

Targeted Killings: A Legally Accepted Counter Terrorism Policy or A Form of Extra-Judicial Killing.

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Abstract

Though International Criminal Law evolves, its evolution needs a careful, considered and consensus among its members through either customs, treaty or other recognized source of international law. The emergence of targeted killings is not clear whether it is a legally accepted counter terrorism policy or a form of extra-judicial killing, thus leaving the jurists undecided; either to criminalize or embrace it as a defence in international criminal law. In a bid to protect national security, many governments have intensified the efforts to counter the terrorists' threats and attacks. Resorting to employing target killings is one of such attempts of counterterrorism that has created a sharp divide between those who support and those who oppose targeted killings by contending that it is resplendent with numerous human rights abuses. This paper discusses the extent to which targeted killing has been applied in the contemporary society, the arguments for and against, as well as its legality and legitimacy under international law.

Key words: Targeted Killings; Terrorism; extra judicial killings; international criminal law.

Introduction

This expose recalls that after the terrorist attacks of September 11, 2001² on American soil, the world led by the USA has never been more keen and committed in tackling the menace of terrorism. Some nations consequently declared a worldwide "war on terror" and called upon the international community to be involved. During an address to a joint session of Congress,³ Bush, the then US President, said, "Either you are with us, or you are with the terrorists." This significantly meant that there could be no geographical boundaries to the theater of this new form of war.

In a bid to protect national security, many governments have intensified the efforts to counter the terrorists' threats and attacks⁴. The resorting to employing targeted killings is one of such attempts at counterterrorism that has created a sharp divide between those who support such a policy and those opposed to targeted killings by contending that it is resplendent with numerous human rights violations and abuses.

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² . Elsewhere in this expose, the date September 11, 2001 has been represented as 9/11 as has gained common and popular expression.

³ . Address by the President of the USA to a Joint Session of Congress and the American People on 20 September, (2001) available at <http://www.whitehouse.gov/news/releases/2001/09/images/20010920-8.html>., accessed on 26th July 2016.

⁴ . Prevention of Terrorism Act, Act No. 21 of 2002, Cap. 19 of the Laws of Tanzania RE 2002.

The superpowers, plying the superiority and power game under international law, have completely ignored the established legal doctrine and international relations and opted to pursue relentlessly the targeted killings policy. Russia position can vividly and evidently be seen from, Vladimir Putin, below:

“To forgive the terrorists is up to God, but to send them to Him is up to me. We are going to pursue terrorists everywhere. If they are in the airport, we will pursue them in the airport. And if we capture them in the toilet, then we will wash them in the outhouse. ... The issue has been resolved once and for all.”

Such as statement, which underline the Russian approach into the war against terror is not far from Russia’s known adversary, US. President Barack Obama⁵, also had more or less similar view on how to deal with terrorism:

“There can be no safe haven for al Qaeda terrorists who killed thousands of Americans and threaten our homeland today.”

The counterterrorism strategy has not only brought in this new and legally unknown approach but also controversies associated with the said approach.

Terrorism has often been described as a “new form of warfare” that international law has tragically been unable to effectively deal with.⁶ While international law was originally meant to apply to war and peace between recognized States, the concept of non-State actors had not been contemplated. Terrorist groups and organizations on account of their illegality have no legal basis of their existence that it would be a tragedy to classify them as non-State actors. Thus, in studying counterterrorism according to international law, one of the issues for examination is its relevance and applicability in combating this “new form of warfare”.

Understanding the Notion of Targeted Killings

Targeted killing is a term like many others that has entered the popular consciousness with no established or formally agreed legal definition that even the scholarly definitions vary widely. It can for instance be said that it is the intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval.⁷ It can also be said to be an unlawful and deliberate killing carried out by order of a government or with its acquiescence reflecting a policy to eliminate individuals even though arrest is an option⁸.

Whatever the definition is, it can be contented that the concept of targeted killings is not a recent feature. For instance, since its creation in 1948, Israel has assassinated various enemy targets. In the 1950s, Israel executed such killings against Egyptian intelligence officers involved in orchestrating infiltrations into

⁵ Wall Street Journal, March 30, 2009.

⁶ . E Gross, Thwarting Terrorists Acts by Attacking the Perpetrators or their Commanders as an Act of Self Defense: Human Rights v the State’s Duty to Protect its Citizens, 15 Temple Int’l & Comp. L.J. 211 (2001).

⁷ . S David, Fatal Choices: Israel’s Policy Of Targeted Killing, The Begin-Sadat Center For Strategic Studies Bar-Ilan University, Mideast Security and Policy Studies No. 51 (2002).

⁸ . J Kendall, Israeli Counter-Terrorism: Targeted Killings under International Law, 80 N.C.L Rev. 1069, 1073 (2001-2002).

Israel. Other targeted killings were witnessed against German scientists developing missiles for Nasser's Egypt in the 1960's. The killings of prominent leaders of Palestinian and Lebanese terrorist networks such as the secretary general of Hezbollah in 1992.

Other States too such as the USA are known to carry out targeted killings on persons believed to be terrorists or those with connections with them, donors, supporters and even sympathizers of terrorism. The first publicly known targeted killing of terrorists outside a theater of active war was in Yemen in November 2002, when a Predator drone⁹ was launched at a car carrying Al-Harethi, suspected of the USS Cole bombing, along with four others, one of whom was an American citizen. What is notable about this targeted killing is that it was executed with the approval of the government of Yemen, thereby eliminating some of the international legal difficulties associated with employing force in another country's territory.¹⁰

Targeted killings take place in a variety of contexts and may be committed by employing a variety of methods that include sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison.¹¹ While jurists argue that each targeted killing should be considered in its peculiar circumstances, depending on the context in which it is conducted. These situations may be in armed conflict, outside armed conflict, or in relation to the interstate use of force.

In the armed conflict context, the governing legal framework is humanitarian law as well as human rights law. This means that a targeted killing is only lawful when the target is a "combatant" or "fighter"¹² or, in the case of a civilian, only for such time as the person "directly participates in hostilities."¹³ In addition, the killing must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity, and everything feasible must be done to prevent mistakes and minimize harm to civilians.

In a non-armed conflict situation, the legality of a killing outside the context of armed conflict is governed by human rights standards, especially those concerning the use of lethal force. This means a State killing is legal only if it is required to protect life and there is no other means, such as capture or non lethal incapacitation, of preventing that threat to life.¹⁴

Where target killings take place in an inter-State force scenario, questions surrounding the sovereignty of States comes to the fore. This is so because pursuant to the UN Charter¹⁵, States are forbidden from using force in the territory of another State. The International Court of Justice too in the case of Armed Activities

⁹ . Unmanned and remotely operated

¹⁰ . G Fletcher, *Romantics at War – Glory and Guilt in the Age of Terrorism*, Princeton, New Jersey: Princeton University Press (2003).

¹¹ . N Melzer, *Targeted Killing in International Law*, 1 *Harvard National Security Journal* (2008).

¹² . International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict*, (2006).

¹³ . Geneva Conventions Common Article 3, AP I, art. 52(1) and (2); AP I, art. 50(1); International Humanitarian Law Research Initiative, *HPCR Manual and Commentary on International Law Applicable to Air and Missile Warfare*, Harvard University Program on Humanitarian Policy and Conflict Research, (15 May 2009), available at <http://www.ihlresearch.org/amw/manual> (HPCR Commentary), section C.12.(a).

¹⁴ . Inter-American Commission of Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002).

¹⁵ . Article 2 (4) of the UN Charter.

on the Territory of the Congo¹⁶ ruled that Uganda had no right to use force against armed rebels causing terror from the territory of the Democratic Republic of Congo.

With the rampant incidences of terrorism in the present age, there has been an equally inevitable increase in the number of targeted killings on those believed to be responsible. This in effect has brought forth two schools with one supportive of targeted killings as a valid defense while going after terrorists, while the other school is opposed to it and consider targeted killings as extra-judicial killings that should be prohibited and not go unpunished.

Legal Justification for Targeted Killing

There is an increasingly section of both scholars and State officials who are ever more defending the practice of targeted killings and urge that it be accepted by law, either through the reinterpretation of existing norms, the adoption of new norms or new authorizations. One such scholar, Michael Gross argues that:

“Assassination was long reviled but took on new life in the 21st century to wage war against militants entrenched among civilians. Initially condemned as extra-judicial execution, targeted killing has emerged as an effective means to disable non-uniformed combatants while sparing civilians many of the horrors of full-scale battle.”¹⁷

His argument supporting targeted killings seems to be based on the nature of the tactical operation of the intended target. Un-uniformed target, always plying operation within the civilians needs specialized and specific operation but not fully flagged war, instead, targeted killings come there in as an alternative.

Targeted killing as a legitimate and effective form of “*active self-defense*”¹⁸ is now applied widely from east to the west and it is predicted that “an international norm permitting the use of targeted killing as a counter-terrorism tactic is likely to emerge because targeted killing’s environmental fit, prominence and coherence favor such a development.¹⁹ What we are not certain is whether the targeted killing as an international norm under the current international criminal law jurisprudence is going to be accepted and used as a legitimate self defence. Other commentators²⁰ have embraced the same logic, and have formulated permissive norms to make it easier for governments to kill. It has been argued and proposed that, if a terrorist plan is an act of war by the organization and supporting it, any member of any such terrorist organization may be targeted anytime and anywhere plausibly considered “a battlefield,” without

¹⁶ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19).

¹⁷ . M Gross, Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict, (2010), Available at <http://www.brookings.edu/papers/2009/0511>.

¹⁸ . A Guiora, Targeted Killing as Active Self-Defense, 36 Case W. Res. J. Int’l L 323 (2004).

¹⁹ . W Fisher, Targeted Killing, Norms and International Law, 45 COLUM. J. TRANSNAT’L L 711, 717 (2007).

²⁰ . Kenneth Anderson is one step ahead and describes targeted killings as “a vital strategic, but also humanitarian, tool in long-term counterterrorism”.

prior warning or attempt to capture.²¹ The approach here is essentially redefining the terminology “battlefield” in an attempt not only to accommodate but also legitimize targeted killings.

The Americans approach to the targeted killings has been radical and straight. USA given support to the execution of targeted killings. It has argued that killing leaders of regimes with which the US is involved in an armed conflict may however regrettable, is an appropriate policy option. In making such decisions, United States policy makers, without recourse to international authorization, would take account its own interests and criteria. For example, as far as possible, only those persons within the regime that are responsible for the threats should be killed.²²

Article 51 of the United Nations Charter and customary international law are seen as allowing targeted killings under the inherent principle of self-defense to which every country is entitled after suffering an armed attack. The UN Charter seems to give the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

A lot of controversy has arisen, however, in three main areas: whether the self-defense justification applies to the use of force against non-state actors and what constitutes an armed attack by such actors; the extent to which self-defense alone is a justification for targeted killings; and, the extent to which States have a right to “anticipatory” or “pre-emptive” self-defense.²³ These controversies as to the nature, extent and acceptability of the targeted killings as a self defence, has attracted lots of debate on its legality and legitimacy.

While targeted killing does not find support in judgments of the International Court of Justice²⁴, holding that, States cannot invoke Article 51 of the UN Charter against armed attacks by non-state actors that are not imputable to another State, the US Administration as well as other States that carry on with targeted killings have favoured treating terrorists as combatants and justifying the targeted killing of terrorists as equivalent to the lawful killing of members of an enemy force on any battlefield. There are new issues which need to be discussed here; one the support to the targeted killings is based on the assumption that terrorists are combatants, two the said combatants operation qualified to be equated to the battlefield. The assumptions are not supported by the agreed meaning of combatants and battlefield, thus opening more discussion on this new topic of discussion.

²¹ . G Blum & P Heymann, Law and Policy of Targeted Killing, 1 HARV. NAT.SEC. J.145, 168 (2010).

²² . C Lotrionte, When to Target Leaders, 26 The Washington Quarterly 73, 84 (2003).

²³ . P Aston, Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UNGA A/HRC/14/24/Add.6 (May 2010).

²⁴ . Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion) [2004] ICJ Rep 136.

Assuming terrorists to be unlawful combatants, targetable and detainable, but deny them rights accorded to lawful detainees, namely, to be treated as prisoners of war if captured does pose more questions than answers to the debate. It is argued and submitted that self-defense has an existence as a doctrine apart from International Humanitarian Law armed conflict that can justify the use of force against an individual. The inherent right of self defense potentially applies against any illegal use of force, and that it extends to any group or State that can properly be regarded as responsible for such activities.²⁵

The 2002 Inter-American Commission on Human Rights Reports also does allow room for the use of deadly force against suspected terrorists, even under a general law enforcement model. It is noted that in situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force which includes targeted killings.²⁶ As such, the most powerful institutional incentive today is to kill rather than capture them²⁷. This may further be augmented by the fact that the intelligence losses of killing people, rather than capturing and detaining them for interrogation are great.²⁸ Thus targeted killings take the political and financial support from various people.

Since 9/11, Predator drones have reportedly been used dozens of times by the United States to fire on targets in Afghanistan, Iraq, Pakistan, Yemen, and elsewhere. The targeted killing operations have successfully killed a number of senior terrorists members²⁹. Thus, as targeted killings physically eliminate skilled terrorists, bomb makers, forgers, recruiters and other operatives, those left behind need time to develop expertise. At the same time, targeted killings have been said to prevent some attacks, weakened the effectiveness of militant groups, kept potential bomb makers on the run, and thereby served as deterrence against terrorist operations.³⁰

Instead of separating themselves from the general population in military camps and wearing uniforms, as required by international law, Hamas members and other Palestinian terrorists try to use civilians - the "protected persons" mentioned in the Geneva Convention³¹ as living camouflage. To prevent such a thing from happening, Israel argues that international law explicitly gives it the right to conduct military operations against military targets under these circumstances.³² This provision appears in the Convention precisely to deal with situations like the ones the Israelis faced. It has hence been used by the State of Israel

²⁵ . D. Sofaer, Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense, 126 MIL. L. R. 89 (Fall 1989).

²⁶ . Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II. 116, Doc. 5 Rev. 1 Corr (Oct. 22, 2002), available at <http://www.cidh.oas.org/Terrorism/Eng/exe.htm>.

²⁷ . The Guantanamo Bay and Abu Ghraib Prisons used by the United States to hold terrorist detainees have proven to be a political and financial burden on the American administration.

²⁸ . B Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*, (New York: Penguin Press, 2008), 183.

²⁹ . Al-Qaeda members, including its Chief of Military Operations, Mohammad Atef.

³⁰ . Ibid Fn 3.

³¹ . The Fourth Geneva Convention at Part 3, Article 1, Section 28 provides that, "The presence of a protected person may not be used to render certain points or areas immune from military operations."

³² . S Scheider, What the Geneva Protocols Really Say, Article posted on November 28, 2003 on www.strategypage.com/dls/articles2003/20031128.asp.

as a justification of carrying out target killings against Hamas and Palestinian militant organizations wreaking terrorist havoc.

In any conflict, the international law principle of distinction is core. However, terrorists who either are actually attacking civilians or are sending others to commit acts of terror cannot be deemed to be civilians according to the traditional context. Rather, they are fully fledged combatants minus any insignia, a recognized chain of command and the carrying of weapons openly³³. In addition, unlike soldiers who, as part of a regular army, are obligated to honor international law conventions regulating the conduct of war, the terrorist is not bound by such agreements and seems to provide legitimacy to targeted killings by governments that have been victims of terrorism. This is augmented by the reasoning that, if a terrorist believes that he is not obligated to honour any set off rules, and conducts himself accordingly, then the State must indeed be able to target those that are threatening it beyond the normal established rules of the game.

Targeted killings are said to be effective as they disrupt terrorists' infrastructure and organization, and cause immense stress on individual leaders and fighters, who must constantly move, switch locations and hide. This reduces the flow of information in the terrorist organization and reduces its effectiveness.³⁴ Targeted killings may also serve as a demoralizing agent in the sense that targeted individuals or those on a hit list cannot visit their wives, children, relatives or families without severe risk, and may even shirk their names coming out in public for fear attack³⁵. The targeted killings of Palestinian leaders by Israel seems to have an interesting legal support with an argument that, because the Palestinian National Authority is not a state, and because few governments recognize Hamas' control in Gaza, the Israeli-Palestinian conflict is not bound by the set of norms, rules, and treaties regulating other state conflicts³⁶. This in effect gives Israel the mandate to target terrorists in Palestine without any due regard to sovereignty principles.³⁷

This is the imperative that seems to have provided some form of leeway in the execution of targeted killings to authorities in the defense of their citizens especially in view of the significantly reduced doctrine of anticipatory self defense as enshrined in Article 51 the UN Charter³⁸ from the large scope it enjoyed in the *Caroline case*³⁹. This is so in spite of the fact that international law continues to lag behind and appears to be ill equipped in addressing terrorism. It is for this failure that States employ the concept of active self defense, which comprises to the large extent, targeted killings, in developing this new international law regime.⁴⁰

³³ . Articles 4 (a) and (2) of the Geneva Convention Relative to the Treatment of Prisoners of War. Available at <http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages>, Accessed on 20 February 2016.

³⁴ . Haifa University Press, In the name of security: The Sociology of Peace and War in Israel in Changing Times (pp. 329-367) (2001) (in Hebrew).

³⁵ . An example is the Israeli killings of Hamas leaders Ahmed Yassin and Abdelaziz Rantisi that caused Hamas not to publicly identify their replacement, a necessary step to secure his survival.

³⁶ . Gal Luft, Washington Institute for the Analysis of Global Security.

³⁷ . G Luft, Beer, Bacon and Bullets: Culture in Coalition Warfare from Gallipoli to Iraq, Book Surge Publishing, 2010.

³⁸ . Article 51 authorises self defense only if armed attack occurs but does not provide where other forms of attack such as those perpetrated by terrorists happen.

³⁹ . www.avalon.law.yale.edu, accessed on 5th October 2016.

⁴⁰ . E Nordan, The Best Defense is a Good Offense: The Necessity of Targeted Killing, Algora Publishing, New York, 2010.

Targeted killing operations may be sanctioned where there is no possibility of capturing the terrorist alive. A case in point is where Israeli officials had demanded that the Palestinian Authority arrest Salah Shehadeh. Shehadeh was the head of the military wing of Hamas in the Gaza Strip, and was, according to Israeli intelligence, directly responsible for the killing of scores of Israeli civilians and soldiers and the injury of hundreds of others in dozens of attacks. When the Palestinian Authority declined, the Israeli government sought to capture him directly, but had to forego such plans when it realized that Shehadeh lived in the middle of Gaza City, where no Israeli soldiers had been deployed since 1994, and where any attempt to apprehend him would turn into a deadly confrontation. It was then that Israel decided to kill him.⁴¹

The legitimacy of targeted killings has found lots of favour in the argument in national security demands for exigency when placed on a balance with the lengthy process of following due process. This is so where citizens expect of the State to guarantee them of security and which demand will even be more in the event of terrorist attacks whereby the citizens would wish to see the State do something in retaliation. In a poll conducted and published by Maariv newspaper of Israel⁴² in July 2001, it was found that 90 percent of Israeli public support the practice of targeted killings against Palestinians in support of the notion of protecting their delicate peace and security as well as their sovereignty. In the USA, the citizens have had to be forced under the Patriot⁴³ and USA Freedom⁴⁴ Acts to forego some of their liberties for as long that on its part, the State will assure them of their security from terrorism even if it would mean assassinating American citizens linked to terrorism wherever they may be found.

A state can wage war not only through its combatants in the field, but also through skilled computer operators based many thousands of miles away.⁴⁵ With advancement in technology, the execution of a targeted killing can be carried out with a lot of precision that the crusaders of drone based target killings contend that the 'pilot' of a drone is likely to have a clear video-fed picture of the target and surroundings, whereas the pilot of a high-altitude bomber will be able to see far less.

Legal Opposition of Targeted Killing

Undoubtedly, targeted killings are most of the times accompanied by the indiscriminate impact which results in significant civilian deaths and collateral damage to property and infrastructure. It is difficult to tell just how many innocent lives are lost, for reasons that sometimes the only available information is from

⁴¹ . A Sofaer, Responses to Terrorism / Targeted killing is a Necessary Option, The San Francisco Chronicle. 26 March 1994.

⁴² . Maariv Times, A Nation that Supports the Assassination of Terrorists, July 2001.

⁴³ . Following the 9/11 Attacks, the USA introduced to Congress the Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001 that was passed as the Uniting and Strengthening America (USA) Act (H.R. 2975).

⁴⁴ . The USA Freedom Act was passed on June 2, 2015 to give effect to the expired parts of the Patriot Act that were restored and renewed through 2019.

⁴⁵ . Mckelvey, T., Inside the Killing Machine, Newsweek, 13 February 2011, available at <http://www.newsweek.com/2011/02/13/inside-the-killing-machine.html> , accessed on 26 January 2016.

journalistic sources, which in turn are dependent almost entirely on information leaked selectively by officials involved in the target killings.

It is not unusual for target to be executed merely on blame rather than terrorism status which may result in many extrajudicial mistaken identity assassinations. It is not clear what are the standards by which targets get selected; and this is the core objection of the whole practice by the UN. In March 2011 for instance, the USA launched a raid on a person allegedly responsible for distributing explosive devices in Kandahar. Its media release indicated that it had “captured a Taliban leader, killed one armed individual and detained several suspected insurgents.”⁴⁶ But by the following day the media reported the incident as “a major intelligence failure”. It turned out that the night raid had targeted a family home in a relatively peaceful, reportedly Taliban-free, area. Carried out by US Special Forces, it had mistakenly killed Haji Yar Mohammad Karzai, a 63 year old tribal leader who was President Karzai’s second cousin.⁴⁷

While even under international human rights laws, the possibility of using deadly force against individuals who are threatening the security of the State has not been rejected altogether, all other options must have been first exhausted. However, this is doubtful whenever a targeted killing is executed where clearly other counterterrorism measures would have sufficed. This position is augmented by the UN Human Rights Committee, in its response to the Israeli report on the practice of targeted killings where it noted that:

*“Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.... Such operations must never be carried out for purposes of retribution or revenge,... They may be legitimate if intended at preemption.”*⁴⁸

Unlike law enforcement operation, there are no due process guarantees in targeted killings. The individual is neither forewarned about the operation nor accorded a chance to defend his or her innocence. Further, there is no assessment of guilt by any impartial body. This modus operandi that is against the rule of law became a mainstay of the global war against terror following the 9/11 attacks. The modus operandi is criticized cause it is considered to be clearly unlawful, tantamount to extrajudicial execution or murder as it granted minimal accountability, high levels of secrecy and low levels of transparency in carrying out target killings.

Targeted killings conducted in the territory of other States raise sovereignty concerns. Under Article 2(4) of the UN Charter, States are forbidden from using force in the territory of another state unless the second

⁴⁶ . ISAF Joint Command Morning Operational Update March 10, 2011 (2011-03-S-028), at <http://www.isaf.nato.int/article/isaf-releases/isaf-joint-command-morning-operational-update-march-10-2011.html>, accessed on 26 January 2016.

⁴⁷ . J Boone, US troops' killing of Hamid Karzai's Cousin Brings Claim of 'Deep Conspiracy', The Guardian, 10 March 2011, at <http://www.guardian.co.uk/world/2011/mar/10/hamid-karzai-cousin-nato-deathconspiracy-afghanistan>, accessed on 26 January 2016.

⁴⁸ . U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: Israel, U.N. Doc. CCPR/CO/78/ISR Aug. 21, 2003, available at <http://www.unhchr.ch>, accessed on 2nd October , 2016.

State has consented to the targeting State. In April 1988, the Security Council⁴⁹ condemned as an act of illegal aggression Israel's killing in Tunisia of Khalil al-Wazir who was a leader in Fatah, the military arm of the Palestine Liberation Organization. Al Wazir had been accused by Israel of conducting military operations in Israeli territory that left dozens of civilians dead. The killing was also said to have violated Tunisia's sovereignty and territorial integrity.⁵⁰

It can empirically be said that targeted killings do not reduce terrorism, but encourage more recruits to join militant factions where they get radicalized so as to vent out more violent extremism. The aggression of targeted killings also runs the risk of spiraling hatred and violence, numbing both sides to the effects of killing and thus continuing the cycle of violence. At the same time, the policy of targeted killing has also enhanced cooperation among terrorist groups⁵¹. Thus, when Israel assassinated Abbas Mussawi who was Hezbollah's leader in Lebanon, in 1992, a more charismatic and successful leader, Hassan Nassrallah, succeeded Mussawi. The armed group then avenged the assassination of its former leader in two separate attacks, blowing up Israeli and Jewish targets in Buenos Aires where over a hundred people were killed and hundreds more injured.⁵²

Pursing a targeted killings policy may interfere with important gathering of critical intelligence. The threat of being targeted will always drive terrorists into hiding. This makes the monitoring of their movements and activities by the counterterrorist forces more difficult. Moreover, if these leaders are found and killed instead of been captured, the counterterrorism forces lose the ability to interrogate them to obtain potentially valuable information about plans, capabilities, or organizational structure of their outfits.

While it may be argued that targeted killings particularly those executed by drones have greater surveillance capability and afford greater precision than other weapons, the truth of the matter is, the precision, accuracy and legality of a drone strike depends on the human intelligence upon which the targeting decision is based.⁵³ It would consequently follow that human error cannot always be ruled out. Indeed, advanced surveillance capability enhances the ability of a State's forces to undertake precautions in attack.⁵⁴ But these optimal conditions may not exist in every case. More importantly, a drone operation team sitting thousands of miles away from the environment in which a potential target is located may well be at an even greater human intelligence gathering disadvantage than ground forces, who themselves are often unable to collect reliable intelligence.

In Uruzgan Province of Afghanistan in February 2010, for instance, up to 23 civilians were killed when three minibuses were mistaken for a convoy carrying insurgent fighters and hit by drone-fired missiles. A subsequent investigation found that crucial information as to the character of the convoy "was ignored or

⁴⁹ . UNSC Res. 611, (Apr. 25, 1988) UN Doc S/RES/611.

⁵⁰ . R Pear, US Assails P.L.O. Aide's Killing As 'Act of Political Assassination, N.Y. TIMES, 18 April 1988.

⁵¹ . An example is the Horn of Africa's Al Shabab and the Boko Haram of West Africa having links with Al Qaeda. In Palestine, Islamic Jihad, Hamas and the Palestinian Authority and which are termed as terrorist outfits have long been at odds with one another. But as both are often the target of Israel targeted killings, nothing unites them more than a common enemy

⁵² . Blum, G, and Heymann, P., Law and Policy of Targeted Killing, Article presented at the Harvard Law School, September 2010.

⁵³ . M Wardrop, Unmanned Drones Could be Banned, Says Senior Judge, The Telegraph, (6 July 2009).

⁵⁴ . Schmitt, m., Precision Attack and International Humanitarian Law, 87 Int'l Rev. Red Cross 445, Sept. 2005.

downplayed by the Predator crew.”⁵⁵ Moreover, the relevant operations centers had “failed to analyze the readily available information and communicate effectively” with the relevant commander. It is only later on, due to public outcry that it was reported that six officers had been officially reprimanded as a result.

Proponents of targeted killings argue that these killings are necessary in the course of pursuing democracy, peace and security as well as human rights but the targeted killings contain in themselves a lot of humanitarian law and human right violations. Once it is justified to use force in self-defence, and carry out a targeted killing, international humanitarian law and human rights would not be applicable to that use of force. This approach reflects an unlawful and disturbing tendency in recent times to permit violations of international humanitarian law based on whether the broader cause in which the right to use force is invoked is just⁵⁶ and impermissibly conflates *jus ad bellum* and *jus ad bello*.

Proportionality under self-defense requires States to use force only defensively and to the extent necessary to meet defensive objectives.⁵⁷ Whereas necessity in self-defense requires a State to assess whether it has means to defend itself other than through armed force, in international humanitarian law, necessity requires a State to evaluate whether an operation will achieve the goals of the military operation and is consistent with the other rules of International Humanitarian Law.⁵⁸ The self-defense approach used in target killings fails to take into account the existence of two levels of responsibility in the event that a targeted killing for which self defense is invoked is found to be unlawful. Violation of the limitations on the right to self-defense results in State and individual criminal responsibility for aggression. There is also liability for the unlawful killing and itself and if it violates International Humanitarian Law, it may be a war crime.

Conclusion

Targeted killings may be one of the prevalent counterterrorism measures today, but as the adoption of such a policy goes against the grain of human rights as well as other principles of international law, targeted killings can never attain the legitimacy those States practice it would wish such a policy had.

The inherent right of self-defense many States invoke so as to unleash targeted killings is only a blanket assertion that leaves a great many questions of major importance entirely unaddressed. In particular, it makes self-defense ensure that endless contestation can occur in response to efforts to identify the applicable legal framework, and thus the relevant rules, in terms of International Humanitarian Law and/or International Human Rights Law.⁵⁹

⁵⁵ Memorandum for Commander, United States Forces – Afghanistan/International Security Assistance Force, Afghanistan: Executive Summary for AR 15-6 Investigation, 21 February 2010 CIVCAS incident in Uruzgan Province, available at <http://www.isaf.nato.int/stories/April2010Dari/May2010Revised/Uruzgan%20investigation%20findings.pdf>

⁵⁶ IACHR, Tablada, Report No. 55/97, Argentina, paras. 173-74.Doc. 38, (1997).

⁵⁷ D Akande, Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court, 68 Brit. Yearbook of Int'l Law 209 (1997).

⁵⁸ Gardam, J., Proportionality and Force in International Law, 87 American Journal of International Law 391 1993.

⁵⁹ . A Cumming, Covert Action: Legislative Background and Possible Policy Questions, (2011). Available at <http://www.fas.org/sfp/crs/intel/RL33715.pdf>, accessed on 3rd October 2016.

Targeted killings as a counterterrorism measure is an ideology of fear and repression that creates enemies and breeds more violence rather than mitigating acts of terror and strengthening security. It has too often become an excuse for governments to repress opposition groups and disregard international law and civil liberties. If such a trend were allowed to go on, it risks making targeted killings an option for dealing with a growing range of perceived problems especially in the area of peace and security.

What instead States should address as effective counterterrorism steps should be through international cooperation and diplomacy, using international law and respecting civil liberties and human rights. Governments should also address the root causes of terrorism, notably political alienation due to prejudice, State-sponsored violence and poverty as well as the inequalities brought by societal stratification.

Other ways of avoiding falling in the pitfall of targeted killings would be for States to scale up their homeland security and intelligence agencies so that terror attacks are thwarted at the very nascent stages of their preparation by terrorists. Placing sanctions on States sponsoring or hosting terrorists may also be a viable option just as dealing with suspected captured terrorists in the manner of due process and subjecting them to justice rather than killing them.

From the perspective of both domestic and international law, the practice of secret killings conducted outside conventional combat settings, undertaken on an institutionalized and systematic basis, and with extremely limited if any verifiable external accountability, is a deeply disturbing and regressive one. These developments threaten to do irreparable harm to the international legal framework designed to establish and uphold foundational protections for the right to life and human dignity.⁶⁰ The UN Human Rights Council should also take this issue more seriously and aim at bridging the growing chasm between its approach to targeted killings and that of other international human rights bodies. This is particularly marked in relation to the European Court of Human Rights, as illustrated by its Grand Chamber judgment in *Al-Skeini and Others v. The United Kingdom*.⁶¹ The court pronounced itself in the following terms:

“The general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. ... This judgment is going to be highly significant in determining the obligations of the 47 Contracting States to the European Convention for the Protection of Human Rights and Fundamental Freedoms including all of the United States’ European allies in the North Atlantic Treaty Organization, in conjunction with whom it is conducting various of the operations under consideration in this Article. While the United States will properly insist that it is not a party to, and is thus not bound by, the European Convention, the court’s jurisprudence drew upon analyses of the general position under international human rights law to which the United States is subject. The likelihood that there will be a significant flow-on effect of such jurisprudence raises the question as to whether, and if so why, the United States should take this body of law more seriously”.

⁶⁰ . P Alston, *The CIA and Targeted Killings Beyond Borders*, New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper No. 11-64 (2001), Electronic copy available at <http://ssrn.com/abstract=1928963>.

⁶¹ . EHHR (Application no. 55721/07) Judgment of 7 July 2011.

It is imperative to note that the greater part of the international law community does not accept targeted killings against terrorists, even in a struggle directly devolving from September 11.⁶² Even when that struggle is backed by UN Security Council resolutions authorizing force, the view of much of the international law community is that, a targeted killing is an extrajudicial execution or murder, unless; It takes place in an armed conflict; The armed conflict is an act of self-defense within the meaning of the UN Charter; It is also an armed conflict within the meaning of International Humanitarian Law; and finally, Even if it is an armed conflict under International Humanitarian Law, the circumstances must not permit application of international human rights law, which would require an attempt to arrest rather than targeting to kill. As a matter practical, these conditions would forbid all targeted killings.

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