additional Protocol II of the Geneva Conventions convey that the territory is restricted to that of “*a State and between the State’s own armed forces and the non-state group.*”<sup>88</sup>

The latter definition does without a doubt leave a legal vacuum to be filled as it hardly contains the legal language to set the definition for conflicts between a nation-state and a terrorist organization operating in a 3<sup>rd</sup> party foreign country. It is perhaps for this reason that a wide gap exists between the interpretations of differing scholars, government officials and international institutions.

The International Humanitarian Law applicable to targeted killings as a response to terrorist attacks or threats is in sum found in the definition of a non-international armed conflict. This implies that the conflict in question must reach a threshold in terms of the intensity of the violence and the duration. Furthermore, the conflict must consist of a state and a non-

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<sup>86</sup> Thynne, 2009: p. 161.

<sup>87</sup> Benvenisti, 2010: p. 339.

<sup>88</sup> Additional Protocol II to the Geneva Conventions, Article 1.

state group with minimum requirements for the group's organizational structure and capabilities. Finally, the geographical confinements of a conflict are defined, yet highly disputed within customary international law.

### *Terrorists as civilians or combatants?*

Terrorists have conventionally been a disputed topic within international law, with a basis in the term, "one man's terrorist is another man's freedom fighter", implying that unity at the international level is hard to find on this topic.<sup>89</sup> In domestic law, however, terrorism is commonly classified as a criminal act rather than an act of war.<sup>90</sup> To the individual terrorist this entails that International human rights and domestic laws dictate lawful actions to be taken against the terrorist. The literally vital importance of this fact for the terrorist is found in the prohibition of arbitrary deprivation of life. Under *jus in bello* regulations, IHL, such protection is removed if the terrorist is classified as a combatant. In order for a terrorist to become a combatant, he or she needs to belong to a non-state group party to a non-international armed conflict. This is conditioned by the Geneva Conventions under the criteria outlined above. Through a commentary of the International Committee of the Red Cross in 1960 the concept of groups belonging to a party to a conflict is expanded upon. It thus states that in practice in order for a non-state group to be a party to a conflict it is determining that the group "*conducts hostilities on behalf and with the agreement of that party.*"<sup>91</sup>

But if a non-state group is said to operate globally then it is important to clearly define how this group is knit together. In the example of Al Qaeda one observer, Noam Lubell notes that Al Qaeda has been described as anything from a group, to a network of groups, to a network of networks and even as a mere shared ideology across borders. This becomes problematic, argues Lubell:

*"Accumulating all acts described as terrorism, and its supporters, into a single armed*

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<sup>89</sup> Walter, 2003: p. 11.

<sup>90</sup> Walter, 2003: p. 5.

<sup>91</sup> Melzer, 2009: p. 23.

*conflict on the basis of shared ideology is akin to claiming that [during the Cold War] anyone, or any group, suspected of holding Communist opinions, anywhere around the globe, would also be seen as party to the conflict.”*<sup>92</sup>

If a targeted killing is conducted by the US in Pakistan, Yemen or Somalia, it thus becomes the task for the US to argue that this is indeed an attack launched against a non-state group party to a non-international armed conflict with the US. Paraphrased; Firstly, are the attacks, conducted by Al Qaeda and Taleban, committed under a responsible chain of command? And secondly, is this organisational framework able to sustain and concert violent operations of certain intensity? Critics claim that the lack of centralization and organization behind some of the attacks conducted by the two terror-organizations should oppose the existence of a non-international armed conflict.<sup>93</sup>

A final word on the status of either civilian or combatant concerns the status of civilians in *direct participation in hostilities*. This refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. The distinction between civilian and combatant is not made when addressing the violent act constituting the hostilities, but rather becomes important when considering the time frame for the hostilities. It is thus based on the difference between “*temporary, activity based loss of protection*” of the civilian due to direct participation and “*continuous, status or function-based loss of protection*” as a result of the status of combatant.<sup>94</sup> This thus entails that a civilian may be targeted only for the period of direct participation in a violent act. The scope for an act of hostility is constituted by the act itself but also includes *measures preparatory* to the act.<sup>95</sup> This has fundamental implications for the counter-terrorist element of targeted killings, as they are often conducted in a pre-emptive manner so as to quell the terror threat before it becomes a terror act.

To summarize, it is thus not enough to establish a conflict as a non-international armed conflict to legitimize targeted killings. It is further demanded that the targeted groups do

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<sup>92</sup> Lubell, 2010: p. 120.

<sup>93</sup> Stanford/NYU-report, 2012: p. 111.

<sup>94</sup> Melzer, 2009: pp. 44-45.

<sup>95</sup> Melzer, 2009: pp. 19-20.

indeed belong to a united group that constitutes a non-state group and a party to the conflict. If this condition is not met, the targeted killings are launched against non-combatants, who are automatically civilians guarded by both IHL and human rights.

#### **2.2.4 Conclusion**

This chapter set out to establish a legal framework for the determination of the legality of targeted killings in a hypothesis, which states that the US drone program of targeted killing is conducted under violation of International law. The chapter has revealed the complexity of the targeted killings as a legal issue. Rather than definitively concluding that the US program is unlawful, the chapter outlined the legal conditions, which must be met to lawfully conduct targeted killings.

First and foremost, the principle outlined in article 51 of the United Nations Charter dictates the conditions for the use of force between nations. The use of force is permissible if in self-defence against an imminent threat. The discussion then relates to whether Al Qaeda and Taleban pose imminent threats to the US.

Relating to human rights, the outlook for legal operations of targeted killings in counter-terrorism efforts seems limited. Government assassinations are outlawed except for the acts of self-defence or in the act of hindering the loss of more lives through an imminent attack. While such a scenario is most likely when combating terrorism, an important issue cannot be overlooked; namely the transparency and accountability required by human rights for a lethal operation to be lawful. This entails the presentation of evidence that an imminent attack was indeed deterred and the accountability to ensure that in the case of a wrongful lethal strike, the responsible perpetrators are identifiable.

International Humanitarian Law presents a more lenient legal framework for the killing of terrorists, if such killings are undertaken within the framework of an armed conflict. To the definition of an armed conflict, several conditions must be met: the violence of the conflict



must reach a certain threshold exceeding sporadic acts of violence. Furthermore, the parties to the conflict are well defined. This demands of a terrorist organisation a certain level of coordination, a unified structure and a clear chain of command within the organisation. It is questionable whether Al Qaeda as a global network meets the requirements to be classified as a non-state armed group. This further relates to the definition of terrorists as either civilians or combatants, which relies on the individual terrorist's direct participation in violent acts during which time the terrorist becomes a legal combatant – but only during such time as he/she is directly participating in hostilities. Through determining the legal parameters to abide by when conducting lethal operations as part of counter-terrorism strategies, it becomes apparent that it is crucial to establish transparent and accountable standards in order to ensure all other elements of international law. Only in this manner will it become possible to determine the lawfulness of targeted killings by drones in relation to human rights, humanitarian law and the Charter of the United Nations.

## Chapter 3

### 3.0 Discourses of international law; *the Obama-administration and the Critics*

*This chapter engages in a discursive analysis, which identifies the two major strands of interpretation of international law and targeted killings; the Obama-administration and the Critics. The following will further entangle in the struggle of these two discourses to determine whether the Obama-administration is successful in constructing a discourse of the legality of drone killings, thus engaging the hypothesis:*

(2) The US drone Program of targeted killing is continuously altering the norms of international customary law.

*The chapter will conclude by evaluating, through the established legal framework, the legality of the American drone program.*

The chapter initiates by considering the Obama-administration discourse, which is established both through legal interpretations, the conduct in the field, and the rhetoric of the Obama-administration when addressing the issue of targeted killing as a counter-terrorism strategy.

#### 3.1 The Obama-administration: Interpretation of International Law

Following the attacks on the World Trade Centre in 2001, the American Congress passed a bill intended to equip the leadership of the US with the necessary tools to strike back against the terrorist perpetrators – The Authorisation to Use Military Force (AUMF)<sup>96</sup>.

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<sup>96</sup> American Congress, September 18 2001.

Section 2 paragraph a) of said document reads: *“That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”*<sup>97</sup>

At first glance, this very short piece of legislation states the obvious; the American President is authorised to use force to bring the terrorists responsible for the 9/11 attacks to justice. The aim is just as clearly described – *preventing* the perpetrators from ever conducting their horrendous attacks against the US again. The war in Afghanistan was one such use of force aimed at deteriorating the Taleban and removing the terror-nests and disrupting terror networks. What does, however, make this congressional bill interesting and most relevant today, 12 years later, is that it is the cornerstone of legal justification for drone attacks committed in Pakistan.<sup>98</sup> In practice, this has entailed that when on April 17<sup>th</sup> 2013, five men, suspected Taleban militants, were reported to have been killed in an American drone-strike in South-Waziristan, Pakistan<sup>99</sup>, the President was allegedly exercising his power to prevent attacks against the US, by targeting persons or nations who have links to those behind the 9/11 attacks or who were engaged in terror-plots against the US.

Herein lays three pivotal points to understanding the question of legitimacy of such a drone strike; the geographical span has silently expanded to include Pakistan (and Yemen and Somalia). A targetable person is anyone with links to Taleban and Al Qaeda in general, thus not specifically linked to 9/11. And finally, the time scope of the bill has far out-dated bringing the 9/11 perpetrators to justice. This last point is most strongly marked by the

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<sup>97</sup> American Congress, September 18 2001.

<sup>98</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 8.

<sup>99</sup> Rogio, 2013. \*(The \* indicates journalistic articles without page-numbers – here and throughout footnotes)

killing of Osama Bin Laden in 2011, which would expectedly mark the end of the hunt for the 9/11-terrorists, but the drone killings have continued throughout both 2012 and 2013.<sup>100</sup> During a hearing in the American Senate in May of 2013, the practice of the Obama-administration was to some extent exposed by assistant Secretary of Defence, Michael Sheehan. He thus claimed that the battlefield has indeed been extended to include anything from “*Boston to FATA (The Federally Administered Tribal Areas, Pakistan)*”<sup>101</sup>. The Assistant Secretary of Defence continued by stating that organisations with links to Al Qaeda but not to 9/11 would also be considered valid targets if “*defence officials determined the group was becoming a threat*”.<sup>102</sup> To further disconnect the AUMF legislation from the initiating 9/11 attacks, Michael Sheehan confirmed that even individuals born post 9/11 could become valid targets following their commitment to a group associating with Al Qaeda. To conclude, Sheehan declared that the war on terror and thus the significance of the AUMF would continue until Al Qaeda has been consigned to “*the ash heap of history*”<sup>103</sup>. Such comments from an Obama-administration official and the drone programmes in themselves testify to the underlying legal policy of the White House.

### **3.2 The Obama-administration: Conduct in the Field**

The discursive analysis undertaken is based on the social interactions consisting of both the actions and the spoken and written words of the Obama-administration and of its counterpart in the Critics discourse. To initiate, the actualities of the American drone program will therefore be presented.

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<sup>100</sup> The Bureau of Investigative Journalism, The Long War Journal, The New America Foundation.

<sup>101</sup> McAuliff, 2013.\*

<sup>102</sup> McAuliff, 2013.\*

<sup>103</sup> McAuliff, 2013.\*

### 3.2.1 The praxis – who, where, why?

“Ten years ago [in 2002], the United States Air Force successfully launched a missile from a Predator drone for the first time at a test range in the Nevada desert.”<sup>104</sup>

This initiated a practice of drone strikes, which today, in 2013, has killed 3000 people.<sup>105</sup> Among them, as Table 1 below illustrates, more than 400 civilians have lost their lives. The number of casualties and the amount of strikes has raised concerns from observers who have questioned the strategic, legal and political structure behind the practice. Who is eligible to be placed on a “kill list”, how are civilians characterised in the struck areas, and what are the grounds and reasons for killing the targeted individuals? The lack of any official documents or guidelines has led to speculations as to what the American drone program bases its actions on, and Micah Zenko (2013) of the American Council on Foreign Relations has collected a range of said suppositions of the American strategy.<sup>106</sup>

One of the most debated issues of the US drone strikes relates to the signature strikes performed by the US. These strikes reportedly target individuals or groups, which bear resemblance to Al Qaeda or Taleban<sup>107</sup>, which “*in effect counts all military-age males in a strike zone as combatants . . . unless there is explicit intelligence posthumously proving them innocent.*”<sup>108</sup> US government officials have categorically refused to comment on the conditions for the distinction between civilian and combatant during drone strikes. It has therefore yet to be denied by US officials, when reports suggest that any male in “*military age*” killed in drone strikes is considered legal targets and not civilians.<sup>109</sup> Such a categorisation has obvious impacts on statistics of civilian casualties, leading to public media estimates up to 10 times higher than those of the official US government numbers.<sup>110</sup>

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<sup>104</sup> Cole, 2012: p. 1.

<sup>105</sup> The Statistics in Table 1 are based on the reporting of the Long War Journal, The Bureau of Investigative Journalism and the New America Foundation up until the end of 2012.

<sup>106</sup> Zenko, 2013: p. 12.

<sup>107</sup> Schmitt & Sanger, 2008\*

<sup>108</sup> Zenko, 2013: p. 12.

<sup>109</sup> Zenko, 2013: p. 12.

<sup>110</sup> Zenko, 2013: p. 13.

Another issue concerns the so-called “kill-lists” of especially the CIA targeted killings. The covert nature of the work of the CIA prohibits any insights to criteria for naming alleged terrorists on said lists, which casts doubt on the claim by the US government that only Al Qaeda and Taleban senior operatives constitute legitimate targets.<sup>111</sup>

The conduct of the Obama-administration of targeting terrorist in drone strikes thus constitutes a crucial element of the construction of the discourse. The longer such operations are carried out the more determining they may become for the conduct of American administrations to come.<sup>112</sup> The conduct constitutes only one of the elements in the construction of a discourse of the Obama-administration. In the subsequent section, the rhetoric of the Obama-administration and their influence on the discourse will be presented and discussed.

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<sup>111</sup> Department of Justice Whitepaper, 2013.

<sup>112</sup> Anderson, 2009: p. 4.

Source/Year	Number of Strikes	Total Killed	Number of Civilians Killed
<i>Pakistan</i>			
NAF	340	2.572	175
2004-2007	10	178	101
2008	36	282	25
2009	54	536	25
2010	122	818	14
2011	72	483	6
2012	46	177	5
<i>LWJ</i>			
2004	1		
2005	1		
2006	3	142	20
2007	5	73	0
2008	35	317	31
2009	53	506	43
2010	117	815	14
2011	64	435	30
2012	46	304	4
<i>TBIJ</i>			
	358	3.019	681
<i>Yemen</i>			
NAF	42	655	44
LWJ	59	386	82
TBIJ	59	724	54
<i>Somalia</i>			
TBIJ	17	114	8
<b>Average Total</b>	<b>411,33</b>	<b>3.430</b>	<b>401</b>

Sources: *New American Foundation (NAF)*  
*Long War Journal (LWJ)*

### 3.3 The Obama-administration: Rhetoric Defence of Targeted Killings

This next section offers an analysis of the main traits of the Obama-administration discourse on the lawfulness of its drone program. In the Laclau and Mouffe tradition<sup>113</sup>, the discursive analysis will determine key moments that come together to formulate an overall contraption of the Obama-administration discourse. To do so, the analysis will comprise of available official documents, speeches and commentaries of the Obama-administration, and scholars and observers who favour the lawfulness of the drone program.

#### 3.3.1 Self-defence

As stated earlier, the official documents explaining the legal framework for the Obama-administration's use of drones and targeted killings are indeed limited. Publicly, the President and officials have referred mostly to the right to self-defence, which is, besides the UN Charter, founded on the Authorisation to Use Military Force (AUMF).<sup>114</sup> However, when in spring of 2013 NBC News acquired a document leaked from the Department of Justice this constituted a major insight into the legal foundation for the Obama-administrations conduct.<sup>115</sup> The document speaks mainly of the conditions under which an American citizen may be lawfully targeted, but moreover, it addresses many of the issues pertaining to targeted killings by drones in general. Three main conditions are outlined in the Department of Justice White Paper (henceforth "the Whitepaper");

*“(1) an informed; high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States.*

*(2) Capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and*

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<sup>113</sup> See infra p. 15.

<sup>114</sup> American Congress, September 18 2001.

<sup>115</sup> Department of Justice White Paper.



*(3) The operation would be conducted in a manner consistent with applicable law of war principles.”<sup>116</sup>*

In the following, point (1) and (3) will be the field of further research as they constitute two of the main arguments in the Obama-administration discourse; namely the referral to an imminent threat and the claim to the drone strikes being conducted consistent with laws of war - humanitarian law. A few words concerning point (2) are, however, in order, as it makes the claim that targeted killings are only permitted when capture is impossible. The legitimising effect of this condition is challenging to determine, as only a closed circuit of officials have access to the classified information, which leads to the conduct of a strike. In essence, it is indeterminable for anyone outside of the Obama-administration to determine the feasibility of the capture of an alleged terrorist killed in a drone strike.

### **3.3.2 The imminent threat of terrorism**

The referral to “imminent threats” has been a crucial moment in the creation of the Obama-administration’s discourse, as exemplified in Counter-terrorism advisor to the Administration, John Brennan’s urge to a “*more flexible understanding of imminence*”.<sup>117</sup> In the White Paper, the Department of Justice argues that a re-definition of “imminence” is required to respond to the different and novel threat, which terrorists pose. By referring to the case of 9/11 the White Paper presents the argumentation that if the U.S. had to “*refrain from action until [the terrorist’s] preparations for an attack are concluded*” it would not allow for the time to successfully counter and prevent such an attack.<sup>118</sup> Furthermore, imminence must, in the White Paper definition, integrate an understanding for the limited window of opportunity for counter-strikes, the attempts to limit civilian casualty, and the

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<sup>116</sup> Department of Justice White Paper, 2013: p. 1.

<sup>117</sup> Cited in Human Rights Watch, 2011: p. 7.

<sup>118</sup> Department of Justice White Paper, 2013: p. 7.

possibility of preventing future attacks against the US.<sup>119</sup> In practice, an Al Qaeda operative who has continuously been involved in the plotting of attacks is lawful even if said individual is not undertaking concrete action at the time of an attack. This is due, is the argumentation, to the small window of opportunity for a successful strike. This brings forth the next central point of the White Paper, namely the adherence to laws of war.

### 3.3.3 The laws of war

One of the claims of the Obama-administration discourse has been that international law in many aspects fail to grasp the new threats and challenges of terrorism<sup>120</sup>. Asymmetrical warfare requires asymmetrical defence, seems to be the mantra, which points to the outdated character of international law with regards to responding to the global terror threat. Robert P. Barnidge Jr., professor at the University of Reading argues that this legal vacuum in which “*international law kinetically pivots between State practice of the past and the dilemmas of the present*” ought not to hinder states in responding firmly to violent attacks.<sup>121</sup> A similar thinking is found in Henriksen & Ringmose (2013) as they argue that the international legal framework changed following 9/11. Although the international treaty law did not grasp the relation of violence between a state and a private actor such as terrorism groups, they argue that customary law responded to this new threat by, at least under certain conditions, legitimising states’ use of force in self-defence against a private actor.<sup>122</sup>

The Department of Justice comes to a similar conclusion when stating that, as long as the strikes are conducted under guidance of the four fundamental principles of *necessity, distinction, proportionality, and humanity* no laws of war preclude the use of “*stealth or surprise, nor forbid attacks on identified individual soldiers or officers*”.<sup>123</sup>

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<sup>119</sup> Department of Justice White Paper, 2013: p. 7.

<sup>120</sup> Barnidge, 2011: p. 447.

<sup>121</sup> Barnidge, 2011: p. 447.

<sup>122</sup> Henriksen & Ringmose, 2013: p. 40.

<sup>123</sup> Department of Justice White Paper: p. 8.

To support this claim, Legal Adviser to the Obama-administration, Harold Hongju Koh, argues that the American targeted killing rests, safely, on three main legal pillars; proportionality, distinction and the use of force in an on-going armed conflict.<sup>124</sup>

As established in the above, the Obama-administration views its counter-terrorism efforts versus especially Al Qaeda to be a continuous response to an imminent terror threat, hence constituting an armed conflict. This entails, Harold Koh argues, that the US or any other party to an armed conflict, needs not provide its targets, belligerents, with legal processes prior to an attack according to international humanitarian law.<sup>125</sup> Also in compliance with international humanitarian law is the appropriate inclusion of the proportionality and distinction clause, which in effect only allows combatants to be targeted if the foreseen military advantage is greater than the civilian casualties and harm.<sup>126</sup>

The critical issues inherent in many of these moments, which construct the Obama-administration discourse, pertain to the requirement under international humanitarian law to examine every single act of violence when determining the lawfulness of the strikes.<sup>127</sup> This entails an evaluation of the proportionality and the determining of combatant not merely in the general fight against terrorism, but in every single targeted killing. The clandestine nature of many of the drone strikes prohibits any real investigation into the killings, and the US can therefore not ascertain the lawfulness of the strikes.<sup>128</sup> This point is presented time and again by the Critics discourse and will be elaborated upon immediately below.

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<sup>124</sup> Speech by Harold H. Koh, Legal Adviser to the Obama-administration, 2010.

<sup>125</sup> Harold H. Koh speech, 2010.

<sup>126</sup> Harold H. Koh speech, 2010 *and* A/HRC/14/24/Add.6, 28 May 2010: p. 26.

<sup>127</sup> A A/HRC/14/24/Add.6, 28 May 2010: p. 26.

<sup>128</sup> Human Rights Watch, 2011: p. 7.

### 3.4 The Critics: the Legal Objection

The American discourse of international law does, however, not stand undisputed. The Critics around the world in forums ranging from the international scenes of the European Parliament, and the United Nations to national American organisations such as the American Civil Liberties Union have criticised the drone programme for violating international law, thus constructing a competing discourse.

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Mr Philip Alston devised a report for the Human Rights Council on the matter. The report, “Study on Targeted Killings” was presented in May 2010 and among other points make the following, on the US policy on targeted killings;

*“They were said to be based on its asserted right to self-defence, as well as on IHL, on the basis that the US is “in an armed conflict with Al Qaeda, as well as the Taliban and associated forces.” While this statement is an important starting point, it does not address some of the most central legal issues including: the scope of the armed conflict in which the US asserts it is engaged, the criteria for individuals who may be targeted and killed, the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings, and the existence of accountability mechanisms.”<sup>129</sup>*

Key elements from International Humanitarian Law such as defining the extent of armed conflict and the distinction between civilians and combatant are stressed by the Special Rapporteur, just as attention is paid to Human Rights such as the right to a fair trial and indeed the right to life. Human Rights Watch (HRW) shares this position and have urged President Obama to clarify the legality of and ensure accountability for the targeted killings<sup>130</sup>. By not clarifying the legality of the targeted killings and by not prosecuting those responsible for illegal operations, HRW have pointed to the risk of the American conduct watering down international customary law and standards.<sup>131</sup>

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<sup>129</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 8.

<sup>130</sup> Human Rights Watch, 2010: p. 1.

<sup>131</sup> Human Rights Watch, 2010: p. 1.

Three members of the European Parliament summed up much of the criticism directed towards the American drone program in a concerted statement.

*“We are deeply concerned about the legal basis, as well as the moral, ethical and human rights implications of the United States’ targeted killing programme that authorises the CIA and the military to hunt and kill individuals who have suspected links to terrorism anywhere in the world.”*<sup>132</sup>

The three MEP’s, Ana Gomes (S&D–Portugal), Sarah Ludford (ALDE–UK) and Rui Tavares (GREENS–Portugal), lead us to the focal point of this chapter; namely the very different approaches to the issue of targeted killings. As opinions and interpretations of the legality of the drone programs differ, an assessment of the contemporary legal nature of targeted killings seems crucial and long overdue. The following sections will consider the main themes of the Critics discourse.

### **3.5 The Critics: Countering the Obama-administration Rhetoric**

During a speech at the German Bundestag, Steven Watt of the American Civil Liberties Union summed up the legal concerns of the international discourse of Critics of the American drone program. The ACLU representative claimed, that a targeted killing by drone may be lawful, *“in the context of an actual armed conflict against an organized armed group, for example, a state may only use lethal force against a specific civilian who is directly participating in hostilities and if the humanitarian law requirements for the protection of civilian bystanders are met.”*<sup>133</sup>

Herein, two crucial points are presented; firstly, referring to the existence of an “actual” armed conflict questions the foundation of the legal paradigm of the US, which insists on the existence of an armed conflict with Al Qaeda and Taleban.<sup>134</sup>

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<sup>132</sup> Statement by MEP’s, Ana Gomes, Sarah Ludford and Rui Tavares, 7 March 2013.

<sup>133</sup> ACLU speech to the German Bundestag, Committee on Human rights and humanitarian aid, February 27th, 2013.

<sup>134</sup> Department of Justice White Paper, 2013 .

Secondly, it underlines the criteria to be met for targeting an individual; “*directly participating in hostilities*” – a criterion which the Critics discourse claims the Obama-administration does not meet.

Along with these two issues, a final over-arching element will be discussed below. The precedence of customary law being set by the American drone program lacks legitimacy, transparency, and the rule of law. The clandestine nature of the drone program has hindered investigation into the targeted killings, thus making it impossible to determine the true legal character of each attack. The discourse of the Critics has as a result made a call for clear guidelines pertaining to the conduct of states when using drones.

### 3.6 Questioning the Obama-administration: No Armed Conflict

In 2001, legal scholar Antonio Cassese contemplated on the consequences for international law following the 9/11. The war on terror paradigm was initiated by Bush and ended by Obama, but as has been argued in this research, the conduct of the Obama-administration continues to resemble the waging of a war against Al Qaeda, Taliban and its affiliates.<sup>135</sup> Cassese concludes on the discussion; “*It is obvious that in this case “war” is a misnomer.*”<sup>136</sup> This claim constitutes a main pillar of the criticism towards the American drone program and the targeted killing of terrorists as an act of war. The importance of this discussion revolves around Article 2 and 51 of the UN Charter, which describe the *jus ad bellum* criteria.<sup>137</sup> The Critics claim that the Obama-administration cannot continue to claim to be acting in self-defence against an imminent threat from terrorism and secondly, the US is overstepping the principle of sovereignty for every strike in Yemen, Pakistan and Somalia, if these strikes are conducted without prior acceptance from said states.<sup>138</sup>

The paradigm of armed conflict and terrorists as combatants is understandably appealing to the Obama-administration, as this implies applying International Humanitarian Law. In the words of Special Rapporteur Alston, “*the IHL applicable in armed conflict arguably has*

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<sup>135</sup> Human Rights Watch, 2011: p. 7;

<sup>136</sup> Cassese, 2001: p. 993.

<sup>137</sup> See *infra* pp. 25-28.

<sup>138</sup> International Crisis Group, 2013: p. 3.

*more permissive rules for killing than does human rights law or a State's domestic law, and generally provides immunity to State armed forces.*"<sup>139</sup>

A broader and less restricted legal frame for targeted killing is thus the reason the Critics discourse attempts to counter the armed conflict paradigm. In the 2012 Stanford and New York University report, the authors question the legality of the strikes, when they're aimed against individuals not linked to the 9/11 attacks and individuals "*who do not pose imminent threats to the US.*"<sup>140</sup> If the drone strikes are no longer merely targeting alleged terrorists with connections to the 9/11 attacks, then how can the 9/11 attacks still constitute the legal basis for the drone program, seems to be the rhetorical question of the Critics discourse. The initial geographical scope of the self-defence paradigm was limited to Afghanistan, but this theatre has expanded to now include Pakistan, Somalia and Yemen. This has led observers to worry, that the US is expanding the proclaimed armed conflict to be a "*global battlefield*".<sup>141</sup> On this matter, Elizabeth Stubbins Bates, proclaims; "*the US is engaged in a non-international armed conflict with armed groups in Afghanistan and Iraq [...] elsewhere, the US is not engaged in an armed conflict at all.*"<sup>142</sup>

The Critics discourse point to the time scope of defining armed conflict. Antonio Cassese argues that in an UN Charter Article 51 permission to use force, in a response to an act of violence, "*the use of force had to be terminated as soon as the aggression had come to an end [...]*"<sup>143</sup>

Hence, if the Obama-administration is responding to the imminent threat posed by the planners and executors of the 9/11 attacks, surely the death of Bin Laden would have marked the end of this act of self-defence.

Several observers within the Critics discourse thus reject the notion of an armed conflict between the U.S. and Al Qaeda and Taleban. If such a prerequisite is to be accepted, the less restrictive laws of IHL are binding. But as the Obama-administration has made clear in

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<sup>139</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 16.

<sup>140</sup> Stanford/NYU-report, 2012: p. 4.

<sup>141</sup> American Society of International Law, 2011: p. 4.

<sup>142</sup> Bates, 2012: p. 40.

<sup>143</sup> Cassese, 2001: p. 995.

both action and words, it views the right to self-defence as sufficiently legitimizing the attacks. Thus, the legal stride has been moved to the arena of IHL, where the Critics discourse has the objections presented immediately below.

### 3.7 Questioning the Obama-administration: Al Qaeda not a party to an armed conflict

If one accepts the prerequisite of the existence of an armed conflict, the conflict in question is a non-international armed conflict between a state actor and a non-state group<sup>144</sup>. The first point of criticism to the Obama-administration's argument involves the legal definition of non-international armed conflict. Some observers claim, "*the duration and intensity of such attacks has not risen to the level of an armed conflict*"<sup>145</sup> thus undermining this point of validation. Additionally, observers have questioned the labelling of Al Qaeda and Taleban as non-state groups parties to a conflict. Special Rapporteur Alston contends that the Obama-administration has yet to set clear lines as to when an individual is an affiliate of these terror-organisations by referring to the often self-sustaining and independent character of parts of the Al Qaeda network. These groups "*are often loosely linked, if at all.*"<sup>146</sup>

Legal adviser to the International Committee of the Red Cross Thynne argues along the same lines stating that parts of the global Al Qaeda networks outside of Afghanistan "*do not negotiate, they have no central command structure, they do not have a unified military strategy [...]*"<sup>147</sup> The International Committee for the Red Cross commentary provides further directives on the definition of direct participation in hostilities. To be classified with the status of combatant, it is indeed required that any targeted individual is actively engaged in planning, executing or facilitating violent attacks.<sup>148</sup>

Amnesty International in a 2012 report elaborated this criticism by evaluating the different Al Qaeda cells. The conclusion was that from the Laskhar-e-Taiba, to the Haqqani Network,

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<sup>144</sup> See infra pp. 32-38.

<sup>145</sup> American Society of International Law, 2011: p. 12.

<sup>146</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 14.

<sup>147</sup> Thynne, 2009: p. 161.

<sup>148</sup> See infra pp. 32-38. And ICRC, 2009: pp. 66-68.



and from the Hezb-e-islami Gulbuddin to the TTP, both agendas and methodologies differ.<sup>149</sup>

Hence, when the US targets an individual on the basis of affiliation to the Taleban or Al Qaeda, it is problematic in two manners. Firstly, as these organisations do not have a structured command that can link different cells across the four countries in question (Afghanistan, Pakistan, Yemen, and Somalia), and secondly, if the US institutions possess information that discloses such connections, it is kept secret and therefore cannot constitute a basis of legitimacy.

In conclusion, a range of questions pertaining to the lawfulness of the Obama-administrations conduct under IHL arises. The scope and criteria for armed conflict, the determining of combatants, the proportionality of strikes, and the involvement of the CIA in the operations all pose significant unanswered questions as to the legality of the drone program. The overarching issue with all these elements, the Critics discourse contends, is the lack of information and transparency that would allow for the independent evaluation of the lawfulness of the program. The next section deals with this issue.

### **3.8 Transparency, Legitimacy and the Rule of Law – setting a dangerous precedent**

The most crucial point of the Critics discourse is the fear of the American approach setting a dangerous precedent. The lack of transparency, the questionable legitimacy and the disregard of the rule of law have led scholars to claim that the legal standards and norms of the international society have been violated<sup>150</sup>; and the “*violations of these norms run the risk of replacing law with force and spiralling international violence.*”<sup>151</sup>

Antonio Cassese argued that if 9/11 warranted a shift in international legal structures, it should be one based on the common principles of the international society on a united basis.

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<sup>149</sup> Amnesty International, 2012, in Stanford/NYU-report, 2012: p. 111.

<sup>150</sup> Stanford/NYU-report, 2012: p. viii.

<sup>151</sup> Blum & Heymann, 2010.; p. 146.

*“Otherwise, the road would be open to the setting in of that anarchy in the international community so eagerly pursued by terrorists.”*<sup>152</sup>

Transparency and accountability is the only manner in which the US can ensure legitimacy and the preservation of the rule of law. The Obama-administration has recognised the importance of these principles, as seen for instance in Counter-terrorism adviser John Brennan’s speech: *“Staying true to our values as a nation also includes upholding the transparency upon which our democracy depends.”*<sup>153</sup>

Through the failure to reveal the details of each drone strike regarding the casualties, the security risk imposed by the targeted individual or the strategic considerations that formed the basis for the strike, the drone killings constitute violations of international human rights in terms of the right to life, the right to a fair trial and the right to liberty and security.<sup>154</sup> Even in the event that a targeted killing constitutes the last resort in saving more lives through preventing a terrorist attack, the human rights and the rule of law is undermined through the lack of accountability and evidence.<sup>155</sup> Furthermore, transparency is required under IHL as to the general principles of law that guide states in their conduct of targeted killing missions.<sup>156</sup> This includes creating accountability mechanisms that will ensure that in the event of an unlawful act during a targeted killing mission, the perpetrator can be prosecuted.<sup>157</sup> Article 147 of the IV Geneva Convention speaks of the grave breaches to the Convention being constituted by *“wilful killing [...] not justified by military necessity and carried out unlawfully and wantonly.”*<sup>158</sup>

This further entails that insufficient or false evidence that has led to the killing of an alleged terrorist needs to be disclosed in order to live up to the standards of the rule of law.<sup>159</sup> The consequences of ignoring the international norm-based legal framework is *“irreparable*

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<sup>152</sup> Cassese, 2001: p. 1001.

<sup>153</sup> John O. Brennan remarks, 30 April 2012.

<sup>154</sup> See infra pp. 28-31.

<sup>155</sup> Stanford/NYU-report, 2012: p. viii; A/HRC/14/24/Add.6, 28 May 2010: p. 10.

<sup>156</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 26.

<sup>157</sup> International Committee of the Red Cross (ICRC), *Geneva Convention I-IV*, 12 August 1949, Articles 50/51/130/147.

<sup>158</sup> International Committee of the Red Cross (ICRC), *Geneva Convention I-IV*, 12 August 1949, article 147.

<sup>159</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 26.

*harm to the international legal framework designed to establish and uphold foundational protections for the right to life and human dignity”<sup>160</sup>, as UN Special Rapporteur Philip Alston has termed it.*

The nature of international customary law will, argues the Stanford and New York Universities’ report, lead the American interpretation to set a dangerous precedent, and “*US practices may [...] facilitate recourse to lethal force around the globe by establishing dangerous precedents for other governments. [...] and as more countries develop lethal drone technologies, these risks increase.*”<sup>161</sup>

### **3.9 Conclusion – A legal framework for the use of drones**

Chapters 2 and 3 set out to grapple the issues put forward through the two hypothesis:

- (1) The US drone program of targeted killing is conducted under violation of International law.*
- (2) The US drone Program of targeted killing is continuously altering the norms of International customary law.*

Commencing with the latter, chapters 2 and 3 have outlined both the nature of customary law and the manner in which the US conduct may indeed be altering the international legal standards. Although this thesis has identified two colliding legal discourses, the Obama-administration and the Critics discourse, in essence only one of said discourses plays a role in the customary element of international law. As international customary law is based on the actions and legal conduct of states, only the Obama-administration, as a state entity, may construct a constitutive discourse for the development of international customary law.<sup>162</sup> Therefore, despite difficulties in determining the actual effects, the conclusion is that the US is indeed altering the norms and principles of international customary law with

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<sup>160</sup> Alston, 2011: p. 289.

<sup>161</sup> Stanford/NYU-report, 2012: p. viii.

<sup>162</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 26.

regards to targeted killings and in particular with regards to the conduct of states within the field of drone warfare.

Hypothesis (1) makes the claim that the US drone program does in fact constitute a violation of international law. To engage in this hypothesis, an analysis of the differences between the two conflicting discourses; the Obama-administrations and the Critics, was outlined in the above. This has clearly revealed strong disagreements on legal issues both when determining whether the US is indeed engaged in an armed conflict with Al Qaeda and Taleban and further, which international law should be binding in the given circumstance. Even if the Critics discourse in some instances accepts the application of international humanitarian law, interpretations differ as to the status of Al Qaeda and Taleban as non-state group parties to armed conflict and the failure or ability to meet threshold of intensity and duration of acts of violence. Whilst the efforts of the Critics discourse in promoting an agenda, which questions the legality of the American drone program is crucial, the most essential task of the constructors of this discourse is the referral to the undeniable lack of transparency and accountability. This deficiency in turn leads to the undermining of the rule of law and the utter lack of legitimacy. The very first and most significant step for the Obama-administration must, for the above reasons, be the formulation of a legal framework and principles to guide the conduct in this area of lethal operations. Only then can a genuine debate and evaluation of the legitimacy of the undertaken drone strikes be commenced. President Obama's promise<sup>163</sup> to present such a set of guidelines may constitute a step in this direction, but until then, the American program is a continuous violating International law.

This has led several of the above-cited authors to suggest indeed just such legal frameworks. Philip Alston concluded in the recommendations to his report to the Human Rights Council on targeted killings that

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<sup>163</sup> Remarks of President Obama, 23 May 2013.

*“States should publicly identify the rules of international law they consider to provide a basis for any targeted killings they undertake.”*<sup>164</sup>

The Stanford and New York Universities report also urges the Obama-administration to *“Release the US Department of Justice memoranda outlining the legal basis for US targeted killing”*<sup>165</sup>, just as the International Crisis Group elaborates, calling for

*“Crucial steps would be to establish clear, rigorous and publicly available targeting guidelines in keeping with international legal principles of distinction and proportionality and to transfer control from the CIA to the Defence Department, with oversight by the Senate and House Armed Services Committees and appropriate judicial review.”*<sup>166</sup> Even among the proclaimed supporters of the drone program, calls have been made for determining the legal framework. Kenneth Anderson has thus written of the dire need of government clarity, when stating:

*“Congress and the administration need to offer standards to regulate the practice of targeted killing.”*<sup>167</sup>

The completion of this chapter, which sought to answer the hypotheses of the legal framework for targeted killings and to determine the legality of the US drone program, is based on a set of recommendations, which would warrant the first steps towards legitimacy. In order for the Obama-administration to return to the confines of the norms of the international community, guidelines and legal principles must be formulated and they should ensure transparency, legality, accountability, and the rule of law.

This entails

- 1) *Transparency*; through determining which elements of international law and their interpretation to clarify the legal basis for the American drone program.
- 2) *Legitimacy and Accountability*, through clarifying the chain of command and identifying the responsible conductors or heads of missions of each drone strike.

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<sup>164</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 17.

<sup>165</sup> Stanford and New York Universities report, 2012: p. vii.

<sup>166</sup> International Crisis Group Report, 2013: p. 34.

<sup>167</sup> Anderson, 2009: p. 34.

Furthermore to ensure that any perpetrators of the laws set forth will be brought to justice.

- 3) *Rule of Law*: Ensure thorough investigation of all future, present and past drone operations to clarify the civilian and terrorist casualties.

## Chapter 4

### 4.0 Political and Strategic Considerations – European Drones and American Influence

*Chapters 4, through 7 approach the assertion presented in hypothesis (3)*

“The American precedence within drone warfare effects European decision-makers and may lead European states to follow the American example without due attention to political and strategic considerations.”

*This assertion rests on three underlying assumptions; the European states’ are increasingly interested in or have already acquired drones. American influence on European states may have spill over effects to drones and targeted killing strategies. And finally, critical points of political and strategic issues need to be addressed to evaluate the efficiency of targeted killings by drones in counter-terrorism struggles.*

*By first presenting the current European undertakings within acquisition and use of drone technology in chapter 5, it will be shown how the time is arguably ripe for engaging in political and strategic considerations of targeted killings by drones. Chapter 6 assesses the trans-Atlantic strategic influence, which may affect European decision makers when considering these new acquisitions. Chapter 7 concludes on hypothesis (3) by analysing the benefits and costs of a targeted killing drone strategy, both through the American case but also through contemporary scholar’s deliberations.*

#### 4.1 Introduction; European Political and Strategic Considerations of Targeted Killings

The next chapters follow the constructivist approach as presented in the legal chapters above, as they analyse discourses of political and strategic considerations in relation to targeted killings by drones. The discursive analysis reveals a strong discourse, which

supports the strategic and political benefits of drones in counter-terrorism. In essence, the discursive analysis reveals that a strong American-led discourse in support of drones as part of counter-terrorism is only opposed by a less articulated critical discourse, thus posing the compelling question: is there a need for constructing a European discourse on drone policies?

The following two chapters 5 and 6 therefore seek to disclose the political and strategic considerations necessary to make informed decisions when acquiring and utilising drones. As of today, most reporting agrees that only the US, Israel and the United Kingdom have conducted armed drone strikes in targeted killing missions.<sup>168</sup> Recent developments, however, reveal a new pattern of still more states acquiring armed drones, and among these are several European states. But when procuring and utilising new warfare equipment it is pivotal to consider the possibilities and prospects, but also the problems and potential pitfalls. This entails, as has been shown, considering legal limitations to such warfare, and the consequences if existing legal standards are watered down. But it also necessitates the thorough consideration of the political and strategic benefits or deficits of applying such a weapon. And as importantly, such considerations should be conducted in public debates to include participation of independent legal, political and military strategic experts ensuring legitimacy and transparency.<sup>169</sup> As an observer of the development within drone warfare Chris Cole states, *“all of these questions, and many more, need to be debated openly and honestly and require careful analysis and clear-headed judgement based on evidence. Unfortunately that evidence is being kept strictly under wraps.”*<sup>170</sup>

Attention will therefore be paid to a collection of European states<sup>171</sup>, which have acquired or have invested in the research and development of armed drone technology. Once again the case for comparison will be the American drone programme in Pakistan, Somalia and

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<sup>168</sup> Henriksen & Ringmose 2013, Cole 2012, Long War Journal.

<sup>169</sup> A/HRC/14/24/Add.6, 28 May 2010: p. 26.

<sup>170</sup> Cole, 2012: p. 28.

<sup>171</sup> France, Italy, Germany, Sweden, Spain, Switzerland, Greece, Denmark.



Yemen. This case is chosen for two purposes; firstly as the US has conducted the most elaborate and intense armed drone programme and therefore constitutes the most remarkable case. Secondly, the unique position of the US as the most dominant military force in the world is crucial when evaluating a set of European countries. Through the concept of strategic culture the political and strategic influence of the US on European states will be analysed. Strategic culture is in this regard to be understood as defined for instance in Alistair I. Johnston (1995) and Peter Katzenstein (1996) as a means to determine differing dominant strategic preferences within nation-states.<sup>172</sup> This concept allows for an investigation of whether American influence is successful in altering European mind-sets. Inter-state strategic cultures become of the highest significance when considering for instance the trans-Atlantic cooperation in NATO-missions in Afghanistan or the recent NATO Alliance Ground Surveillance drone programme.

In sum, chapters 5 and 6 set out to determine why the call for European political and strategic standard setting needs to be heard soon and it provides insight into relevant aspects that need to be taken into consideration. It is thus not the aim to out-rule any possibility of European states conducting drone operations, but rather it urges for a debate on the topic thereby allowing for decision-making to be based on informed choice. The importance of such debates is underlined by the potential pressure from the US, both in terms of the legal standard setting under customary international law and under the political and strategic influence performed through geopolitical dominance and military strategic trans-Atlantic cooperation. It is, in other words, the call for the construction of a European discourse.

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<sup>172</sup> Katzenstein, 1996: p. 2.

## Chapter 5

### 5.0 European Dreams of Armed Drones

In the following section the trends and trajectories of central European states' interest in drones will be outlined. Information concerning drone programmes in Europe is not easily attainable, which is in part due to the often indirect nature of state sponsored research and development agendas. One such example is the development of the Neuron UAV-project, which is developed in cooperation between six countries, namely Sweden, Greece, Switzerland, Spain, Italy and France.<sup>173</sup> In Sweden, the partly state-owned company SAAB conducts the development of the Neuron drone, but the undertaking - reportedly costing the Swedish government 300 million Swedish Kroner<sup>174</sup> - is merely mentioned once in its annual armed forces budget – under research and development<sup>175</sup>. The development of the Neuron drone was concluded in early 2012, when it undertook its first ever armed drone test flight in France.<sup>176</sup> The French government, seemingly more open on the matter of drone development, released a press statement presenting “*The Neuron, [...] European Armed Unmanned Aerial Vehicle was presented on the 19<sup>th</sup> January 2012.*”<sup>177</sup> Part of the French know-how on drone technology is derived from the cooperation with the British government.<sup>178</sup> The two states' joint efforts were formalized at the France-UK 2010 summit, where the two states' governments issued a concerted statement proclaiming that, “*Unmanned Air Systems have become essential to our armed forces. We have agreed to work together on the next generation of Medium Altitude Long Endurance Unmanned Air Surveillance Systems.*”<sup>179</sup>

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<sup>173</sup> Bergen & Rowland 2012: p. 2.

<sup>174</sup> Swedish Ministry of Defense, Yearly Report 2012.

<sup>175</sup> Swedish ministry of defense, Yearly Report 2012.

<sup>176</sup> Ministry of Defense, France, Press release: 3 February 2012.

<sup>177</sup> Ministry of Defense, France, Press release: 3 February 2012.

<sup>178</sup> Cole 2012: p. 11.

<sup>179</sup> <https://www.gov.uk>.

Besides participating in the Neuron-project, American officials claim, Italy and Germany have both attempted to acquire the Israeli Harop drone, which albeit being short-ranged, is an armed drone.<sup>180</sup> Other sources indicate that the Italian government has been involved with on-going negotiations with the U.S. government about the possibility of purchasing the armed Reaper drone.<sup>181</sup>

Applying an economic analysis, *The Economist* analysed the Pan-European raise in investments into research and development of drone technology thereby concluding, that a significant rise indicates a significant increase of interest.<sup>182</sup> In 2012, Danish minister of Defence proclaimed a keen interest in acquiring and applying drones, thus following the apparent trend among European states.<sup>183</sup>

The culmination of this increase in drone interest was manifested during the NATO Chicago summit in 2012. Here, fourteen NATO-members signed the procurement program for the Alliance Ground Surveillance program (AGS). Among these fourteen, Bulgaria, Czech Republic, Denmark, Germany, Italy, Luxembourg, the Baltic countries, Norway, Romania, Slovenia and the United States, it was decided to acquire five UAVs of the type Global Hawk.<sup>184</sup> The general trend in Europe thus indicates that in the near future, a range of countries will be in possession of drones. This, in itself, demands serious considerations of the conduct of drone warfare. Thus far, no European legislation exists on the use of drones in counter-terrorism or war, besides the international law regulations.

Further questions need answering when considering the numerous examples of international trans-Atlantic cooperation, which has indeed involved armed drones.

## 5.1 Drones in International Missions

### 5.1.1 Libya

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<sup>180</sup> Zenko, 2013: p. 20.

<sup>181</sup> Butler, 2013: p. 1.

<sup>182</sup> *The Economist*, 8 October 2012\*

<sup>183</sup> Havmand, 2012: p. 1.

<sup>184</sup> NATO, 2013.

When the NATO mission “Unified Protector” was in operation protecting and enforcing the no-fly zone in Libya, several instances were interesting from the perspective of this thesis. Firstly, the American drones flew 250 armed missions, all operating out of six different Italian air-bases.<sup>185</sup> Secondly, several media reported that the Libya mission marked the first flight of Italian drones in a NATO mission.<sup>186</sup> Albeit no missiles were fired, the Reaper drone, which was flown, has the ability to be armed. Furthermore, several news agencies, including the Wall Street Journal have reported that the US is contemplating on selling the technology to the Italian government, which would indeed allow for such armament of the Reaper drones.<sup>187</sup> A third significant element of the Libya mission was the British engagement. Despite no British drones fired any missiles, the Bureau of Investigative Journalism claims to have in its possession a report, which reveals that British military personnel flew some of the American armed drone missions in Libya, and thus fired missiles over Libya.<sup>188</sup>

### 5.1.2 Mali

The French intervention in Mali in 2012 also presents several interesting aspects of the international drone cooperation. Initially, the American drones assisted the French armed forces through aerial surveillance, which pin-pointed the whereabouts of targeted individuals, which led to the French Air Force conducting lethal strikes against alleged terrorist members in Mali.<sup>189</sup> Furthermore, extensive reporting indicates that the Obama-administration is contemplating on providing the French Air Force with drones so as to reinforce the French intervention in Mali.<sup>190</sup>

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<sup>185</sup> Cole, 2012: p. 4.

<sup>186</sup> <http://www.adnkronos.com>

<sup>187</sup> Entous, 2013 (a).\*

<sup>188</sup> Woods, 2012.\*

<sup>189</sup> Entous, 2013 (b).\*

<sup>190</sup> Hirsch, 2012.\*

### 5.1.3 AFRICOM

Finally, a report released in Germany and brought by the German national television ARD, revealed that the American drone program, which focuses on Africa, AFRICOM, has its Air Force based partly at the German base Rammstein.<sup>191</sup> Albeit not constituting a direct contribution to drone warfare, as the Rammstein Base is legally American soil, Deutsche Welle questions the role of the German government, and the extent to its knowledge of potential targeted killing missions being conducted outside of armed conflict.<sup>192</sup>

Firstly, by not criticizing the American drone conduct, do European states indirectly condone the American approach? Secondly, does this cooperation increase the risk of abiding by the common practice standards set by the U.S. over the past decade?

These two questions form the backbone of the subsequent chapter. Following a brief introduction of the concept of strategic culture, the concept will then be applied to the case of American dominance in the NATO ISAF mission in Afghanistan and possible parallels to the issue of drones will be drawn.

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<sup>191</sup> Die Welle, 31 May 2013. \*

<sup>192</sup> Die Welle, 31 May 2013. \*

## Chapter 6

### 6.0 Strategic Culture – setting NATO-standards?

Hypothesis (4): *the Strategic influence of the U.S. has influenced European strategic culture in the Afghanistan War and may subsequently influence European conduct when using drones*

#### 6.1 Strategic Culture

The theoretical basis for applying the concept of strategic culture is derived from the writings of Alistair I. Johnston and Peter Katzenstein and builds on the understanding that political and strategic decision-making is a socially constructed<sup>193</sup> “*ideational milieu, which limits behavioural choices*”<sup>194</sup>. The limitations in this context refer to specific preferences defined by national context built upon political, cultural, historical, and philosophical traits of the state in question.<sup>195</sup> Strategic culture thus provides the tools to determine and differentiate national motives that influence political decision-making and as a result determine the limitations, which dictate the military strategies in the field. Alistair Johnston elaborates the concept by presenting the idea that through strategic military inter-state cooperation, states have a tendency of attempting to influence one another. Powerful states are thereby able to assert their particular strategic culture resulting in inducing and even purposely altering other states’ military strategies.<sup>196</sup> As a dominant force and a pioneer of drone technology, is the US able to control or influence European state’s drone strategies?

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<sup>193</sup> Katzenstein, 1996: p. 2.

<sup>194</sup> Johnston, 1995: p. 42.

<sup>195</sup> Johnston, 1995: p. 34.

<sup>196</sup> Johnston, 1995: p. 57.

### 6.1.1 International Security Assistance Force and American dominance

Ida M. Oma (2012) and Christopher Coker (2006) both conducted studies of the differing military strategies in the concerted NATO efforts in Afghanistan. Both researchers found use in applying the concept of strategic culture to determine why the cooperative difficulties arose in the ISAF mission.<sup>197</sup><sup>198</sup> In Coker's research, the conclusion initially becomes that the way in which countries, in this case Britain and the US, "*do war*"<sup>199</sup> is different. This in effect is described by Coker as the American use of overwhelming force as determining, whereas the British approach is characterised as being softer, emphasising personal encounters and valuing contact to local citizens.<sup>200</sup> While highly simplified, the example serves to illustrate the differences in warfare culture and Coker uses it to describe the challenge that NATO faces in the ISAF mission; "*ISAF's challenge is [...] to mitigate the friction between national strategic cultures of its members.*"<sup>201</sup> An interesting issue, which arises following this task-description for NATO is, whether NATO is obliged to include the strategic culture of each member on equal footing or whether the alliance bases this mitigation of friction on financial or military personnel contribution.

Oma also utilises strategic culture to determine the nature of the contribution of military force into the ISAF mission.<sup>202</sup> Using Germany as a case she explains why Germany's NATO partners have been disappointed by the German contribution and what is elsewhere labelled the "*German culture of restraint*"<sup>203</sup>. This culture has arisen as the result of the German history of warfare and the subsequent national political reluctance to partake in warfare.<sup>204</sup> The two-fold applicability of strategic culture thus aids both in determining the German strategic approach and furthermore unveils the national context-bound reasoning

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<sup>197</sup> Oma, 2012: p. 567.

<sup>198</sup> Coker, 2006: p. 1.

<sup>199</sup> Idem.

<sup>200</sup> Idem.

<sup>201</sup> Coker 2006: p. 2.

<sup>202</sup> Oma, 2012: p. 567.

<sup>203</sup> Noetzel and Schreer, 2008: p. 219.

<sup>204</sup> Idem.

for the strategic behaviour. The German culture of restraint is reflected in the national caveats that the German contingency to the ISAF mission is conditioned under. One such caveat is the restriction on German soldiers to operate outside of Regional-command North.<sup>205</sup> This had led to instances where ISAF-soldiers have called for the German assistance outside of Regional-command North, but the German troops were unable to respond positively, as national regulation has prohibited such engagements.<sup>206</sup> Besides historically based cultural aspect of the reasoning behind such military strategic behaviour, Saidemann et al. (2012) point to domestic political and institutional relations as the reasoning behind the German caveats, as parliamentary majority is not easily reached.<sup>207</sup> Saidemann et al. consider the German caveats a clear disadvantage for the ISAF mission, because they hinder the full potential of reaching the aim of the Afghanistan operations. This view is shared by both voices within NATO through officials and army personnel, but also by countries with a different strategic culture, such as the US. Under the leadership of George W. Bush, the lifting of the national caveats was regularly called for, for instance during the Riga NATO summit in 2006.<sup>208</sup> During a briefing at the Pentagon ISAF commander General David McKiernan expressed his concern over the effects of caveats:

*“we have advantage with our military capabilities, with speed, with mobility, with intelligence, with firepower, with logistics. When we place caveats on our military contributions, we tend to reduce those advantages.”*<sup>209</sup>

The crucial element in such discussions is the clash of two strategic cultures within a transnational military cooperation. Oma reflects on this issue by emphasising the important role of burden sharing within such international alliances, and uses it to describe how NATO countries have expressed their disappointment in the inability of Germany to carry its expected part of the burden.<sup>210</sup> Implicit in such a line of thought is, however, a key element, as it applies a certain set of NATO-standards to which the member-states must

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<sup>205</sup> Saidemann et al. 2012: p. 76.

<sup>206</sup> Idem.

<sup>207</sup> Saidemann et al. 2012: 77.

<sup>208</sup> George W. Bush remarks, NATO-summit Riga, 2006.

<sup>209</sup> Institute for the Study of War.

<sup>210</sup> Oma, 2012: p. 567.



adhere. But who decides on NATO-standards? And what happens when member-states disagree on the scope and aim of the ISAF mission?

The German government has imposed caveats on its participation not as a result of an unwillingness to share the burden, but rather as a result of its strategic culture<sup>211</sup>. Vincent Morelli, researcher for the American Congress, concluded in a 2009 report that the German strategy and vision for Afghanistan was one based on reconstruction rather than combat and deterrence strategies.<sup>212</sup> Morelli goes on to describe the Dutch contribution as one built on security and reconstruction, the French on combat and stabilisation, and the EU as acting on its member's behalf as focusing primarily on humanitarian and reconstruction assistance.<sup>213</sup> Morelli thus captures an important point as these differences reflect the different national military strategies and the individual domestic strategic cultures.

Returning once again to the German case, the strategy of reconstruction implied further caveats to the armed forces in Afghanistan. The restriction on German soldiers to engage in offensive missions only allowed German troops to fire when fired upon.<sup>214</sup> Such a caveat seems in line with the overall purpose of a reconstruction strategy, and albeit not as limiting, the Netherlands and other European countries were firm in their reluctance to engage in the American deterrence and counter-insurgency missions.<sup>215</sup> In the course of the war, however, the pressure on Germany to remove the caveats resulted in the Minister of Defence temporarily removing the restriction against offensive missions in 2009.<sup>216</sup> This strategic change of heart was not restricted to a German instance, but was rather the result of a general trend. From 2004 onwards the Bush-administration had clear visions of merging the American Operation Enduring Freedom with the ISAF mission, therefore pressuring its European allies to conform to the counter-insurgency operations characteristic to Operation Enduring Freedom.<sup>217</sup> The pressure paid off, as the development in the scope for ISAF

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<sup>211</sup> Morelli 2009: p. 23.

<sup>212</sup> *Idem.*

<sup>213</sup> Morelli 2009: pp. 23-30.

<sup>214</sup> Saideman et al., 2012: p. 76.

<sup>215</sup> Morelli 2009: p. 17.

<sup>216</sup> Saideman et al., 2012: p. 77.

<sup>217</sup> Mastriano, 2010: p. 5.

reflected; “[...] *Stages Three and Four in Afghanistan had reflected the U.S. desire to see the allies more fully embrace counter-insurgency tasks*<sup>218</sup>.”

This development indicates a general shift in strategy among some European NATO member-countries, from reconstruction and stabilisation to deterrence and counter-insurgency missions.

Saideman et al. conclude along the same lines albeit their causal logic differs. They establish a direct link between the number of troops on the ground and the influence on the strategies for NATO.<sup>219</sup> Further, Saideman et al. argue that a country’s influence is based on the nature of its contingency and its “*flexibility*”<sup>220</sup>. Canada, as a result of this logic, had more influence on the formation of strategy for NATO as they were “*willing to do what ISAF asked of them.*”<sup>221</sup>. Saideman et al. thereby neglect to pay full attention to two vital issues. Firstly, they fail to distinguish between a NATO-strategy and an American strategy by implying that countries not living up to the American expectations in Afghanistan are in the same instance failing the NATO-strategy. Secondly, they indicate that if a country’s strategic preferences differ from what ISAF requires, the American strategy with the NATO/logo, it is the fault of the country in question. If NATO-members disagree on the strategy to follow in the ISAF mission, it should rightly be a NATO-task to “*mitigate the friction*”<sup>222</sup> as Coker phrases it.

The aim of this section is not to question the institutional build-up of NATO or between its members. Neither is it to criticise a division of influence based on political, economic, or military power. Rather, the crucial point in this regard is to draw attention to the American influence or dominance within NATO. The immediate consequence of this imbalanced relationship in NATO has allegedly affected the grand strategy in Afghanistan into an Operation Enduring Freedom part two. But if this is indeed rather a trend than a single event, the effects may extend to other spheres of the NATO cooperation. The extensive

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<sup>218</sup> Morelli et al. 2009: p. 21.

<sup>219</sup> Saideman et al., 2012: p. 82.

<sup>220</sup> Idem.

<sup>221</sup> Idem.

<sup>222</sup> Coker 2006: p. 2.

responsibilities of NATO include nuclear-proliferation, environmental issues, and, key in this context – counter-terrorism.<sup>223</sup>

Strategic culture provides one manner, in which it is possible to determine the American influence on European strategic thinking, and the ISAF missions constitutes only one such example. The trans-Atlantic influence becomes visible, as has been presented, when considering the cooperative missions, also external to the NATO framework. In essence, if the American influence thus far is any indication, this influence may have a crucial role when discussing the European future within drone strategy and policies.

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<sup>223</sup> NATO, 2010: Strategic Concept for the Defence and Security of the Members of NATO.

## Chapter 7

### 7.0 Short and long term Strategic and political costs and benefits of targeted killings

An informed debate on both advantages and potential pit-falls when applying drone technology is more than warranted. As summarized in the executive recommendations in the NYU/Stanford University report, “Living Under Drones; *“It is essential that public debate about US policies take the negative effects of current policies into account.”* <sup>224</sup>

Such a debate becomes all the more important when considering the current context for European decision-makers, which is comprised of two main elements. Firstly, through the legal precedent set by the U.S. through a decade of intense drone campaigns, customary international law has been influenced in a new direction. This legal precedent is enforced by the American influence on European states through the military and security cooperation in NATO and this influence on European security strategies may play an important role at a time when these European states are acquiring drones.

The European states must therefore not only determine the legal and political limitations to the usage of drone warfare but must attempt to do so independent of the existing discourse and dogma on both legal and political aspects of drone warfare.

The following section will thus present prospects and possibilities as well as pit-falls thereby attempting to provide the necessary basis for an informed political and strategic choice.

The vantage point for such an analysis will be the American drone programme with special emphasis on Pakistan, but with referral to lessons learned from the non-international armed conflict in Afghanistan and from the first state to use drones in its counter-terrorism efforts;

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<sup>224</sup> Stanford/NYU-report, 2012: p. v.

Israel.<sup>225</sup> A significant common trait of these three cases is the short-term evaluation that leads the states in question, the US and Israel, to proclaim the successful outcome of the drone-led targeted killings or to at least continue down this path. The reasons for the attraction to the unmanned drones are many. Among them, their capability to conduct missions in areas, which were conventionally too risky to operate in – thus moving the war on terrorism to the terrorists, as President Obama has termed it.<sup>226</sup> A 2010 NATO-report frames this in other words; drones “*lower the risk and raise the political acceptance and confidence*”.<sup>227</sup> American professor Kenneth Anderson argues “*drones permit the United States to go directly after terrorists, rather than having to fight through whole countries to reach them.*”<sup>228</sup> Still other observers claim that drone attacks are the most efficient tool of counter-terrorism, pointing to the detrimental effects they have had to Taleban and Al Qaeda fighters.<sup>229</sup>

Among the literature critical of drones in targeted killings, much focuses on the long-term counter-productive effect of this modus operandi. Referring to the possibility of radicalising the population at large in for instance Pakistan, the threat becomes graver.

The following section therefore approaches the evaluation of targeted killings as a counter-terrorism strategy in two stages. Initially, analysing the short-term effects followed in turn by the possible future scenarios and projected long-term consequences.

## 7.1 Short Term Efficiency – Bringing the Fight to Al Qaeda

In April of 2012 John Brennan, assistant to the American President for Homeland Security and Counterterrorism held a speech at the Wilson Centre, in which he outlined both the

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<sup>225</sup> The case of Israel differs in several instances from the American Drone program in Pakistan, Yemen and Somalia. As an occupant of foreign territories, the nature of the conflict is different. The strategic considerations behind using drones are, however, similar in character.

<sup>226</sup> Remarks of President Obama, 23 May 2013.

<sup>227</sup> NATO Report, 2010: p. 2.

<sup>228</sup> Carvin, 2012: p. 532.

<sup>229</sup> Wilner, 2009: p. 307.

reasoning behind the American drone programme and at the same instance the Obama-administrations evaluation of the effect these operations have on Taleban and Al Qaida.<sup>230</sup> “*Targeted strikes are wise*”, Brennan stated, “*because they dramatically reduce the danger to U.S. personnel, even eliminating the danger altogether.*”<sup>231</sup> Besides the risk-free nature of drone missions, Brennan and the Obama-administration and academic observers alike have pointed to a range of positive aspects in waging a war from a distance, which will be elaborated upon below. Resting with Brennan’s speech for a moment reveals the outlining of three thematic categories of damage that drones have inflicted on terrorist groups.

- 1) The loss of skill and leadership through targeting either operational commanders or military specialists has significantly lowered the quality and intensity of terrorist strikes.
- 2) The targeting of safe-haven areas such as the FATA-area<sup>232</sup> has hindered the operational functions carried out by the terrorists-organisations operating in the areas. Examples include, attacks destructing the communication routes, complicating the use of training facilities, and the lowering local support.
- 3) Finally, the firm American believe in deterrence is also applied in this struggle, as Brennan states “*They’re (Al Qaeda) struggling to attract new recruits. Morale is low, with intelligence indicating that some members are giving up and returning home.*”<sup>233</sup>

Alongside the risk-free character of drone operations, the three issues mentioned in Brennan’s remarks deserve a closer investigation, as these constitute main elements in the Obama-administration’s discourse. The rhetoric thus becomes crucial, as it plays a part in the overall conflict of discourses over the lawfulness of the drone program.

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<sup>230</sup> John O. Brennan remarks, 30 April 2012.

<sup>231</sup> Idem.

<sup>232</sup> Federally Administered Tribal Areas, in Waziristan in the bordering region between Pakistan and Afghanistan.

<sup>233</sup> John O. Brennan remarks, 30 April 2012.

### 7.1.1 Waging war from a distance

The primary effect cited when scholars and officials promote the successfulness of drone strikes is the risk-free nature for the conducting state<sup>234</sup>, as drone operators work out of offices across the globe and far from the actual strike. Subsequently, the argumentation goes; drone operators can more easily remain focused and objective when conducting strikes, as they are not under the immense pressure of face-to-face combat.<sup>235</sup> The removal of pressure on the drone operator has also led analysts to conclude that drone attacks lower civilian casualties, as they are able to conduct more calmly the strikes thus promoting precision.<sup>236</sup> The military nature of the drone itself also ensures precision as it is able to linger over a target for a substantial period, the argumentation sounds, and strike at a time, when the civilian casualty will be at the lowest. Furthermore, the risk-free nature provides the possibility to conduct operations, which are far more proportionate to the intended target, as they merely necessitate one task-force rather than an invasion fleet.<sup>237</sup> John O. Brennan sums up the technological advantages of waging a distant war, by referring to the *“surgical precision, the ability, [...] to eliminate the cancerous tumour called an al-Qaida terrorist, while limiting damage to the tissue around it [...].”*<sup>238</sup>

Another tactical advantage is the possibility to target individuals in geographical settings, which are unreachable and within which it is thus impossible to conduct capture mission. As Daniel Byman argues in a 2009 issue of “Foreign Policy”, *“Arresting Al Qaeda personnel in remote parts of Pakistan [...] is almost impossible today; the Pakistani government does not control many of the areas where al Qaeda is based, and a raid to seize terrorists there would probably end in the militants escaping and U.S. and allied casualties in the attempt.”*<sup>239</sup>

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<sup>234</sup> Carvin, 2012: pp. 532.

<sup>235</sup> John O. Brennan remarks, 30 April 2012.

<sup>236</sup> Gen. Petraeus, 2011 in Henriksen & Ringmose, 2013: p. 17.

<sup>237</sup> David, 2002: p. 17.

<sup>238</sup> John O. Brennan remarks, 30 April 2012.

<sup>239</sup> Byman, 2009, cited in Carvin, 2012: p. 533.

The intrinsic legitimisation of such attacks is based on the supposition that terrorist should not be allowed safe havens anywhere, and drone technology has introduced the possibility of ensuring just that. An interesting point raised on this issue by Henriksen & Ringmose (2013), turns this argumentation around. Rather than fulfilling a vacuum in the counter-terrorist struggles, the drones have created an incentive to undertake missions that would, ceteris paribus, not have been conducted prior to the existence of drones<sup>240</sup>. Drawing on the thinking of Richard Haas (2009)<sup>241</sup>, the distinction between wars of choice and wars of necessity has an explanatory role in this argumentation. The drone strikes are conducted not as a result of an absolute necessity in the maintaining of American security, but rather as a result of a choice based on a cost-benefit analysis of risks and gains<sup>242</sup>.

### 7.1.2 Targeting leadership and know-how

The strategic tactic of targeting the leadership and the technical experts within a terrorist organisation serves a dual purpose. By killing alleged terrorists, the aim is undoubtedly to hinder further terrorist actions by the terrorist, but if the targeted individual holds specific assets, then *“drone strikes should affect not only the quantity, but also the quality and the sophistication of terrorist attacks.”*<sup>243</sup>

Paraphrased, this logic implies that even if replaced, the loss of a specific individual will negatively affect the following militant actions conducted by the group in question, if the quality, be it in leadership or technical capabilities, is not found in the replacement.

The loss of a leader or commander will have direct implications on the capabilities of a terrorist group. The leader may represent a religious or political rallying point for the group, thus affecting the sense of community, the connection to the cause and the reduction in future recruitment.<sup>244</sup> Additionally, if a leader holds commanding or controlling positions,

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<sup>240</sup> Henriksen & Ringmose, 2013: p. 24.

<sup>241</sup> Haas, 2009.

<sup>242</sup> Henriksen & Ringmose, 2013: p. 24.

<sup>243</sup> Johnston & Sarbahi, 2013: p. 3.

<sup>244</sup> Carvin, 2012: p. 531.



the general organisational setup of a terrorist group may be distorted until a possible replacement is found.<sup>245</sup>

Daniel Byman contends along similar lines when arguing “*the number of skilled terrorists is quite limited. Bomb makers, terrorist trainers, forgers, recruiters, and terrorist leaders are scarce.*”<sup>246</sup>

In a study disseminating the effects of drone strikes Patrick B. Johnston (RAND Corporation) and Anoop K Sarbahi (UCLA) investigated the correlation between drone strikes with following terrorist attacks in the FATA-region<sup>247</sup>. Whilst not able to determine the effects in definite terms, the report concludes by stating “*drone strikes are negatively associated with various measures of militant violence, both within individual FATA agencies and their immediate neighbourhood.*”<sup>248</sup>

An important note to this study is that the prerequisite for the investigation is to determine whether the drone strikes have local effect. While the American drone programme intends to prevent attacks on their interests in neighbouring Afghanistan, the, at least proclaimed, aim of the drone campaign is to prevent attacks from the “*eminent threats*” against the US stemming from the FATA regions.

Through a comprehensive study of the literature on targeting the leadership or leadership decapitation and an investigation of the effects of leader decapitation of terrorist groups between 1970 and 2008, Major of the U.S. Army, Bryan Price comes to a similar positive conclusion.<sup>249</sup> The removal of leadership leads to a drastic increase in the general deterioration of the terrorist group in question and as interestingly, Bryan Price concludes that religious groups are more vulnerable to leader decapitation as a result of the key role, both in strategic and spiritual leadership, leaders of religious organisations play.<sup>250</sup>

John Brennan appoints much of the success of the American drone programme to the killing of prominent terrorist leaders, such as Ilyas Kashmiri, one of al-Qaida’s top

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<sup>245</sup> Wilner, 2009: p. 312.

<sup>246</sup> in Carvin, 2012: p. 531.

<sup>247</sup> Johnston & Sarbahi, 2013: p. 12.

<sup>248</sup> Johnston & Sarbahi, 2013: p. 12.

<sup>249</sup> Price, 2012: pp. 9-14.

<sup>250</sup> Price, 2012: 44.

operational planners, Atiyah Abd al-Rahman, killed when he succeeded Ayman al-Zawahiri as Al Qaeda's deputy leader, and Younis al-Mauritani, who allegedly coordinated several attacks against US and European interests.<sup>251</sup>

Add hereto the killing of Anwar Awlaki, who was the chief of external operations for Al Qaeda in the Arabian Peninsula.<sup>252</sup>

The drone program has thus, undoubtedly targeted and killed prominent and key figures of the Al Qaeda network.

### 7.1.3 Distorting the safe havens

The intensity in the drone strikes in an area such the FATA region of Pakistan comes with a clear message; terrorist cannot feel safe anywhere in the world. By targeting areas that have housed terrorist due to their seemingly safe locations has led to, what Wilner rather morbidly sums up as a constant threat, which causes *“leaders to worry about their safety, hinders their freedom of movement, and requires that they spend time and resources in avoiding their own death rather than planning the death of others.”*<sup>253</sup>

Connected to both the issue of removing leaders and of deterrence, the main aim of distorting the safe havens is removing the infrastructural benefits. Cutting off communication routes and mechanisms hinder the planning and has a detrimental effect on organisational set-up for such groups.<sup>254</sup> Furthermore, the threat of drone strikes hinders the set up of training facilities according to John Brennan, who supports his claim by citing letters found at Osama Bin Laden's compound during the operation that killed him in 2011. In one of the letters, Bin Laden reportedly urges Al Qaeda leaders to flee the tribal area and to stay *“away from aircraft photography and bombardment”*<sup>255</sup>

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<sup>251</sup> John O. Brennan remarks, 30 April 2012.

<sup>252</sup> President Obama speech, 2013.

<sup>253</sup> Wilner 2009: p. 312.

<sup>254</sup> Carvin, 2012: p. 532.

<sup>255</sup> John O. Brennan remarks, 30 April 2012.

#### 7.1.4 Deterrence - terrorising the terrorists

Through simple deterrence, the strategy of the Obama-administration seems to have attempted to quell any Al Qaeda and Taleban violent acts by overwhelming use of force. This has undoubtedly caused harm to the operations of the terror organisations and the ever present possibility of being attacked by a drone, even in the most remote areas of Pakistan, has had an effect on the ability of terror-groups to attract new recruits.<sup>256</sup> It has also had the direct effect that the possible killing of both low-level fighters and top commanders logically distresses such terror-groups. Indeed, as Peter Bergen and Jennifer Rowland have argued, “CIA drone attacks in Pakistan have undoubtedly hindered some of the Taliban’s operations, killed hundreds of their low-level fighters, and a number of their top commanders.”<sup>257</sup>

John Brennan sums up the effects of the deterrence strategy when stating that following the intense pressure on the Pakistani tribal areas, “*they [alleged terrorists] have fewer places to train and groom the next generation of operatives. Morale is low, with intelligence indicating that some members are giving up and returning home [...]. In short, Al Qaeda is losing badly.*”<sup>258</sup>

The short-term effects of killing terrorists thus undoubtedly harm the groups and deteriorate their capabilities in the shorter term. If said terrorists occupy a central position in the organisation, this furthers the damage caused. And finally, by putting pressure on an area, such as the so-called “safe-haven” as was the case for Waziristan, the possibilities of terrorists planning, conducting and recruiting for operations are limited.

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<sup>256</sup> Stanford/NYU-report, 2012: p. 29.

<sup>257</sup> Bergen and Rowland, 2012 (b).\*

<sup>258</sup> John O. Brennan remarks, 30 April 2012.

## 7.2 Long term effects – radicalising populations at large

While the short-term benefits of a strategy of targeted killings may seem attractive to states combating terrorism, a significant amount of literature has criticised the strategy for its counter-productive long-term effects. In the following, major contributions to this criticism form the elements of a section, which contemplates on the potential costs of deploying a targeted killing strategy.

The criticism waged against targeted killing policies based on political and strategic concerns is based broadly on three main issues.

- 1) The hazard of risking international political and diplomatic relations to terrorist “host-countries” through operating on their sovereign soil.
- 2) The long-term counterproductive strategic effect of targeted killings, which radicalise a population at large.
- 3) The political and strategic disadvantage in not maintaining legal, moral and ethical high-grounds when combating terrorism, which may lead to the undermining of legitimacy at the political level, and may initiate a fight with terrorism at a level of a-moral warfare, which only the terrorists can win.

These three concerns are summed up by US Admiral Mike Mullen:

*“Each time an errant bomb or a bomb accurately aimed but against the wrong target kills or hurts civilians, we risk setting out strategy back months, if not years. Despite the fact that the Taliban kill and maim far more than we do, civilian casualty incidents such as those we’ve recently seen in Afghanistan will hurt us more in the long run than any tactical success we may achieve against the enemy.”<sup>259</sup>*

The Admirals citation indicates that when a state kills civilians it is far more costly strategically than it is for a terrorist organisation. It also indicates that each failed strike will

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<sup>259</sup> Cited in Stanford/NYU-report, 2012: pp. 131-32.

damage, both strategically and politically, the relations to the national government in question and the population at large. The following section therefore analyses these three issues.

### 7.2.1 Risking International Diplomatic relations

One of the major considerations states must have when conducting a targeted killing on foreign soil is the consequence to the relation to the state in which the missions is conducted. With the American drone program, the relationship between Pakistan and the US has been tested several times. President Obama addressed this issue during his speech at the National Defence University in 2013. *“To put it another way, our operation in Pakistan against Osama bin Laden cannot be the norm. [...] the cost to our relationship with Pakistan – and the backlash among the Pakistani public over encroachment on their territory – was so severe that we are just now beginning to rebuild this important partnership.”*<sup>260</sup>

The gravity of the impact on inter-state relations is underlined in the above, as even the targeted killing, albeit not by drone, of the World’s most renowned terrorist upset the Pakistani government. When the issue is the killing of unknown alleged Talebani terrorists the diplomatic effects must be devastating for the bi-lateral relationship, which is pivotal for other security issues. This has led US officials to conclude that targeted killings in Pakistan *“are eroding US influence and damaging our ability to work with Pakistan to achieve other important security objectives like eliminating Taliban, sanctuaries, encouraging Indian-Pakistani dialogue, and making Pakistan’s nuclear arsenal more secure.”*<sup>261</sup>

In the efforts to aid Pakistan in development and the improving of democracy, the drone attacks present severe setbacks, as the more extremist political wings gain popularity, when

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<sup>260</sup> Remarks of President Obama, 23 May 2013.

<sup>261</sup> Dennis Blair, former Director of National Intelligence, cited in Stanford/NYU-report, 2012: p. 138.

blaming the Pakistani government for allowing US intrusion on Pakistani grounds.<sup>262</sup> The unpopularity among the population at large also presents a challenge and may possible hinder US-Pakistani cooperation in democratic and economic development<sup>263</sup>.

### 7.2.2 Counter-productive effect of targeted killings as a counter-terrorism strategy

The possible counter-productive effect of targeted killings is based on the hypothesis that the attacks form a part of a radicalising effect on individuals in the targeted countries and that it facilitates recruitment of personnel for Al Qaeda and Taleban. The establishment of a causal relation between drone strikes and radicalisation is challenging, as many factors may influence an individual's radicalisation process. The International Crisis Group argues in its report on drones that economic circumstances rather than ideology are the push-factors in radicalisation processes.<sup>264</sup> Other scholars do, however, point to the loss of the "hearts and minds" of the general population in a targeted country, as a possible indicator for radicalisation processes taking place.<sup>265</sup> Andrew Exum et al. contemplate on the counter-productiveness of drone killings and the possible loss of hearts and minds, thus perhaps radicalising and creating more terrorists than are killed in the operation.<sup>266</sup> The Stanford and New York Universities report concurs to this stream of thought, adding that the low percentage of high-level terrorist targets killed by drones (the report estimates 2% out of the total casualties) questions the efficacy of the program.<sup>267</sup> All the more so, the report states, when "*evidence suggests that US strikes have facilitated recruitment to violent non-state armed groups, and motivated further violent attacks.*"<sup>268</sup> Micah Zenko (2013) also provides such evidence when he cites US government officials referring to the increase in membership of the Al Qaeda in the Arabian Peninsula.<sup>269</sup>

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<sup>262</sup> Heymann & Blum, 2010: p. 166.

<sup>263</sup> Stanford/NYU-report, 2012: p. 138.

<sup>264</sup> International Crisis Group, 2013: p. 24.

<sup>265</sup> Zenko, 2013: p. 10; Stanford/NYU-report, 2012: p. vii.

<sup>266</sup> Exum et al, 2009: p. 18.

<sup>267</sup> Stanford/NYU-report, 2012: p. 125.

<sup>268</sup> Stanford/NYU-report, 2012: p. vii.

<sup>269</sup> Zenko, 2013: p. 10.

*“[...] in 2010 the Obama administration described al-Qaeda in the Arabian Peninsula (AQAP) as encompassing “several hundred al-Qaeda members”; two years later, it increased to “more than a thousand members.” By July 2012, AQAP had “a few thousand members.”*<sup>270</sup>

President Obama argued against this causal relation referring to the formerly mentioned deterrence strategy against Al Qaeda and Taleban; *“Their [Al Qaeda and Taleban] remaining operatives spend more time thinking about their own safety than plotting against us. They did not direct the attacks in Benghazi or Boston. They’ve not carried out a successful attack on our homeland since 9/11.”*<sup>271</sup>

This assumption fails, however, to distinguish between a tactic and a strategy to use the terminology of Stephanie Carvin.<sup>272</sup> This entails that a strategy looks at both long term and short term effects, thus weighing costs and benefits not only for the given mission tactic but also for the overall strategy. The strategy is the overall goal to counter terrorism, whilst the tactical mission is to eliminate a member of a non-state violent group. Bryan Jenkins addressed this issue in 1987 when concluding on the Israeli targeted killing missions as retaliation for Munich in 1972; *“the assassinations may have disrupted terrorist operations, but the effects were temporary. It was difficult to discern any decline in Palestinian terrorist attacks at the time, and Israelis and Jews worldwide are still frequent targets of terrorist violence.”*<sup>273</sup>

To the discussion of the strategic benefits of targeted killings as a tool in counter-terrorism efforts, Dr. Matenia Sirseloudi argues that the overwhelming and to an extent repressive character of a state’s use of force against the terrorists may result in achieving the opposite of the intended ends.<sup>274</sup> Counter-terrorism strategies or tactics, which are questionable with regards to proportionality or legitimacy may thus spur the feeling of injustice among firstly the terrorists, and secondly perhaps the broader population. As Dr. Sirseloudi formulates it;

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<sup>270</sup> Idem.

<sup>271</sup> Remarks of President Obama, 23 May 2013.

<sup>272</sup> Carvin, 2012: p. 536.

<sup>273</sup> Jenkins, 1987: p. 12.

<sup>274</sup> Sirseloudi, 2005: p. 391.

*“The harder the response [to terrorism], the more loudly the terrorists will declare that their violence is justified.”*<sup>275</sup>

Hence, the long term success of counter-terrorism strategies depends not only on states’ ability to deter terrorists, but also has ties to the behaviour of states in the eyes of the terrorists. This brings forth the next issue, namely the necessity of democratic states of maintain the high-grounds when combating terrorism.

### **7.2.3 Maintaining the legal, moral and ethical high-grounds when combating terrorism**

To continue in the Jenkins tradition, his work of 1974 on “International Terrorism: a New Kind of Warfare” revealed insights into the nature of combating terrorism. If counter-terrorism is the fight against anti-systemic organisations conducting anti-democratic attacks, then the response must adhere to our own standards to win the moral and ethical battle in the long run; *“Terrorism is violence against the “system”, waged outside the “system”. (...)*”.<sup>276</sup> Therefore, in Jenkins’ terminology, the response to terrorism must be conducted within the system under attack, in other words with legal, transparent and accountable means. David Fromkin (2002) supplements this thinking by presenting an ultimatum in the struggle against terrorism; those who defend themselves against terrorism must refrain from responding to terrorism in the manner that terrorists want you to.<sup>277</sup> This normative approach implies in practice that when responding to terrorism, states must refrain from either giving in to the claim made by terrorists and from engaging in a violent struggle on the terms of the terrorists. Norwegian prime minister Jens Stoltenberg in the hours after the terror-attack in Norway, 2011 responded in precisely the manner prescribed by Jenkins and Fromkin:

*“We must never give up our values.*

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<sup>275</sup> Idem.

<sup>276</sup> Jenkins, 1974: p. 2.

<sup>277</sup> Fromkin, 2012: p. 697.



*We must show that our open society can pass this test too.*

*That the answer to violence is even more democracy.”<sup>278</sup>*

The mantra of the Norwegian Prime minister seems to be that when democracy is under attack, the response must be more democracy. The Obama-administration has reiterated its belief in attaining to moral high-grounds setting high ethical standards, as exemplified in John Brennan’s speech.

*“President Obama has therefore demanded that we hold ourselves to the highest possible standards, that, at every step, we be as thorough and as deliberate as possible.”<sup>279</sup>*

However, what the drone campaigns have shown is that the US has not waged this struggle within the confinements of democracy. Rather as Heymann & Blum argue concerning the strategy of the American forces under the Obama-administration, the *“targeted killings might strengthen the sense of legitimacy of terrorist operations, which are sometimes viewed as the only viable option for the weak to fight against a powerful empire.”<sup>280</sup>*

A further aspect of the importance of maintaining the legal and moral high grounds arises if the strikes are generally perceived as unlawful amongst the population of the targeted country or even in the international society. The struggle for the ideological foundation in the eyes of the wider population thus becomes of the utmost importance, a point underlined by Dr. Sirseloudi. Sirseloudi argues that the terrorist are indeed aware of the potential in the local population, and therefore *“the fight for more potential supporters will be part of the terrorist campaign”<sup>281</sup>*. The current American drone program, which may undermine US credibility and legitimacy, as the Stanford and New York University report argues, thus poses the threat of a “catch-22” dilemma, as the operational efforts only contribute to causing more problems than they solve.<sup>282</sup> One such legal and perhaps legal-philosophical consideration, which may be undermining the Obama-administration’s legitimacy is found in the inherent dichotomy of the self-defence argumentation. The Obama-administration

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<sup>278</sup> Norwegian Prime Minister Stoltenberg, 22nd July, 2011.

<sup>279</sup> John O. Brennan remarks, 30 April 2012.

<sup>280</sup> Heymann & Blum, 2010: pp. 165-66.

<sup>281</sup> Sirseloudi, 2005: p. 392.

<sup>282</sup> Stanford/NYU-report, 2012: p. 125.

refers to the deferral of an imminent threat, which implies a moment, which is threatening the life of civilians. Anna Goppel argues that as a “*targeted killing, by definition, takes place prior to such a moment, they cannot be justified.*”.<sup>283</sup> Goppel thereby rejects the notion of the pre-emptive strikes in regard to targeted killing of terrorists by drones.

In conclusion, the long-term effects of targeted killings as a strategy for counter-terrorism present certain flaws. As is the case when determining the long-term effects of any strategy, it is hard to draw any final conclusions. This section has, however, presented a range of topics, which would enlighten a political discussion about the costs and benefits of employing such a strategy.

### **7.3 The American influence and the need for a stronger European strategic culture – a different approach to drones?**

Chapters IV through VI set out to investigate hypothesis (3):

“The American precedence within drone warfare effects European decision-makers and may lead European states to follow the American example without due attention to political and strategic considerations.”

By introducing the European move towards drones, it has become evident that it is high time for an open debate of the benefits and costs of conducting such operations. The chapters presented the ISAF-case as an example of how the US has been able to influence European decision-making within military strategic considerations. The chapters have also shown both the positive and negative consequences of the American drone campaign and targeted killings as a counter-terrorism strategy.

The nature of the European response to terrorism has thus far been based on the call for conducting counter-terrorism operations consistent with International law, but the chapters in the above give reason to believe that an alteration of this approach may be undergoing changes with the appearance of drones. The conclusion to these chapters is not one

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<sup>283</sup> Goppel, 2013: p. 309.

condemning European states for acquiring drones, but is rather a call for an open democratic debate, where both strategic and political implications are evaluated in order to make a decision based on the most educated information available. It is pivotal that the American influence is not allowed to become determining for European conduct within drone warfare, but rather European states are urged to consider both pro et contra.

The response to the above hypothesis thus suggests that American conduct and influence does indeed contribute to and inspire European strategic and political thinking.

## Chapter 8

### 8.0 Conclusions and recommendations

The overarching issue for this thesis evolved around the following question:

What are the consequences of the American drone program and the practice of targeted killings on legal, strategic and political issues, and how are these significant for European acquisition of armed drone technology?

The discursive analysis of the thesis has revealed a strong American discourse of legal, political, and strategic elements, which is constitutive for the manner in which the rest of the world views drone warfare. The customary element of international law implies that the persistent conduct of the US in its counter-terrorism strategies over the last decade has altered the legal understanding of targeted killings outside of the conventional understandings of armed conflicts. The lack of transparency and accountability in the program undermines the rule of law and sets an unfortunate precedent, which may have dire consequences for the future, if for instance oppressive regimes acquire drones. The American discourse also stretches into the political and military strategic sphere, where hard rhetoric and firm counter-insurgency operations characterise the American counter-terrorism approach. It is in the light of this American influence that the main conclusion of this thesis claims that there is a crucial need for European states, individually or collectively, to construct an alternative discourse, which questions the legal basis and discusses political and strategic consequences of the American approach. The need for effective counter-terrorism operations remains to be the most crucial to securing European states, but this defence must be based on our principles and values.

Two main messages prevail as pivotal to understanding the possible consequences of the American drone program;

- 1) The legal precedent set by the US waters down customary law standards and endangers the preservation of key democratic values; transparency, accountability, and the rule of law.
- 2) The potentially damaging political and strategic consequences of the American drone program may in the long run lead to counter-effective strategic outcome within counter-terrorism efforts and may undermine or damage the political legitimacy in international relations.

### **8.1 Recommendations**

The conclusions to this thesis have formed the basis for formulating four recommendations for altering the current discourse of drone warfare and targeted killing as a tool of counter-terrorism. The recommendations are articulated with the understanding of the essential need to counter the threat posed by terrorism, whilst adhering to the fundamental values and principles on which democracy is founded.

This thesis therefore recommends to;

- 1) Publicly determine and define the legal standards for conducting targeted killings by drones.
- 2) Establish legal mechanisms in accordance with identified legal standards to ensure transparency, accountability, and the rule of law.
- 3) Encourage public and informed political debate in order to ensure that the counter-terrorism strategies reflect the values of the society in question and warrant decisions made on informed choice.
- 4) Initiate strategic debates, which consider the short- and long-term effects of targeted killings as a means of counter-terrorism to establish, which strategies and tactics best serve the interest of the state in question.

### 8.1.1 Determine legal standards

While the Obama-administration repeatedly refers to adhering to international legal standards, these statements have referred solely to the general principles, to which the US seeks to adhere. To be in full compliance with international law, the US must identify in each targeted killing missions and each drone strike, which international legal standards were applied and why. In the current setting the US has granted itself with a virtual *carte blanche* as to its legal conduct. It is therefore crucial that any state conducting targeted killings by drones identifies which elements of international humanitarian law or human rights principles it follows during such operations. A general promise, which can never be tested due to the covert nature of the operations, does not suffice as a legal basis.

### 8.1.2 Establishing legal mechanisms

The crucial character of countering terrorism is not to be undermined and this thesis in no way attempts to do so. Rather, in the opinion of this author, terrorism poses the biggest and most tangible threat to democratic countries and great attention and effort must thus be invested in the countering efforts. This entails both long-term prevention in dealing with the root-causes of terrorism; the historical, social, and political context<sup>284</sup>, and the short-term tactical counter-insurgency operations, which distort and deter the acts of terror. The pivotal point is to reach the balance between countering terrorism and adhering to legal and moral standards – the adherence to human rights, which set us apart from terrorism. When using drone strikes in counter-terrorism, governments must ensure that this balance is maintained. The need to ensure accountability and transparency rests mainly on the need to identify the praxis for identifying alleged terrorists, which pose an imminent threat to national interests. Such a first step would ensure that the conduct was guided by legal

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<sup>284</sup> Sirseloudi, 2005: p. 388.

limitations, but without disclosing covert details of a strike to a broader public. To further enhance accountability and transparency a mechanism already exists, which many states including the US has already used in guiding conduct in counter-terrorism efforts. In the US, closed courtrooms labelled the Foreign Intelligence Surveillance Court<sup>285</sup> have been used in the US when determining the legality of “wire tapping”, i.e. intelligence services listening in on telephone or internet communication. If such operations were to be conducted conditioned by the consent of public trials, they would be of no use in counter-terrorism operations. Rather, a closed trial with independent judges to whom the intelligence service must provide evidence to support the necessity of tapping an alleged criminals’ wires, provides a suggestion, which supports the principles of transparency, accountability and the rule of law. Similarly, any lethal drone strike outside of regular armed conflict would be conditioned by an approval of such a closed court. Such a mechanism would, in the view of this thesis, present a plausible solution for countering terrorism while adhering to legal principles.

### **8.1.3 Public debate**

An essential element of democratic societies is found in the open and public debates, which ensure the inclusion of anyone who wishes their voice heard. Besides ensuring that the elected decision-makers are indeed serving the interest of the population at large, public debates safeguard political accountability and transparency. Pertaining to drone warfare, this entails that decision-makers should indeed determine publicly, which principles they chose to base their counter-terrorism strategies upon.

Furthermore, a public debate ensures that academia, opposition parties, and other relevant parties will have an opportunity to comment and influence the debate thus allowing for decisions to be made on informed choice, rather than in the dark.

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<sup>285</sup> United States Federal Judicial Center.

#### **8.1.4 Strategic considerations**

As has been presented, the short-term effects of killing terrorists have clear advantages in weakening terrorist groups. But this strategy fails to encompass the long-term counter-productive effects. It is to be compared to fighting the ocean by punching into the water; at first it may seem as if you have hurt the area, which is now filled by your fist. But the question is, whether you have efficiently quelled the terrorist movement, or if you have indeed merely dispersed the water to other parts of the ocean. The narrow focus on the short-term effects fails to grasp what will happen as soon as you remove your fist. Will a hole in the ocean remain, or will terrorists once again fill it?

In less illustrative terms, the recommendation on this topic is to thoroughly contemplate on the possible outcome of a counter-terrorism strategy, which focuses mainly on deterrence in the short run.

#### **8.1.5 Questioning the American discourse**

The final and most crucial recommendation, which will conclude this thesis, calls for an uprising against the American discourse on drone warfare and counter-terrorism. It is essential for the years to come that the American approach does not stand undisputed. Whether a collective European or an individual national discourse, the key issue is to underline the adherence to fundamental principles, which ensure the preservation of human rights and international law along with democratic values such as transparency and the rule of law.



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