

Legal and Policy Perspectives on United States' Counterterrorism Policy of Targeted Killing Operations in Pakistan

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1. Introduction

The relatively recent phenomenon of armed attacks carried out by non-state actors against sovereign states has severely challenged the traditional laws of armed conflict with respect to both *jus ad bellum* (law related to the use of force) and *jus in bello* (law related to the conduct of hostilities). Historically, international law of armed conflict has developed and evolved to contain and regulate hostilities between different states and its interpretation and application with respect to armed non-state actors yield contradictory and divergent legal viewpoints. Often, there is disagreement among scholars of international law as to how to apply traditional rules of law of war to novel situations like the unilateral use of armed force against non-state actors even if such actors are operating from the

soil of a friendly state and if the territorial state is unwilling or unable to act on its own against these armed non-state actors.

Some international law scholars like Harold Koh have favored an expansive interpretation of existing international law of armed conflict to justify the use of armed force against hostile non-state actors governed by a 'war paradigm' based on a broad interpretation of anticipatory or preemptive self-defense and armed attack.[1] Such scholars circumvent the traditional and well-settled civilian-combatant distinction of Geneva Conventions by classifying members of non-state terrorist organizations as 'unlawful combatants' or 'unprivileged belligerents' who are legitimate military targets of armed force. On the other end of the spectrum, some international law scholars like Philip Alston espouse a 'law-enforcement paradigm' and hold that a terrorist attack only warrants a criminal law and a law enforcement response which includes detention, prosecution and trial rather than waging war against terrorists and eliminating them.[2] These scholars also refuse to accept the classification of members of non-state terrorist organizations as 'unlawful combatants' or 'unprivileged belligerents.'

As part of its global counterterrorism policy, the United States has adopted a 'war paradigm' to carry out targeted killings of members of armed non-state actors often on soils of friendly countries and on territories that are undeclared war zones. Both Bush and Obama administrations have broadly construed the international law of armed conflict to legally justify their policies of targeted killings. It is encouraging to note that there has been a lively and healthy exchange of ideas on these divisive legal issues in various U.S. and European law journals and there is already a vast and growing literature addressing these issues emanating from the United States and Europe. Unfortunately, there has been extremely limited input to this scholarly debate by international law scholars from territorial states like Pakistan who would assess these issues from the perspective of a weaker and intervened state that has been directly impacted by the United States' counterterrorism policy of targeted killings inside its territory often without its consent. As far as Pakistan is concerned, the lamentable lack of a culture of research-based analysis of international law issues and the often ill-informed, hasty and contradictory positions taken by the government prevent Pakistan from effectively communicating and establishing its legal and policy positions at the global stage.

The lawfulness of a state to use force against a hostile non-state actor located within the territory of another state is not clearly established or well settled and the legal basis for the use of such armed force is indeterminate. The expansive interpretation of the international law of armed conflict attaches too much importance to the interest of the sovereign state to protect itself from trans-national attacks by hostile non-state actors over the interest of sovereign states not to suffer a foreign intervention against a non-state actor located in its territory.[3] Moreover, the expansive construction accords too much weight to the interest of the international community to prevent trans-national terrorism over the interest of the international community to restrict and regulate the use of armed force.[4] On the other hand, the restrictive interpretation of the law of armed conflict gives excessive import to international peace and the sovereign autonomy of the state where the hostile non-state actor is located.[5] The expansive view seems to interpret existing law in light of the position and interests of powerful states, while the restrictive view seems to interpret existing law in light of the position and interests of the international community. Again, it is unfortunate that in the relevant literature, there is no view interpreting rules and balancing policy objectives in light of the interests and the position of weaker states, which are most commonly affected by such types of military interventions.

Thus far, the discourse over the legality of targeted killings has been limited to legal scholarship and public commentary. Neither the International Court of Justice (“ICJ”) nor the courts in the United States have addressed this issue. In fact, the most comprehensive judicial determination of the legal framework of targeted killings was rendered by the Supreme Court of Israel which held that targeted killings were justified under a traditional armed conflict paradigm only if no reasonable alternative for capturing the terrorists was available.[6] Therefore, Israel’s apex Court has qualified and limited the lawfulness of the use of targeted killings to those rare instances where ordinary and traditional law enforcement methods are unavailable to capture the terrorist.

This article seeks to assess the United States’ counterterrorism policy of targeted killings in Pakistan strictly through the prism of Pakistan— the intervened, the cohabitant and directly affected state. First, using the Abbottabad Operation killing Osama Bin Laden (“OBL”) as an illustrative case study, this article argues that in terms of the usefulness and overall benefits to be achieved by its counterterrorism policy, the United States would be well advised to adopt a ‘law enforcement paradigm’ against hostile non-state actors on Pakistan’s territory as opposed to its existing policy of targeted killings governed by a ‘war paradigm.’ Furthermore, using the Haqqani network as a second case study, this paper suggests that given Pakistan’s reasonable reluctance to eliminate members of the Haqqani network either on its own or by consenting to the United States to do so through targeted operations, the indeterminate ‘unwilling or unable’ test as it relates to a cohabitant state which is able but reluctant to conduct armed operation against certain non-state actors on its territory must develop in a direction that makes it mandatory for the intervening states to seek the explicit consent of the cohabitant states for targeted strikes inside their territories. This is essential to strike the right balance between the sometimes clashing interests of the intervening states and the cohabitant states.

1. Crime and Terrorism

A) *Pre 9/11 Classification and Treatment of Crime and Terrorism*

Before the unfortunate September 11, 2001 terrorist attacks on United States’ soil, the usual state practice of combating transnational terrorism was to address terrorism as crime and to bring the transnational terrorists to trial based on a ‘law enforcement paradigm’ buttressed by mutual legal assistance and law enforcement and intelligence cooperation between states. Prior to the global war on terror, claims made by international law scholars regarding a right to respond in self-defense to attacks carried out by non-state actors were rejected by the broader international community including Israel’s 1985 raid on the PLO Headquarters in Tunisia, the United States’ 1986 attack in Libya and South Africa’s forays into neighboring states in the 1980s.[7]

Traditionally, there was no appreciable distinction between the legal treatment of crime and terrorism, which were both regarded as subjects of municipal law and governed by identical legal regimes relating to arrest, investigation, prosecution and trial. Certain criminals had extensive networks in

several cities within the territory of a single state and were tried under terrorism charges for carrying out acts of violence and terror. Some criminals also had transnational operations stretching beyond the borders of a single state into the territories of other states. Certain criminals would link up with similar criminal networks operating from outside their own states to perpetrate transnational crimes, which could be effectively dealt with under the existing legal framework governed by 'law enforcement paradigm.'

Normally, a criminal wanted in one jurisdiction would be apprehended in another and then extradited to the requesting state under the extradition regime. For instance, Aimal Kansi with a head-money of two million dollars was arrested on June 15, 1997 from the town of Dera Ghazi Khan in Pakistan in a joint Federal Bureau of Investigation ("FBI")-Inter-Services Intelligence ("ISI") operation and was extradited to the United States.[8] He was accused of killing two Central Intelligence Agency ("CIA") agents and injuring three others outside the intelligence agency's headquarters in Virginia in 1993 with his Chinese-made AK-47 rifle. Following his extradition to the United States from Pakistan, Kansi was tried in a court in Virginia and sentenced to death for capital murder in 1998. He was executed by lethal injection in Virginia in 2002 and his body was later repatriated to Pakistan.

B) Post 9/11 Classification and Treatment of Crime and Terrorism

The shock and horror at the sheer size and scale of terrorist attacks on September 11, 2001 led to terrorism being subsumed within the broader paradigm of war and no longer being strictly treated as just crime. As an essential component of their counterterrorism policy, the Bush and Obama administrations have justified the targeted killings of terrorists as equivalent to the legally permissible killing of members of an enemy force in any warzone. More specifically, both administrations have classified trans-national terrorists belonging to armed non-state actors as 'unlawful combatants' or 'unprivileged belligerents,' targetable and detainable but not entitled to the rights enjoyed by lawful detainees such as treatment as prisoners of war if captured. The United States maintains this stance even when targeted killings occur outside of immediate theater of wars and justifies its position in terms of the global nature of the war on terrorism which is not limited by geographic borders. Naturally, the United States favors the broad and expansive interpretation of traditional international law of armed conflict to justify its policy of using armed force against hostile non-state actors on territories of other sovereign states.

Targeted killing is the deliberate assassination of a known terrorist outside the country's territory even in a friendly nation's territory, usually but not exclusively by an airstrike. Targeted killing is the most coercive counterterrorism tactic employed in the war on terrorism. Unlike detention or interrogation, it is not designed to capture the terrorist, monitor his or her actions, or extract information but to eliminate him or her. More than any other counterterrorism tactic, it reveals the complexity involved in classifying counterterrorism operations either as part of a war or as a law enforcement operation. The fact that all targeted killing operations in combating terrorism are directed against particular individuals

makes the tactic more reminiscent of a law enforcement paradigm where power is employed on the basis of individual guilt rather than civilian/combatant status. Unlike a law enforcement operation, however, there are no due process guarantees as the individual is not forewarned about the operation, is not given a chance to defend his or her innocence, and there is no assessment of his guilt by any impartial body.

The United States' counterterrorism policy of targeted killings of suspected terrorists governed under a war paradigm has several shortcomings. Eliminating suspected terrorists on the basis of blame rather than status, the problems associated with accurate identification of the target, armed operations occurring outside of a defined battlefield and high collateral damage inflicted on innocent civilians in the course of targeted strikes give rise to legitimate concerns about the usefulness and prudence of United States' counterterrorism policy of targeted killings.[9] Unsurprisingly, the United States' policymakers have been criticized for excessively relying on the use of armed force such as targeted killings without having a comprehensive military and diplomatic war strategy.[10]

When agents of the United States conduct targeted operations outside their own territory without the consent of the intervened state, they are constrained by international norms of peaceful relations and the territorial boundaries among states. Ordinarily, when a criminal suspect finds refuge in another country, the United States must request that country for extradition to gain jurisdiction over him. Violations and excessive abuse of these norms run the risk of supplanting law with force and escalating international violence.

The rise of Al-Qaeda and the means and methods employed by its members in the perpetration of terrorist attacks in various states have fundamentally challenged the traditional classification and treatment of terrorism as a crime. As opposed to a regular state army clearly distinguishable on the battlefield, Al-Qaeda and its associates represent a group of individuals who operate as a multinational, stateless army from within the territories of various different states through global networks and who claim no allegiance to any nationality or state. Essentially, Al-Qaeda and its associates consist of a group of people scattered in various states led by leaders in the hiding and on the run in several states who have declared war against states while using means, methods and acts that are usually cognizable under domestic laws of those states. While the contours of the crimes perpetrated by Al-Qaeda and its associates are somewhat similar to traditional crime, there is a striking difference in motives. By calling for global *Jihad* and declaring holy war using all means against certain states, Al-Qaeda is ideologically motivated to establish 'true Islamic states' based on a strict interpretation of *Sharia* law.

If one peels off the rhetoric of global *Jihad* and considers terrorist acts committed by Al-Qaeda and its associates in isolation, one finds that these terrorist acts are directed against civilians as well as members of armed forces and law enforcement and intelligence agencies who remain as much the target of an Al-Qaeda terrorist strike as that by other local terrorists. However, Al-Qaeda's attacks are usually a lot more lethal and destructive because Al-Qaeda and its associates are much better funded and far more resourceful than local terrorist organizations that continue to be effectively dealt with under the traditional 'law enforcement paradigm.'

The United States treats Al-Qaeda and its associates as trans-national hostile non-state actors who belong to a worldwide terrorist network. International law has so far failed to provide a precise definition of a hostile non-state actor. In rather simplistic terms, the United Nations Security Council Resolution 1540 defines a hostile non-state actor as someone who acts against the lawful authority of the state.[11] A similar definition is found in various military manuals of the United States which define a hostile non-state actor as any organization that uses force not officially approved of by the state. At best, these are working definitions and not comprehensive formulations because under these definitions, every criminal in a state who violates the law can be conceptualized as a non-state actor. Likewise, if an individual acts in violation of the lawful authority of the state but subsequently submits to the state's authority, that individual could only be deemed as a non-state actor during the period of his defiance. In this context, Pakistan's renegade nuclear scientist Dr. A.Q. Khan would be termed as a non-state actor for his unauthorized actions but subsequent to his confession and apology, he would be deemed to have accepted the lawful authority of the state and could thus no longer be classified as a non-state actor.

Even after the elaborate conflation of terrorism and war in the aftermath of 9/11, international law still considers fighting for self-determination as a legitimate reason for fighting the state. Essentially, resistance groups engaged in a struggle for self-determination are non-state actors who enjoy legal basis under international law to use armed force against the state. Therefore, a Palestinian in Occupied Palestinian Territory resisting the Israeli Army is not perceived as a criminal or a terrorist by the international community because it is well-settled that he possesses the right to use force against an occupying force.[12] Similarly, the right of self-determination of Kashmiris has been recognized and reaffirmed in a series of United Nations Security Council Resolutions.[13] Thus, any local Kashmiri has a right to resist the occupying Indian Army in the territories of Indian held Kashmir ("IHK"). However, any non-Kashmiri member of Lashkar-e-Taiba ("LeT") crossing the line of control from Pakistan's side into IHK does not enjoy the right of self-determination and is a legitimate target of Indian armed force. Although international law conditionally recognizes the role of 'third' states in supporting self-determination movements and preventing human rights violations,[14] the LeT's call for *Jihad* and instructions to its followers to cross the line of control on the Indian side and engage in combat with the Indian Army ended up gravely hurting the Kashmiris struggle for self-determination.

State practice seems to suggest that resistance movements against a despotic regime ought to be affirmatively supported by the larger international community. A case in point is Libya where the United Nations Security Council, on the basis of humanitarian intervention and in recognition of the right of the people of Libya to freely choose their government, approved and authorized military campaign to remove President Muammar Gaddafi. In the case of U.S.S.R's invasion of Afghanistan in the 1980s, the international community fully endorsed the right of the Afghans to resist the occupying Russian forces by resorting to the use of force.

According to the existing custom and rules of international law, armed non-state actors fighting for self-determination cannot be targeted as terrorists under a war paradigm and must be dealt with under the law enforcement paradigm. Accordingly, Palestinians and Kashmiris accused of fighting the state must be granted due process of law including determination of guilt by an impartial body.

1. Effectiveness of Law Enforcement Paradigm for Handling High-Value Terror Suspects

Notwithstanding the United States' targeted killing operations against Al-Qaeda and its associates and Israel's policy of targeted strikes against members of Hezbollah, the broader international community continues to prefer handling high profile criminals of international importance through traditional law enforcement means. For example, Saddam Hussein was a legitimate military target but the international coalition forces prudently exercised restraint and decided to bring him to justice through trial by a specially constituted court.

In the case of Hafiz Muhammed Saeed, despite criticisms and pressures from the United States and India, Pakistan has persisted with the law enforcement approach to address the allegations of terrorism against him. After being detained under municipal law, a provincial High Court of Pakistan ordered Saeed's release and later acquitted him of terrorism charges having found no evidence of any linkages between his popular welfare organization Jamat-ud-Dawa ("JuD") and Al-Qaeda or its associates and cleared him of any involvement in Mumbai attacks.[15] The traditional law enforcement route adopted by Pakistan for handling a high profile terror suspect has proved extremely effective in the case of Saeed. Although Saeed, who publicly condemns Al-Qaeda's tactic of suicide bombings, has not toned down his anti-Indian rhetoric, the alleged infiltrations sponsored by him across the line of control into IJK have dropped and even Indians have admitted that for the past year or two, such infiltrations have stopped.[16] Moreover, Saeed's intellectual efforts at helping de-radicalizing militants in Pakistan have been acknowledged by concerned public officials. It is unfortunate that instead of according deference to the decisions of the superior judiciary of Pakistan and highlighting Saeed's case as demonstrative of effective application of law enforcement approach, the United States, most likely on India's insistence, continues to treat Saeed as a terror suspect with tenuous linkages to Al-Qaeda and has even announced a ten million dollar bounty award for information leading to his conviction.

As part of its overall counterterrorism policy, the United States relies on both traditional law enforcement paradigm as well as war paradigm while dealing with terror suspects in Pakistan. It is rarely highlighted that since the beginning of the war on terror, Pakistan has handed over to the American authorities more than two hundred high value terror suspects apprehended by its law enforcement and intelligence agencies. This law enforcement approach based on mutual law enforcement cooperation and effective intelligence sharing between law enforcement and intelligence agencies of Pakistan and United States has proved highly effective and useful in the past. Moreover, such an approach has also been endorsed and encouraged by the United Nations Security Council Resolution 1373.[17]

Most notably, Khalid Sheikh Mohammed, the operational mastermind of September 11 attacks, was apprehended by Pakistan's ISI in 2003 from a crowded section of the garrison town of Rawalpindi and subsequently transferred to United States' custody. The relative usefulness of this law enforcement approach over targeted killing operations was highlighted during Mohammed's interrogation by the United States' officials at Guantanamo Bay where Mohammed confessed to either masterminding or playing a leading role in many of the most significant terrorist plots over the last twenty years. Mohammed confessed to playing a leading role in the World Trade Center 1993 bombings, the

Operation Bojinka plot, an aborted 2002 attack on the U.S. Bank Tower in Los Angeles, the Bali nightclub bombings, the failed bombing of American Airlines Flight 63, the Millennium Plot, and the murder of Jewish journalist Daniel Pearl in Pakistan. Mohammed confessed to having masterminded September 11 attacks, the Richard Reid shoe bombing attempt to blow up an airliner over the Atlantic Ocean, planned assassination attempts on late Pope John Paul II, President Pervez Musharraf and President Bill Clinton and various other foiled attacks.[18] Additionally, the information provided by Mohammed led to the arrests of several other high value terror suspects including M.I.T educated scientist Dr. Aafia Siddiqui. Currently, Mohammed is undergoing trial by a military tribunal at Guantanamo Bay.

If the United States had chosen to eliminate Mohammed through a targeted strike, the wealth of vital information extracted by his interrogators would have been permanently lost. Moreover, the case of Mohammed is not invoked by Pakistan's religious right in its anti-American rhetoric because the law enforcement approach adopted by Pakistan and the United States in Mohammed's case is perceived as lawful by an overwhelming majority of Pakistanis. On the other hand, the United States' policy of targeted killings inside Pakistan's territory constitutes the centerpiece of the religious right's rants against the United States because these unilateral armed strikes are not perceived as legitimate by almost all Pakistanis who regard them as gross and blatant violations of their state's territorial integrity.[19]

The case of Ramzi Yousef, the main perpetrator of the World Trade Center 1993 bombings and a co-conspirator of the Bojinka plot, reinforces the effectiveness of adopting law enforcement approach to handle terror suspects of trans-national terrorist acts.[20] Ramzi Yousef was arrested in 1995 from Pakistan's capital Islamabad in a joint operation conducted by the ISI and United States Diplomatic Security Service special agents and extradited to the United States where he was tried and sentenced to 240 years in prison for his role in the World Trade Center 1993 bombings and the Bojinka plot.

While choosing between addressing terrorism as crime or as war, policymakers are confronted with tough moral, legal and political dilemmas. Often complexities arise while deciding whether counterterrorism measures would be enforced by law enforcement and intelligence agencies of one state or that of several states and whether by the military forces of one state or by a coalition of armed forces of several states. In the case of Pakistan, the Constitution contains provisions under which the armed forces of Pakistan can be called in aid of civil power.[21] Therefore, if threats from hostile non-state actors on its soil escalate, the armed forces of Pakistan can be deployed under the domestic law within the parameters of law enforcement framework. In the unlikely scenario of Pakistan's armed forces incapable of handling these threats on their own, joint law enforcement operations with the armed forces and law enforcement and intelligence agencies of other states remain a viable option.

Under the broad rhetoric and rubric of the war on terror, it is largely ignored that as a direct consequence of American led North Atlantic Treaty Organization (“NATO”) alliance’s incursion into Afghanistan, Pakistan has had to face an insurgency directed against the state by armed non-state actors operating on its soil. These insurgents are located in and operate from the Tribal Areas of Pakistan, which are comprised of seven autonomous agencies legally governed under the Frontier Crimes Regulation and administratively managed by agents appointed by the federal government.[22] The Tribal Areas of Pakistan share a highly porous border area with Afghanistan and constitute less than five percent of Pakistan’s total population as well as territorial area. Although it would be a stretch to state that the Tribal Areas are a lawless and ungoverned region, it is true that the writ of the state is not as firmly established in the Tribal Areas as in other parts of Pakistan.[23]

In the absence of an appropriate and effective law enforcement framework, the armed forces of Pakistan initially resorted to military force against the insurgents in the Tribal agencies of Swat and Bajaur. However, the state’s counterinsurgency strategy has shifted from a war paradigm to a law enforcement model after it enacted Action (in Aid of Civil Power) Regulations 2011 (“ACCP Regulations”) applicable to the Tribal Areas of Pakistan. ACCP Regulations enable the law enforcement and intelligence agencies to intern the insurgents through a lawful regime of preventive detention for security purposes. Domestically, article 245 of the Constitution of Pakistan[24] provides the necessary legal space to enact internment regulations because during action in aid of civil power, there is a ‘constitutional pause’ and enforcement of fundamental rights is muted. In this regard, ACCP Regulations creatively distinguish ordinary ‘constitutional detainees’ who cannot be lawfully preventively detained from ‘counterinsurgency detainees’ who can be lawfully preventively detained as long as internment regime contains mechanisms of supervision and periodic assessment by impartial administrative boards.

Preventive detention for security reasons as provided for by ACCP Regulations is permissible under human rights law as the primary route to incapacitation of threats and mitigation of threats to society.[25] Even the European Convention on Human Rights, generally regarded as the most rights respecting of all Human Rights Conventions, would legally permit ACCP Regulations’ administrative detention for security purposes because the requirement for derogation from the Convention are met. Since the state of Pakistan is under attack from the insurgents and faces an existential threat, Article 15 of the Convention would allow derogation and permit administrative detention for security purposes.[26]

ACCP Regulations are representative of the commitment of the state of Pakistan to resort to law enforcement paradigm to counter terrorism attacks and threats from hostile non-state actors operating on its territory. Furthermore, ACCP Regulations have proved effective in curbing the perverse incentive of the law enforcement and intelligence agencies to engage in extrajudicial killings. ACCP Regulations also provide parameters for the lawful use of force by the armed forces of Pakistan during counterinsurgency operations.

1. Case Study I: United States’ Operation against Osama Bin Laden and the Pitfalls of Targeted Killings

The legal basis for the targeted killing of OBL carried out by a team of United States Navy SEALs on May 2, 2011 in Abbottabad is not clearly established or well-settled. Such an armed operation could be legally justified only under an expansive interpretation of the traditional international law of armed conflict and only after an extensive gap-filling in the existing law. The United States Attorney General Eric Holder justified the Abbottabad operation as an action of national self-defense against a lawful military target which was entirely lawful and consistent with American values.[27] However, the classical and restrictive interpretation and understanding of the international law of armed conflict, favored by Pakistan and a majority of states in the international community, considers such an armed operation carried out without the consent of the intervened state as an unlawful breach of the territorial integrity of the intervened state. Accordingly, Pakistan vehemently protested the violation of its territorial integrity and its civilian and military leadership sternly warned the United States that any similar targeted killing operations involving American boots on the soil of Pakistan would be resisted and retaliated in the future.[28]

OBL renounced his citizenship and allegiance to any state in 1994 after participation in the United States sponsored Afghan *Jihad* against the Soviet occupation of Afghanistan and thus became a stateless person. As leader of Al-Qaeda, OBL was wanted for committing several terrorist attacks against states around the world. OBL had been rightly classified as a hostile non-state actor who had been on the run in various countries. As a result of his terrorist activities, a law enforcement action was initiated against OBL in the United States and an indictment was also filed in this regard. While recognizing the law enforcement action pending against OBL in United States, the United Nations Security Council Resolution 1267 called upon all states to facilitate the United States government in bringing OBL to justice under a law enforcement framework. Importantly, the United Nations Security Council Resolution 1267 expresses a preference for adopting a law enforcement approach to capture OBL.[29] Yet, the United States' government imprudently chose to eliminate OBL through a targeted killing operation—a decision which could substantially impair its long-term interests in South Asia.

A) *Decision Matrix for Policymakers: Lawfulness v. Usefulness*

Notwithstanding the legality and moral implications of targeted killings, the strategic value of employing this counterterrorism tactic is context driven and carries both costs and benefits.[30] Although the United States' choice of adopting a 'war paradigm' to eliminate OBL may have lent some transient political capital to the Obama administration,[31] it otherwise represents a costly policy preference for several reasons.

First, an immediate consequence of eliminating leaders of terrorist organizations is their replacement by more determined and dangerous leaders.[32] By all accounts, at the time of his killing, OBL had been largely marginalized and confined to the role of the spiritual head of Al-Qaeda who had no active operational or planning role within the terrorist organization.[33] Following OBL's targeted killing, Al-Qaeda is headed by Ayman al-Zawahiri, a fierce hard-liner from Egypt who is actively involved in the day-to-day planning and operational activities of Al-Qaeda.[34]

Second, OBL's targeted killing may have negatively impacted the important accumulation of critical intelligence. Since OBL was killed instead of captured like Khalid Sheikh Mohammed, the interrogators were denied the excellent opportunity of obtaining potentially valuable information about plans, capabilities and organizational structure of Al-Qaeda.

Third, the political message flowing from United States' armed operation against OBL may have hurt American interests by reinforcing its stereotypical conception in the minds of local population as an arrogant hyper-power and a bully.[35] More than anything else, it was the United States' preference for using military force rather than a law enforcement approach that has popularized and mythologized OBL as a defiant hero in the rhetoric of the religious right.[36] Pakistan was the only country in the world where OBL's funeral prayers were offered because some elements of society considered the Abbottabad operation as perfidious or treacherous and OBL as a David fighting Goliath in the guise of United States' military might.[37]

Fourth, targeted military operations often lead to escalating international tensions between the intervening state and the intervened state.[38] United States' relations with Pakistan have dangerously spiraled downwards as a direct consequence of OBL's targeted killing operation. The Abbottabad raid set off a chain of events that have estranged the two strategic partners in the war on terror to a point where Pakistan has blocked critical NATO ground lines of communication and the United States does not feel obligated to apologize to Pakistan for the unprovoked killing of 24 Pakistan Army soldiers by the United States led NATO forces in Afghanistan.[39] Although Pakistan's government has never officially acknowledged consenting to targeted strikes, it has been routinely rebuked by all opposition political parties for granting implicit consent to the United States' targeted killing operations in Pakistan.[40] Until OBL's targeted strike, the government largely ignored such criticism but as a consequence of the collapsing relationship between the two states, the democratically elected parliament has recently passed a parliamentary resolution calling for the immediate cessation of United States' targeted strikes through drones in Pakistan. Senator Raza Rabbani, a senior member of the ruling party and the architect of the parliamentary resolution against drone strikes, has unequivocally stated that Pakistan considers drone strikes as a clear violation of its territorial integrity and that such attacks would not be tolerated at any cost.[41] Thus far, the United States has completely disregarded the parliamentary resolution and its targeted strikes in Pakistan have continued unabated, which has further alienated the two states.[42]

Fifth, targeted killings in another country's territory can elicit criticism from local domestic constituencies against the government of the intervened state, which is either seen as acquiescent to or too weak to resist the operation in its territory.[43] OBL's operation put Pakistan's fledgling democracy under tremendous stress from several quarters. In the immediate aftermath of OBL's targeted killing, tensions between civilian and military leadership escalated to a point where Pakistan's Ambassador to the United States had to dishonorably resign and a commission has been formed to investigate whether the disgraced Ambassador had prior knowledge of America's targeted operation in Abbottabad.[44] A country that has been put under multiple periods of military rule and where threats of a military coup are ever present, civil-military tensions such as those surfacing after United States' unilateral strike on OBL can be fatal for Pakistan's nascent democracy.[45] Every opposition political party in Pakistan has constantly and vociferously criticized the elected government for bowing down to American pressure with regard to policy of targeted killings. Such criticism,

intended to gain political mileage, has eroded the political space available to the elected government to make tough decisions in national rather than political interest.

Sixth, the danger of sanctifying exceptional measures like OBL's targeted operation is the risk of over-reliance on and over-use of targeted killings both within and outside the war on terror.[46] This problem is highlighted by the hundreds of targeted killings in the Tribal Areas of Pakistan through unmanned aerial vehicles or drones operated by the CIA. According to reliable estimates, since 2004, the United States has conducted close to 250 targeted drone strikes in the Tribal Areas of Pakistan.[47] The full legal and policy implications of these CIA drone strikes within Pakistan is beyond the scope of this article but the high collateral damage and the anti-American sentiment fanned by these strikes deserves attention.[48] Often, the victims of these drone strikes are innocent civilians who have been mistakenly identified as terror suspects.[49] One such strike in early 2006 left eighteen civilians dead while missing the target completely and elicited fierce domestic criticism of the United States and the government of President Pervez Musharraf. The problem of correctly identifying individuals not wearing a distinct uniform like regular state armies and belonging to a non-state terrorist organization without uniform is grave and frequently leads to needless loss of life. The problem is compounded because the majority of targeted killing operations are 'signature' drone strikes that target groups of men believed to be militants associated with terrorist organizations but whose identities are not always known.[50] One such 'signature' strike on March 17, 2011 left forty innocent civilians dead without eliminating any high-value terror suspects.[51] Moreover, unlike a regular army, joining a terrorist organization does not have an on/off switch whereby individuals might join or support the organization for a while but then return to their ordinary lives without any ritual marking their joining or leaving. Finally, correctly identifying individuals as terrorists becomes exceedingly challenging when non-state actors like Al-Qaeda turn into a network of small dispersed cells or individuals, making the association with hostile non-state actor even more flimsy. In such situations, it is only the law enforcement approach that ought to be making a specific distinction and determining the precise culpability of a terror suspect.

The costs of targeted killing operations ought to be balanced against the usefulness or benefits of such operations. Apart from the meager political capital earned by the Obama administration, the United States' policy of targeted killings possibly benefits its forces by exposing them to less risk than they would be during joint law enforcement operations.[52] The United States' policymakers must balance the costs and benefits of a war driven approach to counterterrorism and if as in the case of Pakistan, the costs outweigh the benefits, the United States must show prudence and refrain from conducting targeted killing operations in Pakistan.

Pakistan has one of the largest and best disciplined armed forces in the world.[53] The state has extensive and effective law enforcement and intelligence operations throughout its territory. The United States needs to trust Pakistan's robust law enforcement structure to deliver in the war on terror. OBL's targeted killing operation raised suspicions between the intelligence communities of the two states[54] but after the exhaustive examination of materials found from OBL's compound by American authorities, it has been established that no state organ or agency of Pakistan including the ISI had any role to play or was associated with sheltering OBL inside Pakistan.[55] The United States must reassess the wisdom of its policy of targeted killings in Pakistan and given the rich history of successful legal and law enforcement and intelligence cooperation between the two states,[56] the

United States would be well advised to pursue terror suspects in Pakistan through mutual law enforcement means rather than targeted killings.

1. Case Study II: The Haqqani Network and Defining the Contours of 'Unwilling or Unable' Test for Cohabitant States

Non-state terrorist organizations often launch attacks against states from within the territory of another state. If the attacked state wishes to respond with force to such attacks, it must decide whether to use force on the territory of a state with which it may not be in conflict. Traditionally, international law mandates the attacked state to assess whether the territorial state is 'unwilling or unable' to suppress the threat on its own. Only if the territorial state is unwilling or unable to do so may the attacked state lawfully resort to the use of force. John O. Brennan, chief counterterrorism advisor to President Obama, has justified the United States' unilateral targeted strikes in Pakistan without the explicit consent of its government on the basis of the 'unwilling or unable' test.[57] Surprisingly, there has not been enough discussion among states or scholars about what the 'unwilling or unable' test requires. The test's lack of depth and content undermines its legitimacy and signifies that it is not currently imposing effective checks on the use of armed force by states like the United States against transnational non-state actors.[58]

One way of refining the 'unwilling or unable' test is to conceptualize territorial states as innocent states, cohabitant states and harboring states and make particularized rules and standards for each group.[59] Under this formulation, Pakistan would be appropriately classified as a cohabitant state. A cohabitant state might be strong enough but somehow reluctant to act on its own against certain non-state actors.[60] In other words, a cohabitant state is able but unwilling to act. In the context of Pakistan, this situation arises in the case of the Haqqanis who are considered hostile non-state actors by the United States. However, based on reasonable grounds, Pakistan views the Haqqanis differently and is reluctant to act against them because doing so would run counter to its national interest.[61]

Before recommending refinements to the 'unwilling or unable' test with regard to cohabitant states like Pakistan, it is worthwhile assessing the reasonableness of Pakistan's reluctance to target the Haqqanis. Just like the Tribal Areas of Pakistan, Afghanistan is a tribal society. The Durand Line that separates Afghanistan and Pakistan also divides many Pashtun tribes like the Haqqanis. Negotiated and formalized in 1893 by British surveyor Sir Mortimer Durand, the Durand Line is an accident of history and reflects the exigencies of British colonialism. The artificial and porous nature of this border is apparent by the grant of special rights of easement granted to the tribes across the Durand Line.

The problems in enforcing the Durand Line are compounded by the rejection of its legitimacy by the Pashtuns who view it as arbitrary and capricious.[62]

In these tribes, customs or *revaj* play a vital role. The law enforcement mechanism is structured on the tribal system and security emanates from the collective protection afforded to a community through the tribe and its decision making body – the *Jirga*. The *Jirga* decides on questions of criminal guilt and ensures enforcement of its verdicts and sentences. Furthermore, the dynamics underpinning the society are altogether different. Therefore, to deal with the heads of tribes as terrorists rather than through ordinary law enforcement mechanism is certainly going to invite serious backlash. In fact, the fierce independence of the tribal society has not made it easy for the United States led NATO coalition in Afghanistan to put in place a stable constitutional dispensation and it is generally believed that the writ of President Hamid Karzai's government does not extend much beyond Kabul.[63] Although the Bonn Agreement and the London Compact on Afghanistan contain provisions related to creation of *Jirga* parliaments, both the agreements represent a lack of deep appreciation and understanding of tribal bonds with regard to dispensation of justice through traditional tools of justice.[64] In this context, terrorism must be handled through law enforcement mechanisms rooted in tribal culture and tradition. The elimination of tribal leaders through targeted killings would inevitably lead to a retributive response which the state of Pakistan is not willing to suffer. Naturally, Pakistan does not want the conflict in the Tribal Areas to spillover into its urban centers, which would be a certain blowback of either a military operation against the Haqqanis by Pakistan's forces or through sustained targeted strikes by the United States.[65]

As members of the Mezi clan of the Zadran tribe, the Haqqanis have traditionally settled along the Durand line. Although the largest proportion of their fighters comes from the Mezi clan, many other tribes and sub-tribes are represented amongst the Haqqani ranks. These locally established credentials coupled with the three decade long history of fighting occupying forces lends the group an almost heroic aura. To expect or pressurize Pakistan to militarily target the Haqqanis is irrational because it would open doors of serious local antagonism, which Pakistan can ill afford. By attacking the Haqqanis, one is seen as attacking the natives of this land and military action against them would only lead to more violence on both sides of the porous border. Consequently, Pakistan is reasonably reluctant to initiate military action against the Haqqani network.

The clans habituated on Pakistan's side of the Durand Line feel strong ties for their Pashtun brethren on the other side of the border and feel compelled to join them in resisting the NATO forces who they perceive as an occupying army.[66] The Haqqanis are mainly situated in the tribal agency of South Waziristan and their fighters must cross the Durand Line and travel in excess of three hundred kilometers inside Afghanistan's territory to commit terrorist acts in Kabul that they are often accused of perpetrating.[67] The NATO forces in Afghanistan must ensure that they are performing their obligations effectively because it is indeed quite sobering if these forces are regularly unable to detect Haqqani fighters within territory encompassing more than three hundred kilometers.

An effective alternative of dealing with non-state actors like the Haqqanis includes intercepting them as they move along the Durand Line and inside Afghanistan's territory. Such an alternative is vitally important considering the Haqqanis' leader Sirajuddin Haqqani has stated that the Haqqani network

has no sanctuaries inside Pakistan and that it has shifted its base to Afghanistan.[68] Thus far, the NATO forces have failed to apprehend any such individuals because the law enforcement mechanisms in Afghanistan are extremely fragile and fragmented. If the United States led NATO coalition can develop an effective and robust law enforcement infrastructure in Afghanistan, the necessity and usefulness of eliminating these non-state actors through targeted killings would be significantly diminished and Pakistan would not have to face the constant American pressures to militarily act against these non-state actors even if doing so would be contrary to its national interest.

With respect to a cohabitant state that is able but unwilling to act against certain hostile non-state actors, the traditional law of war rules and doctrines are too ambiguous and contradictory and also too general and over-inclusive to strike the right balance between underlying policy objectives.[69] In this context, traditional law of war rules and doctrines offer poor guidance to solve the conflict between the security needs of one state versus the territorial autonomy of another state and between preventing terrorism versus deterring interstate violence.[70] Presently, international law on armed conflict does not offer any conclusive and unambiguous answer to the legality of use of armed force by a state against a non-state actor located within the territory of another state without the authorization of the intervened state. Condoning the legal basis for such military operations weakens the legitimacy of states' counterterrorism efforts against hostile non-state actors and also makes it difficult to win the hearts and minds of the local populations affected by these interventions. One way of overcoming these deficiencies and lacunae is to condition the use of force against hostile non-state actors in the territory of a cohabitant state upon its explicit consent. Given Pakistan's reasonable reluctance to militarily target the Haqqanis, the 'unwilling or unable' test should take into account the reasonableness of the reluctance of the cohabitant state to act against certain hostile non-state actors. In this regard, the requirement of explicit consent from the cohabitant state for any use of force by the attacked state against non-state actors within its territory should be mandatory. In case the cohabitant state refuses to allow armed strikes within its territory against hostile non-state actors, the attacked state should respect the decision of the cohabitant state. With respect to cohabitant states that are able but reasonably reluctant to act against certain non-state actors on their territory, the proposed test would bolster the legitimacy of the 'unwilling or unable' paradigm and also provide an effective check on the use of armed force by states like the United States against hostile non-state actors on territories of other states.

1. Conclusion

This article has assessed the legal and policy ramifications of United States' counterterrorism policy of targeted killings in Pakistan from the prism of Pakistan—the intervened, the cohabitant and directly

affected state. I have consistently argued in this article that in light of the weighing of the costs and benefits of pursuing the policy of targeted killings in Pakistan, the United States is acting imprudently and must reassess its policy of treating terrorism under a 'war paradigm.' Using the Abbottabad operation to kill OBL as a test case, I have suggested that instead of relying on targeted killings as a counterterrorism tool, the United States would be well advised to exclusively rely on traditional law enforcement methods of mutual legal assistance and shared intelligence while handling terror suspects in Pakistan. Finally, using the Haqqani network as an illustrative case, I have proposed that the 'unwilling or unable' test with respect to cohabitant states that are able but reasonably reluctant to act against certain non-state actors on their territory must condition the lawfulness of targeted strikes by the intervening state upon the explicit consent of the cohabitant/intervened state to achieve the right balance between the clashing interests of the intervening and the intervened states.

[1] See Speech by Harold Koh, Legal Advisor, U.S. Department of State, to the Annual Meeting of the American Society of International Law, The Obama Administration and International Law (Mar. 25, 2010).

[2] See Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Philip Alston. Addendum. Study on targeted killings UN A/HRC/11/2/Add.6.

[3] Arnulf Becker Lorca, *Armed Force against Non-State Actors: Regulating Violence between War & Peace* 4 (2012).

[4] *Id.*

[5] *Id.*

[6] HCJ 769/02 Public Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings Case*) [2005].

[7] Christian Tams, *The Use of Force against Terrorists*, 20 Eur. J. Int'l L. 359, 367 (2009).

[8] Sabir Shah, *Recalling extradition of Aimal Kanshi*, News, Jan. 30, 2011.

[9] See Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1, Harv. Nat'l Sec. J. 145, 156 (2010).

[10] See Micah Zenko, *Between Threats and War: U.S. Discrete Military Operations in the Post-Cold War World* (2010).

[11] S.C. Res. 1540, U.N. Doc. S/RES/1540 (2004).

[12] See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J 136. (July 9).

[13] *E.g.*, S.C. Res. 47, U.N. Doc. S/RES/47 (1948).

[14] See Annie Bird, *Third State Responsibility for Human Rights Violations*, 21 Eur. J. Int'l L. 883 (2010).

[15] Haider Rasool Mirza, *In defense of Hafiz Saeed*, Pak. Today, Apr. 8, 2012.

[16] See *Suicide attacks not part of Jihad: Hafiz Saeed*, Pak. Today, 25 May, 2011.

[17] S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001): Calls upon all states to: (a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups; (b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts; (c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;...

[18] Josh White, *Alleged Architect Of 9/11 Confesses To Many Attacks*, Wash. Post, Mar. 15, 2007.

[19] See, *e.g.*, Rob Crilly, *Pakistani parliamentarians demand end to US drone strikes*, Telegraph, Mar. 20, 2012.

[20] See Christopher S. Wren, *Long Arm Of U.S. Law Gets Longer*, N.Y. Times, July 7, 1996.

[21] Pak. Const. art. 245 (1): The Armed Forces shall, under the directions of the Federal Government defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so...

[22] See Pak. Const., arts. 246-7.

[23] See Shuja Nawaz, *Drone Attacks Inside Pakistan: Wayang or Willing Suspension of Disbelief?* Geo. J. Int'l. Aff. 79, 81 (2011).

[24] Pak. Const., *supra* note 21.

[25] See John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 Am. J. Int'l. L. 201, 211 (2011).

[26] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 15, Nov. 4, 1950, ETS No. 5, 213 UNTS 221.

[27] Jeremy Pelofsky & James Vicini, *Bin Laden killing was U.S. self-defense*, Reuters, May 4, 2011.

[28] Nicholas Schmidle, *Getting Bin Laden*, New Yorker, Aug. 8, 2011, at 14; Karin Brulliard, *Pakistani military, government warn U.S. against future raids*, Wash. Post, May 5, 2011.

[29] See S.C. Res. 1267, U.N. Doc. S/RES/1267 (1999): Demands that the Taliban turn over Osama Bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice;...

[30] Blum & Heymann, *supra* note 9, at 165.

[31] See *Obama makes OBL killing a campaign tool*, Capital Post, Apr. 29, 2012.

[32] Blum & Heymann, *supra* note 9, at 165.

[33] See Brian Bennett, *Declassified Bin Laden material sheds new light on Al-Qaeda*, L.A. Times, May 1, 2012.

[34] See Mary Beth Sheridan, *Zawahiri named new Al-Qaeda leader*, Wash. Post, June 16, 2011.

[35] See Nawaz, *supra* note 23, at 79.

[36] See Saba Imtiaz, *Amid vows of revenge, cries of indignation, young men hold funeral prayers for Bin Laden*, Express Trib. May 4, 2011.

[37] See *id.*

[38] Blum & Heymann, *supra* note 9, at 166.

[39] Huma Imtiaz, *'Blocking NATO routes says a lot about our ties,'* Express Trib. Dec. 10, 2011.

[40] See Adam Entous, Siobhan Gorman & Julian E. Barnes, *U.S. Tightens Drone Rules*, Wall St. J. Nov. 4, 2011.

[41] Muhammad Anis, *Senate protests against fresh drone attack*, News, May 3, 2012.

[42] See *U.S. snubs Pakistan's opposition to drone strikes*, Pak. Today, May 1, 2012.

[43] Blum & Heymann, *supra* note 9, at 166.

[44] See Mira Sethi, *A Hostage in Pakistan*, Wall St. J. Jan. 21, 2012.

[45] See Moeed Yusuf, U.S. Inst. For Peace, *Fixing Pakistan's Civil-Military Imbalance: A Dangerous Temptation* 2-5 (2012).

[46] Blum & Heymann, *supra* note 9, at 166.

[47] Nawaz, *supra* note 23, at 80.

[48] Jane Mayer, *The Predator War*, New Yorker, Oct. 26, 2009.

[49] *Id.*

[50] See Entous, Gorman & Barnes, *supra* note 40.

[51] *Id.*

[52] See Blum & Heymann, *supra* note 9, at 166-167.

[53] *E.g.*, Shuja Nawaz, *Crossed Swords: Pakistan, its Army, and the Wars Within* (Oxford University Press 2008); Stephen Philip Cohen, *The Idea of Pakistan* (2d ed. Brookings Institution Press 2006).

[54] Alex Rodriguez, *Suspicious grow over whether Pakistan aided Osama Bin Laden*, L.A. Times, May 2, 2011.

[55] See *No role in Bin Laden's stay in Pak: Gilani*, Hindu, May 10, 2012.

[56] See *supra* Parts II.A., III.

[57] *Speech by John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, at Woodrow Wilson International Center for Scholars, The Ethics and Efficacy of the President's Counterterrorism Strategy, (Apr. 30, 2012).*

[58] See Ashley S. Deeks, *"Unwilling or Unable:" Toward a Normative Framework for Extraterritorial Self-Defense*, 52 Va. J. Int'l L. 483, 488 (2012).

[59] See Lorca, *supra* note 3, at 6.

[60] *Id.* at 8.

[61] See U.S. Inst. Of Peace, *Pakistan, The United States and the End Game in Afghanistan: Perceptions of Pakistan's Foreign Policy Elite* 12-14 (2011).

[62] See Thomas H. Johnson & M. Chris Mason, *No Sign until the Burst of Fire: Understanding the Pakistan-Afghanistan Frontier*, 32 Int'l. Security, 41, 43 (2008).

[63] See Shahid R. Siddiqi, *Is Karzai Heading For The End Game?* Foreign Pol'y J. (2010).

[64] See The Afghanistan Compact, Jan. 31, 2006; Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (*"Bonn Agreement"*), Dec. 5, 2011, S/2001/1154.

[65] U.S. Inst. Of Peace, *supra* note 61, at 29-30.

[66] See *The Haqqani Network: Snake Country*, Economist, Oct. 1, 2011.

[67] See Shahzad Chaudhry, *A war neither America nor Pakistan want any more*, Express Trib. Oct. 24, 2011.

[68] See *'No Sanctuaries in Pakistan:' Haqqani network shifts base to Afghanistan*, Express Trib. Sep. 18, 2011.

[69] Lorca, *supra* note 3, at 5.

[70] *Id.*