Introduction

“We must make it clear that if Pakistan cannot or will not act, we will take out high-level terrorist targets like Bin Laden if we have them in our sights.”

— Barack Obama, July 2008

On May 2nd, 2011 at around 1:00 am, two American MH-60 Black Hawk helicopters, coming from a base in Jalalabad/Afghanistan, approached a compound in an affluent neighbourhood of Abbottabad in Pakistan. On board were two dozen soldiers of the United States Naval Special Warfare Development Group (DEVGRU) on the hunt for the head of Al-Qaeda, Osama Bin Laden. After landing in the courtyard, the troops raided the building, engaging in a firefight with Bin Laden’s bodyguards. After they made their way up the stairs, they reached Bin Laden’s room on the third floor where he was killed by two shots, one in his left eye and one in his chest. About 20 minutes after the start of the operation, the Special Forces team reported “Geronimo EKIA” to President Obama, who had watched the raid with key members of his administration via live stream in the situation room of the White House (see e.g. Pitzke 2011; New York Times 2011a). The world’s most wanted terrorist, responsible for the murder of thousands of innocent men, women and children was dead, killed in what the White House (2011b) labelled a “targeted operation”. If this incident had happened in a war between two states and Osama Bin Laden had been a member of a regular state force, there would have been hardly any questioning over the legality and legitimacy of the attack. However, the US personally targeted and killed him outside of a war zone, in a country with which it was not at war. Moreover, as the White House admitted on May 3rd, Bin Laden “was not armed” when he was shot (White House 2011c) and as a special-operations officer later confirmed: “There was never any question of detaining or capturing him – it wasn’t a split-second decision. No one wanted detainees” (Schmidle 2011, 7).

The killing of Osama bin Laden was the most prominent example of a series of attacks on terrorists in the ongoing ‘War on Terror’, mostly known as ‘targeted killing’. After Qaed Salim Sinan al-Harethi (a.k.a. “Abu Ali”), the top Al-Qaeda member in Yemen and suspected architect of the USS Cole attack, was killed by a Predator Unmanned Aerial Vehicle (UAV, better known as “drone”) in an isolated region in the Yemeni countryside on
November 4th, 2002, the issue came into the centre of public attention. Furthermore, the United States are not the only country engaged in the killing of (suspected) terrorists, as Israel has pursued this policy since the inception of the Second Intifada in September 2000 (see David 2002, 1). The policy of targeted killing raises numerous legal and political concerns. The emergence of non-state actors in recent years challenge these foundations, as there are no clear legal norms. In addition, the killing of an individual without due process challenges the rule of law in general. I want to take a look at the practice of targeted killing in counter-terrorism campaigns and assess their legality and legitimacy as well as their effectiveness.

First, the legality of targeted killing under international law is assessed. Foremost, it is discussed whether targeted killings have to be considered under a war paradigm or a law-enforcement paradigm. This is particularly important, because in wartime and under international law, the peacetime legal constraints on the use of deadly force against enemies are abrogated. To put it another way, under a law-enforcement paradigm a killing by a government official would only be lawful if undertaken in self-defence or defence of others, which is surely incompatible with the notion of targeted killing (see Banks/Raven-Hansen 2003, 671). Hereafter, the *jus ad bellum* of targeted killing is assessed. Terrorists and terrorist organisations such as Al-Qaeda are private, non-state actors but they necessarily operate from a state’s territory³. Thus the fight against terrorists on foreign soil always interferes with the sovereign rights of this territorial state. In this sense, the ban on intervention and the prohibition of the use of force as set forth in Article 2 (4) of the Charter of the United Nations (UN) is discussed and whether there is a possibility to justify interstate counter-terrorism and targeted killing as pre-emptive self-defence. However, the possible justification of self-defence on an interstate level does not determine whether this action is legal under International Humanitarian Law (IHL). As the International Court of Justice (ICJ) stated in its advisory opinion on the use of nuclear weapons: “A use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law” (ICJ 1996, 245). As a first step of these *jus in bello* criteria of targeted killing, it has thus to be determined whether targeted killing of terrorists can be considered as an armed conflict and if it constitutes an international armed conflict or a non-international armed conflict. If this applicability of IHL is affirmed, the question arises which legal consequences this has for targeted terrorists or insurgents and which restrictions apply for the lethal use of force against those suspected individuals.

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³ If one leaves out the less likely option of terrorism on the high sea or in space (see Cassese 2005a, 476 ff).
In a second step, the legitimacy of targeted killing is analysed, i.e. whether this method of countering terrorists can be considered as a just and appropriate means. Even though legitimacy is an “extremely slippery concept” (Hurrell 2005, 17), it can be seen from two dimensions. The first dimension is about process and procedure, or ‘input legitimacy’, as Fritz Scharpf (1999) labelled it. It means that an action or a rule is legitimate to the extent that it “has come into being and operates in accordance with generally accepted principles of right process” (Franck 1990, 19). The second dimension of legitimacy is concerned about effectiveness, what Scharpf calls ‘output legitimacy’. Similarly to the delegation of authority to international organisations or regulatory networks, which are often considered legitimate to the extent to which it provides effective solutions (see Hurrell 2005, 22), targeted killing has also to be judged by its effectiveness. In this part, I display some new and original descriptive data. In the end, all results will be summarised in the conclusion.

My central argument is that the use of targeted killing is a tool of warfare that is highly questionable in legal and political terms but can be legal and viable in counter-terrorism campaigns under very strong restraints. The fight against terrorism across state borders has to be seen under a war paradigm. Even though the criminal behaviour of terrorists may lead politicians to invoke the law-enforcement paradigm, it is not feasible when the scale of violence reaches a certain level that can only be dealt with military force or when terrorists operate from states which are either unwilling or incapable of cooperating in law-enforcement (see Kretzmer 2005, 201). This means that the jus ad bellum criteria can be applied to targeted killings. From an international legal standpoint, states can invoke the right to self-defence if the targeted individuals are actively engaged in the planning and execution of terrorist attacks against that state. From the jus in bello perspective, IHL is applicable to the fight against terrorism. It is shown that within the narrow confines of IHL, targeted killing of terrorists can be legal under certain restrictions and circumstances. Terrorists can be considered legitimate targets if they directly participate in hostilities.

As mentioned before, the question of legitimacy is certainly hard to assess. In terms of ‘input’-legitimacy, strong arguments for and against targeted killing exist. There are indeed some drawbacks to the policy of targeted killing, but the positive impacts of targeted killing outweigh those negative aspects. Similarly, the ‘output-legitimacy’ of targeted killing is also contradictory. Descriptive evidence gathered by the author shows that targeted killing may be effective, particularly in Palestine. However, other empirical studies suggest that targeted killing is not a significant independent variable. But those studies are flawed in the sense that they only look at the conflict in Israel and only rely on a relatively little amount of data. Thus, more research is needed to prove this assumption.
2 What constitutes targeted killing?

“We’re in a new kind of war. And we’ve made very clear that it is important that this new kind of war be fought on different battlefields.”

— Condoleezza Rice, November 2002

This chapter serves as the conceptual background of this work. The first section contains a definition and explanation of the concept of targeted killing used in the subsequent parts of this thesis and how it differs from other deprivations of life. The second section gives a short overview of the historical background and examples of targeted killing.

2.1 Definitions

The issue of targeted killing is highly debated in the international arena. It is condemned by Amnesty International (e.g. 2002; 2005), some entities of the UN (e.g. 2002, 2003), the UN Secretary General (2003) and many scholars (see e.g. Cassese 2005; Proulx 2005). Others, however, have defended such attacks as legal and legitimate (see e.g. Statman 2004; Byman 2006). Often, other terms such as ‘assassination’ or ‘extra-judicial killing’ are used synonymously with targeted killing by academics and politicians alike. But, these terms, value-laden with notions of illegitimacy and illegality, label actions significantly different from targeted killing.

For the purpose of this paper, targeted killing is defined as “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” (Melzer 2009, 5). Targeted killing thus consist of five cumulative elements (see ibid., 3 f.). Firstly, targeted killing uses lethal force against human beings. Secondly, targeted killing includes the elements of intent, premeditation and deliberation to kill. Thirdly, targeted killing requires that it is directed against individually selected persons. Fourthly, at the time of the killing, the targeted persons are not in the physical custody of their attackers. Lastly, targeted killings must be attributable to a subject of international law to become relevant under it. As referent objects in international relations, states are also the primary subjects of international law, but in certain limited situations, non-state actors can also become such subjects of international law (see Brownlie 2003, 65; 529 ff.). Thus, the deprivations of life related to non-State actors may qualify as targeted killing to the extent that international law controls or prohibits the use of lethal force by them.

4 Witt 2002.
This definition can be seen as a comprehensive description of targeted killing. Other definitions may suit the context in which they are discussed but are not sufficiently precise for the purpose of this paper. For example, David’s (2002, 2) and Ruys’ (2005, 4) definitions do not differentiate between custodial executions (e.g. the death penalty) from extra-custodial targeted killings. Downes (2004, 280) limits his definition to the targeting of “individual terrorists”, which is a very specific and insufficiently defined category of persons. Concerning the scope, this analysis focuses on “state-sponsored” targeted killings, i.e. killings which are legally attributable to states.

This definition does not, however, clear up the ambiguity between targeted killing and ‘assassination’ or ‘extra-judicial killing’. Similarly to targeted killing, assassination is not a legal term in international law and “does not appear in the United Nations Charter, the Geneva Conventions, the Hague Conventions, international case law or the Statute of the International Criminal Court” (Söderblom 2004, 5). But there is general agreement, that assassination is something illegal (see Downes 2004, 279). In assessing assassination, it is important to contemplate two definitions, one for a peacetime application, and the other for a wartime application. Although all assassinations are illegal, it is still profitable to examine the specific criteria which differentiate peacetime and wartime assassination (see Machon 2006, 12 f.). Concerning peacetime, many scholars define assassination as a subset of murder where the target is chosen based on his identity, prominence and public position. Moreover, the killing is motivated to achieve some political objective (see Canastaro 2003, 11). Thus, peacetime assassination requires three elements to be present: (1) a murder, (2) of a specific individual, (3) for political purposes (see Harder 2002, 5). This definition allows several conclusions to be drawn. A lawful homicide cannot be an assassination. An unlawful homicide could be an assassination, but if there is no political purpose, it would not be classed an assassination. Lastly, a political killing may be a murder, but if there is no specific targeting of a certain person it would not be assassination (ibid., 5).

During wartime, assassination has a different meaning (see Parks 2002, 3). Once a war starts, assassination cannot be considered a political activity anymore. Even though war is often seen as the “continuation of political activity by other means” (Clausewitz 1968, 87) not every killing in war is political. A strict application of the peacetime political requirement would make each wartime killing an assassination, which is surely not reflected either by the laws of war or the common understanding of the word (see Canastaro 2003, 12). According to Schmitt (1992, 632), assassination in a war consists of two elements: (1) the specific targeting of an individual and (2) the use of treacherous or perfidious means. Treacherous or
perfidious are “acts inviting confidence of an adversary to lead them to believe that they are entitled to, or are obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence.” This can include acts such as feigning wounds, feigning civilian status or using emblems or signs of other states (ICRC 1977). However, treachery and perfidy must not be confused with surprise and deception, which are legal under the law of war (see Machon 2006, 13). For example, an air strike against an enemy general and his staff could not be considered treacherous or perfidious and would be allowed by the law of war. Thus, “if the law of war is not violated, an assassination has not occurred” (Harder 2002, 4)\(^5\). Likewise, ‘extra-judicial killing’ is generally understood to be a term applicable to the domestic domain in which international human rights law is operative as the *lex specialis* and which refer to “the deliberate killing of suspects in lieu of arrest, in circumstances in which they [do] not pose an immediate threat.” (Amnesty Int’l 2002). In this sense, extra-judicial killings are primarily a violation of human rights based on missing legitimacy and control by the state and not so much related to the permissibility under international law (see Schmitz-Elvenich 2007, 11).

In sum, the notion of targeted killing does substantially differ from ‘assassinations’ or ‘extra-judicial killings’. The latter terms are too value-laden and do not accurately describe the targeted operations conducted against terrorists. Moreover, targeted killing does not solely refer to a certain area of international law, but allows a legal assessment against the background of the UN Charta, IHL and human rights law.

### 2.2 Historical Background

Only Israel has admitted to carrying out “preventive strikes” since the beginning of the Second Intifada in September 2000 and considers this procedure as a legitimate tool in the fight against terrorist threats (see Israeli Supreme Court 2006). But even before that, ever since its independence in 1948, Israel has used targeted killings. It has assassinated various enemies, including Egyptian intelligence officers in the 1950’s, German engineers developing missiles for Egypt in the 1960’s, terrorists of Black September after the 1972 Munich Olympics massacre, and leaders of Palestinian and Lebanese organisations such as the Secretary General of Hezbollah in 1992 (see Blum/Heymann 2010, 151).

However, with the beginning of the Second Intifada the quantity and quality of targeted killings changed. Never have so many militants been killed in such a short time span. The

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\(^5\) Conversely, however, not all killings that violate the law of war are necessarily assassinations.
Israeli Supreme Court estimates that from 2000 to 2006, over 300 terrorists or members of terrorist organisations have been killed by targeted operations. About 150 civilians nearby have also been killed and several hundreds were wounded (see Israeli Supreme Court 2006, para. 2). Because of the extent of the operations and the obvious involvement of the Israeli Defense Forces (IDF), the Israeli government has been forced to acknowledge its role in targeted killings (see David 2002, 5). Several high-ranking members of Fatah and Hamas have been killed during the Second Intifada (see Amnesty Int’l 2001). The first victim was Hussein ‘Abayat who was killed in his car on November 9th, 2000 by three missiles fired from an IDF helicopter. With him, two women waiting for a taxi nearby were killed. The killings of Sheikh Ahmed Yassin, the founder and spiritual leader of Hamas, on March 22nd, 2004 and of Abdel Aziz Rantinisi on April 18th, 2004 got worldwide attention. In July 2005, Israel continued its policy of targeted killing after it had stopped for several months. On July 15th six Hamas activists were killed in the West bank by a missile attack on their car (see Schmitz-Elvenich 2007, 13 f.). Until today, Israel adheres to its policy of targeted killing.

Besides Israel, the United States are the only country currently engaged in targeted killing operations. The US Senate Select Committee under Senator Frank Church (Church Committee) reported in 1975 that it had found evidence of eight plots involving CIA efforts to assassinate, inter alia, Fidel Castro, President Ngo Dinh Diem of South Vietnam and General Rene Schneider of Chile (see Church Committee 1975). During the Vietnam War, the Phoenix programme rested on the assassination of Viet Cong leaders and collaborators. After the 1998 embassy bombings, President Bill Clinton issued a presidential finding which authorised an attack against Al-Qaeda in Afghanistan. Shortly afterwards, seventy-five cruise missiles were launched at a training camp in Afghanistan where Bin Laden was expected to attend a meeting, but failed to kill him (see Blum/Heymann 2010, 149 f.). The Predator attack on al-Harethi in Yemen on November 4th, 2002 was the first publicly noticed targeted American attack on a terrorist. The attack was carried out by the CIA (see Kretzmer 2005, 204)\(^6\). Other examples of American targeted killing operations include the air strikes on a Pakistani village on January 14th, 2006 with the aim of killing Bin Laden’s deputy Aiman al-Sawahiri, or on a village in southern Somalia on January 7th, 2007. It is unclear whether those attacks actually killed terrorists (al-Sawahiri survived), but several civilians were killed or wounded (see Schmitz-Elvenich 2007, 14 f.). The total numbers of terrorists killed by the US is unclear, but the New America Foundation (2011) estimates that in Pakistan alone, between 1,335 and 2,090 have been killed by drone strikes since 2004.

\(^6\) In this context it shall be noted that I will not address the question whether the use of the non-combatant CIA to carry out combatant activities is lawful.
3 Legality of targeted killing

“Self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of International Law, accompany [war] without essentially impairing its power.”

— Carl von Clausewitz, On War

This chapter analyses the legality of targeted killings under international law. The first section discusses whether it falls under a war or a law-enforcement paradigm and whether international law is applicable. Secondly, the jus ad bellum of targeted killing on an interstate level is scrutinised. Lastly the jus in bello requirements of IHL are assessed in detail.

3.1 War paradigm or law-enforcement paradigm?

Even though Israel’s actions against individual terrorists and terrorist organisations in the Palestinian territories have to be seen with reservations, due to the unclear legal status of these territories (see e.g. ICJ 2004; Benvenisti 1996, 47), they illustrate one central disagreement about the legality of targeted killing: the legal basis by which this legality has to be judged. The states involved maintain that they are a legitimate tool in the ‘war on terror’, whose legality must be assessed in terms of the laws of war; those who see them critically as ‘extra-judicial’ refer to a domestic law-enforcement model, which rests mainly, though not exclusively, on international human rights law (see Kretzmer 2005, 174).

Human rights activists and non-governmental organisations (NGOs) generally deny that laws of armed conflict have to be applied to terrorism, because they are afraid that the real threat is an over-reaction (see e.g. UN 2004; Int’l Commission of Jurists 2004). They either assume that the existing legal constraints on anti-terror measures do not prevent effective counter-terrorism, or if they do, the dangers to human rights resulting from relaxing these constraints are far greater than threats from terrorism itself. Their categorisation of targeted killings as ‘extra-judicial’ implies that the legality of such strikes has to be judged by a law-enforcement model which rests on human rights law (see Kretzmer 2005, 175 f.). Here, the intentional use of deadly force by state agencies can be justified only in very limited conditions, primarily self-defence or defence of others. As the Fifth Amendment of the US Constitution (1789) holds that “no person shall be […] deprived of life […] without due process of law”. Capital punishment is not illegal because it is imposed under the full judicial process (see Banks/Raven-Hansen 2003, 674), but any premeditated use of deadly force by state authorities which is not justified is ‘extra-judicial’ (see Kretzmer 2005, 176).

7 Clausewitz 1968, 2.
8 This dispute is part of a wider controversy over the appropriate categorisation of state measures to fight international terrorism (see e.g. Slaughter/Burke-White 2002; Fitzpatrick 2003).
The involved states obviously have no interest in mandating targeted killing operations under a law-enforcement model, as there is often an “unusual, and at times insurmountable obstacle to indicting them” (Meisels 2004, 304). The ability to build a strong case against a suspected terrorist, proving him guilty beyond a reasonable doubt is inherently difficult. Verifying a suspect’s identity, his connection to a particular terrorist organisation, and the direct responsibility for terrorist attacks in compliance with the strict legal requirements of the criminal justice system remain unsure (ibid., 304). Suspects in custody are an additional problem for the states. Juries and witnesses may be intimidated by the terrorists, making the trial even more problematic (see Finn 1991, 99). The detention of terrorists may also lead to further attacks or hostage-takings to enforce their release (see Machon 2006, 40). Furthermore, the military often resists the law-enforcement model because the attempt to arrest terrorists can be very costly in terms of casualties. The American raid to apprehend Somali warlord Mohammed Farrah Aidid in Mogadishu, on October 3rd, 1993 illustrates some of the potential dangers of this model. Therefore, states opine that targeted killings have to be seen under a war paradigm, where international humanitarian law gives more leeway than human rights law under the law-enforcement paradigm. The central argument is that terrorist organisations have military abilities and means which can only be countered with state military measures.

Indeed, the actions of individual terrorists and terrorist organisations and the violence they inflict, go far beyond that of ordinary criminals. Nearly 3,000 Americans died in the terrorist attacks of September 11th (see Glazier 2008). Israel has lost over 900 citizens in the first five years of the Second Intifada (see Israeli Supreme Court 2006, para. 16). In their attacks, “the terrorist organisations use military means par excellence, whereas the common denominator of them all is their lethalness and cruelty. Among those means are shooting attacks, suicide bombings, mortar fire, rocket fire, car bombs, et cetera” (ibid., para. 16). Law-enforcement authorities cannot deal with those kinds of threats anymore. Moreover, they can often not operate in foreign countries, particularly if it is a failed state. Instead, military means have to be employed, inter alia to kill terrorists via targeted killing. In sum, the war model is the prime basis for the legality assessment and not the law-enforcement model. Although the latter one implies human rights law, it is too domestic in nature to apply to the fight against international terrorism and does not allow appropriate means.
3.2 Jus ad bellum

3.2.1 Use of force

In modern times, the (legal) use of force by states is considered as an act of self-defence against foreign invaders who challenge the territorial integrity or the political independence of a state. This doctrine of self-defence is considered as one of the “fundamental principles of international law” (Schwarzenberger 1955, cited after Kegley/Raymond 2003, 387). But historically, the notion of self-defence had little legal value as states used warfare as a lawful way to settle disputes (see Machon 2006, 8). It was considered the paramount element of state sovereignty to resort to unlimited war (see Gazzini 2005, 130). This attitude changed during the 20th century after the experience of two World Wars. On the one hand, the General Treaty for the Renunciation of War (Kellogg-Briand Pact) of 1928 condemned the recourse to war as the solution of international conflicts. On the other hand, the Nuremberg principles, which resulted from the 1945 International Military Tribunal against the Nazis, were accepted by the United Nations General Assembly as existing international law and contained, amongst others, the prohibition of a war of aggression (see Schachter 1986, 113 ff.).

Since its promulgation in 1945, the UN Charter has become the dominant international institution for the regulation of armed conflict and the use of force (see Machon 2006, 43). A “cornerstone” is the prohibition of the use of force in Article 2 (4) (see ICJ 2005, para. 148). It states that “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations” (United Nations 1945). It is seen a peremptory norm (ius cogens) and although states have often violated it, their reference to exceptions to this prohibition to justify their use of force shows their legal conviction on the existence of the norm (see Gazzini 2005, 124 ff.).

However, since the establishment of the United Nations the scope and content of the prohibition of the use of force have led to controversies. ‘Force’ within the meaning of Article 2 (4) does not comprise any form of coercive power but in the prevailing view only armed power (see Dinstein 2005, 86). Political or economic pressures, for example an oil embargo does not constitute an element of offence of Article 2 (4), and neither does simple physical force such as the damming up of a river. Moreover, this armed power has to be used in the “international relations” of the states, which means that only cross-border use of force would be seen as an offence to Article 2 (4) (see Randelzhofer 2002, para. 29). Although the scope of ‘force’ has to be seen as restricted to armed power, the prohibition has to be construed extensively. The use of military force on foreign territory or against a foreign state always...
holds the danger that the situation gets out of hand, no matter how large it is. Thus, Article 2 (4) not only covers large-scale military operations but also small scale force with military means (see Schmitz-Elvenich 2007, 39). Applied to the targeted killing of terrorists, such actions would therefore generally qualify as a breach on the prohibition of the use of force according to Article 2 (4) of the UN Charter (see Beres 1991, 325).

Although, this breach does not occur if there is expressive consent by the state whose territorial integrity is violated (see e.g. Nolte 1999). Every day, states consent to actions by other states which would be a violation of international obligations without such consent. Examples for such consent are overflight rights for the airspace or passage rights for the territorial waters of a state, but also the authorisation to conduct a public investigation in a foreign state (see ILC 2002, 72). The rising frequency of terrorist attacks increases the probability that states give their consent to counter-terrorism measures by a foreign state on their soil. However, the consent by the state can indeed be reluctant, based on the insight that the intervening state would act anyway, even without consent (see Schmitz-Elvenich 2007, 34). But from a legal standpoint, once the permission is given, the targeted killing of terrorists is not illegal from an interstate perspective. If there is no such permission, a justification would be needed.

The framework of the UN Charter provides two exceptions to the general prohibition of the use of force under Article 2 (4). Firstly, under Chapter VII of the UN Charter, the Security Council may authorise any measure necessary to “maintain or restore international peace and security” (UN 1945). This possibility is not explored further here, because it is irrelevant for the issue of targeted killing. Secondly, Article 51 of the Charter stipulates that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security” (ibid.). In this sense, Article 51 of the Charter is a justification which does not cure the violation of Article 2 (4) but removes its illegality (see Schmitz-Elvenich 2007, 50). It is important to note, that Article 51 allows self-defence not only against other states but also against non-state actors. When a state is attacked by terrorists operating from another state’s territory, any self-defence response would obviously violate that state’s territorial integrity and Article 2 (4). A direct justification over Article 51 is not possible, as the harbouring state is not the initiator if the attack. However, the attacked state cannot be left defenceless if terrorists operate from other territories (see Dinstein 2005, 245). Thus, the flexible interpretation of Art. 51 allows a specific right of self-defence against terrorists on foreign territory, if the harbouring state is not willing

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No state has ever asked for Security Council permission to conduct a targeted killing in a foreign country.
or able to take the measures itself and if the operation is solely confined to effective counter-terrorism operations and against terrorist facilities (see Schmitz-Elvenich 2007, 121).

In the literature, there are different interpretations about the meaning of “an attack occurs”. Some academics take a narrow view and state that Article 51 is superseding customary international law and therefore limits forcible self-defence to cases where the UN Security Council has not already made a response. Thus, the right to self-defence can only be invoked after the attack has already started (see Krajewski 2005, 7). Moreover, it is only a temporary right until the Security Council has taken action (see Gray 2008, 124 f.). It is common ground that states are allowed to self-defence against attacks which are already taking place. But, other scholars take a wider view on this issue by emphasising the concept of “inherent right” in Article 51. They state that pre-charter, customary rules of self-defence remain in place as the Charter does not take away those rights without express provision, and they mention that at the time of the promulgation of the Charter there was a wider customary right of self-defence, including the protection of citizens and anticipatory self-defence (ibid., 117 f.). This view was basically corroborated by the ICJ in the Nicaragua case, as it acknowledged that a customary right of self-defence exists alongside with Article 51 (see Dinstein 2005, 181 f.). However, the ICJ neither stated whether the customary right was wider than the Charter nor if self-defence against imminent threats is legal, as the parties did not raise that issue (see Krajewski 2005, 8).

For a wide interpretation of anticipatory self-defence, advocates often refer to the Caroline incident. In 1837, British troops destroyed the American steamboat Caroline on the Niagara River in US territory, because it was used to transport soldiers and ammunition into British Canada to support an emerging Canadian rebellion against Britain. After the US Government protested, the British claimed their right of self-defence for the attack (ibid., 9 f.). Hereupon, the US Secretary of State, Daniel Webster, made clear that the exercise of self-defence as an inherent and autonomous right requires the demonstration of the “necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation” (Webster 1842). This definition was accepted by the British government and later became a standard of customary international law. However, it is highly debatable, whether standards developed in the 19th century, with a completely different notion of war as a political tool, can still be seen as adequate criteria for the exercise of self-defence in the 21st century (see Krajewski 2005, 10; Brownlie 2003, 701 f.). But international practice is clear: States do claim a right to use force in an anticipatory way when the Websterian conditions are met (Kegley/Raymond 2003, 387).
3.2.2 Self-defence against terrorists?

Against this background, the question arises whether self-defence can be applied to terrorist targets? The customary principles of immediacy, necessity and proportionality as reflected in the Webster doctrine have to be analysed in this context. Firstly, the restriction of immediacy is concerned with temporal limits to self-defence. If the attack is already taking place, it is clear that responses must not be limited to “on-the-spot-reaction[s]” (Dinstein 2005, 220). A self-defence measure satisfies the immediacy criterion if there is no undue time lag between the attack and the self-defence measures (ibid., 210). For example, the time frame between the terrorist attacks of September 11th, 2001 and the begin of operation “Enduring Freedom” in Afghanistan on October 7th, 2001 is generally seen as proportionate and consistent with the right to self-defence (see Schmitz-Elvenich 2007, 130). This also applies to terrorist actions, if they appear as a series of attacks. If there is a consistent pattern to them, they can be seen as an *accumulation of events* which counts as one armed attack (see Cassese 1989, 596). A different situation occurs, if an armed attack is anticipated and self-defence measures are taken before the actual attack takes place. In terms of targeted killing, this would mean that such an operation could already be conducted before terrorists have made an attack. There are two different categories of the use of force in such anticipatory self-defence: pre-emptive and preventive. *Pre-emptive* use of force means that a state reacts to an imminent threat. A state that pre-empts basically has the choice between hitting first or getting the first blow. In essence, pre-emption mandates certainty about an armed attack in the very near future (Gray 2007, p. 13). When “danger [is] immediate, and, as it were, at the point of happening” (Grotius 1949, cited after Kegley/Raymond 2003, 389), pre-emptive action is allowed and legitimate. This is also the view of the UN Secretary General (UN 2005, para. 124). Hence, there seems to be an *opinio juris communis* that such a right exists (see Krajewski 2005, 12). In contrast, a *preventive* use of force entails the use of military force to remove a potential future threat which might appear on the horizon but is not yet imminent (see e.g. Gray 2007, 11; Kegley/Raymond 2003, 388). The state often even has the choice to tolerate such a possible incident (Gray 2007, 13). It is widely acknowledged by scholars that preventive military action is certainly unlawful and inadmissible as it would result in a “bottomless legal pit” (Kaplan/Katzenbach 1961, 213).

Secondly, the principle of necessity requires that the state only responds to an armed attack with the use of force when other defensive measures are not available or not sufficient enough (see Dinstein 2005, 210). Concerning the targeted killing of terrorists, this would raise the question if policing or other less forceful measures are possibly effectual to eliminate the terrorist threat (see Schmitt 2002, 28). However, as demonstrated above, this option is not
feasible, because terrorists often operate militarily and the harbouring states are mostly unable or incapable of cooperating in law-enforcement. Albeit, the intervening state has the burden of proof to show that softer means were not available to fight the terrorists (see Schmitz-Elvenich 2007, 157).

Thirdly, within the scope of proportionality, the permissibility of the use of force is analysed in terms of extent and intensity. On the one hand, the self-defence measure has to be necessary to remove the armed attack, but on the other hand it has to be in appropriate relation to the current or future threat (ibid., 158). In its actions, the defending state must not use more force than necessary to reach the goal of the measure, i.e. the removal of the terrorist threat (see Schachter 1989, 222 f.). As the measure does not only serve the defence of a concrete terrorist attack but also to obviate future attacks, it is allowed to not only attack the particular terror cell responsible, but also the superior terrorist network to prevent further attacks (see Schmitt 2002, 7). With a series of terrorist attacks, the proportionality of a countermeasure might be doubted, as it could exceed the dimension of each attack. However, if there is a consistent pattern to the attacks and they are seen as an accumulation of events, a single self-defence measure is still proportionate, even if it is bigger than each single attack (see Schmitz-Elvenich 2007, 160).

In summary for the *jus ad bellum* of targeted killing of terrorists, it remains to be emphasised that they can be seen as legal under the right of self-defence according to Article 51 of the UN Charter. If terrorists can perform an armed attack against a state, it must be allowed for that state to use its right of self-defence against those terrorists, even if it violates the territorial integrity of another state. In any case, however, every potential targeted killing has to be assessed separately in terms of the *jus ad bellum* and such self-defence measures are limited by the customary principles of immediacy, necessity and proportionality. A self-defence measure that infringes these principles has to be seen as an illegal violation of the prohibition of the use of force under Article 2 (4) of the Charter. Moreover, the self-defence measures have to be directed strictly against terrorist facilities.

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3.3 Jus in bello

The *jus ad bellum* criterion constitutes only one element of the assessment of the legality of targeted killing, namely the legality of such operations on an interstate level. Still, targeted killing has also to be analysed on an individual level, i.e. state vs. person. That is to say, the permissibility of state action as self-defence on an interstate level does not indicate whether

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10 However, if the harbouring state is actively supporting terrorist organisations on its territory, granting them a safe haven, connected state facilities can also legally be attacked (see Schmitz-Elvenich 2007, 95 ff.).
such action complies with the principles of international humanitarian law. On principle, the applicability of IHL has to be seen separate from the question of *jus ad bellum* (see Dinstein 2005, 156 ff.). For IHL to apply, the existence of an armed conflict is an indispensable prerequisite. Therefore, it has first to be determined whether the international fight against terrorism, including targeted killing, constitutes an armed conflict.

Although international law does not provide a clear or uniform definition of ‘armed conflict’, a quite precise understanding of it can be derived from the scope of applicability of international treaties, which have been concluded for situations of armed conflict (see Melzer 2009, 245). In its *Tadic Case* (1995, para. 70) the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) ruled that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.” As mentioned before, modern terrorists, who are organised in globally operating terrorist organisations, often employ military means to reach their goals. If severe combat activity arises in the fight against those terrorists it cannot be called a police activity any longer but must be considered an armed conflict (see Israeli Supreme Court 2002, para. 1). However, this does not clarify the applicability of IHL as there are different types of armed conflicts and different regulations.

International humanitarian law distinguishes between international and non-international armed conflicts (see Schmitz-Elvenich 2007, 168). International armed conflict is regulated by the Geneva Conventions (GC) of 1949\(^\text{11}\) (see ICRC 1949) and the Additional Protocol I (AP I) of 1977 (see ICRC 1977a), whereas non-international armed conflict is regulated by Common Article 3 of the Geneva Conventions and Additional Protocol II (AP II) (see ICRC 1977b). This dichotomy in international and non-international armed conflicts results from the traditional, territoriality-based, understanding of sovereignty and is particularly problematic in connection with contemporary ‘new conflicts’ between a state and non-state actors on foreign territory (see Bruha 2002, 414). Hence, there are two different possibilities for the application of IHL on military measures against terrorists in a foreign state. On the one hand, it would be conceivable to extend the notion of international armed conflict from

\(^{11}\) For the further analysis in this paper, only the Third Geneva Convention of 1949 (GC III) relative to the Treatment of Prisoners of War is relevant.
interstate conflict to non-state conflicting parties so that it comprises conflicts between states and terror organisations because of its international character. On the other hand, it would also be possible to apply the notion of non-international armed conflict to cross-border issues, to include conflicts between a state and a non-state group which do not take place on the territory of that state (see Schmitz-Elvenich 2007, 170 f.).

3.3.1 International Armed Conflict

Under international humanitarian law, the concept of international armed conflict implies a strong connection to the requirement of statehood (see Vöneky 2004, 943). Because statehood is the main indicator for the applicability of IHL, it is irrelevant how intense or prolonged the conflict is. As the Commentary of the International Committee of the Red Cross (ICRC) states: “It makes no difference how long the conflict lasts, or how much slaughter takes place” (Pictet 1952, 32). Concerning the international fight against terrorism, this means that they certainly fall in the category of international armed conflict when the territorial state is involved in the dispute. This can be the case when the state is responsible for the terrorist attack in the first place or when the self-defence measures are also directed against facilities of the host state (see Vöneky 2004, 944; Bruha 2002, 414). In this sense, an international armed conflict also exists when the state objects to the self-defence measures against terrorists on its territory and becomes involved as a conflicting party (see Schmitz-Elvenich 2007, 173). As an example, Operation ‘Enduring Freedom’ in Afghanistan is generally seen as an international armed conflict, because the Afghan government was providing a safe haven for Al-Qaeda and hence jointly responsible for the attacks of September 11th (see Bruha 2002, 416). However, if a host state consents to those military measures or if it does not fight back, the existence of an international armed conflict based on the mentioned criterion of statehood has to be negated (see Vöneky 2004, 944). Nevertheless, some scholars argue that even the violation of another state’s sovereignty makes this state a party to the conflict (see ibid., 944; Dinstein 2005, 245). But this argumentation is flawed, because not every violation of territorial integrity is the same, even though they all violate Article 2 (4). An international armed conflict requires interstate use of armed force. This is missing in the case of a sovereignty violation without the participation of armed forces of both states. Thus, the mere violation of sovereignty does not make that state a party to the conflict in a material sense (see Grote 2004, 982). Conversely, based on the criterion of statehood, armed disputes between a foreign state and a terrorist organisation do not classify as an international armed conflict (see Tomuschat 2002, 4).
Albeit, the existence of an international armed conflict could still be accepted, if one leaves out the criterion of statehood and focuses solely on self-defence against terrorism. In particular, Art. 1 (4) AP I extends the definition of international armed conflict to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination” (ICRC 1977a) to give non-state actors the possibility to become a party of an international armed conflict. Disputes between state forces and an international terrorist organisation cannot be subsumed under this article, because they distinctively differ from situations where national liberation movements take actions against an occupying force (see Bruha 2002, 412). Such actions are generally seen as legitimate by the community of states, which is certainly unthinkable for the actions of terrorists (see Schmitz-Elvenich 2007, 177). Moreover, terrorists cannot be seen as legitimate combatants as defined by the Geneva Conventions. According to Art. 4 A I GC (ICRC 1949), combatants in an international armed conflict are members of the armed forces of a party to the conflict. Terrorists are neither party to the conflict nor do they have armed forces, they do not fall under it. But Art. 2 A II GC extends the definition to:

Members of other militias and members of other volunteer corps […] provided that such […] fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.

Terrorists do not fulfil these conditions (see e.g. Frowein 2002, 895; Watkin 2003, 10). In contrast, terrorists deliberately disguise themselves to commit attacks amongst a civilian population and they certainly do not conduct their operations in accordance with the laws and customs of war when killing innocent civilians. Besides those legal and factual arguments, there is also a political argument against a combatant status for terrorists, because they would not only become a legitimate party to the conflict but their goals and means would receive political legitimisation, particularly with regard to the *ius ad bellum*. However, if one party to the conflict does not have combatants, there would not be legitimate targets on this side of the conflict (see Schmitz-Elvenich 2007, 179)12. In summary, if there is no state party involved on the terrorist side in an armed conflict between them and another state, an international armed conflict is not present. Otherwise, the law of international armed conflict would only bind the state party to its firm rules and not the non-state actor.

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12 Kretzmer (2005, 193) notes that it would be a contradiction between *ius ad bellum* and *ius in bello*, if Article 51 of the UN Charter allows military measures against terrorists but there are no legitimate targets under IHL.
3.3.2 Non-International Armed Conflict

Since it is not possible to apply IHL to the targeted killing of terrorists within the scope of international armed conflict, the option of non-international armed conflict remains. This type of conflict is mainly regulated by Common Article 3 of the Geneva Conventions which applies “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” (ICRC 1949). It provides minimum humanitarian standards for all forms of armed conflict and is thus often conceived as “convention within the conventions” (Jinks 2003, 16; cited after Abi-Saab 1988, 221). In the analysis, it has thus to be determined whether the conflict between state and a terrorist organisation can be considered a non-international conflict and, secondly, at what point or degree it becomes an ‘armed’ non-international conflict.

First and foremost, it is relevant to see whether a non-international armed conflict is confined to the territory of a state. If this is the case, then targeted killing of terrorists by forces of state A on the territory of state B could, by definition, not come within the ambit of non-international armed conflict and would ban the applicability of IHL (see Schmitz-Elvenich 2007, 182). Evidence for such an interpretation can be found in Article 1 (1) of AP II which confines non-international armed conflicts to conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups” (ICRC 1977b). This would mean that cross-border conflicts, including the international fight against terrorism, cannot be seen as non-international armed conflicts. However, AP II does not cover all conflicts mentioned in Common Article 3 GC as “not of an international character”. The express connection between territory and armed forces of Article 1 (1) AP II is missing in Common Article 3 GC. AP II thus has a narrower scope than Common Article 3 GC (see Sandoz 1987, para. 4447). Even though the latter one also mentions the territory of a party, this does not mean that this party has to be part of the conflict. A participation of government armed forces in a non-international armed conflict is therefore not necessary (ibid., para. 4461). Furthermore, the term ‘non-international’ must not be equated with ‘domestic’. It denotes all armed conflicts that are not taking place between two states (see Bruha 2002, 419). This interpretation of Common Article 3 GC was confirmed by the US Supreme Court in the case *Hamdan v. Rumsfeld* (2006, 67 f.). Indeed, so far IHL interpreted non-international armed conflicts as domestic conflicts between the state and a non-state actor. But there is no substantive reason why those norms should not apply to an armed conflict with a non-state actor that is not restricted to the territory (see Kretzmer 2005, 195), because if IHL already takes on issues that are domestic – and thus primarily subject to the sovereignty of the state - conflicts between a state and a group with a
cross-border situation definitely have to come under it (see Jinks 2003, 43). Hence, the notion of non-international armed conflict is not confined to the territory of a state. Instead, Common Article 3 GC covers all conflicts that are not international. Thus, IHL is principally applicable to the targeted killing of terrorists (see Schmitz-Elvenich 2007, 188).

However, the general applicability of IHL to transnational counter-terrorism does not reveal anything about requirements needed for a non-international armed conflict. Other than in international armed conflict, those requirements are not clearly normed, which is partly based on the fact that non-international armed conflicts often interfere with domestic laws and states certainly have no interest that every riot or uprising invokes Common Article 3 GC (ibid., 190 f.). Still, some general requirements can be deduced from the ICJ’s general definition of armed conflict in the Tadic case (see above, 19).

Firstly, it says something about the duration a conflict must have to qualify as non-international armed conflict. By mentioning “protracted, armed violence”, the court refers to a similar phrase in Article 1 (1) AP II which requires “sustained and concerted military operations” (ICRC 1977b). In contrast, Article 1 (2) AP II sees “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence” (ibid.) as not sufficient enough. Similar provisions can be found in Article 8 (2)(d) and (f) of the Rome Statute of the ICC (see ICC 1998). Contrary, contrary to an international armed conflict, non-international armed conflict requires a long-term dispute between a state and a non-state actor. Within the scope of the international fight against terrorism, the protracted nature can certainly be affirmed.

Secondly, the term “protracted, armed violence” also implies a certain intensity a conflict must have to qualify as non-international armed conflict. As one might argue, single terrorist attacks (or responses to it) do not show enough intensity to be classed as non-international armed conflict (see Vöneky 2004, 943). But, a holistic view is necessary in this case. Similarly to the notion or “armed attack” under the ius ad bellum, a subsumption of several terrorist attacks under the accumulation of events doctrine (see above, 17) is possible if they take place in a connective frame (see Schmitz-Elvenich 2007, 194 f.).

Thirdly, for the presence of a non-international armed conflict, a certain degree of organisation is required on the side of the non-state actor, as the phrase “organised armed groups” (see ICTY definition above, 19) implies. The fact is, terrorist organisation often have an incredible command structure which often resembles that of armed forces. This
structure in combination with sophisticated tactics and necessary logistics shows that it is necessary to counter terrorists with continued and coordinated military measures (see Schmitz-Elvenich 2007, 196). Even though the subsumption of conflicts between a state and an international terrorist organisation under Common Article 3 GC may appear as a “loophole” (Bruha 2002, 419), it withstands a judicial review as long as the requirements of duration, intensity and organisation are fulfilled. It can thus be concluded that those conflicts can be considered as non-international armed conflicts which allow the applicability of IHL.

3.3.3 Legal consequences

Since IHL is applicable, the question arises what legal consequences follow for the targeted killing of terrorists. It needs to be determined whether terrorists can become legitimate targets of military measures and which caveats exist with regard to the protection of the population and general proportionality of the attacks.

One of the basic rules of IHL is the *principle of distinction*. It clarifies that in an armed conflict only two categories of persons exist: civilians or combatants (see Dörmann 2003, 72). Under international law, civilians must not be intentionally targeted. Only legal combatants or persons participating directly in the hostilities of an armed conflict may be targeted (see O’Connell 2010, 21). But the classification of terrorists under this scheme is difficult, as they do not have such a status under international law (see Frowein 2002, 893). They are – as shown – not legal combatants and would then have to be classified as civilians, following the basic idea of international law. Consequently, the question arises when and how terrorist can become the target of attacks, including targeted killing operations, despite their missing combatant status. A possible solution could be the status of ‘illegal combatant’.

The protection of civilians under IHL is not absolute. As Article 51 (3) AP I states: “Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities” (ICRC 1977b). Such civilians which directly participate in hostilities are predominantly considered as ‘illegal’ or ‘unprivileged’ combatants (see e.g. Dinstein 2004, 29; Watkin 2003, 4). The classification of illegal combatant is thus not based on a status (as it is with civilians and combatants) but on a certain behaviour. It is reasoned in the ‘inoffensive’ character of civilians. Their passivity is a rigorous and logical prerequisite for their special protection (see Sandoz 1987, para. 1944). If a civilian participates in hostilities, he gives up his passivity and does not have the characteristic feature of a civilian anymore. At least for the time of his participation in hostilities, he forfeits his protection (see Dinstein 2004, 29), but not generally (see Dörmann 2003, 72).
In principle, the classification of terrorists as illegal combatants is supported (see e.g. Frowein 2002, 879; Vöneky 2004, 937; Kretzmer 2005, Wedgwood 2002, 335). Albeit, there is disagreement about what constitutes ‘direct participation in hostilities’. Some argue that terrorists permanently participate in hostilities and can be attacked at any time, because they have a “combatant like approach” (Watkin 2003, 12). Terrorists are only not seen as combatants because they disregard the rules and customs of IHL. Such a disregard should not result in a betterment of terrorists by not being legitimate targets (Watkin 2004, 17).

However, mere membership in a terrorist organisation as indicator for direct participation would undermine the principle of distinction (see Kretzmer 2005, 198). Firstly, terrorists must have a permanent combat role to classify as direct participants. Considering that terrorist organisations can be a party to a non-international armed conflict, they must have members which permanently participate in hostilities (see Sandoz 1987, para. 4789). Admittedly, the competence to decide about whether a terrorist plays such a key role lies with the state which conducts the operation. Still, often enough high-ranking terrorists make no secret of their participation in terrorist attacks (see Kretzmer 2005, 199). However, spiritual leaders must not be classed as full time-fighters as they don’t have a permanent combat role. Their killing would be illegal and could possible qualify as an assassination (see David 2002, 22). For example, the previously mentioned killing of Sheikh Ahmed Yassin (see above, 10) must be considered as illegal, as he was clearly ideologically participating in terrorist attacks against Israel but due to his old age and paraplegia he certainly did have a combat role (see Schmitz-Elvenich 2007, 217 f.).

Secondly, terrorists must participate in combat missions. This includes the active and direct participation in fighting as well as any “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces” (Sandoz 1987, para. 1943 f.). Thus, ‘direct participation’ has to be interpreted in the sense that it does not only include armed actions. However, the mere support of illegal combatants with food, medicine or with money and logistical means cannot be considered as direct participation (see Israeli Supreme Court 2006, para. 35).

Thirdly, it is debatable whether illegal combatants can retrieve their civilian status again. The argument against this view is that terrorists would enjoy “the best of both worlds” (Kretzmer 2005, 193) as they would generally be considered civilians but could selective participate in hostilities. The phenomenon is also known as “revolving door theory” (Watkin 2003, 12). This argument surely cannot be denied, because terrorists can abuse their civilian status to
conduct their attacks which can hardly be accepted (see Israeli Supreme Court 2006, para. 12). However, the revolving door argument must not be used to deny the restitution of comprehensive protection to civilians. The phrase “for such time as” in Article 51 (3) AP I restricts the status of illegal combatant to those time where civilians participate in hostilities (ibid., para. 38). Even though this reversibility contains an abuse potential, it is necessary for the protection of civilians (Schmitz-Elvenich 2007, 222).

This protection of civilians is the underlying foundation for the second basic rule of IHL, the principle of proportionality. Even if terrorists can be considered legitimate targets according to the remarks made above, they must only be made an object of a concrete attack if civilians are not disproportionally affected (see Neumann 2003, 297). This is undisputed in customary international law (see Sandoz 1987, para. 1923). The principle of proportionality is clearly regulated in Article 51 (5) (b) AP I. According to this, 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” (ICRC 1977b) is disproportionate and indiscriminate. In this sense, some aspects have to be considered before each targeted operation.

Firstly, the danger of collateral civilian casualties has to be minimised when planning the attack. For example, Precision-guided munition has to be preferred over heavy bombs (see Dinstein 2004, 126). Secondly, the state has to resort to milder means to avoid an endangerment of the population. An arrest and trial of terrorists has to be considered first (see Israeli Supreme Court 2006, para. 40). However, arrests cannot generally be seen as a milder but still effective means in comparison to targeted killings, so that the latter one is not necessarily disproportionate. Lastly, a high proportionality threshold exists for those operations where it is certain that civilian casualties will occur (see Ben-Naftali/Michaeli 2003, 277). If innocent civilians are killed, prima facie evidence suggests that this targeted killing operation is disproportionate (see Schmitz-Elvenich 2007, 231). Here, the acting state has to put forward serious reasons why such actions justify civilian casualties and possible has to recompense survivors (see Israeli Supreme Court 2006, para. 40).

To sum up the jus in bello of targeted killing, IHL is applicable to the fight against international terrorism and adequately comprises armed conflicts with them. As long as targeted killings of terrorists take place within long-term conflicts, the rules of non-international armed conflict apply. Here, the state is bound to the minimum standards of humane treatment of Common Article 3 GC.
4 Legitimacy of targeted killing

“I don’t care if they do it as long as they get the right people. We’ll protest in the National Assembly and then ignore it.”

— Pakistani PM Gilani, August 2008

This chapter deals with the legitimacy of targeted killing, i.e. the policy issues and effectiveness. Firstly, in terms of policy issues (or the ‘input’-legitimacy), it is discussed whether the pro arguments for targeted killing weigh heavier than the contra arguments. Secondly, a look is taken at the effectiveness of targeted killing (or the ‘output’-legitimacy), i.e. whether it is actually a tool that can help to reduce terrorist activities.

4.1 Policy Issues

In many situations legitimacy is often equated with legality. But the problem of legitimacy arises precisely because of the unstable and problematic relationship between law and morality on the one hand and law and power on the other hand (see Hurrell 2005, 17). Thus the question of legitimacy has to be seen separate from the question of legality. In this sense, legitimacy is about providing persuasive reasons about why a certain course of action, a rule, or a political order is right and appropriate (ibid., 24). Applied to the policy of targeted killing, this means that pro and contra arguments have to be weighed against each other to see whether such a policy can be regarded as legitimate.

Indeed, there are certain drawbacks which speak against the use of targeted killing as a tool of counter-terrorism operations. Firstly, the targeted killing of individual terrorists may elevate them to martyrdom and strengthen enemy morale and resolve (see Scharf 2004). Instead of hampering the terrorists’ work, there is a chance that the targeted individuals will be replaced by others. In the worst case, there would be a Hydra effect, i.e. the rise of more – even more resolute – leaders to replace them. For example, when Israel assassinated Hezbollah’s leader Abbas Mussawi in Lebanon in 1992, a more charismatic and successful leader, Hassan Nassrallah, followed him (see Blum/Heymann 2010, 165). In the case of Al-Qaeda, numerous deadly cells operate independently of a central leadership, thus diminishing the potential effectiveness of targeted killing.

Secondly, when major regional or world powers and democracies such as Israel and the United States more or less openly pursue a policy of targeted killing, it helps to create new

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13 This comment was allegedly made by PM Gilani to US Ambassador Anne W. Patterson on the issue of targeted killing, according to US Diplomatic cables published on Wikileaks (2011).
behavioural standards, which could be detrimental to their interests (see David 2002, 13 f.). Such operations emphasise the disparity in power between the parties and reinforce popular support for the terrorists, who are seen as David fighting Goliath (see Blum/Heymann 2010, 165). Also, “assassination is a weapon of the weak” (David 2002, 13). It benefits those with limited resources. In other words, it plays to Palestinian strengths. If Israel erodes the norm of assassination, i.e. targeted killing, it transforms the rules of conflict in a manner that benefits its most fervent adversaries (ibid., 13). Furthermore, the more frequent use of targeted killing may present cascading threats to world order in general (see Scharf 2004).

Thirdly and obviously, when targeted killing operations are conducted on the territory of a foreign state, they run the risk of heightening international tensions between the attacking government and the host government. A prominent and recent example for this is the relations between the United States and Pakistan after the death of Osama Bin Laden, which really suffered due to the incident (see Borger 2011). The United States even withholds $800 million in foreign aid to Pakistan (see Rettig 2011).

Fourthly, targeted killings comprise the risk of spiralling hatred and violence, which numbs both sides to the effects of killing and continues the vicious circle of violence. At the same time, civilians suffer whether they are the intended target of attack or they just happened to be at the wrong place at the wrong time (ibid., 166). Moreover, the cycle of violence can also lead to cooperation among adversarial terrorist groups against a common enemy (see David 2002, 10).

Lastly, there is a moral argument against targeted killing. According to Michael Gross (2006), the only way to justify killings in a conventional war is by considering soldiers not as individuals, but as agents of their polities. As individuals, most soldiers would be morally exempt from being killed, but as agents of a state, they would lose this immunity and become (morally) legitimate targets. Thus, the license to kill enemy soldiers is granted only because their personal merits or demerits are ignored. The problem with targeted killing is that it does not meet this condition, thereby undermining the very justification for killing in war. This violation of anonymity in targeted killing is referred to by Gross as ‘named killing’.

However, there are certain benefits of targeted killing operations, which became apparent especially in Israel’s campaign during the Second Intifada but also in the American operations at the Hindu Kush. Firstly, targeted killing can act as a deterrent. Even though it seems unrealistic to deter people who are willing and eager to blow themselves up, but
behind every suicide attacker there are others who are might not be as willing to become martyrs, especially senior officials. The large numbers of Palestinian commanders who surrendered during the large-scale Israeli military operations in the spring of 2002 supports this assumption. Moreover, many skilled and capable Palestinians possibly do no engage in terrorist organisations because they fear Israeli reprisals (see David 2002, 7). There is also strong evidence that targeted killings hurt terrorist organisations so much that they change their behaviour. When former prime minister Ariel Sharon met with Palestinian leaders in 2002, the first thing on their list was an end to targeted killings (see Safire 2002). They even agreed to refrain from launching attacks on pre-1967 Israel territory as long as Israel refrained from targeted killing. Although the cease-fire eventually broke, their willingness to abide it for a while shows the deterrent potential of targeted killing (see David 2002, 7).

Secondly, targeted killing is keeping potential bombers and bomb-makers on the run. The Israelis often deliberately informed the Palestinian Authority about upcoming attacks, as they knew this information was passed on to the targeted individuals. Some then voluntarily handed themselves in to Palestinian police to avoid being killed, consequently diminishing the threat they posed to Israel (ibid., 7). Others take precautions such as sleeping in various places every night, praying in different mosques and not giving information of their whereabouts (see Stein 2001, 5). The time and effort terrorists spend to avoid being killed obviously reduces the time and effort they can spend on preparing, planning or conducting attacks (see Fisher 2007, 734 f.). Furthermore, militants often experience “social problems” due to their status as targeted terrorists. They are not even welcome in their own communities: when they enter coffee shops, patrons quickly leave, taxis refuse to take them and shop owners close their doors when they approach (see Wilner 2010, 315).

Thirdly, targeted killing is popular with the public in Israel and the United States. A poll by the Israeli daily newspaper Ma’ariv in July 2001 found that 90 per cent of the Israeli public supported the government’s policy (see Goldenberg 2001). Similarly, a Wall Street Journal poll found that 70 per cent of Americans favoured the use of targeted killing in counter-terrorism operations (see Polling Report 2001). In this sense, targeted killing does not undermine democracy because democracies follow public opinion and the policy of targeted killing has never lost favour with the public (see David 2002, 8). Moreover, it is also effective in the media battle because it creates far less negative media attention than other operations, such as attacks on Palestinian cities (ibid., 8).
Finally, even the argument of ‘named killing’ can be invalidated. On the one hand, it has the permissive moral premise that soldiers can (morally) be killed in war, regardless of their individual innocence but on the other hand, its conclusion is very restrictive in the sense that even actors who are not innocent (either morally or materially) are illegitimate targets. This is quite paradoxical but results from the collectivist solution to the problem of killing in wartime. If self-defence does not provide ample justification for killings in war, then it must be concluded that these killings are morally unjustified and, therefore, war in general is unjustified. Seeing people killed in war as agents of a state rather than as individuals is thus not helpful, because their moral dignity is not contingent to a certain status (see Statman 2004, 190). Furthermore, targeting terrorists does not mean killing them by name, but by role. Terrorists are targeted for the special role they play in a terrorist organisation and for the actions they committed. This is similar to killings in conventional wars, where agents in a prominent position such as generals or military leaders are more preferentially targeted by the enemy. These targetings show no “personal” grievance, but simply mean the recognition of their special position in their role as agents (ibid., 190).

To sum up, there are certainly strong arguments for and against the legitimacy of targeted killing. Even though the negative side seems to be overwhelming at first, it can be invalidated by the positive aspects. In particular the fact that targeted killing has a strong deterrent potential (if used correctly and not excessively) and keeps terrorists on the run, alienating them from society is a strong argument for it. However, they only concern the ‘input’ side of legitimacy and the ‘output’ side, or effectiveness needs to be assessed as well.

### 4.2 Effectiveness

Some literature on targeted killing suggests that this policy diminishes the coercive and operational capabilities of terrorist organisations in several ways (see e.g. David 2002, 6; Byman 2006, 101 f.; Blum/Heymann 2010, 166 f.). The constant targeting of key leaders significantly disrupts an organisation and leaves it in general disarray. Even in decentralised organisations such as Al-Qaeda, skilled and experienced leaders are rare and difficult to replace, particularly in the short-term (see Cullen 2007, 8). In Afghanistan, the US Army has observed that “in several cases, insurgents have actually refused to take over the leadership positions, have had difficulty finding technical experts, such as IED (Improvised Explosive Device) facilitators, gun runners and bomb trainers” (Brook 2011). By removing terrorists in leadership positions, the ability to coordinate attacks is substantially disrupted and the communication between leaders and operators breaks down, which complicates both short-term tactical planning and long-term strategic planning (see Wilner 2010, 312).
Especially with smaller terrorist cells, where leadership, knowledge, and power are combined in only a few people, decapitating strikes can have the effect of completely destroying the group (ibid., 312). These assumptions rest on the understanding that terrorist organisations rely on the work of a few individuals. As Ben-Israel et al. (2006, 5) note: “The number of key activists in the Hamas, [...] who are actually engaged in preparing an act of terror, is only a few hundred. One only needs to neutralize 20%-30% of them for the organisation's “production” of acts of terror to drop significantly.” To make coordinated acts of violence possible, terrorism requires a “production line” (Wilner 2010, 312) of activity, from looking for potential targets to preparing suicide bombers. Most importantly, organisations become de-professionalised. Contrary to popular myth, only few individuals have the skills needed to make effective bombs or the leadership qualities required to successfully manage such an organisation (see Byman 2006, 103). Moreover, the failure to replace killed leaders can also lead to defections and purges, especially if speculations over traitors and informants arise (see Lotrionte 2002, 81).

The question is, whether these assumptions are confirmed by empirical data. It is worth looking at the number of attacks and deaths by terrorist organisations in the two countries where targeted killing operations are most prevalent, Israel and Pakistan.

Chart 1 displays the figures for Israel from 2001 to 2009. As visible on the chart, the fatalities rose in 2002 and stayed high until 2005. During that time the Second Intifada took place. However, the number of incidents stayed quite low and even went down by half in 2004. Thus, the attacks were not as numerous, but lethal. For the period from 2005 to 2009 the picture is reversed. In 2006 and 2008 the number attacks dramatically rose, which can be explained by an increasing predominance of the radical Hamas which won the parliamentary

14 These charts were made by the author, using data compiled by the RAND Database of Worldwide Terrorism Incidents (http://smapp.rand.org/rwtid/search_form.php).
majority in 2006 and Israel’s blocking of the Gaza strip as well as the Gaza War, both in 2008. Albeit, the number of fatalities consistently dropped and the lethality rate went down accordingly.

The figures for Pakistan (Chart 2) show a completely different picture.

From 2001 until 2004 the incidents were relatively steady as were the fatalities. From 2005 to 2008 incidents bulged, reaching a climax in 2006. However, what is interesting, is that even though the incidents steadily declined after 2006, the fatalities continued to rise, reaching an astronomic level in 2008. This means that the lethality skyrocketed as well, i.e. the terrorists became very efficient in their operations. Considering that the CIA drone operations in Pakistan started in 2004 (see The Economist 2011) it seems as if the targeted operations had no or even a negative impact on terrorist activity. Rather, data from 2009 shows a significant drop in incidents and fatalities. But as there is no data available for 2010 yet, it cannot be said whether this constitutes a trend or not.

This descriptive data, at least for Israel, seems to support the notion that targeted killing hampers terrorist organisations. However, it is not clear whether targeted killing is the significant independent variable or if there are other intervening variables which lead to a decline in fatalities. Only inferential statistics can fill this gap, but this would go beyond the scope and length of this paper. Some scholars (e.g. Kaplan et. al 2005; Jaeger/Paserman 2007; Hafez/Hatfield 2006) have done regression analyses on the issue of targeted killing. Their findings suggest that even though there might be a short-term incapacitation or deterrent effect on terrorists, targeted killings do not decrease the rate of violence. Instead, other measures such as preventive arrests are more effective in lowering the levels of violence (see e.g. Kaplan et al. 2005, 232; Cronin 2009, 32 f.). However, those analyses are
flawed in the sense that they only refer to the Palestinian conflict and rely on small amounts of data and short time frames. Analyses from other conflicts such as Afghanistan show a different result (see Wilner 2010, 318 f.).

Overall, the issue of legitimacy of targeted killings depicts a complex picture. They can only be considered legitimate when there are strong arguments in favour of it and when it is effective. As demonstrated, the positive sides of the policy of targeted killing outweigh the negative sides. The ‘input’ side of the legitimacy of targeted killing can thus be affirmed. However, the “output” side of legitimacy concerning effectiveness is more difficult. Even though descriptive data seems to assert the notion that targeted killings are effective in the case of Israel, it is not corroborated by other (rather flawed) analyses. In this instance, more research and a more comprehensive analysis is needed to fill the gap.

5 Conclusion

"If given a choice between killing or capturing, we would probably kill."

 Sen. Christopher S. Bond, February 2010

This paper analysed the legality and legitimacy aspects of the policy of targeted killing differentiated, herein, from other state-sanctioned actions such as ‘assassination’ and ‘extra-judicial killing’. It argues that targeted killing can be justified under international law if strong legal restraints are observed. Moreover, in terms of legitimacy, targeted killing can be seen as a viable tool of counter-terrorism, because the benefits outweigh the negative aspects of it. However, concerning effectiveness, more research is needed to make a qualified assessment.

It was found that targeted killing decisively differs from other forms of state-sanctioned killings such as ‘assassinations’ or ‘extra-judicial killings’. Targeted killing denotes the use of lethal force by a state with the intent, premeditation and deliberation to kill individual terrorists. By looking at the historical background, it became obvious that the policy targeted killings is certainly not a new development but has been used by Israel and the United States in several other (asymmetric) conflicts. In the main part, the legality and legitimacy of such actions were carefully analysed. Firstly, the legality of targeted killing under international law was assessed. In a first step, a decision had to be made whether targeted killing was to be classed under a law-enforcement paradigm or a war paradigm. It was found that the terrorist

15 DeYoung/Warrick 2010.
threat from foreign countries is too severe to leave it to law-enforcement authorities, as they simply lack the means to effectively counter terrorist attacks and they can often not operate in foreign countries, particularly if it is a failed state. Thus, the war paradigm marked the appropriate background for the analysis of targeted killing. Concerning the *jus ad bellum* of targeted killing, it has to be said that it can be seen as legal under the right of self-defence according to Article 51 of the UN Charter. States must have the permission to counter terrorist attacks if they classify as armed attacks within the meaning of Article 51. But, every potential targeted killing has to be assessed separately in terms of the *jus ad bellum* and the self-defence measures are limited by the customary principles of immediacy, necessity and proportionality.

In terms of the *jus in bello*, it can be observed that IHL is indeed applicable to the fight against international terrorism and also covers armed conflicts with terrorist organisations. When targeted killings operations take place within long-term conflicts, the rules of non-international armed conflict apply, where the attacking state is required to guarantee minimum standards of humane treatment as defined in Common Article 3 GC. It is thus argued that terrorists qualify as legitimate targets if they directly participate in hostilities as illegal combatants, but this determination has to be made on an individual basis. However, if terrorists refrain from hostilities and return to a civilian life, they regain the full protection of the civilian status.

Secondly, the issue of legitimacy was scrutinised. To be considered legitimate, both conditions have to apply. Concerning the input-legitimacy, certainly some arguments against targeted killing exist, which have to be taken into account. However, the positive aspects of the policy outweigh them. In terms of effectiveness, comprehensive descriptive data on Israel seems to assert the notion that targeted killings are effective, because the fatality rate of terrorist attacks certainly dropped with the continuation of targeted killings. However, it is unclear whether targeted killing is the decisive variable in this case. Some statistical analyses suggest that other factors, such as preventive arrests or heightened security measures may well be responsible for the drop in fatalities and attacks and not targeted killings. In any case, more empirical data and a detailed analysis of several conflicts are needed to provide a better picture. The policy of targeted killing is certainly a highly controversial topic. Within very narrow confines, it can be considered legal under international law. However, when looking at cases of targeted killings by the US and Israel, it is often highly questionable if those confines are observed. Most of them are indeed seriously illegal. A revision of international law treaties and adjustment to modern warfare could be helpful in this aspect.