Killing Terrorists
Armed Drones and the Ethics of War

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Global Political Studies and Human Rights
One-year master
15 credits
Spring semester 2014
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Abstract

The aim of this thesis is to answer the question whether the U.S. policy on targeted killings with combat drones is compatible with the legal doctrine of just war theory, applicable international law, and human rights law. Moreover, this paper intends to examine the legal issues arising from the U.S. practice of international law in relation to the justification of targeted killings. The purpose of this thesis is to determine whether the practice of targeted killings can be considered lawful and, if not, to provide knowledge about how the method violates applicable international law and the ethics of war.

The focus is placed on relevant treaties and customary international law, and just war theory is used as a theoretical complement to explain the meaning and purpose of selected laws in order to determine their applicability to the research problem. Furthermore, this procedure has been conducted by using a legal method to identify the legal problem and interpret relevant sources of law in order to determine their applicability to the research problem.

The thesis has determined that the U.S. policy on targeted killings with combat drones is not consistent with applicable international law and fundamental human rights law. In particular, the practice of targeted killings violates the principle of distinction.

Number of words: 15 235
List of abbreviations

AP Additional Protocol
AP I Additional Protocol I
AP II Additional Protocol II
CIA Central Intelligence Agency
GC Geneva Convention
GC I Geneva Convention I
GC II Geneva Convention II
GC III Geneva Convention III
GC IV Geneva Convention IV
ICJ International Court of Justice
ICC International Criminal Court
ICCCPR International Covenant on Civil and Political Rights
ICESCR International Covenant on Economic, Social and Cultural Rights
IHL International Humanitarian Law
NGO Non-Governmental Organization
NATO North Atlantic Treaty Organization
POW Prisoner of War
TK Targeted Killing
UAV Unmanned Ariel Vehicle
UDHR Universal Declaration of Human Rights
UN United Nations
UNSC United Nations Security Council
U.S. United States
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Baitullah Mehsud, the leader of the Pakistani Taliban, was resting on a rooftop during a summer night in August 2009. The house was situated in the village of Zanghara in the region of South Waziristan in northwest Pakistan.1 His wife treated Mehsud at the time with an intravenous drip due to kidney failure and dehydration. Suddenly, two Hellfire missiles slammed into the house and killed Mehsud along with 11 other unidentified persons who were located within the explosion area. The two missiles had been fired from an Unmanned Aerial Vehicle (UAV), better known as a drone, which were hovering two miles above the house, undetected. The drone was remotely controlled from the headquarters of the Central Intelligence Agency (CIA), 7,000 miles from the target site.2 According to the government of Pakistan, Mehsud was involved in the assassination of former Prime Minister Benazir Bhutto, and he was identified as the architect behind several suicides bombings in Afghanistan.3 In 2001, the United States (U.S.) government authorized the CIA, a non-military agency, to carry out “lethal covert operations”4 against suspected terrorists with combat drones.5

The U.S. along with Israel has publicly acknowledged the use of Targeted Killings (TK) as their counter-terrorist strategy.6 Israel was the first state that openly defended the strategy since the Second Intifada in September 2000. Since 2000, Israel has conducted several operations with TK in Gaza and the West Bank.7 The government of Israel has chosen to carry out TK with the support of helicopter gunships, tanks, fighter aircraft, bullets, car bombs and booby traps.8 The governments of Israel and the U.S. have favored TK of suspected terrorists rather than judicial processes in a court of law.

In fact, both governments have made TK to an essential part of their counterterrorism strategy. Suspected terrorists are attacked, usually by an airstrike, within other sovereign states.9 The policy of TK has received wide international condemnations, due to the decisions to kill is made in the shadows of public scrutiny and is free from external judicial reviews. Moreover, there is an expressed concern regarding the absence of due process guarantees, the

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1 Enemark 2014: 1
2 O’Connell 2010: 24; Enemark 2014: 1
3 Vogel 2010: 115
4 On September 17, 2001, President Bush signed a secret intelligence finding which authorized the CIA to undertake lethal covert operations against selected individuals, in order to destroy the al Qaeda network (Melzer 2008: 40).
5 Melzer 2008: 40-41
6 Goppel 2013: 1
7 Blum & Heymann 2010: 75
8 David 2002: 1
9 Blum & Heymann 2010: 71
protection of the civilian population and regarding a potential negative impact on international law, in connection to these military operations.\textsuperscript{10}

Ever since September 11, several states, with the U.S. in the lead, has contested former interpretations of how war should be fought in connection to applicable international law. The ongoing War on Terror has initiated a formative turning point, and TK accentuates the tension between defining terrorism as a \textit{crime} or as a \textit{war}.\textsuperscript{11} Unlike traditional wars, there is an obvious definitional problem within the global War on Terror. How do we know when victory is won, and the danger are gone? Current international law, which governs warfare, is not designed for a battlefield without identified borders, enemies or armies, and the former distinction between peace- and wartime laws has become highly challenged. Suspected terrorists are targeted within a No-Law Zone, without any consideration to the existing limitations of force.\textsuperscript{12}

This thesis focuses on the practice of TK with combat drones and its impact on applicable international law and moral rules that govern the conduct of war.

1.1. Research problem

Laws, which exist in peace- respectively wartime operates on the basis of different circumstances and principles. According to peacetime laws, law-enforcement operations and the judiciary is playing a central role in dealing with terrorists. Under the paradigm of law-enforcement, due process principles should be applied. According to this model, terrorist should be processed as criminals by the domestic justice system. Moreover, they should be assigned a legal counsel, and be given the opportunity to prove their innocence in a court of law.\textsuperscript{13} Although these regulations are bound to some extent by international law, each state chooses its own law enforcement regime. However, suspected criminals are entitled to a fair trial, according to fundamental human rights law.\textsuperscript{14} Furthermore, the law-enforcement model rejects the idea that TK of suspected terrorists is legally permissible, unless the targeted individuals pose an imminent threat, and to kill that person is the only way to stop the attack from happening.\textsuperscript{15}

\textsuperscript{10} Blum & Heymann 2010: 72
\textsuperscript{11} Blum & Heymann 2010: 69 & x
\textsuperscript{12} Blum & Heymann 2010: 69 & xiv
\textsuperscript{13} Altman 2012: 5
\textsuperscript{14} International Covenant on Civil and Political Rights, article 14(1)
\textsuperscript{15} Altman 2012: 6
However, unlike the paradigm of law-enforcement, the armed-conflict model determines that terrorists should be neutralized by military means. Terrorists are characterized, as enemy combatants, and a threatened state, according to this model, possess the legal right to target them with lethal force. Further, the Law of War\textsuperscript{16}, which holds an international character, has minimal judicial involvement.\textsuperscript{17}

These two models in combination constitute the legal framework for dealing with contemporary terrorist threats. However, neither of the two paradigms seems to apply in relation to TK. The government of the United States and Israel argues that current international law has failed to address this new type of global threats that non-state actors represent.\textsuperscript{18} As a result, TK is carried out in a No-Law Zone against none-state actors, which is not confined to any particular territory. As mentioned above, existing law is not designed for a battlefield without identifiable borders, armies and enemies. Therefore, suspected terrorists fall between the Law of War and the law of peace; they are being attacked without consideration to the limitation of force that is embedded within the both paradigms. The policy on TK may erode international law, which serves as a compass for moral judgment, and may leave the door open for other states to legitimize similar methods in order to marginalize opposition movements in the name of national security. If international terrorism does not fit into either the paradigm of armed-conflict or law-enforcement, there is a need to develop a new paradigm that conforms to contemporary terrorist threats. However, while such a development takes place, state governments must respect existing international law in order to reduce human suffering, and prevent civil harm.\textsuperscript{19} From a legal perspective, it is not acceptable to claim powers from both paradigms and at the same time deny the limitations of force that legitimizes those powers, these protective values are too important to disregard.\textsuperscript{20}

In addition, several independent Non-Governmental Organizations (NGO), such as the Bureau of Investigative Journalism, has reported on a high rate of civilian casualties in connection to TK in Pakistan, among others.\textsuperscript{21} Another important issue concerns the lack of judicial review. To date, there are minimal judicial elements present during operations with TK. For example, the CIA drone strikes in Pakistan are conducted in the shadows of public scrutiny, and there exist no supranational body that can review the practice of TK with drone strikes or similar methods.\textsuperscript{22} Without public disclosure, the risk is significant high for

\begin{footnotesize}
\textsuperscript{16} Refers to International Humanitarian Law.
\textsuperscript{17} Blum & Heymann 2010: xii
\textsuperscript{18} Eichensehr 2007: 1873
\textsuperscript{19} Blum & Heymann 2010: xvi-xvii
\textsuperscript{20} Blum & Heymann 2010: 3
\textsuperscript{21} The Bureau of Investigative Journalism, \textit{Covert Drone War}
\textsuperscript{22} Murphy & Radsan 2010: 411
\end{footnotesize}
improper and unjust actions. The lack of accountability can set dangerous precedents for other states, which risk weaken international law.

International law is a result of a common moral language that has been developed by states during a long period; this language is used to identify unworthy behavior among states and to prevent unnecessary human suffering. The U.S. government is trying to reformulate this universal language in order to legitimize its practice of TK with combat drones within several sovereign states. If there exists no universal belief in the United States' interpretation of international law, the U.S. government risks violating applicable laws, which could negatively affect intergovernmental relations and erode public faith in international law.

1.2. Research aim and research questions

Several states, such as the U.S. and Israel have since 2001 challenged the predominant interpretation of current international law during the US-led War on Terror. Since 2001, the U.S. government has implemented a policy on TK of suspected terrorists by using drones as a mean to carry out the killings.

The aim of this thesis is to answer the question whether the U.S. policy on TK, with combat drones, is compatible with the doctrine of just war theory, international law and fundamental human rights law. Moreover, this thesis intends to examine the legal issues arising from the U.S. practice of international law, in relation to the justification of TK. If judicial violations occur, the intent is to demonstrate how the method is challenging applicable international law. The study intends to investigate the relationship between the paradigms of armed-conflict and law-enforcement, and the space in between, which the U.S. government uses to legally justify TK.

The purpose of this thesis is to determine whether the practice of TK can be considered legal, based on applicable international law, and if not, to provide knowledge about how the method violates applicable public international law. The study intends to answer the following research questions:

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23 Sofaer 2013: 938
24 Amnesty International 2012: 1
25 Blum & Heymann 2010: 33-34
• Is the U.S. policy on TK consistent with applicable international law and the moral rules that govern the conduct of war?

• If a violation of an applicable international law occurs, in what way is the U.S. policy on TK inconsistent with applicable international law?

1.3. Literature review

The current debate regarding TK primarily focuses on the justification of the method, in particular, how the U.S. and Israel seek to justify the practice of TK on the basis of applicable international law. Furthermore, there is a dispute among academics regarding the legality of drones in armed conflicts. The U.S. government uses drones as a mean to implement the policy on TK; several scholars argue that the use of drones violates the morality of war, in particular, the principle of distinction and the principle of sovereignty. However, those who defend the practice argue that the policy is legitimate because terrorists do not obey the Law of War.26

The U.S. policy on TK has brought together several scholars from different fields of expertise; all contribute with various interpretations of the policy in consideration to applicable international law. Several scholars of law, philosophy, ethics and some with military backgrounds have presented different views regarding the legality of TK with combat drones. Two major themes can be identified within the existing literature, on the one hand, the scholars discusses when and if states are entitled to use force against another in self-defense (jus ad bellum), and on the other hand, against whom and by what means (jus in bello). Both moral and legal lenses are applied within the research field in order to determine the legality of the policy, based on the legal frameworks of jus ad bellum and jus in bello. The discussion has resulted in three different categories of perceptions: those who strictly oppose the policy on TK, those who defend it, and finally, those who believe that existing legal norms needs to be developed in order to conform to contemporary asymmetrical terrorist threats.27

The anthology "Targeted Killings - Law and Morality in an Asymmetrical World" is one of several works that offer the reader arguments from various academic disciplines. The paradigms of law-enforcement and armed-conflict are frequently used as a common starting point within the research field. The former refers to that suspected terrorists should be

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26 Maxwell 2012: 59; Blum & Heymann 2010: 41
27 See, for example, the introductory discussion in “Targeted Killings - Law and Morality in an Asymmetrical World.”
prosecuted as criminals, and the latter defines terrorists as legitimate military targets (combatants). However, there exist a disagreement among scholars whether international law permits attacks against terrorists or not, given that terrorist do not fall under the definition of combatant.

In addition, the existing literature defines a third –hybrid– paradigm that is widely discussed. Gabriella Blum and Philip B. Heymann draw attention to this hybrid model in the book “Laws, Outlaws, and Terrorists – Lessons from the War on Terrorism.” According to the authors, there exists a definitional problem with declaring war against a non-state actor. They conclude that current international law is designed to regulate warfare between states, not between states and non-state actors, such as between United States and al Qaeda; this problematizes the U.S. counterterrorism strategy further. Blum and Heymann argue that terrorists do not fall under the existing paradigms, and as a result, the international community needs to develop current legal norms in order to conform to contemporary terrorist threats.

Moreover, the goal with the War on Terror is "to prevent any future acts of international terrorism against the United States [by those responsible for the 9/11 attacks].” Several scholars, as Blum and Heymann, have questioned this goal: "how do we know when that goal has been attained and the war can be declared over, victory won, and the danger done with?" The U.S. interpretation of applicable international law may lead to unrestricted use of force. In fact, Blum and Heymann refers to the Hydra effect, and argues that such force "may strengthen the sense of legitimacy of terrorist operations" and "bolster support for what seems like a just cause of the terrorists." Furthermore, when the CIA carries out drone strikes "on foreign territory, they run the risk of heightening international tensions between the targeting government and the government in whose territory the operation is conducted." Finally, the authors claim that, “each attack invites revenge, each revenge invites further retaliation.”

A consistent trend among those opposed to TK is that they do not recognize the need to develop the law further. Abraham D. Sofaer at Stanford University sees a danger in not recognizing rules that enable states to defend themselves against non-state actors like al Qaeda. He argues that this may leave such measures unregulated, instead of being integrated.

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28 Altman 2012: 1
29 Blum & Heymann 2010: xvi
31 Blum & Heymann 2010: xiv
32 Blum & Heymann 2010: 87
33 Blum & Heymann 2010: 88
into universally recognized law. However, there exists also a need to regulate TK in order to prevent improper and unjust governmental actions.34

Colonel Mark "Max" Maxwell and Jens Ohlin, Professor of Law at Cornell Law School, belong to those who defend the practice of TK. Maxwell and Ohlin claims that the current law enables terrorist to exploit the principle of distinction, which gives them a critical advantage. Terrorists intentionally fail to distinguish themselves as combatants, in order to seek protection within civilian contexts. Both authors argue that current international law has to be changed, in order to reduce the immunity for terrorists.35

However, none of them explain how fundamental human rights shall be guaranteed if the law is changed, or how to limit the use of lethal force (jus in bello). For example, suspected terrorists are not given the opportunity to defend their innocence in a court of law, which violates fundamental human rights law.

Several scholars have drawn attention to the lack of judicial review in connection to TK, Richard Murphy and John Radsan demonstrates this in their research paper "Due Process and Targeted Killing of Terrorists." To date, there is little information how the CIA selects its targets. The decisions are made in the shadows of public scrutiny, this tends to make the killing arbitrarily, which is prohibited by international human rights law.36

Furthermore, several scholars who defend the U.S. drone policy fail to address the theoretical separation between the principles of jus ad bellum and jus in bello. States that resort to war are obligated to comply with the Law of War, regardless of the reason behind the conflict. Even if a state is entitled to use force in accordance with the principle of jus ad bellum, they must also respect the rules of jus in bello, and vice versa. Jasmine Moussa concludes that the separation between the two bodies of law "provides important protection during armed conflict."37

In fact, Adam Bodnar and Irmina Pacho argue that states are not permitted to deviate from the rules of jus in bello, not even during a State of Emergency, as several governments claim. Several defenders of TK tend to link these principles in an attempt to justify military interventions without regard to the protecting principles of jus in bello. However, military operations must meet the requirements of both principles in order to be considered legitimate.38

34 Sofaer 2013: 937-938
35 Maxwell 2012: 59; Ohlin 2012: 60
36 Murphy & Radsan 2010: 413
37 Moussa 2008: 963
38 Bodnar & Pacho 2013: 204-205
The Obama Administration claims that they are engaged in an international armed conflict, and are therefore entitled to use force in accordance with the inherent right to self-defense. Still, it is not legally tenable to only consider one of the applicable principles; this standpoint is widely supported in the existing literature.\textsuperscript{39}

To conclude, several scholars tend to note that there is nothing new with the practice of TK or the use of combat drones in warfare. However, the use of drones raises concerns of \textit{when} and \textit{how} lethal force may be applied in the diffuse War on Terror. Christian Enemark at Aberystwyth University has summarized it as follows, "\textit{even if the use of armed drones does not introduce an entirely new form of killing, such use might still exacerbate or expand existing moral concerns [...].}"\textsuperscript{40}

In relation to this, this thesis intends to investigate the conditions under which the U.S. government is entitled to use force in self-defense against Pakistan and in what manner, based on the universal understanding of \textit{jus ad bellum} and \textit{jus in bello}. The objective of this thesis is to contribute with knowledge regarding the method's impact on relevant international law and morality in connection to this mentioned research field.

\subsection*{1.4. Delimitations}

This thesis is limited to TK in Pakistan, despite the fact that the strategy is carried out in several other states. The reason behind this is that the numbers of U.S. drone strikes in Pakistan is distinctive high in relation to the other affected states. The Obama Administration has intensified and expanded the drone policy in Pakistan since they took office in 2009.

The thesis will not explain the reasons behind the 9/11 attacks or the U.S. interventions in Iraq or Afghanistan as a response to these events. The time period is limited from 2001 when the U.S. government initiated the political platform of TK, and until present time. I do not have the intention to consider approaches that fall outside applicable international law and its moral principles, due to the fact that this thesis has a legal approach.

\textsuperscript{39}Henriksen 2014: 6
\textsuperscript{40}Enemark 2014: 4
1.5. Chapter outline

After this introduction Chapter 2 follows, which deals with the methodological and theoretical approaches in this thesis, followed by Chapter 3, which explains the analytical framework that is applied in Chapter 4 during the analysis and at last, the conclusions are discussed in Chapter 5.
2. Methodological and theoretical approaches

The following chapter presents the methodological and theoretical approaches that this thesis consists of. First, I explain the choice of material and how to interpret it, followed by a discussion regarding the legal working method that is used, and lastly, a brief discussion about just war theory.

2.1. Choice of material

In order to determine if the U.S. practice of TK is consistent with public international law, its recognized legal sources must be considered. The Statute of the International Court of Justice (ICJ) identifies these legal sources as:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations […]\(^{41}\)

Therefore, this thesis focuses on legal sources that have become codified in law by treaties. Moreover, customary international law, judicial decisions and legal doctrines have also been considered in order to make a correct judicial assessment of TK.\(^{42}\)

These legal sources constitute the main primary material, and in addition to this, I have identified relevant research articles that deal with the topic.

I have focused on applicable international law (bound arguments) within this thesis, and chosen to handle the U.S. interpretation of relevant international law (free arguments) with caution.\(^{43}\) The U.S. interpretation of applicable international law may be different from its original meanings and purposes.\(^{44}\)

To date, there exists no official data regarding the U.S. policy on TK in Pakistan. The U.S. government has not confirmed the numbers of civilian casualties in relation to the implementation of drone strikes in Pakistan. Furthermore, there is no information about how

\(^{41}\) The Statute of the International Court of Justice, Article 38(1)
\(^{42}\) Linderfalk 2006: 24-25
\(^{43}\) For more information, see the chapter regarding the legal method.
\(^{44}\) Lehrberg 2010: 87
the CIA selects its targets or how the conduct of individual CIA operatives is regulated.\textsuperscript{45} Until today, it seems that this information remains confidential.

Due to the lack of information, I have chosen to present data from three independent NGO:s that is used exclusively in the existing literature.\textsuperscript{46} This attribute them a certain degree of legitimacy. Also of note, this data is not official and may differ. However, the focus is placed on the practice of TK as whole, and not on this type of information, which more serves as an indication to the reader.

\section*{2.2. International agreements}

According to international law, the state is the main legal actor within the international community; it possesses both legal rights and obligations.\textsuperscript{47} Public international law consists of two legal frameworks, \textit{customary law} and \textit{treaty law}. Customary international law is applicable to all states regardless of their consent, while the law of treaties only binds the contracting states.\textsuperscript{48} A treaty is an international agreement that has been created between two or more states; the Vienna Convention of 1969 defines a treaty as:

\begin{quote}
an international agreement concluded between States in written form and governed by international law […]\textsuperscript{49}
\end{quote}

The Vienna Convention also contains rules for how international agreements should be interpreted, implemented, changed or terminated by the international community.\textsuperscript{50} For example, it governs how states should interpret a treaty:

\begin{quote}
A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.\textsuperscript{51}
\end{quote}

A written treaty may in time achieve the status of customary international law, depending on whether the content is generally recognized.\textsuperscript{52} A state joins a treaty by \textit{ratifying} it; thereafter must the state maintain and incorporate its contents.\textsuperscript{53}

\begin{flushleft}
\footnotesize
\textsuperscript{45} Enemark 2014: 57
\textsuperscript{46} The New America Foundation, the Long War Journal and the Bureau of Investigative Journalism.
\textsuperscript{47} Linderfalk 2006: 11
\textsuperscript{48} Strömberg 2003: 10
\textsuperscript{49} Vienna Convention on the Law of Treaties, Article 2(1)(a)
\textsuperscript{50} Strömberg 2003: 43
\textsuperscript{51} Vienna Convention on the Law of Treaties, Article 31(1)
\textsuperscript{52} Linderfalk 2006: 27
\end{flushleft}
Customary international law is applicable to all states regardless of their consent; a customary rule arises when there is an established practice among states, which is general, constant and uniform. There must also exist a universal belief in the rule, known as, opinio juris. The established practice must possess a general nature, be widespread in time, and be consistent in order to constitute customary international law. The Geneva Conventions provides an example of customary international law, which is relevant for this thesis. Parts of customary law are absolute and must not be derogated from by agreement; these rules are known as jus cogens. An example of a jus cogens rule is the right to life.

Within the framework of this thesis, I have chosen to interpret legal sources on the basis of the Vienna Convention and a legal working method. Furthermore, this thesis has the intention of explaining the meaning and purpose behind public international law in relation to TK, with the support of just war theory.

2.3. Legal method

I have chosen to use a legal method in this thesis, more specifically, Bert Lehrberg's legal work procedure. Lehrberg’s legal method covers six steps which have to be applied in order to:

- identify and structure a legal problem;
- find the right legal rule;
- read and interpret legal sources;
- identify the necessary prerequisite in a legal rule;
- specify the meaning of the necessary prerequisite with the support of legal sources and;
- independently take a stand with the support of appropriate interpretations.

This study is based on identifying a legal problem in relation to the research aim of this thesis. After the legal problem and its associated research questions have been identified, they must be reformulated into legal terms in order to be compatible with the judicial language. Thereafter, it is possible to legally categorize the problem in order to compare it to the

53 Lundberg 2010: 22
54 Linderfalk 2006: 26-27; Strömberg 2003: 16-17
55 Linderfalk 2006: 33; Goppel 2013: 57
56 Bert Lehrberg is a Professor of Law at Uppsala University, Sweden.
57 Lehrberg 2010: 39
necessary prerequisite in a specific legal rule. The necessary prerequisite of a legal rule refers to the requirements that have to be fulfilled before a legal rule can be applied. For example, in order to be protected by the third Geneva Convention, which governs the treatment of Prisoners of War (POW), must the individual who invokes the protection be subject to the convention and its definition of POW. The necessary prerequisite in this case refers to the definition in the convention; this protection is thus applicable if the individual falls within the relevant description of protected prisoners in armed conflict.

I have been able to find relevant legal sources, such as the Geneva Conventions, by identifying the primary branch of law that is applicable to my research problem. Thereafter, I identified the necessary prerequisites in relevant legal rules within this field; these legal sources are mainly international law, customary international law and legal opinions from international courts. This study deals with legal problems that revolve around international law and customary international law, for this reason, this thesis focuses mainly on international agreements, such as treaties. I have chosen to read and interpret relevant international agreements on the basis of the Vienna Convention and in accordance with this legal method. As previously mentioned, "a treaty shall be interpreted in good faith [...] and in the light of its object and purpose." A legal text must be analyzed thorough and reasonable in order to identify its applicability to a specific situation, and in accordance to the legal method. In the interpretation process, it is important to separate bound arguments from free arguments. Bound arguments are legal norms that stem from international law, and free arguments, in this case, are the U.S. interpretation of such norms. These two arguments may possess different interpretations of the law in question, and for this reason, it is important to examine the meanings and purposes of relevant legal rules in order to conduct a legally secure assessment.

All necessary prerequisites must be identified to ensure that the legal rules are applicable to a specific situation. Furthermore, the meaning of the necessary prerequisites must be explained in relation to the meanings and purposes of relevant legal sources. In this thesis, the doctrine of just war theory is used as a supplement to explain the meanings and purposes of applicable legal rules. In fact, just war theory serves as the legal groundwork for this thesis.

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58 Lehrberg 2010: 30
59 Lehrberg 2010: 35
60 Lehrberg 2010: 31
61 Strömberg 2003: 14
62 Vienna Convention on the Law of Treaties, Article 31(1)
63 Lehrberg 2010: 111
64 Lehrberg 2010: 87
65 Lehrberg 2010: 35-36
Just war theory originated from a long intellectual tradition in the West, known as the just war tradition. This intellectual history can be traced back thousands of years to ancient Greece and Rome. Just war theory stems from the just war tradition, which seeks to limit war. The just war tradition is a result of various ideas and arguments, which have been developed of several intellectuals during a long time; just war theory is an attempt to create a unified framework of ethics in war, by borrowing elements from the just war tradition.\(^{66}\)

The final step of the legal method is about making a final assessment of the law’s applicability, and consider, if there are particular reasons that make the law inapplicable.\(^{67}\)

TK in the War on Terror is a new phenomenon, for this reason there is a need to examine the current use of applicable international law and its possible consequences, in order to provide guidance regarding a potential development of existing law. For this reason, the analysis revolves around the legal realm, and the legal method is most suitable to investigate the given problem. These legal norms are important to examine because they are used among governments in order to justify state behaviors, and it is crucial to investigate attempts to reformulate existing legal doctrines. In fact, attempts with unrighteous intentions may create dangerous precedents among states, with the purpose to dissolve existing limitations of force in war.

2.4. Just war theory

War is a devastating activity for both human beings and the environment, for this reason has the international community agreed on a common language of ethics in war. Just war theory seeks to provide a theoretical foundation for the morality of war. This moral doctrine holds that war can sometimes be morally justified, even so, it is important to impose limits in order to reduce human suffering. Whatever the reason for going to war, the ethics of war imposes restrictions on the means and methods used to fight a war, and the conduct are subject to moral considerations.\(^{68}\) This moral language has later been codified in international law by treaties.\(^{69}\)

It seems that all cultures through history have recognized the need to regulate war; the origins of just war theory can be traced back to St. Augustine (354-430) who argued that war

\(^{66}\) Lee 2012: 31, 35
\(^{67}\) Lehrberg 2010: 36
\(^{68}\) Lee 2012: 3; Kinsella 2007: 55
\(^{69}\) See for example, Geneva Conventions I-IV.
could only be justified under certain conditions. The doctrine of *just war theory* seeks to distinguish just from unjust wars; these moral considerations are applicable to political and military powers within a belligerent state.

The moral landscape within *just war theory* is divided into two realms, and for this reason, war is always judged twice, on the basis of these two dimensions. The first dimension of *just war theory* seeks to determine whether it is justified to go to war, if a particular war is just or unjust. The second dimension seeks to establish whether a war is fought justly or unjustly, concerns about how war should be fought. *Just war theory*, separates “*jus ad bellum, the justice of war, from jus in bello, justice in war.*” *Jus ad bellum* regulates aggression and self-defense, and *jus in bello* regulates the methods and means used during an armed conflict. *Jus ad bellum* and *jus in bello* are logically independent, a just war can be fought unjustly, and an unjust war can be fought justly. The theoretical separation between these two distinct bodies of law provides important protection during war. These two sets of rules bind all belligerents, regardless of who initiated the war from the first place. This regulatory framework stems from the *just war tradition*.

As mentioned earlier, these moral considerations have later been codified in treaty law, for example, into *International Humanitarian Law* (IHL). International law borrows many of its elements from *just war theory*. The codification of *just war theory* through law has made moral rules internationally enforceable, for example, through the *United Nations* (UN) Charter or the Geneva Conventions.

### 2.4.1. Jus ad bellum

All states have the right to territorial integrity and political independence; this right is known as the principle of *sovereignty*. International law defines a violation of this principle as an *act of aggression*. According to contemporary international law, states may only use force towards another state in self-defense, or if the *UN Security Council* (UNSC) so decides.
Jus ad bellum refers to the morality of going to war. According to jus ad bellum, a war can only be legitimate if it satisfies certain criteria, as explained below:

For a war to be just, it must have a just cause, be declared by a legitimate authority, be fought with a rightful intention, show proportionality in the balance between the good and harm it does, be a last resort and have a reasonable chance of success.

First, a just cause is a justifying reason for going to war, and the only acceptable reason is self-defense. Only one state can fight for a just cause; however, both sides may incorrectly believe they are fighting for a just cause. Second, legitimate authority refers to the procedure that initiates war; this criterion can be assessed from both moral and legal starting points. From a legal perspective, legitimacy may be an authority that exercises power in accordance with domestic and international law. In moral terms, if the authority exercises power in a morally acceptable way, such as by respecting fundamental human rights.

Third, a war has to be fought with a rightful intention, that is, with a morally acceptable intention. An acceptable intention is a just cause; a state is not allowed to benefit from the situation. The use of force is only allowed to ward off an attack. Fourth, the principle of proportionality restricts the use of force whenever a state invokes a just cause. The purpose of proportionality is to make jus ad bellum more restrictive, it limits what states can do towards each other under the criterion of a just cause. A self-defense is disproportionate if it creates more evil than what is necessary to ward off an attack. Fifth, a state must first have exhausted all peaceful means before they initiate an armed attack; war is always a last resort. Finally, the last criterion affirms that violence must not be resorted to if the state does not have a reasonable chance of success. War should not be initiated if the chance for victory is low, because war is destructive and should not be undertaken without a reasonable chance of winning.

2.4.2. Jus in bello

Unlike jus ad bellum, jus in bello seeks to determine the conditions for the conduct of war, and this set of rules is applicable to the soldiers who are fighting a war; they are subject to

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78 Lee 2012: 68  
79 Lee 2012: 70  
80 Lee 2012: 73; 77; Walzer 1977: 39  
81 Lee 2012: 82-83  
82 Lee 2012: 83-84; Walzer 1977: 76  
83 Lee 2012: 85-86  
84 Lee 2012: 93; 96
moral and legal restrictions of force.\(^85\) There exist three basic in bello rules that has to be satisfied in order to justify military actions, namely, the principles of *discrimination*, *proportionality* and *due care*.\(^86\)

The principle of *discrimination* (distinction) is at the heart of *jus in bello*, and the regulation is universally recognized and reflected in international law.\(^87\) Soldiers are not allowed to engage in military operations that are intended to kill the civilian population. Combatants are required to distinguish civilians from military targets, and they must do everything in their power to protect the civilian population during military action.\(^88\) The principle of *proportionality* requires that the effects of a military action stand in proportion to the victory in the overall war. *Just war theory* recognizes that some civilians will unintentionally be killed during military operations in war. However, military benefits must never take precedence over the civilian harm inflicted, not even unintentionally can civilians be killed without a limit.\(^89\) Finally, the principle of *due care* requires efforts to minimize civilian harm during military actions; civilian harm must be kept as low as possible to avoid civilian casualties. Soldiers are compelled to gather intelligence information, choose the least harmful course of action, and time the attack to minimize civilian harm.\(^90\) Finally, it is generally believed that the principles of *jus in bello* has achieved the status of *jus cogens*.\(^91\)

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\(^{85}\) Walzer 1977: 131  
\(^{86}\) Lee 2012: 154  
\(^{87}\) Kinsella 2007: 241  
\(^{88}\) Kinsella 2007: 217; Lee 2012: 156  
\(^{89}\) Kinsella 2007: 242; Lee 2012: 156  
\(^{90}\) Lee 2012: 157  
\(^{91}\) Oeter 2010: 39
3. Analytical framework

The practice of TK affects three different sets of rules, since the operations are carried out within other sovereign states. These military actions carry, therefore, an international character. The affected laws are the fundamental human rights, international humanitarian law; and the UN Charter. Moreover, this chapter defines the terms “targeted killing” and “terrorist.”

3.1. Human rights

A common starting point for describing human rights is the Universal Declaration of Human Rights (UDHR). The international community adopted the declaration on December 10, 1948, and the UDHR contains economic, social, cultural, civil and political rights. The declaration is today universally recognized, and many of its parts have achieved customary status, and are, therefore, legally binding for states to follow. The UDHR has been the groundwork for nearly 30 UN conventions adopted by the UN General Assembly. In 1966 the international community adopted two conventions that reflect the rights stipulated in the UDHR: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together the two conventions constitute a "Bill of Human Rights." The method of TK has implications on the ICCPR that reflects the rights in article 1-21 of the UDHR, more precisely, the right to life. This right is considered to be the most fundamental human right and is stipulated in article 6 of the ICCPR. The right to life has no territorial boundaries and constitutes customary international law. It is only allowed to use lethal force in self-defense, and if the situation requires it. Non-lethal alternatives must first be exhausted according to the ICCPR.

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92 Lundberg 2010: 20
93 Lundberg 2010: 21
94 Lundberg 2010: 22
95 Lundberg 2010: 25
96 Karlbrink 2010: 81
97 Karlbrink 2010: 90; Goppel 2013: 57
98 Melzer 2008: 212
99 Karlbrink 2010: 91; Melzer 2008: 212
3.2. International humanitarian law

*International Humanitarian Law* (IHL) regulates the use of force during armed conflicts, regardless of the reason behind the war. 100 Humanitarian law reflects customary international law and originating from *just war theory* and its protecting principles (*jus in bello*). The purpose of IHL is to limit human suffering; this regulatory framework restricts the means and methods that can be employed during armed conflicts. 101 A person who possesses the legal right to use force against hostile targets in armed conflict is defined as *combatant* under public international law. However, they must meet certain criteria in order to be authorized to take a direct part in the hostilities. Combatants must belong to the state’s regular army, stand accountable before a military chain of command, and distinguish themselves by wearing uniform. Furthermore, they are required to comply with and be trained in the Law of War. Legitimate combatants are immune from prosecution for their participation in the hostilities, unless they have not committed war crimes. 102

The most fundamental principle in IHL is designed to protect the civilian population, and it is strictly forbidden to carry out military attacks against civilian objectives. Military forces are always obliged to distinguish between civilian and military targets; indiscriminate attacks violate the principle of *distinction*. 103

Furthermore, wounded or sick persons possess the legal right to protection, irrespectively if they are civilians or combatants (*hors de combat*), and soldiers who surrender have the right to be treated humanely as *Prisoners of War*. 104 These are some of the regulations in IHL, which represents a compromise between the principle of *humanity* and the principle of *military necessity*. According to the principle of *humanity* shall persons who are not taking a direct part in the hostilities be treated humanely, and weapons that cause unnecessary suffering is strictly prohibited, even if it satisfies the requirements of *necessity, distinction* and *proportionality*. 105 Moreover, the principle of *military necessity* states that military operations may only be directed against military objectives, with the intention to weaken the enemy. Other military operations that do not have the intention to weaken the enemy, is strictly prohibited. 106

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100 Linderfalk 2006: 169
101 Nilsson 2010: 356
102 Linderfalk 2006: 174
103 Nilsson 2010: 361 Lee 2012: 156
105 Nilsson 2010: 356—357; Vogel 2010: 128
These rules have been codified in two legal frameworks that are relevant for this thesis. The four *Geneva Conventions (GC)* of 1949 protect persons who are not participating in the hostilities; these regulations are today universally accepted and reflect, thereby, international customary law. The first Geneva Convention (GC I) protects wounded and sick soldiers on land during war. Followed by the second Geneva Convention (GC II), which deals with wounded, sick and shipwrecked military personnel at sea during war. Thereafter, the international community adopted the third Geneva Convention (GC III), which governs the treatment of POW. These three conventions regulate how combatants should treat their hostile counterpart. Finally, the last Geneva Convention (GC IV) affords protection to civilians, including in occupied territory. In connection to the Geneva Conventions, there are two additional protocols (AP), which extend the protection of civilians further.\(^\text{107}\) Also of note, the U.S. has not ratified the *Additional Protocol I (AP I)*. However, some of its regulations are considered to reflect customary international law.\(^\text{108}\)

The other major part of public international law is the *Hague Conventions (HC)*, which governs the choice of means and methods during warfare. The Hague Conventions prohibits, for example, the use of weapons that are causing unnecessary suffering, such as, expanding bullets and chemical weapons.\(^\text{109}\)

### 3.3. The UN Charter and self-defense

The most central norm within public international law and the UN Charter is the prohibition to use war as a mean to change *status quo*.\(^\text{110}\) States are obligated to respect the principle of *non-intervention*, and the norm has attained the status of *jus cogens*.\(^\text{111}\) The UN Charter forbids states to use force against each other, the prohibition is well established in Article 2(4) of the Charter. However, according to the UN Charter there are two exceptions. First, states have an inherent right to individual or collective self-defense if an armed attack occurs. The right to use force in self-defense is established under Article 51 of the UN Charter, and are universally recognized in customary international law. Second, the last exception can be

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\(^{107}\) Nilsson 2010: 358


\(^{109}\) Strömberg 2003: 125-126

\(^{110}\) Bring 2002: 68

\(^{111}\) Linderfalk 2006: 33
traced to Article 42, which gives the UNSC the right to enforce military actions, which may be necessary to maintain and restore international peace and security.\textsuperscript{112}

3.4. Definition of “targeted killing”

There exists no universally accepted definition of "targeted killing." In fact, the term has been evolved through actual usage. The concept has gained increasing interest in recent years, due to Israel's policy on TK during the second Intifada in September 2000, and the U.S. Administration's implementation of the practice during the War on Terror.\textsuperscript{113} However, the UN\textsuperscript{114} has chosen to use Dr. Nils Melzer’s definition of TK, Melzer is a Legal Advisor for the International Committee of the Red Cross. He has also written the book, \textit{Targeted Killing in International Law}, published by Oxford University Press. I have chosen to use his definition of TK in this thesis. Melzer’s definition is based on real cases, where five common elements from all cases have formed the basis of the definition. These five necessary prerequisites have to be fulfilled in order to actualize Melzer's definition of TK:

- **Use of lethal force**: First, targeted killing is a method of employing lethal force against human beings. While targeted killings almost invariably involve the use of some sort of weapon, there are no limits to alternative methods of taking a human life. The notion of “lethal force” must, therefore, include any forcible measure, regardless of the means employed, which is capable of causing the death of a human being.

- **Intent, premeditation and deliberation to kill**: Second, constitutive of targeted killings are also the elements of intent, premeditation and deliberation to kill.

- **Targeting of individually selected persons**: Third, the requirement of targeting individually selected persons distinguishes targeted killings from operations directed against collective, unspecified or random targets.

- **Lack of physical custody**: Fourth, at the time of their killing, the targeted persons are not in the physical custody of those targeting them.

- **Attributability to a subject of international law**: Fifth, in order to be relevant under international law, targeted killings must be attributable to a subject of international law. Subjects of international law are primary States but, in certain situations and for limited purposes, may also include non-State actors.\textsuperscript{115}

\textsuperscript{112} Bring 2002: 73
\textsuperscript{113} Goppel 2013: 9
\textsuperscript{114} Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, 28 May 2010, UN Doc. A/HRC/14/24/Add.6
\textsuperscript{115} Melzer 2008: 3-4 (The definition has been shortened, for full description, see footnote).
In sum:

… the term "targeted killing" denotes the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.116

3.5. Definition of “terrorist”

The term "terrorist" can be clarified with reference to the terms "terrorist act" and "terrorism," terrorists are all those who intentionally are carrying out, plan and organize terrorist acts, or which commands others to commit such attacks.117 Despite several attempts to reach an internationally accepted agreement, the international community has failed to define the term terrorism. As a result, there is no universal agreement on any legal framework that deals with terrorism in general.118 However, the international community has agreed on fourteen conventions and protocols, which deals with specific forms of violence.119 For example, hijacking of airplanes and hostage taking. These legal instruments are often invoked in connection to terrorism. The following definition of the term terrorist is based on the essence of what most commentators agree on, and existing legal sources. I have chosen to use Dr. Anna Goppel’s definition of the term terrorist in this thesis.120 Five necessary prerequisites have to be fulfilled in order to constitute a terrorist act according to Goppel:

… (1) it includes the use of violence or the threat of its use; (2) it is carried out intentionally; (3) it is directed against innocents; (4) it is carried out with the aim to influence the political or societal behavior of an audience; (5) it may reasonably be argued that the act of violence by its nature or its context has the capacity to severely threaten or substantially shock people.121

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116 Melzer 2008: 5
117 Goppel 2013: 17
118 Goppel 2013: 18
120 Dr. Anna Goppel, senior teaching and research associate at the University of Zurich, Goppel has written the book Killing Terrorists - A Moral and Legal Analysis.
121 Goppel 2013: 19
4. Analysis

The following chapter analyzes the U.S. practice of TK with combat drones in Pakistan. New material will be presented in this section, in accordance with the legal working method; applicable legal doctrines will be presented in relation to the legal issues arising of TK.

4.1. No-Law Zone

Before the events on September 11, the U.S. government treated terrorists in accordance with the paradigm of law-enforcement, which regulates the state's ability to exercise force against an individual. The paradigm only permits lethal force if an individual poses an immediate threat, and if deadly force is the only way to avert that threat. The state must first have exhausted all non-lethal alternatives.\textsuperscript{122} Killing an individual in almost any other case, without due process guarantees, constitutes a murder or an extrajudicial execution. The right to use lethal force is constrained by both domestic criminal law and fundamental human rights law.\textsuperscript{123}

However, according to the principle of sovereignty, governments may only exercise jurisdiction within their own borders.\textsuperscript{124} When a foreign government conducts military operations within another state, they are bound to follow international law, regardless of the reason behind the conflict. The U.S. government has favored the paradigm of armed-conflict, because it opened up for warlike measures, such as military strikes. In contrast to, due process guarantees. TK is designed to kill suspected terrorists without these guarantees, because they are categorized as unlawful combatants, not as criminals.\textsuperscript{125} Moreover, the United States categorizes the conflict as a war by referring to the War on Terror. This is done in an attempt to justify military actions without consideration to non-lethal alternatives that are provided by the paradigm of law-enforcement.

It seems that those who conduct terrorist acts fall between the Law of War and the law of peace. Although contemporary terrorist threats do not conform to the existing paradigms, governments are still required to comply with international law; previous limitations of force cannot suddenly disappear into a legal vacuum. From a legal perspective, this must not be

\textsuperscript{122} Maxwell 2012: 36-37
\textsuperscript{123} Blum & Heymann 2010: 69
\textsuperscript{124} UN Charter, Article 2(4)
\textsuperscript{125} Blum & Heymann 2010: xiii
regarded as legitimate.\textsuperscript{126} Existing international law is fully applicable to the ongoing War on Terror, until a new \textit{hybrid} paradigm has been developed which possess a universal character.

On the one hand, there is a danger in not recognizing the need among states to protect themselves against non-state actors. The failure of current legislation to recognize the need for a third paradigm can leave defensive measures, such as TK, unregulated rather than integrated into a universal legal regime. On the other hand, the international community must establish rules and procedures that enable judicial reviews, and which regulates the use of force. Otherwise, the policy will lead to improper and unjust state actions.\textsuperscript{127}

4.2. Targeted killing with combat drones

Drones have become as much a symbol of President Barack Obama that Guantánamo was for his predecessor.\textsuperscript{128} Since 2001, the U.S. government has pursued a policy on drone strikes against suspected terrorists within several states around the world.\textsuperscript{129} Since 2004, Pakistan has the highest frequency of drone strikes within its borders.\textsuperscript{130} The former CIA director, Leon Panetta, described the counterterrorist operations with combat drones as follows: "And very frankly, it's the only game in town in terms of confronting and trying to disrupt the al-Qaida leadership."\textsuperscript{131}

Despite classified official data, several independent NGO:s, such as the New America Foundation, the Long War Journal and The Bureau of Investigative Journalism has tried to gather information regarding the drone strikes in Pakistan from a variety of sources. All three stresses a high rate of civilian casualties during these military operations. Still, the Obama Administration insists that the use of drones in the War on Terror is consistent with applicable international law, including the Law of War:

\begin{quote}
[...] What I can say is that it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.\textsuperscript{132}
\end{quote}

\begin{thebibliography}{99}
\bibitem{126} Blum & Heymann 2010: xviii
\bibitem{127} Sofaer 2013:937-938
\bibitem{128} To date, the attacks are carried out in Afghanistan, Iraq, Pakistan, Libya, Yemen and Somalia.
\bibitem{129} Enemark 2014: 1; Metzer 2008: 40-41
\bibitem{130} O’Connell 2010: 4
\bibitem{131} NPR, Officials: Bin Laden Running Out Of Space To Hide
\bibitem{132} Koh, Harold H. (2010), Legal Adviser, Department of State, The Obama Administration and International Law, Speech at the Annual Meeting of the American Association of International Law.
\end{thebibliography}
In fact, U.S. officials argue that their drone strikes are "precise" and that the numbers of civilian victims during these operations are "limited," however, this position has been questioned in general.¹³³ Several commentators argue that drone strikes cannot be defined as "precise," or that the number of civilian casualties is "limited."¹³⁴ According to unofficial estimates, the CIA has carried out between 370 to 383 attacks in Pakistan and the numbers of civilian casualties are estimated to be between 416 to 957 people.¹³⁵

The UAV technology has enabled the government of the U.S. to transcend time and space in order to kill a selected target anywhere in the world.¹³⁶ The U.S. government possesses three different models of drones in its weapons arsenal, the Predator, the Reaper and the Gray Eagle.¹³⁷ All can stay airborne for over fourteen hours, unlike manned fighter aircrafts, which has the capacity of four hours. The technology offers a risk-free killing, and drones can undertake reconnaissance missions and conduct missile strikes against identified targets, virtually anywhere.¹³⁸ The implementation of drones in armed conflicts is increasing, and the technology is advancing rapidly, the development has taken place since drones was used for the first time as weapon's platforms in Afghanistan, 2001.¹³⁹ Since 2002 until 2010, the numbers of combat drones in the U.S. military weapons arsenal have increased from 167 up to almost 7,500.¹⁴⁰

Drone warfare has been the subject of international criticism since the Obama administration decided to increase the use of combat drones in the War on Terror. Those who oppose the policy believe that the use of drones might dehumanize war and create a "PlayStation" mentality towards killing. In other words, making the use of force too easy, and makes "[...] some soldiers too calm, too unaffected by killing."¹⁴¹ Ethically speaking, even if the method is not entirely new, the employment of combat drones might still raise moral and legal concerns.¹⁴² Existing protective principles in war should be respected during drone operations, to avoid a norm development among states that permit unrestricted access to force in relation to TK and drone strikes. The missiles that are being fired from combat drones are no different from other conventional weapons systems. However, the legal problems arise in

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¹³³ NPR, Official: Bin Laden Running Out Of Space To Hide
¹³⁴ The New York Times, Death From Above, Outrage Down Below
¹³⁵ The Bureau of Investigative Journalism, Monthly Updates on the Covert War; The New America Foundation, Drone Wars Pakistan: Analysis (the statistics cover the period between 2004 until March 2014).
¹³⁶ Enemark 2014: 2
¹³⁷ Enemark 2014: 17
¹³⁸ Gertler 2012: 4
¹³⁹ Enemark 2014: 2; BBC News, US Drones Take Combat Role
¹⁴⁰ Gertler 2012: 2
¹⁴¹ Anderson 2012: 374; Singer 2009: 395
¹⁴² Enemark 2014: 4
relation to how and where they are used.\textsuperscript{143} A drone operator can never be certain about a specific target, unless there is additional intelligence information from the field. The issue surrounding civilian casualties has become particularly evident in Western Pakistan where the information from the ground is limited. The risk is, therefore, high that innocent bystanders who are located within or around the target site are unintentionally killed.\textsuperscript{144} In fact, it has been shown that drone operators are attacking targets even if an element of uncertainty is present, because the killing is done through television screens, and the operators themselves are out of danger. Several CIA operators have even compared the killing with playing a video game.\textsuperscript{145}

Several critics have also drawn the attention to how suspected terrorists are executed without access to a fair trial; this conduct violates fundamental human rights law. For example, the former Swedish foreign minister, Anna Lindh, defined a drone strike as "a summary execution that violates human rights," this will be dealt with later.\textsuperscript{146}

4.3. The relationship between jus ad bellum and jus in bello

Officially, the Obama Administration claims that "as a matter of international law," it "is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."\textsuperscript{147} This approach raises a number of issues under international law, whether the U.S. is involved in an armed conflict or not. In addition, in order to be lawful under international law, all military actions that U.S. carrying out within other sovereign states must comply with the rules of jus ad bellum and jus in bello.\textsuperscript{148} It is not enough to justify military interventions by only consider the right to national self-defense; jus in bello must also be taken into consideration.\textsuperscript{149} The ICJ has confirmed this position; the court noted in an advisory opinion, a “use of force that is proportionate under the law of self-defence (jus ad bellum),” must, “in order to be lawful, also meet the requirements of the law applicable in armed conflict (jus in bello).”\textsuperscript{150}

\textsuperscript{143} Henriksen 2014: 7-8
\textsuperscript{144} O’Connell 2010: 6
\textsuperscript{145} Vogel 2010:133
\textsuperscript{146} Enemark 2014: 19
\textsuperscript{147} Koh, Harold H. (2010), Legal Adviser, Department of State, The Obama Administration and International Law, Speech at the Annual Meeting of the American Association of International Law.
\textsuperscript{148} Henriksen 2014: 5
\textsuperscript{149} Goppel 2013: 77
\textsuperscript{150} International Court of Justice, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)
The Obama Administration claims that the U.S. is at war with al Qaeda, the Taliban and associated forces, and therefore, there is no need for a separate legal justification under *jus ad bellum*. In fact, John O. Brennan, Director of the CIA, stated that "the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa‘ida and its associated forces without doing a separate self-defense analysis each time."\(^{151}\) From a legal point of view, this statement is questionable. Whenever the U.S. violates the territorial sovereignty of another state, the executive branch must justify these actions under relevant international law and the principles of *jus ad bellum* and *jus in bello*.\(^{152}\)

Several commentators, such as Kenneth Anderson, argue that TK abroad only needs to be justified under the rules of *jus ad bellum*.\(^{153}\) The UN has dismissed this claim.\(^{154}\) *Jus in bello* applies equally between all belligerents of an armed conflict, according to the principle known as the "equality of application of international humanitarian law." This principle is codified in Article 2 of the GC I-IV and in the Preamble to AP I.\(^{155}\) *Jus ad bellum* and *jus in bello* are two distinct areas of law, and an act of force has to be justified under both frameworks in order to be legally acceptable.\(^{156}\) The two regimes operate independently, and together they provide an overall system that governs the use of force in armed conflicts.\(^{157}\) To conclude, *jus ad bellum* cannot alone provide a justification regarding TK; both bodies of law must be analyzed in order to make a final legal assessment.\(^{158}\)

### 4.4. Targeted killing as self-defense

As previously mentioned, states are forbidden to initiate war against each other. However, there are two exceptions: if the UNSC authorizes the use of force or in the event of self-defense. The principle of *non-intervention* is expressed in Article 2(4) of the UN Charter, which stipulates that all states "shall refrain in their international relations from the threat or use of force."\(^{159}\) Furthermore, according to Article 51 of the UN Charter, the right to self-defense may only be exercised "if an armed attack occurs." Neither international law nor just

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\(^{151}\) John Brennan, *Speech on Obama Administration Antiterrorism Policies and Practices*

\(^{152}\) Henriksen 2014: 6

\(^{153}\) Kenneth Anderson, Professor of Law

\(^{154}\) Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, 28 May 2010, UN Doc. A/HRC/14/24/Add.6

\(^{155}\) Moussa 2008: 967

\(^{156}\) Goppel 2013: 77-78; Moussa 2008: 965

\(^{157}\) Martin 2012: 231

\(^{158}\) Goppel 2013: 78

\(^{159}\) Enemark 2014: 23
war theory permits pre-emptive strikes; self-defense is the only act that qualifies as a just cause, and the right to self-defense is restricted to situations where “the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”

This precondition for self-defense is well established under customary international law. Still, following the events on September 11, 2001, the U.S. government argued that the right to self-defense should include pre-emptive use of force.

As mentioned earlier, the U.S. has conducted hundreds of drone strikes against suspected terrorists in Pakistan; these targeted operations are justified as self-defense with reference to the 9/11 attacks. However, it is legally questionable whether these attacks still serve as a legal justification for drone strikes in Pakistan. The attacks on American soil took place more than 12 years ago. It becomes more difficult over time to justify the use of force as a response to the terrorist acts on September 11, 2001. The U.S. government has no legal right to use force against Pakistan, unless there is a significant connection between the government of Pakistan and a terrorist organization that bears responsibility for an armed attack against the United States. This position has been confirmed by the UN General Assembly under resolution 3314, according to this document there must exist a “substantial involvement” in order to legitimate the right to self-defense. The ICJ has affirmed similar position; the court made it clear during the Nicaragua case that the right to self-defense could only be invoked in the event of an armed attack, and such an attack must be on a certain level of intensity in order to trigger the right to self-defense.

A victim state has the right to use force in self-defense if the authorities in the host state is incapable to stop terrorist activities within its borders. Such measures may only be exercised if it is the only way to ward off an imminent threat against the victim state. Under such circumstances, the U.S. government must demonstrate how the host state is incapable of stop such activity, which may trigger the right to self-defense. The Obama Administration has not demonstrated this in relation to the Pakistani government. In order to justify force in self-defense, the actions must meet the requirements of military necessity, proportionality and distinction. Until today, it is legally questionable whether the implementation of drone strikes

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160 Bring 2009: 151; Martin 2012: 228
161 National Security Strategy of the United States of America, September 2002
162 Henriksen 2014: 24
163 Henriksen 2014: 27
164 Martin 2012: 229
165 U.N. General Assembly Resolution 3314, (XXIX) (1974), Annex, art. 3(g)
166 O’Connell 2010: 13; Bring 2009: 161
167 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, 13 September 2013, UN Doc. A/68/382; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, 18 September 2013, UN Doc. A/68/389
168 Henriksen 2014: 18
in Pakistan meets these requirements, based on the civilian harm that has been inflicted.\textsuperscript{169} Self-defense may only be directed against terrorist facilities, without affecting the civilian population or the host state’s institutions.\textsuperscript{170}

The basic problem with the American drone strikes in Pakistan is that the U.S. government has failed to demonstrate what constitutes an armed attack against the United States in relation to the Pakistani government. The unwillingness to assume responsibility for TK in Pakistan is an obstacle for a complete legal assessment.\textsuperscript{171}

It is commonly accepted that the international community acknowledged that the September 11 attacks were sufficiently grave to trigger the right to self-defense.\textsuperscript{172} Unlike Pakistan, Afghanistan constituted a legitimate target of attack under Article 51 of the UN Charter. The UNSC approved military actions against Afghanistan by adopting resolution 1368 and 1373.\textsuperscript{173} The former government of Afghanistan supported the al Qaeda network and let them operate within its borders, from where the attacks had been launched and planned.\textsuperscript{174} However, there exist no such nexus between the government of Pakistan and those who bears responsibility for the September 11 attacks. Moreover, the attacks were not initiated from Pakistan, which problematize the U.S. military presence further.\textsuperscript{175} Many of those who being targeted today had nothing to do with 9/11, and for this reason it becomes increasingly difficult to argue self-defense in relation to these attacks. Anders Henriksen, Professor of Public International Law, summarizes it as follows:

\begin{quote}
As the “old al Qaida network ceases to exist as a threat to the USA, so must the justification for a right to self-defence based on the attacks on 11 September 2001. The American right to self-defence against al-Qaeda was triggered by a specific armed attack perpetrated by a specific actor—not by a more diffuse threat from Islamic inspired terrorism.\textsuperscript{176}
\end{quote}

There is little doubt that Islamic inspired terrorists still pose a threat against the United States, however, "it is not at all clear that the ‘old al Qaida’ network, who orchestrated the attacks on 11 September, exists as anything but a very loosely organized network of individuals who can only cause marginal harm to the USA.”\textsuperscript{177}

\begin{flushleft}
\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{169} Henriksen 2014: 19
\item\textsuperscript{170} Goppel 2013: 198
\item\textsuperscript{171} Melzer 2008: 42
\item\textsuperscript{172} Henriksen 2014: 12
\item\textsuperscript{173} Henriksen 2014: 15
\item\textsuperscript{174} Byers 2005: 61; Martin 2012: 244
\item\textsuperscript{175} Martin 2012: 246
\item\textsuperscript{176} Henriksen 2014: 28
\item\textsuperscript{177} Henriksen 2014: 27
\end{enumerate}
\end{footnotesize}
\end{flushleft}
The right to self-defense does not exclude the possibility to use force against Pakistan if the state constitutes an *immediate* threat. However, the crucial point is that the legal assessment is case-dependent. Whenever the U.S. breaches the territorial integrity of Pakistan, the government of the United States must justify such action under the principles of *jus ad bellum* and relevant international law. Every specific occasion the U.S. engage in a drone strike, they must justify such action by referring to an armed aggression from the affected state, or how the state is legally responsible for such an attack. It is impossible to demonstrate whether the use of force is *necessary* when an armed attack has not been identified, and when there is no explanation how the targets constitutes an *imminent* and armed threat to the United States. In addition, there can be no *proportionality* assessment without information regarding the harm that would be caused by the stated threat, in comparison with the harm inflicted by a defensive action. Intentions to extend the right to self-defense to purposes outside the general regulations in Article 51 are contrary to the principle of *rightful intention* and *just war theory* in general.

In summary, the UNSC has not authorized the use of force against Pakistan, and there exist no declaration of war between the states. Pakistan is not responsible for an armed attack against the United States, and has not invited the U.S. government to conduct drone strikes within its territory. In the opposite, they have rejected them. In addition to the UN Charter, the *International Criminal Court* (ICC) expressed that "*there is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary law.*" This means that the U.S. government must demonstrate that their attacks in Pakistan are *proportionate* and *necessary* to eliminate an *immediate* threat, otherwise they risk violate Article 2(4) of the UN Charter. Finally, the United States has not demonstrated that the Pakistani government is unable to handle terrorist activities within its borders.

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178 Martin 2012:247
179 Henriksen 2014: 6
180 Martin 2012:247
181 O’Connell 2010: 19
182 O’Connell 2010: 21
183 Emmerson, Ben (2013), Statement of the Special Rapporteur following meetings in Pakistan, 14 March 2013.
4.5. Characterization of the conflict

The Geneva Conventions and its Additional Protocols and the Hague Conventions of 1907 define two types of armed conflict; "international armed conflict" and "non-international armed conflict." International armed conflicts are armed conflicts between states and are regulated by the Geneva Conventions and its first Additional Protocol, and the Hague Conventions of 1907. Non-international armed conflicts are conflicts without an international character; this category refers to armed conflicts between states and non-state actors, for example, internal armed conflicts that are confined to a particular territory. Common Article 3 of the Geneva Conventions and its second Additional Protocol governs this type of armed conflict. All types of armed conflicts are constrained by international customary law, and all belligerents are obligated to enforce relevant law.

The U.S. government has declared war against a non-state actor such as al Qaeda, which can be attacked, according to U.S. officials, anywhere in the world. There is definitional problem in declaring war against al Qaeda, with relevant law in mind. The War on Terror is abstract, the enemy is hard to identify and is not confined to any particular territory. For this reason, it is difficult for the U.S. to justify military actions within other states by referring to an international armed conflict with al Qaeda and associated forces. There is currently no state behind the terrorist threat towards the U.S. States is the only recognized legal entity in public international law, and al Qaeda cannot be considered to be a state, based on the Montevideo Convention of 1933. Al Qaeda lacks “a permanent population, a defined territory, a government and capacity to enter into relations with the other states.” The U.S. government is unable to be engaged in an international armed conflict with al Qaeda, since al Qaeda is not a state and is, therefore, incapable of fighting a war with an international character.

However, the U.S. was initially engaged in an international armed conflict with the Taliban who occupied the government of Afghanistan, and supported al Qaeda. There was a significant connection between the government of Afghanistan and the terrorist organization (al Qaeda) that was responsible for an armed attack against the United States. Since the

185 Vogel 2010: 110
187 Blum & Heymann 2010: xiii-xiv
188 Montevideo Convention on the Rights and Duties of States (1933), Article 1
189 Vogel 2010: 111
Taliban regime was overthrown and replaced with a democratically elected government, who is fighting alongside U.S. and NATO Forces, the conflict is no longer international.\textsuperscript{190}

Based on applicable international law, it remains legally questionable whether the War on Terror constitutes an international armed conflict, which authorizes the U.S. government to use lethal force in self-defense within other sovereign states.

4.6. Status of the terrorist

As mentioned before, the U.S. and Israeli government have chosen to confront terrorism with warlike measures, rather than the means provided under the paradigm of law-enforcement. The armed-conflict model invokes the Law of War, which distinguishes the civilian population from combatants during armed conflicts. Combatants are never allowed to intentionally kill civilians. As a response to the difficulty of combating terrorism under the paradigm of law-enforcement, the Israeli and U.S. government created a third status: \textit{unlawful combatant}, which is unfamiliar within current international law. The concept of unlawful combatant is used as an attempt to justify TK of suspected terrorists within other sovereign states. Unlike traditional combatants, unlawful combatants can be targeted with lethal force, and are not given combatant immunity if captured.\textsuperscript{191} A right that is articulated in AP I to the Geneva Conventions: "a person who is recognized or who, in the circumstances, should be recognized to be 'hors de combat' shall not be made the object of attack […] a person is 'hors de combat' if […] he clearly expresses an intention to surrender."\textsuperscript{192} The method of TK is designed to kill suspected terrorists without the opportunity to surrender, a policy that violates the right among combatants to become treated as a POW. The U.S. government characterizes terrorists as unlawful combatants because they do not distinguish themselves from the civilian population and since they do not obey the Law of War.\textsuperscript{193}

Under customary international law, only combatants are entitled to participate in the direct hostilities. Individuals who are "members of the armed forces of a party to the conflict are combatants, that is to say, they have the right to participate directly in hostilities," and “civilians shall enjoy the protection [...] unless and for such time as they take direct part in hostilities.”\textsuperscript{194} This means that, “the parties to the conflict must at all times distinguish

\textsuperscript{190} Vogel 2010: 111-112
\textsuperscript{191} Maxwell 2012: 46
\textsuperscript{192} AP I to the Geneva Conventions (1949), Article 41(2)(b)(c)
\textsuperscript{193} Maxwell 2012: 47
\textsuperscript{194} AP I to the Geneva Conventions (1949), Article 43(2), Article 51(3); O’Connell 2010: 21
between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."\textsuperscript{195} Civilians who illegally participate in the hostilities are subjects of attack. However, he or she is entitled to at least the fundamental guarantees set out in AP I, Article 75.\textsuperscript{196} IHL defines two types of persons: civilians and combatants. Unlawful combatants do not constitute a third legal status within current law.\textsuperscript{197} Moreover, justified killing during international armed conflict is territorial; Article 2 of the GC I-IV confirms that "killing can only constitute a legal act of warfare if it takes place on the territory of one of the parties to the international armed conflict."\textsuperscript{198} Still, the question remains, if the War on Terror can be characterized as an international armed conflict, which justifies lethal force against suspected terrorists, or as the U.S. government puts it, against unlawful combatants.

4.7. Status of the drone operator

Another legal issue relates to the CIA operatives who control the U.S. drones over foreign territories, for example, in Pakistan. CIA is a non-military agency of the United States government.\textsuperscript{199} The persons who remotely operate the drones, and who decides to initiate a drone strike towards suspected targets, is not part of the U.S. armed forces, in fact, they are civilians.\textsuperscript{200} CIA may only exercise jurisdiction at the national level, due to the agency is not subject to applicable international law and, therefore, not a legitimate part of the conflict. CIA operatives are not "members of the armed forces,” and have no legal right to participate directly in hostilities.\textsuperscript{201}

Furthermore, there exist several legal issues surrounding the CIA involvement in the implementation of the drone policy. First of all, CIA operatives are not trained in the Law of War, which violates AP I, Article 87(2):

\begin{quote}
In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders
\end{quote}

\hspace{1cm}
\textsuperscript{195} Henckaerts 2009: 3
\textsuperscript{196} AP I to the Geneva Conventions (1949), Article 75
\textsuperscript{197} Goppel 2012: 126
\textsuperscript{198} Goppel 2012: 109
\textsuperscript{199} Enemark 2014: 1
\textsuperscript{200} O’Connell 2010: 7
\textsuperscript{201} AP I to the Geneva Conventions (1949), Article 43(2)
ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.\textsuperscript{202}

Second, customary international law requires that combatants shall be subject to a military chain of command. The CIA drone program operates outside this command structure, which is inconsistent with AP I, Article 43(1):

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, ‘inter alia’, shall enforce compliance with the rules of international law applicable in armed conflict.\textsuperscript{203}

Third, similar regulation has been codified in the Hague Convention IV of 1907, which also requires that combatants distinguish themselves by wearing uniform:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army.”\textsuperscript{204}

In summary, as Professor Mary O’Connell puts it: “the CIA is not part of the U.S. armed forces. They do not wear uniforms. They are not subject to the military chain of command. They are not trained in the law of war.”\textsuperscript{205} Ironically, CIA personnel can be characterized as unlawful combatants based on the applicable customary law. The CIA and its drone operatives perform combat-type functions, despite the fact that they do not qualify as lawful combatants. CIA personnel are therefore unprivileged combatants.\textsuperscript{206} They have lost their protection as civilians because they directly participate in hostilities: “civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in

\textsuperscript{202} AP I to the Geneva Conventions (1949), Article 87(2); O’Connell 2010: 7
\textsuperscript{203} AP I to the Geneva Conventions (1949), Article 43(1)
\textsuperscript{204} Hague Convention IV (1907), Article 1
\textsuperscript{205} O’Connell 2010: 7
\textsuperscript{206} Vogel 2010: 134
**hostilities.** CIA operatives are not entitled to take part in the hostilities and should therefore be prosecuted as unprivileged belligerents in accordance with AP I, Article 45.

The line between the CIA as a civilian intelligence agency and military operations with combat drones has become increasingly blurred in the War on Terror; the CIA operatives are conducting combat-type functions in what appears to be a No-Law Zone. The ethical standards which guides CIA operatives remains a mystery, covert operations with combat drones are conducted in the shadows of public scrutiny, or as Laura Pitter, Counterterrorism Advisor at Human Rights Watch puts it:

> A secret intelligence agency that doesn’t follow international legal rules to investigate alleged violations shouldn’t be carrying out what are essentially military attacks for the US. Bringing these strikes under military control could bring greater transparency and accountability to the public.

### 4.8. The right to life

Terrorists cannot be characterized as neither combatants nor unlawful combatants under IHL; they should instead be categorized as criminal civilians, who illegally taking part in hostilities. Such civilians should be held accountable under applicable international and domestic criminal law for their crimes, with judicial guarantees provided by international human rights law. Such guarantees can help to prevent unjust military actions, which may lead to arbitrary executions of suspected terrorists.

Since the term unlawful combatant is not specified in IHL, and because terrorists do not fall under the category of combatant, they should logically be treated as suspected criminals, until proven guilty in a court of law. International human rights law governs the treatment of such civilians. The ICJ has affirmed the applicability of human rights law during armed conflicts: "the Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war […]."

The right to life is the most fundamental human right; lethal force may only be employed under certain conditions. Article 6(1) of the ICCPR reads: “Every human being has the inherent right to life. This right shall be protected by law.

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207 AP I to the Geneva Conventions (1949), Article 51(3)
208 Ipsen 2010: 83
210 Gasser 2010: 262
211 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion)
No one shall be arbitrarily deprived of his life.”\textsuperscript{212} IHL permits the use of deadly force against combatants, if the killing is conducted within a specific recognized zone of armed conflict, for instance in Afghanistan, and if the military operations meet the requirements of \textit{jus in bello}.

However, the United States has acknowledged a policy on TK, which allows extrajudicial executions of suspected terrorists virtually anywhere in the world. The U.S. government treats the world as a battlefield, where lethal force can be carried out without consideration to human rights standards. Suspected terrorists and armed groups are being attacked with combat drones, even if there is no proof that they are involved in an armed conflict with the United States. Moreover, the U.S. drone policy seems to have abandoned the requirement of "imminence," which must be met in order to justify self-defense. International human rights law and the paradigm of law-enforcement only justifies killing of terrorists if they pose an imminent threat, and if an arrest is excluded. The U.S. executive branch has, for example, implemented a policy allowing for so-called "signature strikes," also known as "crowd killings" against suspected al Qaeda and Taliban fighters in Pakistan.\textsuperscript{213} “Signature strikes” target unidentified terrorists "that bear the characteristics of al Qaeda or Taliban leaders on the run."\textsuperscript{214} The CIA is attacking buildings and individuals within the territory of Pakistan with combat drones on the basis of suspicion rather than proof.\textsuperscript{215} The legality of “signature strikes” can never be determined as long as the policy behind it remains confidential.\textsuperscript{216} The U.S. violates the principle of \textit{distinction} by attacking unidentified individuals without reference to an imminent threat against the United States. The policy tends to violate Article 6(1) of the ICCPR and Article 50(1) in AP I to the Geneva Conventions, which stipulates that, “in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”\textsuperscript{217} A suspected unprivileged belligerent is entitled to protection as a POW until a competent court has determined the person’s status, GC III, Article 5 reads:

\begin{quote}
The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.\textsuperscript{218}
\end{quote}

\textsuperscript{212} International Covenant of Civil and Political Rights, Article 6(1)  
\textsuperscript{213} Council on Foreign Relations 2013: 12; Amnesty International 2012: 4  
\textsuperscript{214} New York Times, Pakistan Shift Could Curtail Drone Strikes  
\textsuperscript{215} Amnesty International 2012: 4  
\textsuperscript{216} Amnesty International 2012: 5  
\textsuperscript{217} AP I to the Geneva Conventions (1949), Article 50(1)  
\textsuperscript{218} Geneva Convention III (1949), Article 5
The U.S. government has an obligation "to protect the life and physical integrity of people within its jurisdiction, and to bring to justice perpetrators of crimes under international law."\textsuperscript{219} Those responsible for the September 11 attacks should be brought to justice in fair trials. Still, international law must be respected during law-enforcement actions that are directed towards these perpetrators. Under such circumstances, lethal force may only be exercised if the suspected terrorists resists an arrest and pose an immediate threat to the lives of others; killing under all other circumstances constitutes an extrajudicial execution under human rights law. The killing of suspected perpetrators, according to human rights law, must be determined by a criminal court, even if the crime constitutes mass murder. Lethal force in self-defense must always be a last resort. According to Amnesty International, "the intentional use of lethal force is lawful only if, at the time of its use, it is “strictly unavoidable” in order to meet an “imminent threat of death” in self-defense or defence of others."\textsuperscript{220} This position has been affirmed by principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which reads:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.\textsuperscript{221}

Even during situations of self-defense, there are additional requirements that have to be fulfilled in order to justify lethal force. Principle 10 of the Basic Principles states that:

In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.\textsuperscript{222}

\textsuperscript{219} AP I to the Geneva Conventions (1949), Article 50(1)
\textsuperscript{220} Amnesty International 2012: 6
\textsuperscript{222} Ibid.
These UN Principles reflect international human rights law, and the term "law enforcement officials" apply equally to military authorities and state security forces. The rules are applicable when authorities are exercising "police powers," even outside a situation of armed conflict.\footnote{Amnesty International 2012: 6} The only exception to the UN Basic Principles and the right to life are in zones of armed conflict. A criminal civilian who is at the relevant time participating in hostilities is a legitimate target of attack, if such an attack satisfies the rules of IHL. However, the U.S. government is obligated to demonstrate that the killing is lawful, when they deliberately kill a suspected terrorist. To date, this has not been done, in relation to TK in Pakistan.\footnote{Amnesty International 2012: 6-7}

As mentioned earlier, there exists a high rate of civilian casualties during operations with TK, the difficulty of distinguishing military targets from the civilian population during drone strikes make it difficult for the U.S. to justify these operations under the ICCPR and IHL. In summary, human rights are applicable to situations outside zones of armed conflict. The use of TK outside the context of armed conflict, under other situations than what the UN Basic Principles permits, constitutes an extrajudicial execution that is prohibited under international human rights law. The U.S. government is conducting TK with combat drones outside specific recognized zones of war, for example, in Pakistan and without any consideration to applicable international human rights law. United States has failed to observe relevant "law-enforcement" standards under these regulations and, therefore, violated the right to life in the ICCPR.\footnote{Amnesty International 2012: 11} The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has made the following statement:

[...] a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the sole objective of an operation. Thus, for example, a “shoot-to-kill” policy violates human rights law.\footnote{Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, 28 May 2010, UN Doc. A/HRC/14/24/Add.6}

The right to a fair trial, which is determined in Article 14(1) of the ICCPR, is denied by targeting suspected criminals with lethal force without giving them the possibility to prove their innocence in a court of law.\footnote{International Covenant of Civil and Political Rights, Article 14(1)}
4.9. Conducting drone warfare

The difficulty with the War on Terror is that terrorists intentionally fail to distinguish themselves from the rest of the civilian population, they use civilian environments as a cover to carry out their criminal activities. The U.S. is thus forced to combat terrorist threats in civilian contexts; they are, therefore, obligated to do everything in its power to attack the right target, and clarify how the targeted individual has lost its protection as a civilian by performing combat-type functions against the United States.\textsuperscript{228} They are also obligated to protect the civilian population during military operations, and respect international human rights law.

The Obama Administration claims that they are "firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts."\textsuperscript{229} Still, as previously mentioned, the use of drones has resulted in hundreds of civilian casualties along with the intended targets in Pakistan.\textsuperscript{230} Places, such as western Pakistan, the U.S. government have minimal field information to confirm suspected targets. CIA operatives are relying strictly on computerized information, which is often difficult to interpret; this might result in attacks that are based on incorrect grounds.\textsuperscript{231} To be consistent with the principle of \textit{distinction}; drone pilots must supplement the computerized information with information from the ground, in order to prevent civilian casualties:

The first two C.I.A. air strikes of the Obama Administration took place on the morning of January 23rd—the President’s third day in office. Within hours, it was clear that the morning’s bombings, in Pakistan, had killed an estimated twenty people. In one strike, four Arabs, all likely affiliated with Al Qaeda, died. But in the second strike a drone targeted the wrong house, hitting the residence of a pro-government tribal leader six miles outside the town of Wana, in South Waziristan. The blast killed the tribal leader’s entire family, including three children, one of them five years old.\textsuperscript{232}

The UAV technology is improving, but the difficulties to be certain about specific targets remain, and CIA personnel tend to favor computerized information in front of their own judgment.\textsuperscript{233} Even when a CIA operative has identified a specific target, he or she is required

\begin{itemize}
\item \textsuperscript{228} Vogel 2010: 118
\item \textsuperscript{229} Koh, Harold H. (2010), Legal Adviser, Department of State, The Obama Administration and International Law, Speech at the Annual Meeting of the American Association of International Law.
\item \textsuperscript{230} O’Connell 2010: 6
\item \textsuperscript{231} O’Connell 2010: 7
\item \textsuperscript{232} Ibid.
\item \textsuperscript{233} O’Connell 2010: 6
\end{itemize}
to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects." To date, there is no indication that the U.S. government takes such precautions, which is inconsistent with international customary law.

The next chapter assesses TK with drone strikes in the light of the three *jus in bello* requirements, namely, the principles of *military necessity*, *distinction* and *proportionality*.

### 4.9.1. The principle of military necessity

The principle of *military necessity* is linked to the principles of *distinction* and *proportionality* under *jus in bello*, the requirement refers to that force may only be used if it is strictly necessary to repel an armed attack, or if it is necessary to achieve a reasonable military purpose. Anticipatory or pre-emptive military strikes are prohibited, and the U.S. government is obligated to demonstrate the necessity to use lethal force in order to repel an armed attack. Minor forms of force have to be applied before the state may resort to lethal force, this entails that the requirement of *necessity* obliges the U.S. government to explore all measures before they conduct drone strikes against suspected terrorist groups abroad. The U.S. has not provided any explanation regarding the necessity of TK, making it difficult to justify the practice under the principle of *military necessity*. Moreover, the U.S. government has apparently not considered other measures than lethal force; the main purpose of TK is intended to assassinate suspected terrorists.

The requirement of necessity is considered to reflect customary international law, Article 52 of AP I to the Geneva Conventions affirms that armed attacks shall be "*limited strictly to military objectives*" and offer "*a definite military advantage*." Article 23 of the Hague Convention IV prohibits combatants to "*destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war*." Also of note, Article 8 of the Rome Statute defines "*intentionally directing attacks against civilian objects*"
and “destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war” as a war crime.\textsuperscript{242}

There are doubts whether the immediate benefits of U.S. drone attacks in Pakistan outweigh the costs.\textsuperscript{243} TK of suspected terrorists with combat drones are unnecessary if they do not provide a definite military advantage related to a long-term success. Studies have shown that the practice of TK with combat drones has a short-term impact on reducing terrorist related threats.\textsuperscript{244} Law-enforcement measures and political processes are more effective for this purpose.\textsuperscript{245} TK tend to become counterproductive; several scholars explain this by referring to the \textit{Hydra effect}.\textsuperscript{246} The use of military force may bolster the support for terrorists and strengthen the sense of legitimacy of terrorist activities when innocent bystanders unintentionally are being killed during drone strikes.\textsuperscript{247} The desire of revenge among the victim’s relatives may increase the number of recruits to terrorist organizations.\textsuperscript{248} Christian Enemark, summarizes it as follows, "if they are counterproductive, drone strikes are worse than useless, in which case they cannot for jus in bello purposes be characterized as necessary."\textsuperscript{249}

In the case of Mehsud, in the introduction of this thesis, it is doubtful whether the drone attack against him met the requirements of \textit{military necessity}. He was at the time of the attack placed \textit{hors de combat}, and the U.S. government has not explained how he or the other 11 unidentified victims constituted an imminent threat against the United States, inconsistent with the principle of \textit{distinction}.

\subsection*{4.9.2. The principle of distinction}

The principle of \textit{distinction} is the most fundamental rule under \textit{jus in bello}; only combatants may be targeted; civilians shall be immune from attack at all times. The requirement of \textit{distinction} is well established under customary international law.\textsuperscript{250}

Article 48 of AP I, requires that combatants "at all times distinguish between the civilian population and combatants, and between civilian objects and military objectives."\textsuperscript{251}
Furthermore, Article 52 defines military objectives as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." Article 51 prohibits "indiscriminate attacks" and stipulates that, "the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations," and "not be the object of attack." Civilians are immune from attack "unless and for such time as they take a direct part in hostilities." Moreover, AP II to the Geneva Conventions governing non-international conflicts reflects similar regulations, and the Rome Statute defines indiscriminate attacks against the civilian population as a war crime.

Also of note, the Hague Convention IV contains regulations that are applicable to the use of drones; Article 25 prohibits air attacks "by whatever means, of towns, villages, dwellings, or buildings which are undefended." In order to meet the requirement of distinction, the drone operators may only attack combatants and civilians who illegally participating in the hostilities; under such circumstances may drone strikes only be applied against the terrorist facilities without affecting the civilian population. United States is obligated to ensure that they are attacking right individuals, and if civilians are targeted, the U.S. must ensure that they have forfeited their status as protected civilians. To date, there is no indication whether the U.S. government takes such precautions. The U.S. practice of "signature strikes" proves this lack of analysis, which is inconsistent with the principle of distinction. The U.S. government must demonstrate that targeted individuals have forfeited their civilian protected status. It is not sufficient to attack individuals on the basis of their claimed characteristics. The targeting state must confirm the identity of the suspected terrorists and relate them to an armed attack when carrying out drone strikes in self-defense. Even so, President Obama has extended and expanded the practice of "signature strikes," against unidentified targets. The Obama Administration must explain how the targeted individuals in "their nature, location, purpose

252 AP I to the Geneva Conventions (1949), Article 52
253 AP I to the Geneva Conventions (1949), Article 51
254 AP I to the Geneva Conventions (1949), Article 51(3)
255 AP II to the Geneva Conventions (1949), Article 13; Rome Statute of the International Criminal Court (1998), Article 8(2)(b)
256 Hague Convention IV (1907), Article 25
257 Vogel 2010: 118; Goppel 2013: 198
258 Vogel 2010: 118
259 O’Connell 2010: 23
260 Council on Foreign Relations 2013: 12
or use make an effective contribution to military action," and therefore constitute a legitimate target of attack.\textsuperscript{261}

The practice of “signature strikes” has caused civilian casualties on several occasions.\textsuperscript{262} The method is incompatible with the principle of\textit{distinction} and the violence tends to become arbitrary, due to the killing of unidentified targets and innocent bystanders. The basic problem with drone attacks is that they are implemented without additional field information that can confirm the target's identity or whether civilians are within the explosion area or inside a building along with the intended target. The U.S. government is constrained by international customary law to not engage in indiscriminate attacks, they are obligated to avoid non-military objectives and exercise “\textit{constant care}” to protect the civilian population.\textsuperscript{263}

\textbf{4.9.3. The principle of proportionality}

If the attack causes unintended harm to civilians and civilian objects which are disproportionately in relation to what is necessary to achieve a reasonable military goal, the operation must not be carried out. For example, in the case of Mehsud, it is not proportionate to unintentionally kill eleven unidentified individuals, when the target was one single individual who was placed \textit{hors de combat}.

AP I, Article 51(5) prohibit “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”\textsuperscript{264} Moreover, military decision-makers shall “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”\textsuperscript{265} Drone attacks can be considered to constitute a military advantage that is disproportionate to the civilian harm inflicted. The risk of civilian casualties is high when the operations are conducted within civilian contexts.

\textsuperscript{261} AP I to the Geneva Conventions (1949), Article 52(2)
\textsuperscript{262} Council on Foreign Relations 2013: 14
\textsuperscript{263} AP I to the Geneva Conventions (1949), Article 57; Vogel 2010: 122-123
\textsuperscript{264} AP I to the Geneva Conventions (1949), Article 51(5)(b)
\textsuperscript{265} AP I to the Geneva Conventions (1949), Article 57(2)(a)(iii)
5. Conclusion

We are living in a world with asymmetrical terrorist threats. The armed confrontation between the United States and its enemies who are carrying out terrorist acts accentuates this asymmetrical phenomenon within the War on Terror. Those terrorists who pose a threat against the United States seek to offset their disadvantages in technology, organizational structure, and firepower by blending into the civilian population as protection, and by deliberately targeting them; this tactic is explicitly prohibited by applicable international law. 266 Terrorists intentionally fail to distinguish themselves as combatants, which have forced the United States to combat terrorism in civilian contexts. This situation requires that the United States take precautions to protect innocent bystanders and to ensure that only belligerents are targeted. 267 The U.S. government is relying on the method of TK with combat drones in order to neutralize suspected terrorist threats abroad.

Armed drones do not introduce an entirely new form of killing, and they are no different from other conventional weapons. However, the problem arises in relation to when and how they are applied in the War on Terror. Ethically speaking, the current use of drones has exacerbated existing moral concerns in relation to the rules in jus ad bellum and jus in bello. 268

This thesis has demonstrated that the U.S. policy on TK with combat drones in the War on Terror is not consistent with applicable international law and the ethics of war. The U.S. government intervenes in states, such as Pakistan, without referring to an imminent threat against the United States, which has triggered the right to self-defense in accordance with the rules in jus ad bellum and Article 51 of the UN Charter. The 9/11 attacks can no longer be considered to constitute an imminent threat that triggers the right to self-defense.

Furthermore, this thesis has shown that, without public scrutiny, it is difficult for the U.S. government to meet the requirements of distinction and proportionality in connection to the implementation of drone strikes in Pakistan. Innocent bystanders have been killed during these drone strikes, and the U.S. is attacking targets without additional information from the ground that is needed to determine the status of the affected individuals. The practice of so-called "signature strikes" is an example of this, suspected individuals are targeted on the basis of suspicion rather than proof, “signature strikes” violates the rules of jus in bello, in

266 Altman 2012: 2
267 Vogel 2010: 118
268 Altman 2012: 4; Henriksen 2014: 7
particular, the principle of *distinction* and fundamental human rights law. Suspected terrorists are executed without access to a legal counsel, and without the possibility to prove their innocence in a court of law. As a result, the practice of "signature strikes" and TK in general tend to violate the ICCPR and the right to life. The lack of accountability risk set dangerous precedents among states, which might lead to unrestricted use of force, and erode current international law.

My suggestion for further research is whether the War on Terror has initiated the development of a third paradigm, which tends to reformulate prevailing interpretation of a just war, and what impact this may leave on existing international law and legal norms.
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