

**EVALUATING THE EFFECTIVENESS OF TARGETED KILLING
COUNTERTERRORISM STRATEGY: THE NATURE AND LIMITS OF DOCTRINAL,
HERMENEUTICAL AND SYSTEMATIC GAME THEORY APPROACHES.**

by

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ACRONYMS

ICCPR - International Covenant on Civil and Political Rights

ICRC – International Committee of the Red Cross

IHL – International Humanitarian Law

IHRL – International Human Rights Law

LOAC – Law Of Armed Conflict

NATO – North Atlantic Treaty Organisation

OHCHR – Office of the United Nations High Commission for Human Rights

UDHR – United Declaration of Human Rights

UN – United Nations

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Abstract

Literature reviewed so far shows that several scholars dismiss targeted killings as clear violation of international law; while others argue that it is the law that should adapt to its contemporary context of application. My thesis argues in favour of the latter concept. My aim is to clarify the current legal interpretation of targeted killings and then enhance and supplement the international legal framework by identifying a range of standards in which states can lawfully and effectively defend themselves against terrorists. Critical analysis of legislations permitting the use of lethal force, through the methodological approach of doctrinal analysis, which focuses on the meaning of legal categories in the abstract, reveals that targeted killing is an accepted form of self-defence, during peace time, only when it is carried out in response to imminent threats that are both *instant and overwhelming*. A would-be victim must have no alternative choice of means and no moment of deliberation but to respond to an armed attack in a proportionate measure. From the perspective of such doctrinal analysis, only upon satisfaction of this condition can Article 51 of the United Nations Charter be invoked. Laws of Armed Conflict permit the use of targeted killings against civilians only when they are *found* to be directly participating in hostilities against those targeting them. By cross referencing these legal provisions with the supplementary methodology of socio-legal studies, which in contrast to doctrinal approach focuses analysis upon of the *law in action*, it is possible to secure more critical insights. My research has thus identified discrepancies between these regulatory laws and their actual application to practical scenarios.

The thesis addresses the following questions: firstly, because terroristic plots are typically planned covertly and executed instantaneously, what comprises the catalyst for victims of terrorism - who do not have an *overwhelming imminent* threat experience - to enable them to mount an effective defence? Secondly, since terrorists covertly plot and execute attacks, how can states fulfil the condition under the laws of armed conflict of *finding* terrorists *engaged* in the act of hostilities in order to fulfil the present criteria for 'lawful targeting processes'? Existing

international law provisions, appearing to permit killing in self-defence within limited parameters, are underdeveloped and the legality of targeted killing is, therefore, debateable. Thus, the thesis adopts a mixed method approach that critically evaluates legislative provisions permitting killing in self-defence and the viability of their application to practical scenarios. They include the following: A qualitative hermeneutical analysis of theoretical perspectives from legal realist, liberal cosmopolitan and pragmatic schools of thought and associated methodologies. This will highlight challenges with attempts to fully applying existing law to contemporary targeted killing; and a semi-quantitative approach using the *Peace War Game Theory* analytical tool. In order to clarify the contribution of targeted killings as a viable counterterrorism strategy, the latter methodological approach, which addresses the options facing different parties relative to their goals, serves as a new lens for predetermining the outcomes of strategic decisions, regarding the long term utilization of targeted killings. As an original contribution to the literature, my research critically tests the viability of this game theory methodological approach as a means of adding something new to existing debates over research practice. It further suggests guidelines for a new legal model focussed, in particular, upon the use of targeted killings as a counterterrorism strategy. As the game theory methodological approach envisages, deployment of targeted killing may only serve to alleviate or defer future terroristic activities from persons who have been killed rather than eliminate terrorism and its concept completely.

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CHAPTER ONE: INTRODUCTION

1.1.INTRODUCTORY REMARKS

The United States and Israel have rules, independent of international law, that govern their counter-terrorism strategies. Both countries have endorsed targeted killings as a warfare tactic.¹ The US favoured method is the missile attack by drones, while Israel prefers bombs in explosive booby traps and helicopter missiles.² In the US, the Bush administration declared war on the al-Qaeda terrorist group after the latter's attack on US targets on September 11, 2001.³ Subsequently, the Obama administration began to actively hunt for Al-Qaeda terrorists in order to target and kill them, claiming it as an act of self-defence under Article 51 of the United Nations Charter.⁴ Such attacks have led to the controversial killing of wanted leaders of terrorist organisations such as Osama Bin Laden in 2011 and Anwar Al-Awlaki in 2011. The Trump administration has continued this policy with the killing of al-Bagdadhi in 2019.⁵ US targeted killings are not limited to the Asian continent. On 18th March 2015, the Pentagon announced that a US drone sent to South of Somalia had targeted and killed Adnan Garar, a leader of Al Shabaab, a militant group in Kenya known to have ties with al-Qaeda.⁶

¹ A. Birdsall, 'Drone Warfare in Counterterrorism and Normative Change: US Policy and the Politics of International Law.' [2018] 32(3) Global Society, P241; C. Lovelace, *et al.* 'The Domestic use of Unmanned Aerial Vehicles.' [OUP 2014] P134.

² A. Jurgen, 'Arms control for armed uninhabited vehicles: an ethical issue.' [2013] Ethics and Information Technology, P16; O. Ben-Naftali, 'We must not make a scarecrow of the law: A legal analysis of the Israeli Policy of targeted killings.' [2003] 36 Cornell International Law Journal, P1.

³ M. Denbeaux, *et al.*, 'Global War on Terror Timeline: September 11, 2001 to January 20, 2009.' [2017].

⁴ D. Glazier, 'Playing by the Rules: Combating al Qaeda within the Law of War.' [2009] 51 Wm. & Mary L. Rev. P957.

⁵ R. Chesney, 'Who May be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force.' [2010] 13 Yearbook of International Humanitarian Law, P3.

⁶ The Pentagon serves as the headquarters of the United States Department of Defence, <http://www.globalsecurity.org/military/facility/pentagon.htm> [Accessed on 08/12/19]

Israel openly adopted a policy of targeted killing at the time of the second intifada⁷ in September 2000.⁸ So far, the Israelis have identified, located and killed alleged Palestinian terrorists, using fighter aircraft, helicopter gunships, tanks, car bombs, booby traps and bullets.⁹ In 2012, Israel carried out an airstrike that resulted in the targeted killing of Jabari, the Head of the Hamas Military wing.¹⁰ The fact that main targets by the US and Israel have been active Islamic terrorists, hints on the fact that the conflict between those targeting and the terrorists being targeted is of a religious character.

Targeted killing has been defended as the most reliable counterterrorism strategy where no better means are deemed possible in practice.¹¹ However, targeted killing raises questions as to its legality under international law in general and in particular, whether the strategy can be regulated by either the Laws of Armed Conflict, or criminal acts requiring ‘due process’ under Law Enforcement (IHRL) regimes predicated upon Human Rights norms.

Modern conflict in general and the unique targeted killing counterterrorism strategy in particular challenge conventional legal paradigms; thus, the legal literature is divided. Some, authors who are preoccupied with determining the legal implications of targeted killing are convinced that it is a clear violation of all existing laws that regulate the use of ‘targeted force.’¹² Others who are convinced that targeted killing is a new conflict strategy which is practically applicable to

⁷ Definition of Intifada: Intifada is an Arabic word that translates literally as ‘shaking off’. It has been used to refer to legitimate means of resistance against oppression across the Middle East for decades. The second Palestinian intifada or uprising, named after the Jerusalem mosque complex where the violence began, occurred at the end of September 2000, signifying their frustration over failed negotiations with Israel over the latter’s refusal to relinquish authority over the West Bank and Gaza strip. Available at: <https://www.vox.com/cards/israel-palestine/intifadas> [Accessed on 19/06/18]

⁸ BBC News, ‘Al-Aqsa Intifada Timeline.’ Available at: http://news.bbc.co.uk/1/hi/world/middle_east/3677206.stm [Accessed on 19/06/18]

⁹ S, David ‘Fatal Choices: Israel’s Policy of Targeted Killings’ (2002) 51 *Mideast Security and Policy Studies*.

¹⁰ L. Kershner, *et al* ‘Ferocious Israel Assaults on Gaza Kills a Leader of Hamas’. [NYT 2012] P1

¹¹ *Ibid*

¹² E. Archambault, ‘Targeted Killing, Technologies of Violence, and Society’ [2018] 47(1) *Sage Journal of International Studies*, P144.

modern conflict have focused on determining its viability (justification and effectiveness).¹³ In this thesis, I argue in favour of the latter. Existing laws that regulate the use of force can be made to adapt to the modern context of targeted killing if the strategy is certified as practicable and effective. This chapter highlights the scope of the thesis in order to align the expectations of the reader to what is addressed in the thesis. The first paragraph contains a brief overview of the topics to be addressed and the relevance of the research. Then the chapter defines targeted killing and distinguishes it from assassination. In addition, the chapter also defines terrorism. It then gives an overview of the literature that will be reviewed in detail in chapter three. Following this is a section detailing the relevance of the research. Then chapter then highlights the background of targeted killing and distinguishes it from assassination. It also contrasts the two applicable legal frameworks for interpreting targeted killing operations: armed conflict versus law enforcement.

This chapter also provides an overview of the literature, highlighting the original contribution to academic studies of this thesis. It then highlights the methodologies adopted and how they facilitate the resolution of the research aims. This is followed by a brief introduction to the methodologies used to carry out the research and the summary of chapters. Then, the chapter introduces and explains the rationale for carrying out a systematic analysis of the efficiency of targeted killing operations. The terms used in this thesis that are not specifically defined by any legal doctrines or organisations are also highlighted. These include terms like: terroristic conflict(s), modern or contemporary conflict, the war against terror, etc. Overall, it is argued that the adoption of mixed methodologies strengthen the theoretical and analytical dimensions of the practicality and effectiveness of targeted killing. In this thesis, questions are asked and

¹³ D. P. Hepworth, 'Terrorist retaliation? An Analysis of Terrorist Attacks Following the Targeted Killing of top-tier al-Qaeda Leadership.' [2014] 9 *Journal of Policing, Intelligence and Counter-Terrorism*, P1; A. Zussman, N. Zussman, 'Assassinations: Evaluating the effectiveness of an Israeli counterterrorism policy using stock market data' [2006] 202 (2) *Journal of Economic Perspectives*, P194.

arguments that consider different viewpoint are put forward. Any conclusions reached are a result of navigating and balancing the various viewpoints.

1.1.1 What is Targeted Killing?

There is yet to be an international endorsement of the strategy of targeted killings, neither is there a universally adopted definition of the term.¹⁴ Notwithstanding, the explanation proffered by the United Nations (UN) serves as an introduction to the concept of the phrase ‘targeted killing of suspected terrorists’ in this thesis. The UN defines Targeted Killing as “the intentional, premeditated and deliberate use of lethal force, by states or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of those targeting them.”¹⁵ This definition is adopted for the purpose of this thesis, to distinguish it from other types of killings conducted by individuals, non-state groups or state agents. This act is contemporarily referred to as a government devised counterterrorism strategy because attacks are directed against suspected terrorists who are deemed enemies of the states targeting them.¹⁶

According to Melzer, “while targeted killings almost invariably involve the use of some sort of weapon, there are no limits to alternative methods of taking a human life.”¹⁷ Thus, by these definitions given, targeted killing is different from accidental killing and killings permitted under law enforcement (as a last resort in self-defence). Examples of targeted killings as identified by the International Committee of the Red Cross (ICRC) include those of al-Qaeda members after

¹⁴ J. I. Walsh, ‘The rise of targeted killing’ [2018] 41(1-2) *Journal of Strategic Studies*, P145.

¹⁵ The definition is obtained from P. Alston, “Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions,” United Nations, Human Rights Council [28 May 2010]. Available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/Permissibility of Targeted Killing 31314session/A.HRC.14.24.Add6.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/Permissibility%20of%20Targeted%20Killing%2031314session/A.HRC.14.24.Add6.pdf) (accessed 6 August 2013); and other definitions such as the ones provided by N. Melzer, ‘Targeted Killing in International Law [Oxford: University Press, 2008] PP 3-5, particularly at P5; and W. J. Fisher, ‘Targeted Killing, Norms, and International Law,’ [2006] 45 (3) *Columbia Journal of Transnational Law*, P715.

¹⁶ – Melzer *Supra* P 5

¹⁷ N. Melzer, ‘Targeted Killing in International Law [OUP 2008] P3

the latter's attack on the US.¹⁸ However, this thesis focuses on the US and Israel's targeted killing as a counterterrorism strategy, particularly the use of drones by the US.

Similarly, there is no universally agreed definition of Terrorism.¹⁹ Owing to the political and emotional nature of the subject matter, which invariably leads to difficulties in achieving unanimity, government agencies around the world have adopted different definitions. For instance, the US broadly construes terrorism to mean "premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents".²⁰ However, this thesis relies on a non state definition offered by the UN general assembly which defines terrorism by condemning the following acts:

'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.'²¹

One incident of terrorism that marked the beginning of radicalism occurred on 22nd July 1968, when the Popular Front for the Liberation of Palestine (PFLP) hijacked an Israeli El Al flight, marking the start of civilian targeting by a terrorist group.²² In 1972, the Palestine Black September Organisation attacked and killed 11 Israeli civilians, athletes at the Munich Olympic

¹⁸ J. Pejic, 'Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications.' International Review of the Red Cross, 10.1017/S1816383114000447, 1. Also available at:

https://www.icrc.org/en/download/file/.../jelena_pejic-armed_drones-final_pdf.pdf at P1 [Accessed on 09/02/18]

¹⁹ FMJ Teichmann, 'Financing of terrorism through the banking system' [2019] 22(2) Journal of Money Laundering Control P189

²⁰Section 2656f, 'U.S. Foreign Relations and Intercourse Annual Report on Terrorism.' Available at: <https://www.law.cornell.edu/uscode/text/22/2656f> [Accessed on 13/11/19]

²¹ Available at: <https://www.un.org/press/en/2005/gal3276.doc.htm> [Accessed on 13/11/19]

²² C. Berrebi, *et al*, 'How does Terrorism Risk Vary Across Space and Time? An Analysis Based on the Israeli Experience.' [2007]18 (2) Defence and Peace Economics, P115.

games.²³ In response, Israel devised the active mechanism of targeted killing to prevent terrorists from thriving.²⁴ Likewise, the United States (US) response to the 9/11, al-Qaeda terrorist attack on the Twin Towers and the Pentagon has given rise to a chain of targeting policies aimed at checkmating terrorist activities.²⁵ This has led to recurrent drone attacks against al-Qaeda suspected terrorists resident in Pakistan and Yemen.²⁶ The effects of these attacks are probably under-reported and include the number of innocent civilians (including women and children) who are killed in the process.

These terrorist attacks and counter-terrorism responses are indications of how the scope, scale, and very nature of warfare have changed to involve civilian targeting, within civilian territories. As these attacks persist, questions about the legality and justification for the targeting process are posed in legal debates involving modern armed conflict and self-defence. The questions asked include whether the strategy is legal under either the laws of armed conflict (LOAC) or international human rights law (IHRL) that generally regulate the use of lethal force; whether the strategy is an admissible form of self defence under article 51 of the UN Charter; and whether targeted killing is effective in facilitating an end to terrorism.²⁷ The US and Israel claim that although it is unconventional, the strategy of targeted killing has proved to be the most practicable and effective method of apprehending terrorist attacks.²⁸ In examining these claims, this thesis recognises the difficulty in focusing on both countries in detail. Thus the majority of examples cited will come from the US. However, the role of Israel in targeted killings cannot be ignored. Examples from Israel will be cited to emphasise an argument or for comparative purposes.

²³ Ibid P115

²⁴ H CJ 769/02 Public Committee Against Torture In Israel v. Government of Israel (2005) in K. E. Eichensehr, 'On target? The Israeli Supreme Court and the expansion of targeted killings.' [2007] 116 (8) The Yale Law Journal P1873.

²⁵ D. Kretzmer, 'Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Defence?' [2005] 16 (2) EJIL, P188.

²⁶ M.E. O'Connell, 'The Choice of Law against Terrorism.' (2010) 4 J. Nat'l Sec. L. & Pol'y, P343.

²⁷ For Example Supra note 2

²⁸ R. Murphy, *et al*, 'A. J. Due process and targeted killing of terrorists' (2009) 31 Cardozo L. Rev, P405.

The fact that terrorism and targeted killing counterterrorism strategy causes legal debates comes as no surprise because its nature evidences a drastic change in the way conflicts are handled. Thus, the legal bounds of international law on conflict are bound to be challenged. The nature of 21st Century armed conflict differs from that of the 20th Century.²⁹ The laws that governed 20th century armed conflict did not envisage the terroristic type of conflicts of the 21st century. So, is it time to review old laws and enact new ones that can be made applicable to 21st Century conflicts? Should targeted killing be governed by the law of war, human rights laws or a synthesis of both?

Any counterterrorism law must prescribe a practicable method for dealing with terrorists. The questions that should be asked, and which this thesis ultimately seeks to answer include; is targeted killing counterterrorism strategy able to achieve the goals of countering terrorism? In answering this question, this thesis explores the question of whether targeted killings should be quickly dismissed as illegal simply because it is unconventional. Alternatively, should targeted killing strategy be considered on its merits as a practicable, necessary and effective counterterrorism solution?

Following this overview, the relevance of this research is highlighted. Subsequently, the two dominant paradigms through which one can interpret targeted killings are described. The same will later be applied to different facts and cases in the body of the thesis. In addition, the evolving method of drone operated targeted kinetic strikes and its potential to be Law of Armed Conflict compliant or law enforcement compliant will be discussed in the body of the thesis.

²⁹ R. Sanders, 'Response to Tanisha M. Fazal's review of *Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror*.' [2019] 17 (2) *Perspectives on Politics*, P499.

Whether or not targeted killing, even through the use of drones could be a valid form of self-defence under international law is a question that this thesis will also seek to answer.

1.1.2 Relevance and scope of the Research

This thesis is a critical, doctrinal, hermeneutical and empirical analysis of the strategy of targeted killing and an evaluation of its effectiveness. In this way, this research differs from other works that adopt purely doctrinal and transcendent forms of critique, or standards in evaluating targeted killing. Even the discussion of targeted killing in the literature will progress from the constant attempt at determining its legality under international law into discussions that determine more pressing issues like its effectiveness in guaranteeing protection from terrorism. The starting point of the research therefore, is to evaluate the operation of targeted killing in response to terrorism, as well as relevant statutory provisions and practical facts. The aim is to determine whether the laws fail on their own standards and whether targeted killing strategy meets its own expectation. Furthermore, the reasons for any such failures would be extrapolated and analysed with the aim of resolving the discrepancies between the law and practice on the one hand; and between 'simply' expedient and optimal strategies on the other. Thus, the legal position of targeted killing counterterrorism strategy is critically analysed. This allows for a better understanding of the legal issues that generate debate over the use of targeted killing. From this, the gaps in the literature and conflict regulatory policies are identified.

The thesis then determines the rationale for targeted killing. This rationale is weighed against the conclusions reached from assessing the effectiveness of targeted killing counterterrorism strategy. This considers whether targeted killing meets the intended goals for which it was designed. A major contribution to research is that this thesis offers game theory as a novel method of analysing the effectiveness of targeted killing counterterrorism strategy in the field of law. The thesis also explores new ways of analysing the ideologies behind terror related conflicts

(subsequently referred to as terroristic conflicts). In the end, a range of standards by which states can effectively defend themselves against terrorists are suggested.

This thesis will not examine local actions (non-international armed conflict), which do not cross international boundaries; this is because it examines international actions, such as drone attacks by the US outside its territory. Furthermore, this work will not look at political contexts, since its focus is on international law. In reading this work, it should always be borne in mind that the focus is on the legal context of international terrorism and targeted killing counterterrorism responses.

1.1.3 Distinction between Targeted Killing and Assassination

Should targeted killing strategy be revised by legislators as viable in terms of its practicality, it may put an end to the contention that targeted killing is the same as assassination. The distinction between targeted killing and assassination has implications in terms of legality and public acceptance. However, the concepts are so intertwined that such distinctions are not easy to make. The Legal online dictionary has defined assassination as murder committed by a perpetrator without the personal provocation of the victim, who is usually a government official. This definition is similar to those contained in Webster and Blacks law dictionaries and scholarly literature including the report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions.³⁰

³⁰Available at: <https://legal-dictionary.thefreedictionary.com/assassination> [accessed on 30/06/18]; N. Melzer 'Targeted killings in International Law.' (2009) EJIL, P449; P. Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution Study on Targeted Killings (2006) 33, U.N. Doc. A/HRC/14/24/Add P6.

Assassination is *per se* illegal, whereas targeted killing may be legal or illegal, depending on how it is justified under either the laws of armed conflict or the self-defence law.³¹ Targeted killing may easily be seen as a modern rhetoric to justify murder because the elements that make assassination illegal are all present in a case of targeted killing. For instance, the fact that assassination and targeted killing are premeditated, involving murder of persons who are not in the physical custody of those wanting them dead and usually in exercise of state mission, (all of which are unjustifiable under law enforcement courts and the LOAC) are proof of their similarities. It is difficult to differentiate between the two. This is why targeted killing is dismissed by humanitarian experts as extra-judicial.³² It is only on grounds of technicality that one can begin to distinguish between the two. While assassination is not a new phenomenon, targeted killing by state actors, especially by drones, is a 21st century counterterrorism strategy. Targeted killing of terrorists has the tendency to invoke the approval of commentators who recognise the seriousness of terrorism. They realise that international laws are very restrictive in how they prescribe that such threats can be dealt with.³³ In the aftermath of the 9/11 terrorist attack, the United Nations Security Council Resolutions 1368 and 1373 permitted the US to take ‘necessary steps’ towards preventing future terrorist attacks.³⁴ This is proof that the impact of terrorism on victims generally invokes worldwide sympathy and any strategy devised for tackling terroristic threats should be considered on its merits. As Jose observes, “immediate reactions to bin Laden’s targeted killing seemed to take little issue with it. Such was the case even among actors who previously opposed other US targeted killings or demanded more information about them. This is surprising as its legality was arguably as questionable as the

³¹ H. A. Wachtel, ‘Targeting Osama bin Laden: Examining the Legality of Assassination as a Tool of US Foreign Policy.’ [2005]55.3Duke Law Journal, P679.

³² F. Seatzu, ‘Enhancing the Implementation of the State’s Duty to Investigate Targeted Killings in the Case-Law of the European Court of Human Rights and American Court of Human Rights.’ [2018] 34 Anuario Espanol de Derecho Internacional P 601.

³³ For Example the DPH restrictions under the LOAC Nils Melzer, ‘Interpretative Guidance on the Notion of DPH Under International Humanitarian Law [2009], https://www.icrc.org/customary-ihl/eng/docs/v2_cou_il_rule6_sectiona [Accessed on 14/11/19]

³⁴ S/Res/1368 [2001] The United Nations, available at: <https://www.un.org › counterterrorism › ctif › sres1368-2001>; S/Res 1373 [2001] Par. 1-3. Available at: <https://www.un.org/sc/ctc/resources/databases/recommended-international-practices-codes-and-standards/united-nations-security-council-resolution-1373-2001/> [Both accessed on 14/11/19]

killings which were condemned or questioned.”³⁵ The effect of terrorism on its victims evokes a high level of sympathy and acceptance of targeted killing as the necessary step towards preventing future terrorist attacks.³⁶ It is not likely that assassination will ever evoke similar empathy. Thus, the interest that targeted killing evokes in the literature is an incentive for carrying out this research.

Many incidences of terrorism and targeted killing responses have resulted in policies and rhetoric which blur the edifice of international law and global public order.³⁷ These prompt the questions: can terrorism be an act of armed conflict? What are the criteria for determining that a situation is an armed conflict? Will terrorism meet those criteria? If it does, then can the targeted killing of a terrorist be justified under the LOAC? If a terrorist act does not meet the LOAC criteria, how will this affect a targeted killing response? Will the targeted killing response be justified under another rule i.e under IHRL? The controversy generated by the novelties in modern warfare comes sharply into focus with regard to targeted killing; the following paragraphs attempt to answer the questions by clarifying the positions of the relevant laws.

1.2 Two paradigms of Analysis: The LOAC vs. IHRL (law enforcement).

The ongoing conflict between terrorists and western states including the US, often referred to as modern or contemporary warfare, is different from that of traditional warfare which is governed by the LOAC. The conflict is also alien to the IHRL because it does not usually consider due process of law which is a characteristic of the IHRL. Hence, questions arise generally as to the applicability of either the LOAC or the IHRL to contemporary warfare involving terrorism and targeted killing counterterrorism strategy. The dual applicability of both regimes to terroristic

³⁵ B. Jose, ‘Bin Laden’s Targeted Killing and Emerging Norms.’ [2017] 10 (1) Critical Studies on Terrorism, P52.

³⁶ See generally Article 39, 41, 42 and 51, Charter of the UN; Available at: <https://www.un.org/press/en/2001/sc7158.doc.htm> [accessed on 30/06/18].

³⁷ The Israeli case supra; D. Kaye, ‘International Law Issues in the Department of Justice White Paper on Targeted Killing’ (2013) 8 ASIL Insights, P3

conflicts (terrorism v. targeted killings counter terrorism) is one that both parties to the conflict seek to exploit.

Targeted killing operations can be used in a dual legal and operational context and there are two regimes under which they can be evaluated. They may be viewed under the models of either law enforcement of international human rights laws (IHRL) or warfare regulated by the laws of armed conflict (LOAC), otherwise known as International Humanitarian Law. The LOAC regulates warfare and the IHRL is applicable in absence of war (peacetime).³⁸ This means that targeted killing can either be within the context of an ongoing armed conflict situation and/or as part of a ‘beefed up’ police operation.

Under the LOAC, a distinction can be made between non international armed conflict and international armed conflict. Under Article 3 common to the Geneva Conventions of 12 August 1949, non-international armed conflicts are armed conflicts in which one or more non-state armed groups are involved.³⁹ Depending on the situation, hostilities may occur between governmental armed forces and non-state armed groups or between such groups only.⁴⁰ Indeed, any armed conflict between governmental armed forces and armed groups or between such groups should ideally take place on the territory of one of the parties to the Convention.⁴¹ Furthermore, two requirements are necessary for such situations to be classified as non international armed conflicts: Firstly, the hostilities must reach a minimum level of intensity.⁴² This may be the case, for example, when the hostilities are of a collective character or when the government resorts to using the means and methods of warfare against the insurgents, instead of

³⁸ . M. Coleman, ‘The Legality Behind Targeted Killings and the Use of Drones in the War on Terror.’ [2014] 5, Global Security Studies, P1.

³⁹ Common Article 3, GC 1949, Available at: <https://casebook.icrc.org/glossary/non-international-armed-conflict> [Accessed on 11/12/19]

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

the use of police forces.⁴³ Secondly, non-governmental groups involved in the conflict must be considered as "parties to the conflict."⁴⁴ This may mean for example that these forces have to be under a certain command structure and have the capacity to sustain military operations.⁴⁵

In contrast, an international armed conflict occurs when one or more states have recourse to armed force against another state, regardless of the reasons or the intensity of this confrontation.⁴⁶ The LOAC extends the definition of international armed conflicts to include armed conflict situations in which peoples are fighting against colonial domination, alien occupation or racist regimes.⁴⁷ No formal declaration of war or recognition of the situation is required. The existence of an international armed conflict, and the consequent possibility of applying the LOAC to this situation depends on what actually happens on the ground (*jus in bello* criteria as described below) i.e. It is based on factual conditions.⁴⁸ There remains the gap in legislation that fail to prescribe how to regard a conflict between state actors from one state and non-state actors from another state as occurs with terroristic conflicts. However, the transnational nature of terrorism and targeted killings is suggestive of the fact that it could be treated as international armed conflict.

Under law enforcement, targeted killing could occur in any number of contexts. These may include killing as a means of self-defence from impending danger, or instances where people are

⁴³ K. Onishi, 'Rethinking the Permissive Function of Military Necessity in Internal Non-International Armed Conflict.' [2018] 51 (2) Israel Law Review, P240.

⁴⁴ Article 3 Common to Geneva 4 Convention 1949; Article 3 applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties" - These include armed conflicts in which one or more non-governmental armed groups are involved.

⁴⁵ Ibid

⁴⁶ Available at: <https://casebook.icrc.org/glossary/international-armed-conflict> [Accessed on 11/12/19]

⁴⁷ Article 1(4) AP 1 GC, 1977.

⁴⁸ T.C. Ngai, 'Was Iraq War a "Just War" or Just a War? An Analysis from the Perspectives of Just War Theory.' [2019] 9(2) Open Journal of Political Science, P374.

killed by their state agents as a result of death penalties by their state judiciary.⁴⁹ Bearing in mind that the latter are examples of targeted killing based on its literal definition, the extent to which targeted killing is a counter-terrorism strategy under law enforcement varies with jurisdictions. Some jurisdictions like China have specific guidelines that permit killing of suspected terrorists without putting them on trial.⁵⁰ Some other jurisdictions like the UK employ the strategy of ‘shoot to kill’ of terrorists who are considered too dangerous to attempt an arrest.⁵¹ Whilst these issues remain subjects of debate in chapters two and three of this thesis, the point worthy of note here is that both regimes are not identical but applicable under different conditions and criteria. During peacetime, the IHRL is the default regulatory mechanism and the LOAC is inapplicable. However, during armed conflict between states and/or organisations, the LOAC becomes the applicable law.⁵²

Both regimes are subject to Article 51 of the UN Charter which provides:

‘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 measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security

⁴⁹ S. Xiao, ‘The Influence of the International Covenant on Civil and Political Rights on the Death Penalty Legislation in China: Judicial, Administrative and Humanitarian Problems of State Structures and Economic Subjects.’ [2018] Atlantis Press, P739.

⁵⁰ Israeli case supra; D.Kaye, ‘The US White Paper’ supra; See also, Jeremy Wright, ‘The modern law of self-defence: Attorney General’s speech at International Institute for Strategic Studies’, 11 January 2017, Available at: <https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies> [Accessed on 26/11/19]

⁵¹ G.N. Giordano, et al, ‘The 2005 London terror attacks: An investigation of changes in psychological wellbeing and social capital pre-and post-attacks.’ (2003-07)-A UK panel study.’ [2016] 2 SSM-population health, P485.

⁵² P. Alston, ‘Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions,’ United Nations, Human Rights Council (28 May 2010): A/HRC/14/24/Add.6 para. Available at : <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> 10, [Accessed on 26/11/19] M. Coleman, ‘The Legality Behind Targeted Killings and the Use of Drones in the War on Terror.’ [2014] 5, Global Security Studies, P1.

Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.’⁵³

The LOAC and IHRL regimes have some overlapping norms, in that they both aim to protect the health, dignity and lives of individuals.⁵⁴ There is therefore a certain amount of hybridity and fluidity between both regimes. This means that an action may be justified using either regime if it meets the criteria set out in the previous paragraph. For example, the evolving method of targeted killing by drones has the potential to be justified under the LOAC or if viewed as enhanced international policing, under the IHRL. For targeted killing to be justified under the IHRL it will have to be an act of self-defence as would occur for example if the strike was against a person about to commit an act of aggression.⁵⁵ Targeted killing, e.g by drone strikes on terrorists could be similarly justified under the LOAC if carried out to prevent a breach of international human rights such as genocide. There is however a slight difference in the parameters with which states or individuals can express their rights under Article 51 of the UN Charter. While drone attacks which are pre-emptive in nature may be justified under the LOAC, the IHRL would require a would be victim to be certain of an impending attack before any self defence counter attack can be contemplated and launched.⁵⁶ This disqualifies any premeditated form of self defence responses under the IHRL, including drone attacks.

As will be seen later in the chapter, there are operational differences between targeted killing under the LOAC regime and one carried out as an international human rights response. In the former case for example, there is no requirement for the arrest and conviction of the terrorist. A pre-emptive targeted killing strike by a drone may in some circumstances, meet the conditions

⁵³ Article 51, UN Charter

⁵⁴ M.E. Newell, ‘Interstitial Rules and the Contested Application of Human Rights Law and the Laws of War in Counter-terrorism.’ [2016] 5(2) Global Constitutionalism, P207.

⁵⁵ Article 51 UN Charter.

⁵⁶ J. D. Huntsman, ‘Just Strike: A Commander's Guide to Preemptive Self-Defense.’ [2018] Naval Postgraduate School Monterey United States, P4.

under the LOAC but will certainly not be justifiable under the IHRL, as pre-emptive strikes do not envisage arrest and trial of suspected terrorists. In the same way, a last resort killing may be justifiable under IHRL. It is also possible that the targeted killing does not meet the conditions of either the LOAC and IHRL regimes as will be concluded in this chapter.

Arguably, the LOAC and the IHRL are not interoperable, although several scholars suggest that a 'mixed model' should be formed in which they should jointly be made to regulate terroristic conflicts.⁵⁷ An appeal to both laws to justify targeted killing cannot stand. International law is planned in such a way that it does not allow for abuse in the application of force. This defines state and individual rights and limits to use force. The liberal approach to pre-emptively use force under the LOAC is curbed by a restriction on who is permitted to apply such force, against which such force is applicable and the circumstances in which force can be applied. Furthermore, the permission to use force under the IHRL is subject to judicial inquiry and verdict. This is why the LOAC was designed for the purpose of regulating warfare and the IHRL is appropriate for regulating peacetime.

Regardless of the setting (warfare or peacetime) any individual or nation that claims to have used force under Article 51 of the UN Charter must be seen to have complied with the restriction on the circumstances in which such force is applicable. At any rate, between the two conflict regulatory regimes, the LOAC is the main contender. This is because although there are very rigid differences in applicability of both regimes, terroristic conflicts have become so complex that the differences between them are difficult to observe in practice. In addition, the gravity of terroristic threats may render the IHRL impracticable; in fact it will render all targeted killing

⁵⁷ D.Kretzmer, 'Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Defence?' [2005] 16 (2) EJIL. Pp 172, 174, 186, 201 &211.

cases illegal. This is why this thesis argues in favour of an amendment to the LOAC to solely regulate terrorism and targeted killing. Since it is not illegal for combatants to kill other combatants during armed conflict, targeted killing will not be outrightly dismissed as illegal. Instead, a lawful or unlawful case of targeted killings will depend on the circumstances in which they are carried out. Notwithstanding, the competence of both regimes are described and analyzed below, starting with the LOAC.

1.2.1. The LOAC

The LOAC is flexible, recognising the need to launch pre-emptive strikes in response to anticipated attacks. Firstly, as far as the LOAC is concerned, to the extent that individuals are enemy combatants and in the event of armed conflict, lethal force can legally be applied.⁵⁸ In particular, the LOAC emphasises that the protection of civilians is paramount. The latter must not be the object of deliberate attacks and should be treated humanely if they ever have an encounter with enemy combatants.⁵⁹ In fact, the laws regulating armed conflict regard the launching of indiscriminate attacks against civilian populations as a grave breach.⁶⁰ Combatants are under serious obligation to distinguish civilians when targeting.⁶¹ A civilian may be targeted and killed only for such time as the civilian “directly participates in hostilities.”⁶²

⁵⁸ Art. 43 (2) AP1 GC1949 defines combatants as-Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities

⁵⁹ Art. 51(3) A P I 1949.

⁶⁰ Art. 85(3) (b) 1977 Ad. Protocol 1; Article 50 AP1, GC 1949 -Definition of civilians and civilian population - A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

⁶¹ Art. 48 AP 1, GC 1977: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between ... civilian objects and military objectives”

⁶² Common Article 3, Additional Protocol 1, Geneva Conventions;

<https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm#a1> [Accessed on 11/07/16]

The notion of direct participation in hostilities evolves from the phrase “taking no active part in the hostilities” used in the common article 3 of the Geneva Convention I-IV. Although the English editions of the Geneva conventions and additional protocols use the words “active” and “direct”, interchangeably, the consistent use of the phrase *participant directement* in the equally accurate French text demonstrate that the terms “direct” and “active” refer to the same quality and degree of individual participation in hostilities.⁶³

This general principle embedded in the Common Article 3 to the fourth Geneva Convention (the laws of war) provides that civilians must not be targeted during armed conflict, except for “...such a time that they are *found* to be directly participating in hostilities.”(DPH)⁶⁴ Civilians are defined by the ICRC as all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.⁶⁵ ICRC guidance on the conduct of hostilities defines both civilians and the act of DPH thus:

‘For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).’⁶⁶

Under the LOAC, individual conduct that constitutes part of the hostilities is described as ‘direct participation,’ regardless of whether the individual is a member of the armed forces or a

⁶³ Article 3 Geneva Convention I-IV; Articles 51 [3] AP I; 43 [2] AP I; 67 [1] (e) AP I and 13 [3] AP II.

⁶⁴ GP 1, Art. 48, 52(2)

⁶⁵ *levée en masse* was the policy of forced mass military conscription of all able-bodied, unmarried men between the ages of 18 and 25 adopted in the aftermath of the French Revolution of 1789.

⁶⁶ N. Melzer, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities.’ Available at: <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> at P16, [Accessed on 26/11/19]

civilian.⁶⁷ For example, if harm is caused by killing civilians and it is related to the conflict, it constitutes direct participation.⁶⁸ Conversely, it does not constitute direct participation if a civilian definitely resigns and desists from such military activity. For example, the handing over of weapons of warfare is seen as an expression of non-participation, or by a long period of non-participation.⁶⁹ In acknowledgement of the fact that direct participation implies involvement in physical attack, the ICRC has proffered a three part test for active participation.⁷⁰ It refers to specific acts, carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. In order to qualify as direct participation in hostilities, the specific act must meet the following criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm).
2. There must be a direct causal link between the act and the harm likely to result, either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus). Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act. Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a

⁶⁷ Articles 43 [2] AP I; 51 [3] API; 67 [1] (e) AP I; 13 [3] AP II.

⁶⁸ The ICRC in Rule 47, Customary IHL Guidelines suggest that persons who significantly surrender their weapons should be regarded as *hors de combat*. Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter15_rule47 [Accessed on 23/11/19]

⁶⁹ Ibid

⁷⁰ N. Melzer, 'Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities.' [2009] 42 NYUJ Int'l L. & Pol. P 833.

non-state party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume continuous combat function.⁷¹

In order to make it easier to comply with this principle of distinction, traditional warfare is usually restricted to defined battle zones and only combatants who are parties to the conflict are deployed to the zones.⁷² Combatants are also under obligation to wear uniforms, tags or emblems that make it easy to identify the army they represent and differentiate them from civilians.⁷³ This enables combatants to use lethal force against enemy combatants with little concern about grievously harming civilian targets.⁷⁴

Traditionally, wars were also fought under specified guidelines that were clear and understood by all parties (combatants) to the conflict. There were identified battle-zones and ideally, targeting during warfare was proximal and anticipated.⁷⁵ The resolutions of warfare were usually also anticipated.⁷⁶ These traditional norms were inspired by the just war principles.⁷⁷ The just war theory (*jus bellum iustum*) which formalizes the moral justification for war, primarily seeks to answer two questions: whether or not the decision to go to war is morally justifiable (*jus ad bellum*) and whether combatant conduct during warfare is moral and complies with the Distinction, Proportionality and Military Necessity targeting criteria (*jus in bello*).⁷⁸ There is a third criterion— *jus post bellum* – which deals with justice and regulates post conflict

⁷¹ Ibid

⁷² Art. 58 AP 1, GC, 1977 - states that the parties to the conflict shall, to the maximum extent feasible “avoid locating military objectives within or near densely populated areas.”

⁷³ Article 44, AP 1, GC 1949.

⁷⁴ D. Statman, ‘Can Just War Theory Justify Targeted Killing?’ Three Possible Models in C. Finkelstein, ‘Targeted Killings: Law and Morality in an Asymmetrical World.’ [1st Ed. OUP 2012] P90.

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ T. Winright, ‘Why I Shall Continue to Use and Teach Just War Theory’ [2018]12 (1) Expositions P143.

⁷⁸ M. Watkins, *et al*, ‘A fundamental asymmetry in judgments of soldiers at war.’ [2019] *Journal of Experimental Psychology: General*. P2.

relationships. In theory, declaring war against an enemy at the first instance is justified by *jus ad bellum* considerations.⁷⁹

Any consequent application of force to that enemy is legally justifiable whether or not the war itself is justified: all that is necessary is that a state of armed conflict exists, and the targeted individual is a member of, or directly and actively contributes to the military threat posed by the enemy.⁸⁰ Therefore, it is not the conduct of the targeted individual that makes him a permissible target, rather his status as a member of the enemy force. Under this war model, enemy combatants are targeted only by virtue of their 'status'.⁸¹ Whether by rifle fire or missile strike, a person is a justifiable target as long as they are wearing a recognisable emblem or uniform and/or operating under a command structure of an enemy force.⁸² Even then, when combatants are targeted in armed conflict, it is not necessary to justify the application of force on a case-by-case basis.⁸³

War crimes are perversions of legitimate and accepted conduct in warfare.⁸⁴ It is a war crime to launch an attack with intent to cause incidental loss of life, injury to civilians, damage to civilian objects or extensive and serious damage to the natural environment that is evidently excessive in relation to overall military advantage anticipated.⁸⁵ Traditionally, the death of civilians during armed conflict does not in itself constitute a war crime, no matter how grave and unfortunate. However, a war crime occurs when there is an intentional attack directed against civilians (distinction principle)⁸⁶ or an attack is launched against a military objective in the knowledge that incidental civilian injuries will be clearly excessive in relation to the anticipated military

⁷⁹ C. Kutz, 'On War and Democracy.' [Princeton University Press, 2016] Pp 11-12.

⁸⁰ Winright Supra P148.

⁸¹ G. Corn, 'Mixing Apples and Hand Grenades: The Legal Limit of Applying Human rights to Armed Conflict.' [2010] International Humanitarian Legal Studies, P30.

⁸² Ibid

⁸³ N, Melzer, 'Targeted Killing in International Law.' [1st OUP 2008] P439.

⁸⁴ GC I: Article 50; GC II: Article 51; GC III: Article 130; GC IV: Article 147.

⁸⁵ AP 1, GC 1949, and relating to the Protection of Victims of International Armed Conflicts AP I 1977.

⁸⁶ Article 8(2)(b)(i) AP 1, GC [1977].

advantage sought (principle of proportionality).⁸⁷ The principle of necessity requires that attacks can be launched only if they are helpful in the military defeat of the enemy; any attack must be within the parameters of a military objective and the harm caused to civilians or civilian properties must be proportional and not excessive in relation to the concrete and direct military advantage anticipated.⁸⁸

These are applicable standards whether or not the armed conflict is between states (an international armed conflict) or between a state and recognisable political groups (non-international armed conflict).⁸⁹ The laws of armed conflict obligate states to investigate war crimes allegedly committed by their nationals or armed forces, on their territory, or over which they have jurisdiction, and if appropriate, prosecute the suspects.⁹⁰ The state must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.⁹¹

The Rome Statute of the International Criminal Court (ICC) established four core international crimes: genocide, crimes against humanity, war crimes and the crime of aggression.⁹² Thus, the ICC is responsible for investigating war crimes but only when and if an individual state is unable to or unwilling to do so themselves.⁹³ The ICC has jurisdiction over crimes committed in the territory of a state party or if they are committed by a national of a state party.⁹⁴ This court may

⁸⁷ (Article 8(2)(b)(iv). AP 1, GC (1977).

⁸⁸ Article 52 of Additional Protocol 1 to the Geneva Conventions provides a widely accepted definition of military objectives: 'In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'

⁸⁹ Ibid

⁹⁰ H. Van der Wilt, 'War crimes and the requirement of a nexus with an armed conflict.' [2012] 10 JICJ P 11, 13.

⁹¹ Rule 158, Customary IHL https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 (Accessed on 12/05/2020).

⁹² Articles 6-8, Rome Statute of International Criminal Court, 1998.

⁹³ Article. 8 ibid

⁹⁴ Article 14 ibid

also have the jurisdiction to try offences of aggression that are permitted by the United Nations Security Council (UNSC).⁹⁵

Both article 2 (4) of the UN Charter which prohibits states from applying force in the territory of other states, except when exercising their inherent right of self-defence, and Article 51 which prescribes the use of force in self-defence derive their principles from the just war theory.⁹⁶ Under this just war theory, the laws of war standards laid out in the body of the Geneva Conventions and in customary international law, are derived and established to limit unnecessary violence and suffering in war to the furthest extent possible.⁹⁷ It is under this law of war paradigm that enemy combatants can be targeted and killed without recourse to any 'due process. However, targeting enemy combatants is permitted only during warfare and can only be conducted by the warring parties.⁹⁸ It is important that targeting conforms to strict compliance with the three LOAC principles of distinction and proportionality.⁹⁹ Enemy combatants can be targeted whether or not they are dangerous, armed or asleep. However, combatants who surrender their weapons at discretion indicate an unwillingness to continue carrying out hostilities and therefore must not be targeted.¹⁰⁰ Hurting or killing a combatant who has laid

⁹⁵ Article 15 *ibid*

⁹⁶ C. Guthrie, *et al*, 'The Structure of the Tradition Just War: The Just War Tradition: Ethics in Modern Warfare.' [United Kingdom: Bloomsbury Publishing 2007] P11.

⁹⁷(4 treaties and 3 protocols)The Geneva convention 1949: Geneva Convention (I) on the Wounded and Sick in Armed Forces in the Field 1949; Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea, 1949; Geneva Convention (III) on Prisoners of War, 1949; Geneva Convention (IV) on Civilians, 1949; Additional Protocol (I) to the Geneva Conventions, Additional Protocols (I) (II) and (III) to the Geneva Conventions, 1977.

⁹⁸ *Ibid*

⁹⁹ AP I, Article 51(3), GC(1977): The principle of distinction is a fundamental principle of international humanitarian law which provides that parties to an armed conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives. This implies that indiscriminate attacks and the use of indiscriminate means and methods of warfare are prohibited; The principle of proportionality prohibits attacks against military objectives which are "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". In other words, the principle of proportionality seeks to limit damage caused by military operations by requiring that the effects of the means and methods of warfare used must not be disproportionate to the military advantage sought. Definitions available at: <https://casebook.icrc.org/glossary/fundamental-principles-ihl> (Accessed on 12/05/2020).

¹⁰⁰ Rule 47, International Committee of the Red Cross (ICRC) Customary International Law; Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule47 [Accessed on 12/02/18]

down his arms or having surrendered, no longer has a means of defence is regarded as a war crime.¹⁰¹ In addition, the killing must be militarily necessary; the use of force should be proportionate to prevent mistakes and minimize harm to civilians.¹⁰² As prescribed by the LOAC, a combatant surrenders as an indication of the desire to refrain from combat.¹⁰³ Attacks are also prohibited against those placed *hors de combat* by sickness, injury, detention or any other cause.¹⁰⁴

As gleaned from the description of the LOAC above, military targets are targetable simply because they are combatants and at war against those targeting them. In contrast, terrorists have no military status as they do not operate on behalf of any state. Since terrorists do not fit the description of combatants as recognised under the LOAC, they are by default to be regarded as civilians subject to law enforcement of the IHRL. Persons with civilian status can be targeted only and when they are found directly participating in hostilities.¹⁰⁵

As it stands, the US and Israel do not consider the implication of targeting terrorists who have civilian status. They also target terrorists at any time and on any occasion; whether or not the targets are found participating in hostilities at the time they are targeted. This counterterrorism approach comes across as a form of punishment for terrorist past actions, thereby disregarding the principle of distinction under the LOAC. Thus, it is difficult to conclude that targeted killing is LOAC compliant. However, in order to award the states the benefit of doubt, chapter two and three will critically explore the reasons why targeted killing is used despite its non conformity with LOAC. Even less applicable is the IHRL (law enforcement) regime to terroristic conflicts in general and targeted killing in particular.

¹⁰¹ AP 1, GC 1949, and relating to the Protection of Victims of International Armed Conflicts . 8 June 1977.

¹⁰² Article 147, IV GC (1949).

¹⁰³ Ibid

¹⁰⁴ Art. 41(1) (2a-c) AP1, GC, 1949; M. N. Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"' [2013] 24 (3) European Journal of International Law P858.

¹⁰⁵ Common Article 3, GV, I- IV.

1.2.1 1.2.2. Law enforcement of International human rights laws (IHRL)

The IHRL is not as flexible as the LOAC in regard the manner in which lethal force can be applied. Classification of targeted killings as ‘extra-judicial executions’, rather than war crimes or grave breaches of international humanitarian law infers that the applicable legal regime is a state’s criminal code which derives its standards from international human rights laws and norms.¹⁰⁶ Under law enforcement of IHRL, any target is suspected of a kind of legal guilt regarded as a criminal act.¹⁰⁷ The state is obligated to respect and guarantee the rights of every person to life and due process of law.¹⁰⁸ Individuals outside the context of armed conflict must be presumed innocent, awarded due process of fair trial and punished only when proved guilty.¹⁰⁹ The Universal Declaration of Human Rights (UDHR) lays out specific criteria that guarantee individual human rights.¹¹⁰ In particular, the protection against arbitrary deprivation of human life is provided for in Article 2(4) of the UN Charter and firmly established in the UDHR.¹¹¹ A similar provision included in the International Covenant on Civil and Political Rights (ICCPR) prohibits “arbitrary” and punitive killing of individuals.¹¹² These human rights laws are also present in the constitutions or bill of rights of some states.¹¹³

Any deliberate use of lethal force by state authorities that is not justified under provisions on the right to life will by definition be regarded as an ‘extra-judicial execution.’¹¹⁴ Thus, a state is

¹⁰⁶ D. Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extrajudicial Executions or Legitimate Means of Defence?’ [2005] 16 EJIL, P176.

¹⁰⁷ C. Finkelstein, ‘Targeted Killings: Law and Morality in an Asymmetrical World.’ [OUP 2013] P136

¹⁰⁸ Article 10, UDHR 1949

¹⁰⁹ Article 10 & 11(1) UDHR 1949

¹¹⁰ Article 1, UDHR1949 <http://www.un.org/en/universal-declaration-human-rights/index.html>; Article 6 ICCPR (UN 1966) <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; Article 1 ECHR (Council of Europe) 1950; (Links accessed on 12/05/2020).

¹¹¹ Article 3, UDHR, 1948

¹¹² Art. 6(1) ICCPR. Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel, 15, U.N. Doc. (discussing the committee’s concerns with targeted killings). [2003] CCPR/CO/78/ISR.

¹¹³ See for example the states under study in this thesis: the 14th Amendment, U.S Constitution 1789; (Israel has no written constitution. Various attempts to draft the formal document since 1948 have fallen short of the mark, and instead Israel has evolved a system of basic laws and rights, which enjoy semi-constitutional status). This clarification and part of the Constitution of Israel are contained in the introductory paragraph of this link: https://knesset.gov.il/constitution/ConstP18_eng.htm [Assessed on 27/11/19].

¹¹⁴ Amnesty International, Israel and the Occupied Territories: Israel Must End its Policy of Assassinations, 4 July 2003 AI Index: MDE 15/056/2003 Amnesty International report on the Israeli policy, defined an extrajudicial execution as follows: ‘[a]n ‘extrajudicial execution is an unlawful and deliberate killing carried out by order of a

prohibited from killing individuals without following judicial due process of fair hearing, irrespective of whatever crime he or she is alleged to have committed.¹¹⁵ Due process under law enforcement serves as a legal guide to determine whether or not our moral or legal accusations are warranted. Only after this can justifiable action be taken against culprits in the form of punishments.¹¹⁶ Therefore, failure to make due process available to a suspect (i.e., simply killing them) cannot stand.¹¹⁷

Killing must not be the sole purpose of an operation under a law enforcement paradigm. Thus the intentional and premeditative nature of targeted killing strategy is a flagrant disregard of the requirements under law enforcement. Even when a state or an individual relies on Article 51 of the UN Charter that allows them to use force against a person or an individual in self-defence, it is with strict limitations.¹¹⁸ A degree of proximal imminence in the approaching danger must be anticipated before an attack in self-defence can be launched.¹¹⁹ The imminence of the approaching danger must leave no room for deliberations upon alternative means of self-defence and such a response must be commensurate to the impending attack.¹²⁰ This is in contrast to a more liberal exercise of Article 51 under an armed conflict situation, in allowing a combatant to pre-emptively launch lethal attacks against other combatants during armed conflict attacks. During armed conflict attacks, a state can launch an offensive on a potential enemy combatant

government or with its acquiescence. Extrajudicial killings are killings which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice. These killings take place outside any judicial framework.' To be found in: D. Kretzmer, 'Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence? [2005] 16 (2) European Journal of International Law, P176 fn 27.

¹¹⁵Article 11, UDHR 1948

¹¹⁶P. Sikkema, 'Targeted Killing: Modern Solution or Modern Problem?' [2014] ScholarWorks @ Georgia State University, Philosophy Theses Department, P 2.

¹¹⁷ Ibid

¹¹⁸ Article 51, UN Charter; D. Sloan, 'The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Laws of War.' [2010] 34 Yale International Law Review, Pp 47 & 69.

¹¹⁹ S.D. MacDonald, 'The Lawful Use of Targeted Killings in Contemporary International Humanitarian Law.' [2011] 2 (2) Journal of Terrorism Research, P138.

¹²⁰ *Nicaragua v. USA* [1986] ICJ Rep 94 at para. 176 in M. Wood, 'The Caroline Incident-1837' in T. Ruys, *et al*, *The Use of Force in International Law: A Case Based Approach* [2018] OUP P5.

before that enemy combatant has had the chance to carry out an attack.¹²¹ In essence, under both regimes, the lawfulness of the use of force in self-defence against anticipated attacks depends, inter alia on necessity and proportionality.¹²²

1.2.3. The Caroline Test and Article 51 of the UN Charter

After the Second World War, delegates from fifty one states drafted the UN Charter, their main objective: to protect succeeding generations from the afflictions of war.¹²³ As, already noted, this charter established a strict principle under Article 2(4) that obliged states to 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, except the use of force is in exercise of the right under Article 51 UN Charter against anticipated armed attack as described above.

The anticipatory self-defence doctrine was first established under the *oft-cited Caroline Case*.¹²⁴ In the early nineteenth century, an anti-British insurrection took place in Canada which was at the time still a British colony. The US and Great Britain were not in conflict at the time, however, the *Caroline, a ship owned by US nationals* was allegedly providing assistance to the rebels.¹²⁵ At dusk on 29th December 1837, while the ship was moored on the US side of the Niagara River, some British soldiers crossed the river, boarded the ship, killed several U.S. nationals; set fire to the ship, and sent the vessel over Niagara Falls. The British claimed that they were acting in self-defence, but after some deliberations with the American Secretary of

¹²¹ P. Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution Study on Targeted Killings [2006] 33, U.N. Doc. A/HRC/14/24/Add 6.

¹²² D. Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus ad-bellum.' [2013] 24 (1) EJIL P239.

¹²³ The Preamble, UN Charter, 1945.

¹²⁴ T. Mori, 'Origins of the Rights of Self-Defence in International Law: From the Caroline Incident to the United Nations Charter.' [2019] 36 (1) The Austrian Year Book of International Law P 245; Moore, Digest, II, 24-30, 409-14; VI, 261-62; VII, 919-20.

¹²⁵ Ibid

State Daniel Webster, (as he then was) the British government apologised for their actions.¹²⁶ This led to the 1842 Webster-Ashburton Treaty with the British North American colonies.¹²⁷ Nevertheless, over the course of diplomatic communications between the US and Britain, two principal criteria for permissible self-defence—including pre-emptive self-defence—were articulated:

1. The use of force must be necessary because the threat is imminent and, thus, pursuing peaceful alternatives is not an option (necessity);¹²⁸
2. The response must be proportionate to the threat (proportionality).¹²⁹

The terms ‘anticipatory self-defence’, ‘pre-emptive self-defence’ and ‘pre-emption’ traditionally refer to the right of a state to strike first in self-defence when faced with imminent attack.¹³⁰

As Webster explained in a letter to Lord Ashburton, who, at the time, was a special British representative to Washington; ‘in order for Britain’s claim of self-defence to succeed it must be demonstrated that the necessity of self-defence must be instant, overwhelming, and leaving no choice of means, and no moment of deliberation.’¹³¹ This has come to be referred to as ‘instant and overwhelming necessity’ or the ‘imminent threat doctrine’. In other words, the exercise of such right of self-defence from imminent attack was a ‘last resort.’¹³² Killings in self-defence are considered necessary under international law only if there are no other non-lethal means of preventing the threat to human lives. It was upon this concept that the Caroline test was formed as a prerequisite for exercising the right to strike first in self defence.¹³³

¹²⁶ Mori Supra P 248

¹²⁷ Available at: http://www.ehow.com/about_6382299_definition-imminent-threat.html [accessed on 28/11/15]

¹²⁸ British-American Diplomacy. ‘The Caroline Case’ Available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2 [Accessed on 19/02/18]; T. B. Earle, ‘Transatlantic Diplomacy, North Atlantic Environments, and the Fisheries Dispute of 1852.’ [2018] 23 (4) Environmental History, P775.

¹²⁹ Ibid

¹³⁰ M.C. Waxman, ‘The Caroline Affair in the Evolving International Law of Self-Defense.’ (2018), The LawFare Book Review, P2.

¹³¹ Ibid

¹³² B. G. Chow, ‘Space Arms Control: A Hybrid Approach.’ [2018] 12(2) Strategic Studies Quarterly, P107.

¹³³ Ibid

This test came to be accepted as part of customary international law.¹³⁴ The notion of self-defence was acknowledged prior to this, but it was the test that established specific criteria by which it could be determined whether there had been a legitimate exercise of the right of self-defence from imminent attack.¹³⁵ Thus, if an individual or a state can demonstrate necessity- that the opposing party was about to engage in an armed attack- and act proportionately, premeditated self-defence in the form of a counter attack would be deemed lawful.¹³⁶ The problems with establishing imminent threat, in practice, are a subject for debate in chapter two of this thesis. It seems though that the recognition of the problems has led the UNSC to approve of targeted killings.

In the exercise of the right of self-defence under article 51 of the UN Charter, the Resolutions 1368 and 1373 permit states to take necessary steps towards preventing future terrorist attacks.¹³⁷ The UNSC has ultimate responsibility on matters of international peace and security and has to be informed of any measures taken in self-defence; according to Article 24 of the UN Charter, the Security Council is the main body responsible for the maintenance of international peace and security¹³⁸. The UN charter permits both application of force authorized by the Security Council and force exercised in self-defence.¹³⁹ Under Article 39, the Council is empowered to determine acts that constitute a “threat to peace, breach of peace, or an act of aggression”. If the Security Council so determines, it can authorize the use of force against the

¹³⁴ Chow Supra P 118.

¹³⁵ J. Brunnée, *et al*, ‘Self-Defence Against Non-State Actors: Are Powerful States Willing But Unable To Change International Law?’ [2018] 67(2) International & Comparative Law Quarterly, P265.

¹³⁶ Ibid

¹³⁷ UN doc. S/RES/1368 [2001], SC Res. 1368 [2001] of 12 September 2001; UN doc. S/RES/1373 (2001), SC Res. 1373 (2001) of 28 September 2003; Also available at: <https://www.un.org/press/en/2001/sc7158.doc.htm> [accessed on 30/06/18]; Article 42 and 51, Charter of the UN

¹³⁸ Article 39, 40 UN Charter

¹³⁹ Ibid

offending state under Article 42.¹⁴⁰ Thus, the UNSC reserves the right to limit use of force in self-defence.

One fact worthy of note is that the UNSC has not prohibited targeted killing in general and the use of drones in particular. This suggests that international law approves of targeted killing as a necessary counter-terrorism strategy and drones as permissible weapons for carrying out the killings. Whilst this implied permission to use targeted killing raises contention in the literature, it is argued that the absence of discussions on terrorism related conflicts in the laws that regulate the use of force is what causes debates. Although the UNSC perceives that the new threat in terrorism may require an active counter terrorism approach like targeted killings, legislators are slow to endorse targeted killings. The reason for this will be explored in the hermeneutic discussions gleaned from several schools of thought in chapter three of this thesis.

The US has continued to launch attacks aimed at eliminating suspected terrorists since 2004.¹⁴¹ However, terrorism continues to such an extent that it casts doubt on the effectiveness of targeted killing counterterrorism strategy. On the one hand, it is strongly recommended in this thesis that targeted killing be seen as a practical counterterrorism strategy albeit unlawful. On the other hand, it is the argument that targeted killing is effective that remains debatable, giving rise to a thorough evaluation of the effectiveness of targeted killing in chapter five of this thesis.

1.3 Overview of the Literature: (Theoretical Underpinnings and Original Contribution to Research Practice)

The literature is replete with research assessing the standards for judging targeted killings and determining the guilt of alleged terrorists.¹⁴² Accordingly, there has been a substantial amount

¹⁴⁰ Article 39, UN Charter

¹⁴¹ J. Gruenewald, *et al*, 'American jihadi terrorism: A comparison of homicides and unsuccessful plots.' [2019] 31(3) *Terrorism and Political Violence*, P516.

¹⁴² C. Finkelstein, 'Targeted Killings: Law and Morality in an Asymmetrical World.' [1st Ed. OUP 2012] Pp135, 156, 183, 223, 253, 433.

of literature on targeted killing by Israel and the US, chronicling the major developments in the targeting process.¹⁴³ The legality of targeted killings as well as permissible means for engaging in armed conflict has been the subject of several texts and articles by academics and journalists.¹⁴⁴

The analysis of the distinctive nature of Israeli and US targeted killing has gradually developed since Israel invoked the law of war against terror in 2002, making targeted killing the country's main anti-terrorism strategy. Commentaries by Special Rapporteurs to the International Committee of the Red Cross (ICRC) and the Media form a major part of the literature on the legality of targeted killings.¹⁴⁵ This class of literature is mainly expository and seeks to draw attention at national and global levels, to systemic and other violations of the principles of war and human rights. On the other side of the spectrum, academic literature offers critiques, opinions and recommendations for international law reforms. Contributions here have also been varied. Some of the literature has focused on determining the legality of the killing of those who have been targeted without resort to due process, for example, the targeted killing of Osama bin-Laden and Anwar Al-Awlaki.¹⁴⁶ Other writings have analysed the impact that targeted killing has on innocent bystanders.¹⁴⁷ However, only a few have focussed on assessing the effectiveness of targeted killing. It is the scarcity in this latter group that this thesis is most concerned with.

Generally, there is a deficit of research in the literature that determines the effectiveness of targeted killing. There is also little empirical analysis of the effectiveness of targeted killing.

¹⁴³ S. R. David, 'Israel's Policy of Targeted Killing.' [2003] 17(1) *Ethics & International Affairs* P111; A. Kober, 'Targeted Killing During the Second Intifada: The Quest for Effectiveness.' [2007] 27 (1) *Journal of Conflict Studies*, P1; V. M. Vlastic, 'Assassination & Targeted Killing-A Historical and Post-Bin Laden Legal Analysis.' [2011] 43 *Geo. J. Int'l L.* P259.

¹⁴⁴ C. Finkelstein *Supra*

¹⁴⁵ <https://casebook.icrc.org/glossary/targeted-killings>; <http://www.un.org/en/globalissues/terrorism/> [Both Accessed on 12/01/18]

¹⁴⁶ M. Ramsden, 'Targeted killings and international human rights law: the case of Anwar Al-Awlaki.' [2011]16(2) *Journal of Conflict & Security Law*, P385; K. Ambos, et al, 'Has 'Justice Been Done'? The Legality of Bin Laden's Killing Under International Law.' [2012] 45(2) *Israel Law Review*, P341.

¹⁴⁷ G. Blum, *et al*, 'Law and policy of targeted killing.' [2010] 1 *Harv. Nat'l Sec. J.* P145.

Carson's assessment of the effectiveness of targeted killing has focused on clarifying the effectiveness of 'high profile' targeted killing of notorious leaders of terrorist organisations.¹⁴⁸ Falk who used a non-specific game theory method to derive empirical data only assessed the effectiveness of targeted killing in relation to the cost borne during the targeting processes. His assessment considered only the impact of Israel's targeted killing campaign against Hamas Palestinian group but did not consider the targeted killing drone campaign by the US against terrorists in Pakistan.¹⁴⁹ Such a non-holistic analytical approach to research is arguably bound to yield inaccurate results on the general effectiveness of targeted killing. Giving the vastness in the literature on the subject matter, it is perhaps difficult if not impossible for one research to cover all areas. However, this thesis identifies a gap in the literature on the effectiveness of targeted killing in relation to the main goal for which it is used, to generally eliminate the threats posed by terrorists. This thesis attempts to fill this gap using a systematic and mathematical *Peace War* game theory method. This thesis will be the first in the literature to use a combination of the doctrinal, hermeneutical and game theory approaches to arrive at the conclusions to be gained at the end of this research.

1.5. Research Problems and Methodologies.

In the course of assessing the standards for the justification and effectiveness of targeted killings under international law, the two paradigms of international law that regulate the application of force will be assessed. This would be followed by assessing the liberal, realist, and pragmatic perspectives of targeted killings. Lastly, recommendations of empirical research-informed reforms to counterterrorism approaches and existing legislation will be made.

¹⁴⁸ J. V. Carson, 'Assessing the Effectiveness of High-Profile Targeted Killings in the "War on Terror"'. [2017] 16 (1) 'Criminology & Public Policy.' P191.

¹⁴⁹ O. Falk Supra P1.

1.5.1. Methodologies

This thesis adopts a variety of methodologies to test the viability of targeted killing. The doctrinal, hermeneutical and socio-legal methodologies, detailed in chapter 4 of this thesis, are used to study the main and ancillary effects of targeted killing of suspected terrorists. Relevant statistics are also used to determine whether the common defences and justifications given for targeted attacks are reasonable, in view of the deaths and harm caused. Through the doctrinal analysis, the rationale and validity of the defences used to justify targeted killings will be explored against the benchmark of human rights principles on the one hand and warfare principles on the other.

Through the hermeneutical approach, this thesis aims to explore the ideological/philosophical background upon which terrorism and targeted killings are predicated. It aims to confirm the reasons why, of all other less legally controversial counter-terrorism approaches, targeted killing is considered to be practically effective in dealing with terrorism.

Through the socio-legal game theory approach, the concept of a more effective strategy than targeted killing will be explored. This aims at a compromise agreement that balances the rights of the perpetrators and victims of targeted killings. Furthermore, the thesis aims to determine whether targeted killing practice is effective in relation to its goal of eliminating terrorism. It is hoped to create research-informed proposals over targeting practice, advocate for law reforms and propose recommendations that will adequately address contemporary conflict.

1.6. Summary of Chapters:

1.6.1 Chapter one:

Chapter one introduces the subject matters explored in the thesis. It gives a brief overview of legal and empirical findings as well as relevant research on the subject matter. It also defines the general terms and terminologies used by authors, news commentators and international

organisations in reference to issues relating to the subject matter. Thereafter, the chapter proceeds to explain how the methodologies adopted in the thesis facilitate the resolution of the research aims. Overall, it explains how the adoption of the Doctrinal, Critical Hermeneutical and Game Theory methodological approaches strengthen theoretical and analytical dimensions of targeted killing vs. terroristic warfare debates. The chapter emphasises how the combined use of the three methodologies enhance a proper evaluation of the implementation of targeted killing. The conclusion of chapter one defends the rationale behind the research.

1.6.2 Chapter two:

Chapter two explores the legal implication for utilizing targeted killing counterterrorism strategy. It highlights the legal uncertainties surrounding the status of terrorists and the justification for targeted killing. It asks and attempts to answer questions on the applicable regime for regulating terroristic conflict, i.e. are terrorists combatants in an armed conflict or civilians only targetable when operational (directly participating in hostilities)? It then identifies the main arguments against the legality of targeted killing under the LOAC and Law enforcement of human rights regimes.

1.6.3 Chapter three:

This chapter shall re-conceptualize the analysis of the justification of terrorism and targeted killings by exploring the literature through a hermeneutical approach. Islamic extremism expressed through acts of terror is an ideology that is imbibed and practised by many perpetrators across the globe. Democracy is the main ingredient of modern governmental rule that terrorists protest against. The collision of both ideologies is the main focus in chapter three.

1.6.4 Chapter four:

This chapter will establish details of the doctrinal, hermeneutical, socio-legal (game theory method) methodologies used for carrying out the research on targeted killing. It will explain how and why the doctrinal and hermeneutical methodologies were used in chapters two and three

respectively and how and why the game theory method will be applied as the main method for carrying out the assessment on the effectiveness of targeted killing in chapter five.

1.6.5 Chapter five:

The interdisciplinary method of game theory which falls under the socio-legal/empirical type approach will be applied in chapter five which is the analysis chapter. This method was devised by the main proponents of game theory, to systematically analyse strategic options faced by parties in conflict in relation to their goals, how they make decisions on what options to use and the responses triggered by the use of those options. What makes game theory analysis different to other theoretical and empirical types of analysis is in its presentation. This method will be used in the analysis chapter for assessing the effectiveness of targeted killing. The game theory method proposes to offer transparency to what is being analyzed. This is mainly because of the format in which the interactions between opponents in a conflict or competition are explicitly written down, tabulated and quantified. This outline proposes to promote objectivity when studying the outcomes of each interaction and may hopefully yield results different from analysis that are merely dependent on intuitive assessments.

1.6.6 Chapter six

This chapter will conclude on the discussions in the thesis by detailing the limitations encountered from using the doctrinal, hermeneutical and socio-legal game theory methodologies in this thesis. It will also explain how each limitation should be addressed. It will do this by distinguishing between the realistic expectations to be gained from using the methodologies and their inadequacies. The chapter will then suggest ways in which future researchers can realise the full potentials of the methodologies. Further, this chapter will conclude the research by summarising the key findings explored. The chapter will also detail the contributions this research seeks to make to the field of research and legislature. The chapter will then discuss the

implications of the research conducted and make recommendations to future researchers of the subject.

1.6.8 Definition of Terms and Terminologies

This thesis will generally regard the modern conflict involving terrorists organisations and states as terroristic, modern or contemporary conflict. Reference to the terms is suggestive of the idea that there is no name given to such conflicts in international law. In addition, the term, the ‘war against terror’ is simply a description of terroristic conflicts, when, for the purpose of analysing an issue, the writer is under the assumption that warfare exists between states and terrorists. Lastly, in chapter two, the term ‘DPH’ will be used to mean those referred to in the LOAC as ‘participants in hostilities’. This may sometimes be used to refer to terrorists when they are found to be directly participating in hostilities.

1.7 Concluding Remarks

This first chapter has introduced the topic of the research— evaluating the effectiveness of targeted killing and the adopted methodologies – Doctrinal, Hermeneutical and Socio-legal approaches to analysing the topic. There is a gap in the current literature pertaining to an empirical approach that assesses the effectiveness of targeted killing in relation to the goal for which the strategy is used. It was clarified that the research would apply the game theory method to analyse the effectiveness of targeted killing, in order to make an original contribution to the literature. The aim is to decide upon better antiterrorism strategies. It would then proceed to recommend practical reform proposals to improve the academic literature and practice.

The chapter further set out the stages of the research and how it intended to both apply and overcome some of the peculiar challenges of the doctrinal, hermeneutical and game theory methodologies. The legal sources to be relied on as well as the challenges and limitations of these sources were stated and explained. Having set out and explained these steps, the research will now proceed to its first stage which is to discuss the issues, dilemmas and current legal interpretations of targeted killing counterterrorism strategy.

CHAPTER TWO:

THE CONFLICT BETWEEN TARGETED KILLING COUNTERTERRORISM STRATEGY AND INTERNATIONAL LAW: A CRITICAL ANALYSIS OF LEGISLATIONS PERMITTING THE USE OF LETHAL FORCE, THROUGH THE METHODOLOGICAL APPROACH OF DOCTRINAL ANALYSIS.

2.1. Introduction

The targeted killing of terrorists like bin Laden and Baghdadi may have evoked more applause than disapproval, simply because of the notoriety of the targets. Regardless, such killings are not void of moral and legal implications. Chapter one has explained the general prescription of permissible use of lethal force as contained in the LOAC and IHRL. It distinguished between the lawful and unlawful use of force. This chapter scrutinises the laws that may be made applicable to targeted killings in order to answer the following questions: Firstly, what law can targeted killing appeal to? Is the so called 'war against terror' a legitimate one? If terroristic conflict must be regarded as an act of war to be regulated by the LOAC, then, is the response of targeted killing a legitimate response under the LOAC? Can combatants lawfully launch lethal attacks against transnational terrorists specifically identified by name? In other words, is it alien to the traditional norms of war for the US or Israel to have a 'kill list' containing the names of terrorists that they have pre-identified with the intention of killing them at a later date?

This chapter clarifies the current legal interpretation of targeted killings, identifying and critically analysing the legislations permitting the use of lethal force. It does this by outlining and putting into context, controversial issues, dilemmas and legal interpretations surrounding targeted killings. It precedes the literature review because it introduces and highlights topical issues, specifically: inchoate and ambiguous provisions of law on terrorism and

counterterrorism strategies that are subjects for philosophical/ideological debate in the literature review.

The first part of this chapter scrutinises the legal basis for targeted killing. It does this by outlining the legal relationship of targeted killing with the LOAC on the one hand and the IHRL on the other. While assessing the implications of targeted killing under the LOAC, a critical analysis of the legal and practical implications of the use of drones by the US is made. Major facts that describe the counterterrorism strategy of targeted killing adopted by US and Israel are referred to. They include summaries of some controversial targeted killings that have occurred in the early 21st century. Although targeted killing as practised by both the US and Israel is generally controversial, even more so is the US use of drone to carry out the killings. Thus, the chapter makes reference to the assorted weapons used by Israel to carry out targeted killings. It considers the compliance of drone technology, the specific strategy used by the US, within the LOAC. The focus of the drone analysis is on the LOAC and not the IHRL because the US claims that it is at war with terrorist organisations, especially al-Qaeda. This hinges on the notion that the targeting of terrorists is a military necessity and the drone mechanism is used as an attempt to comply with the principle of distinction under the LOAC. It then highlights the ambiguities and the absence of conclusive prescriptions on the limits or extent to the use of force under the LOAC. Further, an analysis under the IHRL is made.

It is a straight forward condition that the IHRL requirement of due process must precede every other concept under the IHRL. Thus, it is the concept of self-defence attack under the IHRL that is emphasised and explored in this chapter. The aim of this chapter is to expose

aspects of international law that should determine the legal implications of targeted killings. In the end, the rationale for targeted killing is highlighted. This clarifies why the US and Israel prefer the controversial targeted killing as a counter-terrorism strategy and why they nominate the LOAC to be the regime to regulate it. Deducing the US and Israel's rationale for using targeted killing also serves as a prelude to chapter three, which critically analyses the ideological concepts around targeted killing.

2.2. What laws appeal to Terroristic Conflicts (Terrorism vs. Targeted Killing)?

The unavoidable question arises as to whether terroristic conflicts can be regarded as warfare to be regulated by the LOAC or whether targeted killing counterterrorism strategy is criminal conduct requiring judicial intervention under a state's criminal code that enforces human rights laws. A third consideration is whether terroristic conflicts are simply incompatible with either regime. The nature, status and rights of those involved and gaps in the laws pertaining to terroristic conflicts are observed thus:

2.2.1 LOAC-Conflict

Justifying targeted killing hinges on the applicability of the LOAC paradigm. Making the case for this applicability requires answers to the question whether it is acceptable from a legal point of view to hold that a state can wage war on a non-state organisation.

A literal interpretation of the Geneva Convention suggests that it is not a tradition for countries to be at war with individual non state actors. In suggesting the mechanism for the application of laws of armed conflict, common Article two of the Geneva Conventions states

“The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more “High Contracting Parties” (signatories).¹⁵⁰ The law of war is therefore applicable in a logical sense to international war, that is, an armed conflict involving two or more countries. Article Three extends the laws of war to cases of armed conflict “not of an international character” which occurs “in the territory of one of the High Contracting Parties.”¹⁵¹

The language of this article extends the application of humanitarian norms to conflict beyond the conventional war of country versus country. However, the broadened definition of Article Three remains unclear with regard to its application to certain contemporary forms of armed conflict. At first glance, Articles Two and Three appear to consider all possible forms of conflict: Article Two applies to conflict international in nature, and Article Three applies to conflict not international in nature. However, as Article Two was formulated and has since been interpreted, it does not consider a situation whereby one party is a state and the other is not. Furthermore, Article Three does not apply to all armed conflict that is not international in character.

Unfortunately, terroristic conflicts may fall outside of the scope of either of the two Articles. In the rhetoric regarding the war against terror, it is clear that the US is not at war with a state, but neither is the conflict necessarily restricted by a single national boundary. Terrorist organizations are not concerned with any one particular country, and can easily migrate from country to country to carry out hostilities. There is therefore a regulatory gap in the law unforeseen by 20th Century legislatures. Whether or not the LOAC apply to cross-border military operations against non-state actors is a question that is yet unanswered. Pending a

¹⁵⁰ Article 2, GC (III) Relating to the Treatment of the Prisoners of War (1949).

¹⁵¹ Article 3, GC (III) Relating to the Treatment of the Prisoners of War (1949).

legislation that considers 21st century type of conflicts between state and non state actors, Military operations involving targeted killing will continue to fall out of character with the LOAC.

2.2.2 LOAC –Status

When combatants are targeted during warfare, there is no need to justify the application of force on a case-by-case basis, as is the case under the IHRL. In theory, declaring war against an enemy is justified by *jus ad bellum* considerations. Any subsequent application of force to that enemy is legally justifiable, regardless of whether the war itself is justified: all that is required is that a state of armed conflict exists and that the person targeted is a member of, or directly and significantly contributes to the enemy military threat.¹⁵² Thus, it is not the conduct of the targeted individual that makes him a permissible target, but rather his status as a member of the enemy force; as an enemy combatant.¹⁵³ Therefore, enemy combatants are not individually identified by name or punishable and targeted on account of specific conduct; they are targetable by virtue of their status as military state actors.

In contrast, the premeditated strikes launched against terrorists, following a process of identification of specific targets by name on a kill list, alienates itself from the principles and norms of the LOAC.¹⁵⁴ To start with, the fact that international law or even state laws do not confer combatant status on terrorists suggests that terrorist organisations are not militarily

¹⁵² Article 48, AP, 1977 GC.

¹⁵³ R. C Neil, 'Justified killing in an age of radically asymmetric warfare.' [2018] 25(2) European Journal of International Relations, P410

¹⁵⁴ J. Becker, *et al*, 'Secret 'kill list' Proves a Test of Obama's Principles and Will.' [2012] 29 New York Times P5.

recognised at any level.¹⁵⁵ This may be due to the fact that terrorist organisations like Al-Qaeda or Hamas do not have the political structure that would warrant military recognition.¹⁵⁶ It may also be because terrorist organisations themselves have no interests in conforming to armed conflict rules.¹⁵⁷ At any rate, the only legal option left to the parties at conflict with terrorist groups is to regard them as civilians under the LOAC. This implies that targeted killings against them, in the name of warfare, are unlawful because terrorists have the same ‘civilian immunity’ as civilians.¹⁵⁸ Thus, it is erroneous for the former US President, George Bush to have declared war against these groups of non-state actors with no military status.¹⁵⁹ It is also erroneous for the Israeli government to claim to be at war with Palestinian terrorists of Hamas who are also not state actors.¹⁶⁰ It questions whether Bin Laden, Anwar al- Aulahi Ahmed Farouq, Adam Gadahn and other suspected terrorists targeted were legitimately killed under the LOAC.

2.2.3 LOAC- Rights

As earlier noted, not all civilians have the right to claim immunity from being targeted under the LOAC. Due to frequent civilian participation in hostilities during the Second World War, the laws regulating armed conflict were revised to identify when a civilian becomes a *defacto* combatant.¹⁶¹ The LOAC addressed this by providing a fundamental principle embedded in both Additional Protocols to the Geneva Conventions, by which civilians have immunity

¹⁵⁵ D. Gilbert, ‘Terror by Any Other Name.’ [2019] 31(2) Terrorism and Political Violence, P420.

¹⁵⁶ K. Michael, *et al*, ‘The Dangers of Failing Middle East States.’ [2018] Middle East Quarterly, P4.

¹⁵⁷ S.N. Herman, ‘*Ab (ju) dication*: How Procedure Defeats Civil Liberties in the War on Terror.’ [2017] 50 Suffolk UL Rev. P 79.

¹⁵⁸ Article 57(2)(a) AP I, 1977

¹⁵⁹ N. Chowdhary, *et al*, ‘Global War on Terror: Policies, Propaganda, and Perspectives.’ In The Impact of Global Terrorism on Economic and Political Development: Afro-Asian Perspectives (Emerald Publishing Limited 2019) P83.

¹⁶⁰ Michael Supra P4.

¹⁶¹ S.D. Bachmann, *et al*, ‘Hybrid Threats and Asymmetric Warfare: What to do?’ [2018] Conference Proceeding P18.

from direct attacks from combatants “unless and *for such a time* as they directly take part in hostilities.” (DPH)¹⁶²

The most serious challenge to this is the principle of distinction. Distinction prohibits the intentional killing of civilians by the military, requiring military combatants to avoid civilian casualties to the greatest extent possible. The heart of the issue is that non-uniformed, non-state actors and organizations do not neatly fit into the categories laid out by the Geneva Convention. In the traditional war context in which the Geneva Conventions were written, combatants were easily identified by uniforms or insignia, or carried arms openly in order to distinguish themselves from civilians.¹⁶³ Generally, the DPH principle does not explain what constitutes “direct participation” which would make an individual subject to attack. Secondly, it does not describe the extent of participation required for confirming that a person directly takes part in hostilities. Thirdly, it does not prescribe how long a combatant will have to have been withdrawn from participation before he is considered to revert to civilian status and so not be targetable. Fourthly, the clause ‘for such a time’ which suggests that the civilians in question must be targeted only when they are *found* taking part in hostilities, does not put into perspective the nature and characteristic of terroristic conflicts.

One reason why it is difficult to comply with the principle of distinction is that direct participants in hostilities do not always distinguish themselves from the civilian population.¹⁶⁴ Consequently, innocent civilians are at risk of being targeted. This is

¹⁶² Article 13(3) of AP II, GC

¹⁶³ Article 44 (3), AP I GC

¹⁶⁴ M. Maxwell, R. Meyer, ‘The Innocent Combatant: Preserving Their *Jus In Bello* Protections.’(2017) 5 Penn St. JL & Int'l Aff. P111.

unfortunate because it is under this provision that the determining factor for the legality of targeted killings is predicated. Consequently, there are differences of opinion about whether a state is justified to pursue proven terrorists if they have not taken part in action for some time. Crucially, the phrasing of the DPH principle is ambiguous:

2.2.3.1 ‘Direct’ participation in Hostilities: What acts of hostilities are ‘Direct’?

On its own, the ICRC definitive rationale for a direct participant in hostilities is incomprehensible and hypothetical. One must look to the literature for what scholars opine to be the hidden meaning of the DPH notion. M. N. Schmitt offers that ‘direct’ connotes a convincing level of ‘connectivity’ to hostilities.¹⁶⁵ The ICRC three part test as listed in chapter one, 1.2.1 of this thesis, does not proffer any precise ‘means’ of defining who a direct participant is. The three part test only goes as far as hypothetically describing scenarios that feature the actions, without defining the actions themselves. For example the wording “...direct causal link between the act and the harm likely to result, either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), is arguably a more complex rewording of the phrase ‘direct participation’. The provision also offers no real meaning in terms of classification of the specific activities that constitute direct participation.

Firstly, in terms of the actual acts to consider, what side of the line of distinction between civilian and combatant can we group as terrorist? Subject to the quality and degree of such

¹⁶⁵ M.N. Schmitt, ‘The law of cyber targeting.’ [2015] 68(2) Naval War College Review, P12.

involvement, individual participation in hostilities may be described as “direct” or “indirect”.¹⁶⁶

The LOAC and the ICRC do not proffer a distinctive, prescriptive list containing a spectrum of involvement in hostilities that separate “direct” from “non-direct” participants.

The three part test implies that, “direct participation in hostilities” is determined by ‘conduct’ rather than by ‘status.’ For example, an ‘insurrectionist sniper’ would be regarded as a direct participant rather than his assistant. Therefore, in acknowledgement of the fact that direct participation may include other acts around the physical attack itself, the ICRC has adduced that a penumbra of preparatory and concluding activities may also qualify, as long as the proximate causality criterion is met.¹⁶⁷ In contrast, the test will not regard as targetable, individuals that recruit or finance belligerents, or engage in decision-making about hostile activities. It is easy to conclude that those who carry out the attacks are direct participants in hostilities. However, the problem lies in the assumption that the accomplices of those who carry out attacks are not liable targets simply because they were not visibly seen carrying out hostilities. For instance, if an armed terrorist has just finished operating but was not found doing so, it would be unlawful to target and kill him or her.

This provision fails to draw limits to the distinctive behaviour that suggests indirect participation. The ICRC illustration above suggests that an ‘insurrectionist sniper’ would be regarded as a direct participant, in contrast to his assistant.¹⁶⁸ The ICRC has however concluded that “direct participation” may be construed as “more accentuated and continuous

¹⁶⁶ M.N. Schmitt, ‘The law of cyber targeting.’ [2015] 68(2) *Naval War College Review* P 12.

¹⁶⁷ Ibid

¹⁶⁸ Ibid

combat functions”.¹⁶⁹ A common practice would be the physical conduct of hostilities in civilian territories, including cases of urban conflict, characterized by an intermingling of armed actors and civilians. According to the ICRC, there must be a necessarily close causal connection between the act and the resulting harm.¹⁷⁰ Standards such as “indirect causation of harm” or “materially facilitating harm” are clearly too broad, as they would bring the entire war effort within the concept of direct participation in hostilities and would thus deprive large portions of the civilian population of protection against direct attack.¹⁷¹ Instead, the distinction between direct and indirect participation in hostilities must be interpreted as corresponding to that between direct and indirect causation of harm.

The ICRC exclusion of those who engage in decision making, including ordinary members who do not carry arms as un-targetable, while those who carry out the orders by physically launching attacks are targetable is unrealistic and illogical.¹⁷² The exemption of the former could make the fight against terrorism futile. This is because several acts of terrorism are instigated by those who are not inclined to execute the attacks themselves; but without them such attacks may not be carried out. For example, Osama bin Laden was the leader of the al-Qaeda terrorist organisation which spearheaded the 9/11 attack and inspired other 21st century terrorist attacks. However, he was never reportedly seen to physically carry out acts of hostilities. Those who criticise the killing of Osama-bin Laden consider it illegal under the LOAC because he was not a direct participant in hostilities. Such individuals should be regarded as direct participants in hostilities because they are the main perpetrators of terrorism.

¹⁶⁹ N. Melzer, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law.’ Available at: <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [Accessed on 02/07/18]

¹⁷⁰ N. Melzer Supra (Interpreting the Notion of DPH on behalf of the ICRC) P47

¹⁷¹ M.N. Schmitt, ‘The Interpretive Guidance on the Notion of Direct Participation in Hostilities: a Critical Analysis.’ In M.N. Schmitt, *Essays on Law and War at the Fault Lines*, (TMC Asser Press 2011) P513.

¹⁷² N. Melzer Supra P13

It may be difficult to include all the necessary acts of hostilities on a list of criteria so that important activities are not omitted, leaving the DPH rule open to abuse. This problem could potentially be solved by excluding the word ‘direct’ from the proviso, to infer that any form of activity deliberately done to precipitate attacks on opposing forces should strip the civilian in question of his or her immunity. The challenge with this option is that DPH will have to be established on a case by case basis. It is however a valid consideration pending legislative decisions on what status to confer on terrorists. Even M.N. Schmitt offers a similar option by stating that:

“The approach which best comports with the purposes of humanitarian law is one which assesses the criticality of the act to the direct application of violence against the enemy. For example, working in a munitions factory is distant from the direct application of force, whereas providing tactical intelligence is essential and immediate.”¹⁷³

Schmitt suggests that gray areas should be interpreted liberally, i.e., in favour of finding direct participants.

2.2.3.2 ICRC’s Failure to clarify how long a combatant will have withdrawn from participation in hostilities in order to re-claim civilian status.

According to the ICRC interpretive guidance, the concept of direct participation in hostilities includes the immediate execution stage of a specific act meeting the three criteria of *threshold of harm*, *direct causation* and *belligerent nexus*.¹⁷⁴ Any terrorist who is short of meeting these criteria is presumed to be a civilian who has immunity from targeting under the

¹⁷³ M.N. Schmitt, ‘Direct Participation in Hostilities and 21st Century Armed Conflict.’ [na.2004] P507.

¹⁷⁴ Melzer Supra P16

LOAC. This is interpreted as the process of preparing to execute acts of hostilities, as well as the deployment to and return from the scene where he/she carried out hostilities.¹⁷⁵ However, as exemplified above, apprehending terrorists under these three circumstances may be challenging, as terrorists attacks are covert until instantaneously launched against unsuspecting victims. If unharmed or apprehended, terrorists are inclined to flee the scene immediately following such attacks, making it even harder to identify them in future. Even though the ICRC has clarified that the terrorist is still targetable when returning from the scene of hostilities, it has not made clear the point at which the terrorist regains civilian immunity. If it is to be assumed that immunity is regained immediately he/she gets home, what happens if the terrorist's does not go straight home after carrying out hostilities?

In any case, there is the concern that the above criteria offer terrorists a strategic protective advantage to resume hostilities at will and unannounced. This is what the literature refers to as the '*Revolving Door Theory*.'¹⁷⁶ It is used to explain how the frequently alternating civilian status of terrorists allows them to 'pick up arms' immediately after regaining immunity.¹⁷⁷ This is considered as giving a terrorist an unreasonable repetitive advantage: targetable only when in active conflict and immune immediately afterwards when inactive.¹⁷⁸ This no doubt limits the number of opportunities for a state to exercise the right to use force in combating terrorism. Whilst state combatants attempt to comply with the LOAC principles, terrorists

¹⁷⁵ N. Melzer, 'Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities.' [2009] 42 NYUJ Int'l L. & Pol. P861. (ICRC 2009) P861

¹⁷⁶ B. Boothby, 'And for such time as: the time dimension to direct participation in hostilities.' [2009] 42 NYUJ int'l L. & Pol. P741.

A. T. Keck, 'Not All Civilizations Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare.' [2012] 211 Mil. L. Rev. P115.

¹⁷⁷ M. Luedtke, 'The Expansion of DPH Regarding Emerging Technological Weapons.' [2018] 20 Or. Rev. Int'l L. P503.

¹⁷⁸ K. Watkin, 'Opportunity Lost: Organised Armed Groups and the ICRC.' [2010] 42 Direct Participation in Hostilities Interpretative Guideline, N.Y.U.J. Int'l L& Pol. P641.

randomly attack victims, showing no interest in obeying the principles.¹⁷⁹ The LOAC, or any law for that matter, that allows terrorism and subversives to thrive is arguably bad law¹⁸⁰ that should be abolished.

In addition, temporary abstention from hostilities should not be interpreted as resignation. Inquiries about the legality of bin-Laden's killing was predicated on this argument.¹⁸¹ It was reported that in May 2nd 2011, Osama bin Laden was shot by US Special Forces. He was reported to have been unarmed when shot and killed in front of his family members. However, weapons were later found in the room in which he was killed.¹⁸² The legality of bin-Laden's killing under the LOAC is highly debatable as it appears that he was not given an opportunity to 'surrender' himself, as is typical of a soldier on a battle-field who is incapacitated and no longer has the means to continue the warfare.¹⁸³ Whilst many aspects to the facts of his killing are unclear, one thing that is consistent is that he was not found directly participating in hostilities at the time he was killed.

At face value it may seem that Bin Laden was unlawfully killed, as there is nothing to show that he was found directly participating in hostilities. However, who is to say that he may not have been covertly plotting future attacks (such as directing hostilities, mobilising forces, teaching Islamic extremism or configuring of explosives to be detonated at a future date). The implication under the interpretive guidance of the three part test that motivating actions that encourage terrorism do not constitute direct participation is erroneous. Arguably, such an

¹⁷⁹ C.J. Finlay, 'The Deadly Serious Causes of Legitimate Rebellion: Between the Wrongs of Terrorism and the Crimes of War.' [2018] 12 (2) *Criminal Law and Philosophy* P286.

¹⁸⁰ *Hanford v. Archer* [1842] 4 Hill 271 at 324. (landmark definition of bad law [A law that is oppressive and fosters injustice])

¹⁸¹ J. Paust, 'Permissible Self-Defence Targeting and the Death of Bin Laden.' [2010] 39 *Denv. J. Int'l L. & Pol'y* P569.

¹⁸² B. Schaack, 'The killing of Osama Bin Laden and Anwar Al-Awlaqi: Unchartered Legal Territory.' [2012] Accepted paper 2, Legal Studies Research Series. SCLSC Faculty Publications, P259

¹⁸³ *Supra* note 31; A. Elfstrom, 'The Killing of Osama bin Laden, Was it Lawful?' Doctoral Diss. Orebro University, 2012.

action should be regarded as “direct participation.” Assuming secretly plotting attacks were regarded as direct participation, even the requirement to wait for obvious signs of direct participation is futile. It may even be more difficult to look out for signs of participation because of the distance between the US that has to carry out the observation and Pakistan and Yemen where terrorists reside. It is little wonder why the US prefers the simpler option of premeditatedly determining who should be targeted on what is classed as a ‘kill list’ before deploying the drones to the territories of Pakistan and Yemen to carry out the killings.¹⁸⁴ Even if there is no distance barrier, the covert nature of terrorist plots would make it difficult to ascertain when a terrorist has desisted from participating in hostilities, unless he/she publicly resigns or retires.

Surrendering, handing over or laying down of weapons are convincing ways in which soldiers indicate that they are no longer engaged in warfare, so that he/she can be rendered *hors de combat* under the LOAC.¹⁸⁵ Arguably, this cannot serve as a distinguishing technique in practise: Firstly, considering that terrorists strategise by taking their victims by surprise. When they attack, they are not likely to pick up arms and are therefore not required to lay them down. Assuming that terrorists carried arms openly, laying down weapons that can quickly be picked up again is a less reliable sign of non-participation when compared with handing over weapons once and for all. It is also noteworthy that bombs and explosives are ‘arms’ commonly used by terrorists to carry out hostilities. The laying down of an explosive weapon in this scenario is an act of hostility in itself, rather than a sign that a participant has decided to withdraw from armed conflict. As enunciated above, the terroristic conflict setting is totally different from what the drafters of the LOAC ever anticipated; consequently there are no prescriptions under the LOAC for the above scenarios.

¹⁸⁴ J. Becker, *et al*, ‘Secret ‘kill list’ proves a test of Obama’s principles and will.’ [2012] 29 New York Times, P5.

¹⁸⁵ Article 41, API GC 1977

2.2.3.3 The inconceivable requirement of limiting targeting to only when civilians ‘for such a time’ DPH

If the only legal means of apprehending terrorists is to react when they ‘*for such a time*’¹⁸⁶ *participate in hostilities*, terrorism may thrive for the following reasons:

Unlike traditional warfare where uniformed combatants are faced with enemies in identifiable uniforms, terrorists do not undertake any such obligation. Further, terrorist attacks against civilians are usually spontaneous and unforeseeable (in terms of the location of attacks and victims) they usually appear in conflict scenes without distinguishable emblems.¹⁸⁷

It will be inconceivable to facilitate an effective counter attack against terrorists, who are *de facto* civilians, if they can only be targeted whilst they directly partake in hostilities, i.e, at the scene of the attack. ‘For such a time’ under Article 51 (3) AP1, 1977 presupposes that future acts of terror, including the time and place of intended attacks are preceded by warnings, to allow the victim states mount an effective defence. In the reality of terrorists attack, the opposite is the case; terrorist attacks are not usually preceded by warnings. In fact this is supposedly the reason why spontaneous attacks are one of several strategies terrorists use to disadvantage victim states.¹⁸⁸ With advances in technology, deadly weapons have been disguised to look like harmless implements in order to avoid recognition. In fact, seemingly harmless machines including automobiles are used as weapons of terror, making the terrorist attacks even more unsuspecting. Some terrorists who are not apprehended at the scene of an attack tend to flee and merge into the civilian population to avoid detection. For example, a

¹⁸⁶ Article 51(3) AP I GC 1977

¹⁸⁷ I.J. Udoh, et al, ‘Understanding the Implication of Some Counter-Terrorism (CT) Measures: A Mathematical Perspective.’ [2019] 8 (438) *J Appl Computat Math* P. 2.

¹⁸⁸ R. Fuller, ‘All bark and no bite: rhetoric and reality in the war on terror.’ [2015] 2 *Indon. J. Int'l & Comp. L.* P 1.

Jihadist inspired by ISIS drove a truck into a crowd of people who had gathered on the Nice waterfront to watch the fireworks celebrating Bastille Day. He killed 86 persons and injured several hundred. The driver fled the scene of the attack immediately afterwards.¹⁸⁹

Even after increased US vigilance following the 9/11 attack, several terrorist plots have been successfully executed. It is true that between 2001 and 2019 some small scale terroristic plots were successfully intercepted and averted by U.S intelligence.¹⁹⁰ These include the arrest of a man caught attempting to detonate a shoe bomb on a long distance flight in 2001, the arrest of two men attempting to detonate a bomb in New York and a host of others.¹⁹¹ Lone wolves and leaderless Jihadists still carry out terrorist attacks often resulting in fatalities.¹⁹²

The above examples clearly illustrate terrorists penchant for secretly plotting and openly executing attacks in places least expected, with little chance of apprehension. Usually, it is only after the attacks have occurred that a state can begin to plot counter-attacks.¹⁹³ Not only is the DPH rule ambiguous, it is also ineffective for any state wish to limit its counter-attacks to the illogical dictates of the DPH rule. Should the DPH rule apply to terrorists, it would not be without a liberal interpretation. Thus, the LOAC would need to be revised to either change the status of terrorists from civilian status to a more counter-terror friendly status, or remove the limitations under the DPH scope to allow for a more proactive apprehension of terrorist targets. This would give states more lawful opportunities to exercise their rights to

¹⁸⁹ B.M. Jenkins, et al, 'Smashing into Crowds'—An Analysis of Vehicle Ramming Attacks.' [2019] P11

¹⁹⁰ ["IS blasts kill more than 140 as US, Russia press Syria truce". Agence France-Presse, Yahoo News.](#) 21 February 2016.[Accessed 14/12/19]

¹⁹¹M. Klenka, 'Major incidents that shaped aviation security.' [2019]12 (1-2) Journal of Transportation Security P50.

¹⁹² K. Gaibulloev, et al, 'What we have learned about terrorism since 9/11.' [2019] 57(2) Journal of Economic Literature, P9.

¹⁹³C. Lotrionte, 'Targeted Killings By Drones: A Domestic and International Legal Framework.' [2016] 31 (2) Journal of International and Comparative Law See Pp 33, 35, 42 showing targeted killing cases that occurred, not to intercept terrorist attacks but only 'after' terrorist attacks were carried out.

defend themselves.

2.2.4 LOAC- Mechanism for warfare : US Drone

Nothing in the definition of targeted killing in chapter one suggests that it is only carried out by drones. Indeed Israel employs different weaponry to the US. It is the drone compatibility with the DPH principle and the principle of distinction and the rationale for its use that is being accessed in this paragraph.

The rationale for the U.S use of drone within civilian territories is predicated upon the following reasons: Terrorists do not distinguish themselves from innocent civilians, but, instead, limit their movement to civilian territories;¹⁹⁴ Civilian territories have become the *de facto* battle field in the war against terror; the desperate need for the US to eliminate terrorists motivates its actions, even within civilian territories in Pakistan and Yemen.¹⁹⁵ The US claims that the drone mechanism makes invading the civilian terrain less chaotic, as it limits the rate of stampede by infantry soldiers.¹⁹⁶ Therefore there is a reduction of human costs for the forces using them.¹⁹⁷ The US argues that through the use of drone technology, it is able to gather intelligence and engage military targets without risk to its soldiers.¹⁹⁸

Some scholars express the view that removing drone operators from harm's way enables the drone pilots to more "carefully evaluate a situation without combat fears and anxiety."¹⁹⁹

¹⁹⁴ G. Aran, 'Striking Home: Ideal-Type of Terrorism.' [2019] 31(5), Terrorism and Political Violence, P990.

¹⁹⁵ A. Fraser, Alexander, 'For the Sake of Consistency: Distinguishing Combatant Terrorists from Non-Combatant Terrorists in Modern Warfare.' [2017]51 U. Rich. L. Rev. P593.

¹⁹⁶ D. Brunstetter, 'The implications of drones on the just war tradition.' [2011] 25(3) Ethics & International Affairs. P 339.

¹⁹⁷ M. L Cook, 'Ethical Issues in Targeting.' Targeting: The Challenges of Modern Warfare.' [TMC Asser Press, 2016] P147.

¹⁹⁸ K. Fink, 'Boots Off the Ground: The Impact of Individual-Level Factors on American Public Approval of Lethal Drone Strikes.' [2019] P6.

¹⁹⁹ Ibid

Some also argue that the recording technology in drones makes it easier to hold operators accountable for any breach of the laws of war and the principles of Just War law than traditional pilots.²⁰⁰ However, there is no report that suggests that this has ever happened. There is also an economic argument that a drone attack is more economical than a large scale operation with helicopter support to capture the terrorists alive.²⁰¹ In fact, the UNSC impliedly permitted the use of drones in Resolutions 1368 and 1373, where it endorsed states use of “necessary steps” to fight terrorism.²⁰² Therefore the drones are considered necessary for safety and economic reasons.²⁰³ Commentators in favour of the US targeted killing by drones also argue that the strategy complies with the LOAC proportionality and distinction principles. Drones are not prohibited so they can be seen as legitimate weapons permissible during warfare.²⁰⁴

The US government utilises drones as a necessary weapon of war.²⁰⁵ The US has listed a set of criteria for the approval of drone strikes: “near certainty” that the target was present and that civilians would not be harmed or killed; capture of a terrorist is not feasible in a transnational type of conflict; failure of the authorities of the country in question to capture or address the terrorist threats; and no other reasonable alternatives are available.²⁰⁶ One reason for its preference is that drones are configured to target with precision.²⁰⁷ With the aid of drones, it is easier to comply with the LOAC principle of distinction than an infantry man

²⁰⁰ E. Di Nucci, *et al*, ‘Drones and Responsibility.’ [2016] Legal, Philosophical and Socio-Technical Perspectives on Remotely Controlled Weapons, P1.

²⁰¹ A. Basham, ‘Eichmann and Bin Laden: extraterritorial abduction and targeted killing as tools of national security.’ [2012]. San- Diego State University Thesis, P1.

²⁰² Y. Shiryayev, ‘Cyber-terrorism in the context of contemporary international law’ [2013]3, Legal Studies Research Paper, University of Warwick, P141.

²⁰³ *Ibid*

²⁰⁴ M. Schulzke, ‘The Morality of Remote Warfare: Against the Asymmetry Objection to Remote Weaponry.’ [2016] 64(1) Political Studies, P90.

²⁰⁵ E. Schwarz, ‘Prescription drones: On the Techno-biopolitical Regimes of Contemporary Ethical Killing’ (2016) 47.1, Security Dialogue, P59.

²⁰⁶ A. Hashim, ‘The Controversy Over Drone Warfare.’ [2013] 3 (1), Journal of Defence Management, P122.

²⁰⁷ ²⁰⁷ M. Schulzke, ‘Drone Proliferation and the Challenge of Regulating Dual-Use Technologies.’ [2018] International Studies Review, P500

would, when targeting terrorists within civilian territories.²⁰⁸ This fulfils the goal of minimising civilian casualties.²⁰⁹ This is the strongest argument used by those who justify the drone mechanism. However, the argument that the drone mechanism allows for compliance with the LOAC principle of distinction may be compelling until we look at figures.

Research shows that between 2004 and 2012, the US employed the services of its CIA to control drone strikes in Pakistan.²¹⁰ These drone strikes were criticised for their inability to reach the minimum thresholds of transparency and accountability required under international law.

One of the earliest such recorded strikes was deployed against al-Qaeda in Yemen in 2002. Since then, the locations for the drone strikes have been in Pakistan, Yemen and Somalia.²¹¹ According to the estimates made by the Bureau of Investigative Journalism, deaths and harm caused from the drone programme in these three countries are summarised in the table below:

Pakistan (2004 – May 21st 2016)	Yemen (2002 – July 16, 2016)	Somalia (2007 – June 21st 2016)
Obama strikes: 373	Confirmed drone strikes: 127-147	Drone strikes: 21-31
Total killed: 2,499-4,001	Civilians killed: 65-101	Children killed: 0-2

²⁰⁸ Ibid

²⁰⁹ M. Schulzke, *Supra* P 507.

²¹⁰ A. Byrne, 'A Dangerous Custom: Reining in the Use of Signature Strikes Outside Recognized Conflicts.' [2018] 86 *Geo. Wash. L. Rev.* P 620.

²¹¹ M. Byrne, 'Consent and the Use of Force: An Examination of 'Intervention by Invitation' as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen.' [2016] 3 (1) *Journal on the Use of Force and International Law*, P97.

Civilians killed: 424-966	Children killed: 8-9	Civilians killed: 3-10
Children killed: 172-207	Injured: 96-228	Injured: 2-8
Injured: 1,161-1,744	Total killed: 552-806	Total killed: 222-386
Total strikes: 424	Possible extra drone strikes: 89-106	Other covert operations: 9-13
	Total killed: 351-503	Children killed: 0-2
	Civilians killed: 26-61	Civilians killed: 7-47
	Children killed: 6-9	Injured: 11-21
	Injured: 82-109	Total killed: 59-141
	Other covert operations: 15-78	
	Children killed: 26-28	
	Civilians killed: 68-102	
	Injured: 45-132	
	Total killed: 203-436	

Between 2004- 2019, the Bureau of Investigative Journalism recorded in summary:

6,786 minimum drone strikes;

8,439-12, 105 of persons killed;

769 – 1,725 of civilians killed and

253- 397 of children killed by the drone strikes.²¹²

The above table represents the scale of drone operations and casualties that have occurred in over 15 years.²¹³ Childhood deaths are a first point of concern. If it may sometimes be difficult to distinguish culprits from innocent civilians, is it also true to conclude that it is

²¹² Available at: <https://www.thebureauinvestigates.com/projects/drone-war> [Accessed on 14/12/19]

²¹³ Ibid

difficult to distinguish children from adults? When drone strikes involved less militant deaths and more civilian deaths, the percentage of civilian casualties increased to 40%.²¹⁴ These facts in estimates weaken the argument that the drone programme complies with the LOAC distinction and proportionality principles. and has the ability to target with precision. Fewer casualties may be defended as accidental but so many casualties calls for a reconsideration of either the use of drones or the manner in which they are used. If the drones target precisely, then perhaps it is the pilots who do not exercise due caution when launching missiles. Perhaps the criticisms against the use of drones will abate if the drone pilots are trained to pilot discriminately. If drones are indeed devised to target with precision, then it seems that the liability of indiscriminate killings falls on the shoulders of drone operators and not the drones themselves.

Even the ICRC confirms that drones are not weapons of mass destruction.²¹⁵ It agrees that drones are not indiscriminate weapons and so have the capacity to prevent unnecessary loss of life, harm and suffering to innocent persons if used properly.²¹⁶ It is true that civilian casualties are a common phenomenon during warfare. It is possible to accidentally target children and innocent civilians within the nexus of a battlefield. Who is to say that an infantry soldier can prevent such accidents from happening? The emphasis of Article 51 (2) AP1, GC 1977 is that they must not be ‘deliberately’ targeted.

It is possible to argue that drones weaponry is not illegal. However, this does not eliminate the ethical question that those in favour of drones might struggle with: Can the drone mechanism fully comply with the LOAC in terms of making life and death decisions on the

²¹⁴ Ibid

²¹⁵ Weapons: ICRC Statement to the United Nations:
<https://www.icrc.org/eng/resources/documents/statement/2013/united-nations-weapons-statement-2013-10-16.htm> [Accessed on 14/12/19].

²¹⁶ Ibid

battlefield? Who can be made accountable if the use of drones results in a war crime: the drone pilot, the manufacturer or the person giving the command, or all of the above? If remotely piloted drones become permissible machinery for engaging in warfare, two parties engaging each other on a battlefield may be evenly represented by drones instead of infantry as is the norm. It is difficult to picture such a scenario whereby, opposing parties remotely pilot drones against each other. There is nothing separating such an experience from that of a video game. This is why some scholars have referred to those who pilot the drones as the ‘Joystick/play-station’ soldiers.²¹⁷ It is impractical to have a scenario in which, in order to save human lives only drone machines should be present in a battlefield. It becomes a case of one army’s missile attempting to overpower the missiles fired from the drone belonging to the other party, making such type of warfare pointless. The point is that at any given time or place; the idea of fighting a war without humans to engage each other on a battlefield is inconceivable. The drone strategy induces controversy only because it is new and not formally recognised under international law. If we do not ignore the fact an advance in technology is inevitable then, perhaps legislators may devise ways in which the drone itself may be regulated.

2.2.5 LOAC Mechanism of Warfare: Israel’s Scheme

Israel specifically defends its right to target and kill terrorists under the laws of war.²¹⁸ The military force of Israel is designated to carry out targeted killings against Hamas and Islamic Jihad terrorist groups in Palestine. Its actions are predicated on the grounds that a state has the right to devise means to actively protect its citizens.²¹⁹ To the Israeli government,

²¹⁷ N. Sharkey, ‘Killing made easy: From joysticks to politics.’ *Robot ethics: The ethical and social implications of robotics* [2012]. P111.

²¹⁸ C. A. Jones, ‘Frames of law: Targeting advice and operational law in the Israeli military.’ [2015] 33(4), *Environment and Planning D: Society and Space*, P677.

²¹⁹ Article 51, UN Charter; Resolutions 1368 and 1373 of the UNSC. Available at: <http://www.un.org/Docs/scres/2001/sc2001.htm> [Accessed on 22/03/18]

targeted killing is a sophisticated military machinery that is intended to minimize the number of Palestine civilian casualties.²²⁰ The Israeli Supreme Court in *Public Committee against Torture in Israel v. the Government of Israel* enforced targeted killings of Hamas Palestinian terrorists using guns, bombs and explosives as regular warfare tactics.²²¹ It has been argued that the war between Israel and Hamas is valid because Hamas members can be classed as non-state actors with a hybrid military identity, meaning they incorporate a range of different modes of warfare, including conventional capabilities of an army,²²² making targeted killing against them valid. Whilst this claim remains debatable, Israel's targeted killing is met with criticism, mainly because neither its implementation nor the terrorist attacks it faces are done with regard to the LOAC. Targeted killing and terrorism are deliberately carried out within civilian territories, with the knowledge that civilians are in close range to the targets²²³ For instance, while Israel's tanks and bulldozers have expelled Palestinians from the West Bank, bombs and missiles have developed into the 'weapons of choice' for displacing Palestinians in Gaza.²²⁴ When Palestinian terrorists enter into Israel's civilian terrain to perpetrate hostilities, Israeli civilians are usually the object of attacks.²²⁵ Records show that Palestinian terrorists have on several occasions entered Israeli territory, wounding and killing Israeli civilians with knives and guns.²²⁶

²²⁰ M. Joronen, 'Death comes knocking on the roof: Thanatopolitics of Ethical Killing During Operation Protective Edge in Gaza.' [2016] 48 (2) *Antipode*, P336.

²²¹ Israeli case *supra*

²²² O. Hadad, 'A Battle of Names: Hamas and Israeli Operations in the Gaza Strip.' [2019] *Terrorism and Political Violence*, P7.

²²³ L. Marek, 'The Principle of Best Protection: A Viable Solution to Norm Conflicts between International Humanitarian Law and Human Rights?' [2011].
<https://www.duo.uio.no/bitstream/handle/10852/22686/LINHA-xMaster.pdf?sequence=1&isAllowed=y> At P26.
[Accessed on 14/12/19]

²²⁴ M. C. Haas, 'The evolution of targeted killing practices: Autonomous weapons, future conflict, and the international order.' [2017] 38(2) *Contemporary Security Policy*. P285.

²²⁵ Hadad *Supra* P 6.

²²⁶ *Ibid*

The US drone warfare strategy motivated Israel to formulate a fresh method of applying transnational force in their fight against terrorism. Recently, Israel negotiated the use of drones to achieve their counter-terrorism goal.²²⁷ Some scholars contend that Israel's targeted killing policy should be supervised; others argue that Israel is justified in pursuing the policy until Palestinian authorities are willing to challenge Palestine terrorist organisations for the atrocities they commit in Israel.²²⁸ The current policy to use military assets including explosives, helicopter gunships and booby traps received international condemnation by many organisations including the UN for its tendency to maximise collateral damage.²²⁹ There were several petitions intended to protect human rights.²³⁰ It was decided that a more "proportionate" and less adverse measure, in terms of the capacity of bombs, be used.²³¹

However, Israeli Intelligence found that the reduction in the capacity of explosives allowed by the courts weakened what the state considered the 'necessary' amount of force needed to defeat terrorists.²³² To date, Israel relies on targeted killing as its main counterterrorism strategy. It claims that this inhibits the progress of some planned attacks, postpones or impacts plans for future attacks and minimizes collateral damage.²³³

²²⁷ Ibid

²²⁸ S. David, 'Israel's policy of targeted killings.' [2003] 17(1) Ethics of International Affairs, P111.

²²⁹ Ibid P119

²³⁰ A.J.E. AJE, et al, 'Arab-Israeli Conflict.' [2014] 68 (1) Middle East Journal, P604.

²³¹ Ibid

²³² A. Margalit, 'Did LOAC Take the Lead? Reassessing Israel's Targeted Killing of Salah Shehadeh and the Subsequent Calls for Criminal Accountability' [2012] 17 (1) J Conflict Security Law, P147.

²³³ O. Falk, et al, 'Minimizing Unintended Deaths Enhanced the Effectiveness of Targeted Killing in the Israeli-Palestinian Conflict.' [2019] 42(6) Studies in Conflict & Terrorism, P600.

It is noteworthy that the targeted killing counterterrorism strategy is highly applauded by many commentators as the most practical and effective strategy. Irrespective of this, targeted killing is a new strategy that has not yet been legally endorsed under the LOAC. If terroristic conflict in general and targeted killing in particular are generally incompatible with the LOAC as shown above, targeted killing is even less compatible with law enforcement. This is because it does not allow for law enforcement requirements of due process and fair hearing.²³⁴ Nevertheless, it is time to explore the applicability of the law enforcement regime to terroristic conflicts in greater detail.

2.5 Terrorism vs. Targeted killings: Applicable under Law IHRL?

The failure of the U.S and Israel to put suspected terrorists on trial before killing them raises controversy amongst Human Rights activists.²³⁵ They question the legitimacy of such killings under Human Rights Laws. For instance, should the U.S have attempted to put Bin Laden, Anwar al- Aulaqi Ahmed Farouq, Adam Gadahn and other suspected terrorists on trial before they were killed for their alleged crimes? What is the justification for not putting these suspected terrorists on trial before killing them? Under what circumstance is it lawful to kill without resort to due process? Ultimately, should Enforcement of Human Rights Laws regulate terroristic activities?

²³⁴ A. Guiora, 'Targeted killing as active self-defence' [2004] 36 Case W. Res. J. Int'l L. P 319; C Gray, 'Targeted Killings: Recent US Attempts to Create a Legal Framework.' [2013] 58 Current Legal Problems, The American Journal of Jurisprudence. P1.

²³⁵ Guoria Supra P 327.

2.5.1 Can the Law Enforcement of Human Rights Regulate Terrorism and Targeted Killings?

International Human Rights Law specifies a set of rights and entitlements guaranteed to individuals by virtue of their humanity.²³⁶ These norms are expressed in various treaties and conventions and are viewed as an ethical minimum that applies to all and for all time. The most pertinent provision of human rights law with regard to targeted killing is the right against arbitrary deprivation of life. Pursuant to this right, a state would be prohibited from killing an individual in the absence of due process, regardless of any alleged criminal guilt of which he or she may be accused. As previously mentioned, targeted individuals outside of the context of armed conflict must be afforded due process. Their protection against arbitrary deprivation of life is firmly established in almost every body of IHRL.²³⁷

The questions asked above result from an attempt to regulate the terrorism vs. targeted killing conflict under the Law enforcement of human rights regime. Is law enforcement able to regulate actions of suspected extraterritorial terrorists, who cannot be easily apprehended because they do not reside in the states seeking to prosecute? If the law enforcement model should regulate terrorist activities, then what methods can be used for holding individual suspected terrorists accountable without violating the HRLs stated above? Is it practicable for terrorists to be treated as criminals under law enforcement, or military state actors whose actions are to be regulated under the LOAC regime?

²³⁶ Preamble, UDHR 1948.

²³⁷ Article 4 CCPR; Article 27 American Convention of Human Rights; Article 15, European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 4(2) Arab Charter on Human Rights, etc.

We have already considered the LOAC to be incompatible with terroristic conflict because one of the parties does not possess the military status required to qualify for LOAC regulations. Now the only other option available is to consider terrorists to be suspects of criminal act(s) whose alleged crimes must be confirmed by law enforcement due process of fair hearing.²³⁸ The twenty-first century conflict between terrorists and state actors creates some difficulties for domestic laws. The mass deaths and destruction of properties that occurred on September 11, 2001, is one of several examples that show its complexity.²³⁹ Is it possible to judge each death on a case by case basis as required under law enforcement? Due Process of fair hearing affords a person suspected of committing a crime the opportunity to plead their case against all allegations made.²⁴⁰ This means that an accused person charged for multiple offences is expected to plead against the charges individually.²⁴¹ If we take into account the proliferation of terrorist attacks leading to mass casualties, we begin to realise that perhaps terrorist operations are too extreme for law enforcement to handle. It may be time consuming and impractical to charge an offender accused of causing thousands of deaths on each count. For example, Osama bin laden was alleged to have been responsible for spearheading the 9/11 attack that claimed the lives of 3000 victims, as well as mobilising other 21st century terrorist attacks.²⁴² Law enforcement would require that he be tried for each attack as well as the death of each victim. This is a huge task for the judiciary owing to the high number of deaths and the fact that not all deaths may easily be accounted for; especially

²³⁸ Article 10 UDHR 1948

²³⁹ S. Oh, C.Jung, & T.Yoon, 'Analysis of the Development of IS (Islamic State) in its Relation to Conflicts within OIC (Organization of Islamic Countries) by Using SPSS Statistical Program.' [2016] 6(10) International Journal of Social Science and Humanity, P799.

²⁴⁰ Implied in Article 10, UDHR 1948; Article 14, ICCPR 1954.

²⁴¹ Implied in Article 14 (3), ICCPR, 1954 of which Israel and the US became signatories in 1966 and 1977 respectively.

²⁴² J.L.Madeira, 'Clear and Ever-Present Dangers? Redefining 'Closure 'in a Post 9–11 World.' [2016] Capital Punishment: A Hazard to a Sustainable Criminal Justice System? P113.

in mass murders like that of the 9/11 incident. In the aftermath of that incident, some families were advised to presume the death of victims that were unaccounted for.²⁴³

Further, terrorists depend on secrecy as a foundational concept for their organizations.²⁴⁴ This includes covert plots, secret leadership, secret communications and the concealment of their faces during operations.²⁴⁵ This would make it difficult to determine the main actors in any terrorist organisation. These groups use modern information technology to execute their operations with minimal risk of disclosure.²⁴⁶ Tools with no obvious military use which were purchased at local shops can be fashioned to construct bombs. For example, the bomb blast by Islamic terrorists, which occurred on August 7 1998 at two American embassies in Africa killed about 200 innocent people, including 12 American citizens, and injured about 5,000 civilians.²⁴⁷ The explosive devices were improvised, small and inexpensive so that they did not raise suspicion from passers-by, prior to deployment.²⁴⁸

The 9/11 incident serves as a reminder that ‘suicide bombing’ is one of several ways by which terrorist organizations maintain confidentiality and avoid publicity. The deaths registered during the incident included those of the main perpetrators.²⁴⁹ Usually, suicide

²⁴³ B.E. Aguirre, et al, ‘Phenomenology of Death Counts in Disasters: the invisible dead in the 9/11 WTC attack.’ [2008] 26 (1) International Journal of Mass Emergencies and Disasters, P31.

²⁴⁴ G. Rilinger, ‘Corporate Conspiracies and Complex Secrets: Structure and Perception of the Insull Scheme in 1930s Chicago. [2019]124(4), American Journal of Sociology, P1043.

²⁴⁵ Ibid

²⁴⁶ J.T. Picarelli, et al, ‘Methods not motives: Implications of the convergence of international organized crime and terrorism.’ [2002] 3 (4) Police Practice and Research, P305.

²⁴⁷ J. Haynes, ‘Islamic Militancy in East Africa.’ [2005] 26 (8) Third world quarterly, P1321.

²⁴⁸ Ibid

²⁴⁹ J. Winkates, ‘Suicide terrorism: martyrdom for organizational objectives.’ [2006] 23 (1) Journal of Third World Studies, P87.

bombers wear explosive vests and can therefore not survive detonation.²⁵⁰ This makes it impossible for such offenders to be arraigned before a court. Although the leadership of the group can be traced, nobody can be held directly liable for executing a suicide bombing. Homicide without determining culpability as required under law enforcement has therefore become a trend with terroristic conflicts.²⁵¹

Delays in the judicial process also give terrorists the opportunity to plot and execute future attacks.²⁵² The judicial process involves finding and adducing evidence which can then be rebutted by the accused. Sometimes, an accused person is acquitted, not because he or she has been proved innocent of the charges, but because a prosecutor is unable to gather sufficient evidence to warrant a guilty verdict.²⁵³ Worse still, in some jurisdictions a dismissed allegation cannot be revisited by the criminal courts so as to guide against double jeopardy.²⁵⁴ The criminal justice system in several jurisdictions is designed in such a way that potentially dangerous culprits may be allowed to move about freely until their guilt is proven; only after this, or if they are convicted of a different crime, can sentence be dispensed. With such an advantage, terrorists are able to commit more atrocities at will, thereby endangering more lives in future attacks.

In addition, the requirement of fair trial of terrorists suggests that suspected perpetrators are within the jurisdiction of the law-enforcement authorities in the victim state, so that arrest can be easily facilitated. However, arrest is difficult since terrorists usually reside outside the victim states and cannot be apprehended without the active assistance and support of the state

²⁵⁰ Y. Delannoy et al, 'Terrorist explosive belt attacks: specific patterns of bone traumas.' [2019] 133(2) International journal of legal medicine, P565.

²⁵¹ Ibid

²⁵² A. Warren, 'Altering the Playing Field: The U.S. Redefinition of the Use of Force.' [2015] 36 (2) Contemporary Security Policy, P174.

²⁵³ Article 11 (1) UDHR, 1954.

²⁵⁴ Article 20, Rome Statute of the International Criminal Court (Rome Statute) 2002.

in which the terrorists reside.²⁵⁵ It is possible for both states to have conflicting interests, especially if the host state is either unwilling to facilitate the arrest of a suspect, or incapable of doing so because its indigenous laws do not permit the arrest.

It is noteworthy that the law enforcement model offers punitive rather than preventative measures. Individuals are tried for offences they allegedly commit. However, the main objective of states is to completely eliminate terrorism and prevent future attacks, rather than convict perpetrators after an incident. Prevention is better achieved by apprehending those plotting and preparing the attacks before they can be launched. On this basis, the fundamental requirement of fair trial under the law-enforcement model is ineffective and a more proactive method is best suited to dealing with terrorism.

Even the law enforcement regime recognises that under some pressing circumstances, an individual or group may need to abandon the requirement of fair trial and employ the use of 'force'. This is the right of self-defence of Article 51 UN Charter. However, the exercise of this right is not without challenges when it relates to terroristic conflicts.

2.5.2. How Article 51 UN Charter relates to Terroristic conflicts

As earlier noted, this right to exercise self-defence is applicable 'if an armed attack occurs' against a victim.²⁵⁶ There had to be a departure from a literal interpretation of this provision

²⁵⁵ K. K. Robison, et al, 'Ideologies of Violence: The Social Origins of Islamist and Leftist Transnational Terrorism.' [2019] 84(4), *Transnational Terrorism*, P127.

²⁵⁶ See footnote 53, Chapter one for the quotation of Article 51, UN Charter.

because it is impossible for anyone whose life has been taken to exercise the right to self-defence under Article 51 of the UN Charter.²⁵⁷ Thus, the literature generally adopts a combined interpretation of the Caroline case and Article 51, when deciding whether an attack in self-defence was lawfully carried out. The Caroline case (as detailed in 1.2.3 of chapter one) holds that attacks in self-defence can be made against imminent and visibly advancing attacks. It must leave no moment of deliberation and no immediate alternative means of prevention or option of arrest, but to apply proportionate force against the attacker.²⁵⁸ Thus, for targeted killing to be lawful, it must be aimed at preventing visibly advancing and lethal threats from terrorists.²⁵⁹ Anything short of this; every suspected terrorist should be arrested and tried before guilt is established.²⁶⁰ Regardless, this relevance of the imminent threat doctrine is still being questioned in discussions relating to terroristic conflict. Victims will find it very difficult to prevent attacks from terrorists that were designed to be unexpected. It would take a victim who is already aware of a terrorist's plot to contemplate an action in self-defence. Thus as far as terrorism is concerned, some critics conclude that targeted killing in self-defence should also be in response to 'hearsay threats' like terrorists propaganda videos which boast of future attacks.²⁶¹

The provision of human rights law, appearing to permit killing in self-defence within the above stated limited parameters are underdeveloped and the legality of targeted killing is therefore debateable. The ICJ in the *Nicaragua* case pointed out that because "the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised ... the

²⁵⁷ C. Pierson, 'Pre-emptive self-defence in an age of weapons of mass destruction: operation Iraqi freedom.' [2004] 33 *Denv. J. Int'l L. & Pol'y.* P150.

²⁵⁸ A. C. Arend, 'International Law and the Pre-emptive Use of Military Force.' [2003] *The Washington Quarterly.* Spring P89.

²⁵⁹ W. C. Banks, *et al*, 'Customary Constraints on the Use of Force: Article 51 with an American Accent.' [2016] 29 (1) *Leiden Journal of International Law*, P67.

²⁶⁰ Article 14, ICCPR 1976.

²⁶¹ M. Williamson, 'Terrorism, war and international law: the legality of the use of force against Afghanistan in 2001.' [Rutledge 2016] P1.

Court expresses no view on the issue.”²⁶² In the absence of directives on the right to use lethal force in self-defence against terrorists, U.S and Israel choose to broadly construe their right to kill them in self-defence.²⁶³

2.6.3 Current Study: Can existing laws regulate terroristic conflict?

The legal doctrines have already implied that targeted killing is illegal.²⁶⁴ This chapter argues that targeted killing is illegal simply because it falls short of recognition under international law. Targeted killing seems to offer a more practicable counterterrorism strategy over the prescribed limits of international law.²⁶⁵ Existing laws only need to adopt targeted killing or similar strategies that are practicable.

The US and Israel are ahead of international law. Both states have adjusted their state counterterrorism laws to fit with the reality of terrorism operations: They regard terrorists as combatants, civilian territories as battlefields, and the premeditated ‘kill list’ replaces the traditional method of distinction through uniforms, tags or emblems.²⁶⁶ The US use of drones is also the means to carrying the otherwise impossible tasks of distinguishing terrorists from civilian territories.²⁶⁷ Such approaches are practical in dealing with terrorism and in their decisive ways of complying with the LOAC. In order to legalise targeted killing and avoid the risk of international scrutiny, the US and Israel have called for its recognition under international law.

²⁶² Nicaragua, *Supra*

²⁶³ US Department of Justice White Paper; <http://www.nlg.org/news/statements/Israeli_Supreme_Court.pdf> at 18 October 2007; PCATI [2006] HCJ 769/02, [15]. [Accessed on 20/02/2018]

²⁶⁴ Finklestein *Supra*.

²⁶⁵ H. Strachan, *et al*, ‘The Changing Character Of War’ [OUP 2013] P79

²⁶⁶ R. Sanders, ‘Human rights abuses at the limits of the law: Legal instabilities and vulnerabilities in the ‘Global War on Terror’.[2018] 44(1), *Review of International Studies*, P3.

²⁶⁷ M.C. Haas, *et al*, ‘The Evolution of Targeted Killing Practices: Autonomous Weapons, Future Conflict, and the International Order.’ [2017] 38 (2) *Contemporary Security Policy*, P281.

International organisations are however be mindful of a law that will confer combatant status on all terrorists. By recognising them as state actors, except the reforms specifically states otherwise, terrorists will be able to access certain privileges that states have , including the rights to sanction, or the rights to form state allies.

Conferring combatant rights on terrorists only puts terrorists at an advantage. There is nothing to suggest that terrorists intend to be bound by LOAC especially if such obligations do not favour them. In fact, Islamic terrorism is in itself a protest against western laws.²⁶⁸ When legislators consider reforming international law, consideration should be given to the uniqueness of terrorists and their actions. The approach must be practical but also guide against abuse. This new approach must also be effective in achieving the counterterrorism goals sought by the states. This may or may not include targeted killings but targeted killing is a contender amongst other possible counterterrorism strategies to be explored later in this thesis. One way it will do this is by assessing the impact targeted killing has on terrorist organisations in general. If targeted killing does not deter terrorism then its effectiveness is in question. A hermeneutic study of various schools of thought in the following chapter is a starting point to discovering the ideologies that drive terroristic conflict. This provides insight into what parties want to achieve in order to negotiate an end to the conflict.

²⁶⁸ J. Burke, 'The New Threat from Islamic Militancy.' [The Bodley Head 2015] P37.

2.6. Conclusion

This chapter put into context, controversial issues, dilemmas and legal interpretations surrounding targeted killings. The aim of the chapter was to clarify and explore the extent to which transnational targeted killings of suspected terrorists compromise their human rights and whether such action can be legitimised under the rule of international law; to evaluate the validity of the defence that targeted killing is a legitimate self-defence tactic and to explore the concept of an acceptable legal compromise that balances the rights of the perpetrators and victims of targeted killings. The chapter contained a critical appraisal of the legal doctrines (laws in books) that regulate conflict and particularly those that regulate the use of lethal force. The contents of the legal doctrines were then contrasted with what obtains in terroristic conflicts (law in action) in order to specifically determine the legality of targeted killing strategy. Then a critical analysis of the social, political, cultural and legal defences adduced by the states was conducted in order to clarify the contribution of targeted killings in pursuit of a practical and legitimate counterterrorism strategy. By a critical analysis of targeted killings, this chapter distinguished between traditional warfare and contemporary terroristic conflict, to emphasise the changes in warfare or warfare like conflicts (law in action).

The current LOAC evolved at a time when nation fought against nation, and when political boundaries and uniforms gave scope and shape to conflict. However, terroristic conflicts differ significantly from the LOAC paradigm. With the 21st Century global terroristic conflict has come the rise of non-state actor involvement; a development that has already drastically changed the face of warfare. Contemporarily, the world is faced with fewer

occurrences of traditional types of warfare and a lot more of the terroristic type of conflict that are not directly covered by the LOAC. Likewise the law enforcement paradigm is also weak because it insists that in certain circumstances, a terrorist should be tried rather than targeted. Alternatively, if it appears that there is imminent threat to justify targeting, law enforcement allows for targeting in self-defence from immediate threats, without due process. However, states find this difficult to prove because the laws that permit force to be applied in self-defence do not apply to the new form of attacks, where terrorists perpetrate surprise attacks against civilians. Rather, it is often predicted, (based on past behaviour), that at some future date, there may be a recurrent attack from the same source. Analysis of the legal doctrine has however shown that there is no case for the defence of imminent threat arising from the later circumstance. The only option open to states will be to arrest suspected terrorist culprits, this being difficult to achieve owing to the international nature of terroristic conflict. It seems however that any self-defence counterterrorism strategies must be 'proactive' to be effective. This automatically rules out the law enforcement model because of its 'reactive', and time consuming due process requirements. Targeted killing has continued based on this notion but regardless of the sympathy the strategy evokes, as long as international law fails to recognise terrorists as combatants, targeted killing of terrorists will always be illegal.

This thesis does not condemn the use of targeted killings done in the name of warfare. This chapter has argued that terroristic conflict between a state and a non-state organization is an area not covered but worthy of regulation by the Geneva Conventions. Because non-state organizations are capable of inflicting grave hostility on the population of other states, potential victim states retain the moral right of self-defence against them. The incompetence of law enforcement of human rights in the regions in which these organizations operate

leaves the state with no other option but military action, which fulfils the necessity requirement of *jus ad bellum*. Once engaged in armed conflict, the right against arbitrary deprivation of life for participants in the conflict is reinterpreted through the lens of the LOAC. Thus, targeted killing is not a violation of human rights if the persons targeted can be classified as combatants in armed conflict. However, to make terroristic conflict fit perfectly under the LOAC, terrorists should be awarded a form of status that allows states to lawfully target them. It may be necessary to disregard the DPH rule that considers non-uniformed personnel as combatants for such time as they remain a threat, according to Additional Protocol I.

This chapter takes cognisance of the concerns that a thorough legal analysis will always regard targeted killing and the mechanisms used as illegal. It is in consideration of the compelling argument in favour of targeted killings that recommendations for reforms on current laws are made in this thesis. Perhaps, out of empathy for the states which justifiably feel the need to practically defend themselves from terrorist attacks, a legal recognition of targeted killing may be invoked. However, such compelling arguments in favour of the practicality of targeted killing do not steal focus of this thesis which, in the end, is to evaluate the effectiveness of targeted killing strategy. It is only upon a conviction of the effectiveness of targeted killing that recommendation of new law reforms that consider targeted killing will be made in this thesis.

CHAPTER THREE

LITERATURE REVIEW

A HERMENEUTIC ANALYSIS OF THE IDEOLOGIES BEHIND THE TERRORISM VS TARGETED KILLING CONFLICT AND DEBATES: THE PERSPECTIVES OF THE LIBERAL COSMOPOLITAN, REALIST AND PRAGMATIST SCHOOLS OF THOUGHT.

3.1. Introduction

There is conflict between scholars on the legality of the counter-terrorism strategy adopted by the US and Israel. This chapter comprises a literature review, examining issues that have become a source of debate around the research topic. The hermeneutical analysis of views in literature also highlights aspects in need of further study on the subject of targeted killings. There are a number of schools of thought in international relations on the law in action regarding terrorism and counterterrorism strategies.

Firstly, the chapter highlights changes in the character of warfare in recent years. It does this by differentiating modern warfare from traditional warfare in terms of the applicability of the current laws that regulate the general use of force. Secondly, the chapter lays out the relevant historical background to the study area by using facts to analyse and appreciate the changes in the character of conflicts in general. Thirdly, the chapter adopts a Hermeneutical methodology to analyse the ideological perspectives from three different schools of thought believed to be representations of parties that debate contemporary terrorism and counterterrorism strategies, and particularly targeted killing. These schools are: the legal realist, the liberal cosmopolitan and the pragmatic schools of thought. These schools present alternative views on several legislative ambiguities and dilemmas identified in Chapter Two.

The war against terror is argued to be an ideological one, in which the parties involved fight for what they believe in. A thesis that analyses terroristic warfare must therefore study the ideological background of the debates representing the different parties to the conflict. Discoveries made from analysing these philosophical perspectives will facilitate the structure of legal frameworks, because it offers insights on how to compose regulations that realistically induce compliance by the parties to the conflict. Fourthly, the ethical debates over the use of drones by representatives of the above schools of thought are reviewed. The drone mechanism used for carrying out most of the killings by the US is analysed. The aim of assessing the legal debates is to clarify aspects of the laws regulating weapon control that require amendment. Fifthly, the gaps in international policies that generally regulate conflicts, in the literature discussion over targeted killing, the gaps this thesis aims to fill, and the scope of this thesis are listed and explained. Sixthly, the game theory as a discipline is briefly introduced and defined. This chapter explains ‘what’ game theory is and ‘why’ it is used in this thesis. However, it is the next chapter that extensively explains ‘how’ the game theory method is applicable to this thesis. The chapter makes an exposition into the historical rationales and conclusions of researches that adopt the use of game theory methodical approach in the literature. This chapter concludes with a discussion of the Pragmatic rationale for the justification of targeted killing counterterrorism strategy.

3.2. Objectives of the Literature Review:

Reviewing the literature helps to identify the extent of research on targeted killings. It also highlights challenges arising from a comprehensive application of existing law to contemporary targeted killing. Divergent scholarly opinion is useful in assessing varied interpretations of the justification for states’ use of force in self-defence. This allows the

researcher to distinguish and verify the line between self-defence as propounded by the states and unjust killings as alleged by the victims and some commentators. This chapter is not meant to be an exhaustive review of the literature; instead, the main aim of the review is to put into perspective the normative values of various stake holders in the terrorism vs. targeted killing conflicts. The knowledge gained about the values that drive the ‘war against terror’ would hopefully lend insight into suggestions that can resolve them. A significant starting point will be to appreciate the differences between past era ‘traditional warfare’ that were merely political in nature and ‘modern terroristic warfare’ that are now philosophically driven.

3.3.The Changing Character of Warfare:

Carl Schmitt’s in his ‘Nomos of the Earth,’ is generally applauded for the recognition of the changes in the world order that occurred in the seventeenth and again in the twentieth century.²⁶⁹ Schmitt invites us to accept that humanized wars of the current European states’ system represent not only in practice but also in theory, an advance of the ‘just wars’ that preceded them and the humanitarian wars that followed them. Irrespective of the background, the current trend in armed conflict involving terrorism and counterterrorism suggests that all parties involved fight to express deep rooted belief systems or mandates. While acts of terrorism continue because they propose some form of reward for their perpetrators, targeted killings purportedly preserve the power of national sovereignty and protects citizens’ right to life. As long as terrorism persists, the fight to annihilate it continues in the name of warfare. However, this is not akin to the traditional understanding of the intent and purpose of engaging in armed conflict. There was always a perceived end to traditional wars specifically

²⁶⁹ C. Schmitt, ‘Theory of the Partisan: Immediate Commentary on the Concept of the Political.’ (Translated by G.L.Ulmen) [Telos Press Publishing 2007] Pp 1-94.

by peace treaties. According to Schmitt, the model of war which operates today is one of ‘total war’ or ‘absolute war’. It is no longer enough to defeat the enemy, instead, one has to eliminate him.²⁷⁰ Schmitt also noted that theologians define the enemy as something which must be annihilated.²⁷¹ Those who fight the so called ‘war against terror’ use this reasoning. Their intention is not merely to combat terrorism but to eliminate it. In subsequent paragraphs, an assessment of the motivation, methods and ideologies behind contemporary conflict leads to the recognition that contemporary warfare is by nature very different from traditional warfare. This examination begins with closely assessing the disparity between the US and Israel’s’ targeted killing programmes and the *jus ad bellum* (justification for engaging in war) and *jus in bello* (justification of the conducts and mechanisms used during warfare) just war principles, upon which the laws of war, otherwise known as Laws of Armed Conflict (LOAC) are predicated.

3.4. Traditional warfare vs. Modern warfare:

Israel has vehemently pursued a policy of targeted killing since the second intifada in September 2000. The Israelis have identified, located and killed alleged Palestinian terrorists with helicopter gunships, fighter aircraft, tanks, car bombs, booby traps and guns.²⁷² For the past fourteen years, the US has employed drone missiles to combat Al-Qaeda and other transnational terrorist threats, framing the issue as a Global War on Terror (GWOT). These two states, which practice targeted killing, believe they are fighting a war against terror and, thus, engage their military forces to hunt down and kill terrorists who have been predetermined for elimination on a ‘kill list.’ Former US President George Bush declared ‘war on terror’ after the 9/11, al-Qaeda, ‘Twin Tower’ attack on the US. Later, the Obama

²⁷⁰ Ibid

²⁷¹ Supra note 1

²⁷² S. R. David, ‘Fatal Choices: Israeli Policy of Targeted Killings.’ [2002] 51 The Begin-Sadat Centre for Strategic Studies Bar-Ilan University Mideast Security and Policy Studies. P3.

administration and the western media began to use the term to legally justify the response of targeted killing of terrorists under the laws regulating warfare. This ideology of modern warfare is what the proponents of human rights and fundamental freedom, liberal democracy and the rule of law against targeted killing struggle to accept.²⁷³ Even more disconcerting is the manner in which the GWOT is expressed. There is a significant difference between the manner in which this so called war against terror is carried out and traditional warfare that has been the norm for many years.

There has obviously been a major shift in methods of targeted killings during warfare. The close quarter, ‘man to man hand delivered killing’ which is known to be the traditional way of engaging in warfare has changed.²⁷⁴ The means and ends of mass mobilization and state-centred approaches, which were the hallmark of traditional warfare have been by-passed. The mechanism, the setting in terms of boundaries and the status criteria in terms of the eligibility for participating are different from the old norms of warfare. Remotely controlled drones are now used to deliver missiles against previously determined civilian targets found within civilian territories.²⁷⁵

Some scholars attempt to support the US and Israel’s legal justification for targeted killings conducted in the war against terror’ on the grounds that the LOAC permits pre-emptive strikes against the enemies of a state. What they fail to bear in mind is the fact that, in terroristic warfare, the enemies of the states are not states themselves but civilians who carry out hostilities and who must therefore not be targeted unless certain criteria are met. After the Second World War, the laws regulating warfare were updated to give more regard to the

²⁷³ K.E. Lunday, *et al* ‘Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court.’ [2008]39 Cal. W. Int’l LJ. P87.

²⁷⁴ *Ibid*

²⁷⁵ M. K. Wells, ‘Tribal Warfare: The Society of Modern Airmen.’ (2015) AIR UNIN MAXWELL AFB Airforce Research Institute; <https://humanrightsinvestigations.org/the-laws-of-war/> [Accessed on 14/12/19]

needs of civilians. The laws of war codified in 1945 were not designed for non-military participants, neither was it envisaged that civilian territories would be the battlefields. The laws of war recognise conflict as existing between states and lethal force should only be applied against combatants who constitute the military force of a state. Combatants are prohibited from deliberately targeting civilians or their properties unless they are found directly participating in hostilities against those targeting them. To this end, enemy combatants were restricted to conducting hostilities in battle-zones that were not proximate to civilian terrain. The aim was to distinguish between enemy combatants and civilians, thereby reducing the risk of harm to innocent civilians during warfare. Instead, what seems to obtain today is that civilian involvement far outweighs military participation in terroristic warfare.²⁷⁶ The main victims of terrorism are civilians; even the terrorists are themselves civilians because international law does not recognise them as state actors.²⁷⁷ It suffices to add that the only real military participants in the ‘war against terror’ are combatants from the states carrying out targeted killings. In the view of many scholars, this novel idea of warfare that expands the chances of collateral damage and human rights violations needs to be explored properly in terms of the justification for its use.

3.5. The Novelty of Targeted killing.

The term ‘targeted killing’ has no general definition under international law. The United Nations (UN) has however recognised that in recent years, the U.S and Israel have implicitly and openly adopted policies of targeted killings, including within the territories of other states.²⁷⁸ Military combatants have implied duties that include targeting and killing enemy

²⁷⁶ International Institutions and Global Governance Programme, ‘The Global Regime for Terrorism.’ (2011) Issue Brief: Council on Foreign Relations. Available at: <https://www.cfr.org/report/global-regime-terrorism> [Accessed on 18/05/18]

²⁷⁷ Ibid

²⁷⁸ N. Melzer, ‘Targeted Killings in International Law’ [OUP, 2008], Pp3-4.

combatants under guided parameters during armed conflicts.²⁷⁹ In contrast however, when the UN and scholars mention ‘targeted killing,’ it is usually with reference to the ‘intentional, premeditated and deliberate use of lethal force by states or their agents, acting under colour of law, or by an organised armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.’²⁸⁰ The phrase ‘acting under the colour of law’ suggests that the UN regards targeted killings as practised by the states to be illegal. The common factors present in the contextual definition of targeted killings is that lethal force is intentionally and deliberately applied, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator. Some commentators opine that the terrorist incidence of 9/11 exposed the vulnerability of the US and other western nations, demonstrating the need to be expeditious and pro-active in response to terroristic threats to national security.²⁸¹ This rationale has given rise to the endorsement of targeted killing as a counterterrorism strategy by many of the western states who do not accept the more restrictive approach of human rights agents. Over the past two decades, the counterterrorism strategy of the US and Israel has continually featured targeted killing.²⁸²

The aim of a targeted killing operation is to use lethal force to eliminate persons considered as national threats, alleged to have committed or to intend to commit violent crimes against a state.²⁸³ For instance, once the US intelligence service is aware of an individual’s involvement in a terrorist organisation, such person becomes a ‘person of interest’ and his/her name is included in a ‘kill list’ of those to be targeted on a future date. The targeting process

²⁷⁹ Ibid

²⁸⁰ Ibid

²⁸¹ E C. Lee *et al*, ‘Predicting Emergency Response Intentions Among the Canadian Public in the Context of Terrorism Threats: Examining Sociodemographics and the Mediating Role of Risk Perception.’ [2015] 21(1), Human and Ecological Risk Assessment An International Journal, P205.

²⁸² R. Lambèr, *et al*, ‘A literature review on new robotics: automation from love to war.’ [2015] International journal of social robotics, P1.

²⁸³ W. Lamentowicz, ‘Legal and Moral Dilemmas of Targeted Killing by Drones: Technology, Society and Sustainability.’ [Springer International Publishing, 2017]169(192) particularly at P 14.

usually involves entering into civilian territory in other states, using remotely controlled drones equipped with targeting cameras and missiles, to kill suspected terrorists. The whole process distinguishes targeted killings from unintentional, accidental killings, or killings as a last resort. The general debate over the tactic includes concerns that targeted killings violate all existing laws that regulate the use of force. This includes the laws of war which states use to justify targeted killing. This is because it is incompatible with traditional warfare norms. Moreover, the targets are not recognised as combatants under the LOAC, but as civilians under international law. It means that Due Process of criminal law enforcement must be followed and the guilt of all suspected terrorists judicially determined as would that of other civilians.²⁸⁴ However, the following paragraphs demonstrates how the law enforcement is inapplicable to targeted killing and terrorism.

3.6. How applicable is Due Process under Law Enforcement of Human Rights?

Targeted killing can be distinguished from law enforcement operations that may include killing out of necessity in self-defence, for instance against a suspected suicide bomber. Under such circumstances, it may be legal for law enforcement personnel to apply lethal force based on the imminence of the threat, but the original goal of the operation should not be to apply lethal force.²⁸⁵ Law enforcement requires the guilt of a culprit to be proved before punishment. However, on occasions when terrorists do not reside in the same state as those targeting them, there are no guarantees that a thorough judicial intervention is achievable. For example, there might be insufficient evidence to negotiate the arrest and extradition of suspected terrorists that do not reside in the investigating state.²⁸⁶ Moreover, due process is not only time-consuming; it is also merely punitive and not preventative. The real solution

²⁸⁴ Art 3(1) (d), 4th Geneva Convention of 1949.

²⁸⁵ Article 51, UN Charter; Webster's Dictum in *Caroline* case.

²⁸⁶ K.E. Lunday, *et al*, 'Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court.' [2008]39 Cal. W. Int'l LJ., P17.

sought from anti-terror measures is to prevent attacks and not to only punish culprits.²⁸⁷ This is why some states consider the ‘due process’ of prosecuting criminals before civilian courts to be inadequate for averting serious threats from terrorists.

However, in the eyes of many human rights commentators, the system of law enforcement does not demonstrate any such inadequacy: terrorism is usually dangerous, but it does not call for a significant departure from how liberal states deal with crime. Rather, it requires better coordinated and more effective law-enforcement efforts.²⁸⁸ On the other hand, the quest for more effective law enforcement efforts by these commentators only buttresses the claim that the human rights law enforcement regime is not suitable for dealing with terroristic conflicts. As will be shown below, many scholars argue that the laws regulating warfare should take precedence over human rights laws. This is because military forces are better skilled in dealing with large scale conflicts. They are also equipped with assorted ammunitions for dealing with opponents during warfare than are policemen equipped. Otherwise, like the law enforcement of human rights regime, the laws of war are just as inapplicable to terroristic conflicts.

3.7. What makes the Laws of war inapplicable?

The aim of international armed conflicts is to weaken opposing military targets. That is why all operations are to be directed only against military objectives.²⁸⁹ For this to be practically and factually possible, military objectives have to be clear, in contrast to civilian objectives. For combatants to be distinguished from civilians, they must wear uniforms or emblems. For belligerent civilians to be distinguished from innocent ones, they must be directly

²⁸⁷ S. Kaplan, ‘The Death Penalty: A Dialogue on Morality and the Law: Remarks by Steve Kaplan.’ [2018]. 13(1), University of St. Thomas Journal of Law and Public Policy, P11.

²⁸⁸ D. Sofaer, ‘Targeted killings from many perspectives.’ [2013] 91(4)Texas Law Review, P925

²⁸⁹ G. McNeal, ‘Kill-List and Accountability.’ [2013] 102 Georgetown Law Journal, P733

participating in hostilities. Targeted killing must therefore be conducted at the time that the targets are engaging in hostilities.

Distinction is a fundamental principle under the laws of armed conflict.²⁹⁰ Although terrorist organisations acknowledge that they are at war with western states, terrorists do not comply with the laws of war. They deliberately do not wear uniforms, emblems or tags that identify them. They also limit their movements to civilian territories, making it difficult to distinguish them from other civilians. This is why some states complain of being disadvantaged by the laws that they are expected to comply with when engaging terrorists in conflict. Their chances of targeting ‘the real culprits’ are limited to moments when there is full clarity about the legitimacy of the targets. To avoid keeping a dangerous person alive, states target the suspect anyway, even when uncertain of their legitimacy. Any mistaken identities or accidental attacks are regarded as collateral damage. This action is criticised by humanitarian commentators, who insist that the best option in situations of uncertainty is to refrain from targeting, even at the risk of harm from the dangerous culprits kept alive.

On the other hand, terrorists prefer to exploit the laws of war to their advantage. They portray themselves as civilians with vested rights to immunity under Art 3 of the GC of the LOAC. This aims to limit the states pre-emptive rights to attack them. However, research shows that terrorists are not inhibited by the laws of war and do not exercise restraint when attacking civilians within their territories. It comes as no surprise that it is difficult to apply the laws of war to terroristic conflicts, if the parties involved in the conflict have little or no regard for the laws of war principles. The question is why do parties to terroristic warfare have little regard for the laws of war principles? It appears that disobeying the law is a matter of choice

²⁹⁰ Although the US is not bound by AP I the government is still bound by this principle which is also one of the main principles of the Laws of Armed Conflict. See AP I article 44 para. 3.

on the part of terrorists. However, subsequent analysis clarifies whether the US and Israel deliberately disregard the principles of war or whether the laws are just impossible to comply with when engaging in terroristic warfare. These questions cannot be answered without exploring the historical and ideological background upon which the war against terror is predicated. These explain normative justifications on grounds of self-preservation and autonomy despite the risk of disregarding the laws of war in the ongoing war against terror.

3.8. Historical Review of Targeted Killing Strategy (the US and Israel):

Since 2000 and 2001 respectively, Israel and the US have actively utilised targeted killings, whilst both legally endorsing it as their countries main 21st century counterterrorism strategy.²⁹¹ However, both countries have a history of resorting to targeted killing strategy when attacking those they regard as threats to their national sovereignties.

3.8.1. Targeted killing by US

The US current pursuit of targeted killings is not the first of its kind. Tal Tovy²⁹² provides the most detailed analysis of the US historical targeted killing programme. Starting with what was tagged the ‘Phoenix programme,’ the US planned to pursue an intensive targeted killing programme against guerrilla terrorists during the Vietnam War in 1960. Tovy assessed the development, implementation and effectiveness of the programme.²⁹³ The findings suggest that the programme was largely influenced by the American insights.²⁹⁴ The programme was founded as a result of the intentional collaboration of military, political and social science

²⁹¹ *The Public Committee Against Torture and Palestinian Society for the Protection of Human Rights and Environment V. The Government of Israel* [2005] H CJ 769/02; N. Pollack, ‘American/Israeli War Crimes: National Policies Engendering Fear: Capitalism, Hegemony and Violence in the Age of Drones.’ [2018] Palgrave Macmillan, Cham, P217.

²⁹² T. Tovy, ‘The Theoretical Aspects of targeted killings: The phoenix program as a case study.’ [2009] 11(4) JMSS P1.

²⁹³ Ibid

²⁹⁴ American Insights is an organisation that broadens exposure to the history and future of Free Speech through emerging technologies. See more at: <http://americaninsights.org/> [Accessed 01/07/18]

experts, sponsored by the CIA and implemented by US special forces and their Vietnamese trainees.²⁹⁵ The aim was to capture and/or kill members of the Viet Cong (VC) who had been identified by Vietnamese indigenes.²⁹⁶ The programme disrupted the effectiveness and operational scope of VC activities, resulting in about 81,740 VC killed between 1968 and 1972.²⁹⁷

There was much debate over the relative merits or legality of targeted killings. For example, several plots to kill foreign political leaders were hatched by the CIA between 1950 and 1970.²⁹⁸ These resulted in deliberations and hearings by the Church Committee of the US Senate between 1975 and 1976. This committee was set up in 1975 and charged with the duty to study governmental operations with respect to intelligence activities.²⁹⁹ The observations of the Committee indicated the need to curb killings not authorised by the state. This led to the implementation of Executive Order 12,333 which signified a ban on assassinations by the then US President, Gerald Ford, and which was un-rescinded by his successors.³⁰⁰ The policy has continued to control US decisions on targeting certain persons.³⁰¹ However, the US has increasingly signed death warrants for leaders deemed as threats to humanity. For instance, the Second Gulf War led to adjustments in the US anti-assassination view. It even instigated the murder trial and eventual execution of Saddam Hussein of Iraq, in 2006, as a punishment for his brutality towards humanity.³⁰²

²⁹⁵ Ibid

²⁹⁶ Ibid

²⁹⁷ Ibid

²⁹⁸ T.B. Grasse, 'A Companion to American Military History' [2010] 2 American History, P1000.

²⁹⁹ Available at:

<https://www.tandfonline.com/doi/abs/10.1080/02684520801977337?src=recsys&journalCode=fint20> [Accessed on 01/07/18]

³⁰⁰ E. Baazan, 'Assassination ban and E.O. 12,333: A brief summary' [2002]2, CRS Report for Congress. Order code 21037.

³⁰¹ J.A. Peterson, 'Three Bibliographies on (i) Drone and Targeted Killing (ii) Prosecuting Terrorism and (iii) Enhanced Interrogation Technique v. Torture (2012)6'. Available at: <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/peterson-three-bibliographies/html> [Accessed on 16/12/2019]

³⁰² Available at: <http://edition.cnn.com/2006/WORLD/meast/12/29/hussein/> [Accessed on 01/02/18]

As noted above, the ‘white paper’ released by the US Justice Department in 2011 is the first official document that lawfully endorses modern ‘targeted killings’ as legitimate acts of war, authorising the use of lethal force against suspected terrorists including non-state actors and active members of the al-Qaeda group.³⁰³ From the US perspective, there is a parallel between lawful killings of enemy combatants during armed conflicts and the targeting of active members of terrorist organisations who harbour plans to wage war on states.³⁰⁴ Whether the state is permitted under any law to disregard the provisions of international law in the event of terrorism based conflict is a question yet unanswered in the current literature. In order to fill the gap, this research assesses the justification for these actions through the socio-legal research methodology. In a bid to assess the US programme, this thesis focuses on attacks on the al-Qaeda group in Yemen and Pakistan.³⁰⁵

3.8.2. Targeted Killings by Israel

Israel has traditionally resorted to targeted killings in reaction to the increasing wave of Palestinian terror activity. The first series of transnational attacks by the Palestinians occurred in the 1960s, and included aircraft hijackings and the murder of eleven Israeli athletes at the 1972 Munich Olympics. These attacks resulted in serious civilian casualties, leaving Israeli society in disarray.³⁰⁶ During the Intifada, many Palestinians were administratively detained, while others were put on trial or deported. The current conflict has been characterized by a more hostile operational response, largely due to the Palestinian terrorist groups’ decision to

³⁰³ D. Kaye *Supra*

³⁰⁴ C. Lotrionte, ‘When to target leaders’ [2003] 26 (3) *The Washington Quarterly*, P73.

³⁰⁵ D. S Robert, ‘Taking Stock Ten Years In: Coin, Casualties and Costs in the Long War-An Introduction.’ [2012] 30 *BU Int'l LJ.*, P565.

³⁰⁶ G. Luft, ‘The Logic of Israelis Targeted Killings.’ [2003] 10 (1) *Middle East Quarterly*, P3.

attack civilians with suicide bombs during the first intifada.³⁰⁷ Since the infrastructure of Palestinian terror groups was located mainly in host Arab countries which were technically at war with Israel, extradition or other forms of coordinated legal action against the terrorists were not possible. The only way to react was by targeting the perpetrators and masterminds.³⁰⁸

Assessments of the Israeli programme have served as prelude to most normative or legal arguments on targeted killings. These works include those by MJ Boyle,³⁰⁹ Ben-Naftali,³¹⁰ Alexander Beck and Cohen, Shanny, Mikko and Avi.³¹¹ Like the US, the Israeli government found targeted killings as a means of exercising the right to self-defence against terrorism.³¹² A few notable scholars, including David, Tovy and Fernandez³¹³ have assessed specific historical cases and programmes.

Firstly, David found that such practices were employed in medieval times by secret groups like the Hagana.³¹⁴ Secondly, the groups that conducted targeted killings used biblical cases of targeted killings to justify their actions against their opponents.³¹⁵ Thirdly, the Israelis have targeted the British army, Arabs, Nazi followers residing in Israel when the territory was a

³⁰⁷ I.J. Bickerton, C.L. Klausner., 'A History of the Arab-Israeli Conflict.' [Routledge, 2018, 8th ed] P.17

³⁰⁸ Ibid

³⁰⁹ Ibid P15

³¹⁰ O. Ben-Naftali, 'We must not make a scarecrow of the law: A legal analysis of the Israeli Policy of targeted killings.' [2003] 36 Cornell International Law Journal, P1.

³¹¹ A. Cohen, Y. Shany, 'A development of modest proportion: The application of proportionality in the targeted killing case.' [2007] 5 (2) Journal of International Criminal Justice, P310; F. Klor *et al* 'Counter-suicide-terrorism: Evidence from the house of demolitions.' [2015] 77(1) The Journal of Politics, P27; J. Mikko 'Death comes knocking on the roof.' Thanaopolitics of Ethical killing During Operation Protective Edge in Gaza' [2015] Antipode; K. Avi 'From Heroic to Post-Heroic Warfare Israel's Way of War in Asymmetrical Conflicts.' [2015] 41 (1) Armed Forces and Society, P96.

³¹² J.N. Kendall, 'Israeli counter-terrorism: Targeted killings under international law.' [2001] 80 NCL Rev, P1069.

³¹³ G. Palmer-Fernandez, 'Justifying political assassination: Michael Collins and the Cairo gang.' [2000] 31(2), Journal of Social Philosophy, P160.

³¹⁴ S. David, 'Fatal choices: Israeli policy of targeted killing.' [2003] 2 (3) Review of International Affairs, P138.

³¹⁵ Ibid

British protectorate, and some Jews.³¹⁶ Fourthly, Israel has continued to conduct targeted killings since its independence.³¹⁷ Fifthly, the Israeli army has employed several weapons including helicopter gunships, fighter aircraft, tanks, booby traps and bombs for the killings.³¹⁸ However, they usually refer to their tactics as ‘interceptions’ or ‘target thwarting.’³¹⁹ Sixthly, Israeli targeted killings increased after the start of the second intifada in 2000.³²⁰ Seventhly, the Israeli Supreme Court has ruled that targeted killings are lawful under its domestic law.³²¹ Lastly, research shows that Israel carried out 213 targeted killing strikes in the Palestinian territory between 2000 and 2010, killing 239 people. Between 2000 and 2014,³²² a total of 8,166 died in the conflict, 7,065 of which were Palestinian and 1,101 Israelis. This means 87 percent of deaths have been Palestinians and only 13 percent Israeli.

³²³ Israel negotiated with Hamas and other Palestinian groups to stop targeted killings of Palestinian leaders and activists in return for an end to the 2014 Israel Gaza conflict.³²⁴ However, the Israeli government continues to employ targeted killing tactics against Palestinian terrorists, because the latter have not desisted from terrorising Israeli civilians.³²⁵ Even after Israeli Prime Minister Ariel Sharon had pledged to cease all military activities against all Palestinians everywhere including the Gaza strip, research suggests that neither Israeli forces nor Palestinian terrorists complied with this peace agreement.³²⁶ Some Israeli

³¹⁶ Ibid

³¹⁷ J.D. Ohlin, ‘Is Jus Bello in crises?’ [2013] 11 (1) *Journal of International Criminal Justice*, P27.

³¹⁸ Ibid

³¹⁹ Ibid

³²⁰ T. Henriksen, ‘Security lessons from the Israeli trenches.’ [2007]141 *Policy Review*, P32.

³²¹ The Israeli case *Supra*

³²² M. Aaronson *et al*, ‘Hitting the target? How new capabilities are shaping international intervention.’ [2013] *RUSI White Paper Report Series*; O. Falk, ‘Measuring the Effectiveness of Israel’s Targeted killing Campaign’ [2015] 9 *First Published in ‘Perspectives on Terrorism.’* P1

³²³ M. Fisher, ‘This Chart shows every person killed in the Israel Palestine conflict since 2000’ <http://www.vox.com/2014/7/14/5898581/chart-israel-palestine-conflict-deaths> [Assessed 16/12/19]

³²⁴ A. Alghafli, ‘Societal Conflict Defies Peace Diplomacy: Evidence from the Palestinian-Israeli Conflict.’ [2019] 8 (1) *Academic Journal of Interdisciplinary Studies*, P95.

³²⁵ J.F. Murphy, ‘State support of international terrorism: legal, political, and economic dimensions.’ [Routledge, 2019] P48

³²⁶ A. Bishara, ‘The Targeted and the Untargeted of Nablus.’ [2015] *Middle East Research and Information Project*, P235.

soldiers are reported to have initiated an exchange of fire with some Palestinian targets only two months after the pledge, and Palestinians have responded in the same vein.

There are recent incidents of Palestinian ‘lone wolves’ encroaching into Jerusalem to attack and kill Israeli civilians with a variety of weapons including butcher knives, guns and vehicles.³²⁷ Recent years have witnessed an increasing number of Palestinian terrorist attacks in the West Bank, several of which were thwarted.³²⁸ On June 30, 2015, Yoram Cohen, head of Israel’s General Security Service (GSS), reported to the Knesset’s Foreign Affairs and Defence Committee that since 2012 there had been a 50 percent annual increase in “popular” terror attacks (683 in 2012 compared to 1,834 in 2014).³²⁹ The highest number of attacks occurred during Operation Protective Edge in which Hamas launched 4,594 rockets and mortars against Israel in 2014.³³⁰ After an intervention from the US and UK government, Israel and Hamas reached a truce and agreed on a ceasefire.³³¹ However, few days after the ceasefire, the war between Israel and Hamas resurrected. Palestinian militant suicide bombers emerged at Gaza strip and detonated a bomb in an attempt to stop Israel military from destroying a Hamas tunnel. Israel launched a revenge attack and the conflict and hostility between both entities continued.³³² Attacks by some 130 terror cells (mostly belonging to

³²⁷ O. Falk, *et al*, ‘Minimizing Unintended Deaths Enhanced the Effectiveness of Targeted Killing in the Israeli–Palestinian Conflict.’ [2017] *Studies in Conflict & Terrorism*, P17.

³²⁸ *ibid*

³²⁹ K. Michael, *et al*, ‘The “Double Game” in the Palestinian Arena: A Platform for Increased Terrorism’ [2015] *INSS Insight No.720* Available at <https://www.inss.org.il/publication/the-double-game-in-the-palestinian-arena-a-platform-for-increased-terrorism/> [Accessed on 12/05/2020].

³³⁰ ‘Rockets Fired from Gaza Into Southern Israel, No Casualties Reported.’ *The Jerusalem Post*, Available at <https://www.jpost.com/Breaking-News/Rocket-fired-from-Gaza-into-southern-Israel-no-casualties-reported-522580> [Accessed on 18/05/18]

³³¹ S. Raghavan, *et al*, ‘How a 72 Hour Truce in Gaza Fell Apart in Less than 2 Hours.’ (2014) *The Washington Post*. Available at: https://www.washingtonpost.com/world/israel-hamas-agree-to-72-hour-humanitarian-cease-fire/2014/08/01/059f1ff8-194e-11e4-9e3b-7f2f110c6265_story.html?noredirect=on&utm_term=.a4d22cc73ff6 [Accessed on 18/05/2018]

³³² *Ibid*

Hamas) and by some 60 cells, were prevented in 2014 and 2015 respectively.³³³ However, between January 1 and November 6, 2017, Israeli security forces killed 62 Palestinians, including 14 children, and injured at least 3,494 Palestinians in the West Bank, Gaza and Israel. Those killed included protesters, suspected assailants or members of armed groups, and bystanders. Palestinians killed at least 15 Israelis during this same time, including 10 security officers, and injured 129 in conflict-related incidents in the West Bank and Israel.³³⁴

The persistent terror attacks have spurred Israeli forces to intensify their targeted killings of suspected Hamas terrorists.³³⁵ Likewise, Israel's persistence on targeted killings seems to have initiated more acts of terror from Palestinians.

Tracing the history of targeted killings makes it easy to appreciate the difference between modern and traditional armed conflicts. Even more important is the need to critically analyse philosophical debates and ideologies around the perceived legality of targeted killings. This should help us better understand the motivations for changes in the character of armed conflicts in general and warfare in particular.

3.9. Ideological Analysis of Terrorism and Targeted Killings

Ideological debates including Carl Schmitt's *Theory of the Partisan*, and the media, identify the global war on terror as a battle of ideologies based on religious concepts.³³⁶ This is because those who engage in this type of warfare do not pursue a 'win or lose' situation that determines which army is more powerful. Instead, they proceed from a belief system that either imposes religious mandates, or refuses this imposition and protects national

³³³ World Report 2015: Israel/Palestine. Available at: https://www.washingtonpost.com/world/israel-hamas-agree-to-72-hour-humanitarian-cessation/2014/08/01/059f1ff8-194e-11e4-9e3b-7f2f110c6265_story.html?noredirect=on&utm_term=.a4d22cc73ff6 [Accessed on 18/05/18]

³³⁴ Israel and Palestine Events of 2017.' Human Rights Watch. Available at: <https://www.hrw.org/world-report/2018/country-chapters/israel/palestine> [Accessed on 18/05/18]

³³⁵ Ibid

³³⁶ Schmitt supra P74

sovereignty.³³⁷ Even the former British Prime Minister, David Cameron, realised this as he made the following comments:

‘...What we face now is a radical ideology that is not just subversive but can seem exciting... One that has often sucked people in from a state of non-violence to violence... that is overpowering moderate voices within the debate... Such conflict of ideologies is what should be taken seriously.’³³⁸

It is important to explore the basis for terrorism and targeted killings so as to constructively devise ways of tackling terroristic conflicts. An understanding of ideologies and stakeholders’ values give better insight when considering the applicability of reforms of current policies.

The broader goals of terrorist groups are rarely mentioned but the main assumption of terrorist attacks is connected to the Islamic ideology.³³⁹ For Al-Qaeda terrorists, the ultimate goal is an independent state or caliphate, ruled by Sharia law and established and defended by holy war or “jihad.”³⁴⁰ This is a perceived divine mandate backed by specific Quran injunctions that includes a kind of ‘irregular warfare’ through acts of terrorism.³⁴¹ The mandate is achieved by using various strategies including suicide bombings, random knife attacks, and even mowing down of pedestrians with vehicles.³⁴² For Al-Qaeda, Alshabab and some other terrorist organisations and lone wolves engaged in the jihadi conflict, dying in the

³³⁷K. Avi ‘From Heroic to Post-Heroic Warfare. Israel’s Way of War in Asymmetrical Conflicts.’ [2015] 41 (1) *Armed Forces & Society*, P96.

³³⁸ Available at: <https://www.gov.uk/government/speeches/extremism-pm-speech> [Accessed on 02/02/18]

³³⁹ J. Goodwin, ‘What do we really know about (suicide) terrorism?’ [2006] 21(2) *Sociological Forum*, P315.

³⁴⁰ C. Blanchard, ‘Al-Qaeda: Statements and Evolving Ideology.’ (2007) CRS, Congress Research Service. Available at: <http://fas.org/sgp/crs/terror/RL32759.pdf> at P17, [accessed on 12/05/2020]

³⁴¹ Ibid

³⁴² CNN Library, ‘Terrorists Attacks by Vehicles Fast Facts.’ Available at: <https://edition.cnn.com/2017/05/03/world/terrorist-attacks-by-vehicle-fast-facts/index.html> [Accessed on 18/05/18]

process of carrying out Gods mandate is gain because God highly rewards such acts of bravery.³⁴³ This is why it is not uncommon for terrorist organisations like al-Qaeda to accept the terminable implications of adopting the strategy of suicide bombing.³⁴⁴ The general perception by Islamic terrorists is that Islam is under attack. This is owing to the refusal of western states to accept its practise norms and values. A fundamental aspect of terrorism is the presence of a political objective (e.g., ousting the United States from the Persian Gulf states) that the terrorist acts are designed to achieve. These terrorist acts would include extremism, radicalisation and terrorism. In extremism it is used to promote values that are extremely incompatible with human rights norms.³⁴⁵ In terrorism it is used to promote violence, and in radicalisation it is used to exploit vulnerable people and recruit them to the cause. This mandate sufficiently encompasses populations all over the world, both local and international conflicts, and to oppose domestic and foreign policies.³⁴⁶

2 The use of extraordinary violence or brutality is an attempt by terrorists to capture news headlines or media attention. While al-Qaeda relentlessly imposes Sharia standards on western states, the latter, spearheaded by the US, fight back using ‘irregular tactics of targeted killings’ through drones to stop the impositions.³⁴⁷

In the Torah,³⁴⁸ there is a seminal passage in Deuteronomy that mandates Israel to expel non-Jewish inhabitants from the promised land of Canaan (currently Israel and Palestinian

³⁴³ C.J. Santifort, *et al*, ‘An Empirical Study of Suicide Terrorism: A global Analysis.’ [2014] 80 (4) Southern Economic Journal, P98.

³⁴⁴ B. Hoffman, ‘The Logic of Suicide Terrorism.’ The Atlantic. Available at: <https://www.theatlantic.com/magazine/archive/2003/06/the-logic-of-suicide-terrorism/302739/> [Accessed on 18/05/18]

³⁴⁵ J. M. Berger, ‘Jihad Joe: Americans who go to war in the name of Islam.’ [2011 Potomac Books, Inc]. P62.

³⁴⁶ E. Tolis, ‘Investigating the influence of ISIS radicalisation on the recruitment process: a critical analysis.’ [2019] 14(2) Journal of Policing, Intelligence and Counter Terrorism, p146.

³⁴⁷ A.S. Hashim, ‘The Islamic State: From al-Qaeda Affiliate to Caliphate [2014] 21(4), Middle East Policy, P69.

³⁴⁸ (Torah, the book of the Jewish scriptures and other sacred Jewish writings Deuteronomy 20 verses 10-18)

territory) that God has given them as an inheritance.³⁴⁹ However, the Palestinians also lay claim to parts of this land and use terrorism to prevent the Israelis from fully actualising their claim.³⁵⁰ U.S and Israel claim self-defence against terror as a justification for utilizing targeted killings.³⁵¹

This research analyses three schools of thought on the lawfulness of applying force. They include the Liberal Cosmopolitan School, reliant upon Kantian ethics,³⁵² the Realist school of Hans Morgenthau and Carl Schmitt,³⁵³ and the Pragmatism school of philosophy attributed to William James, John Dewey and Charles Peirce.³⁵⁴ The rationale for this selection is that scholars debating the legality of targeted killings and the relevance of law enforcement model or laws of war regime, express views that associate them implicitly with at least one of these schools.

3.9.1. The Liberal Cosmopolitan Rationale

The first proponents of the liberal cosmopolitan school include Immanuel Kant, who is considered the central figure of enlightenment rationalism and moral law; John Locke and Aristotle and more contemporary philosophers like Richard Rorty, Jurgen Habermas and

³⁴⁹ C. Cook, et al., ‘YHWH: Great in Kindness’ [2019] An Exegetical Study of Exodus 34 Verses 5-8, P2.

³⁵⁰ Ibid

³⁵¹ H. Strachan *et al*, ‘The Changing Character of War.’ [1st ed.OUP 2014] P 162

³⁵² I. Kant, ‘The Conflict of the Faculties:- *Der Streit der Fakultaten*.’ University of Nebraska Press, 901 N. 17th St., Lincoln, NE 68588-0520, 1992. (This essay, originally written by Immanuel Kant in 1798, and presented in both the original German and in facing page English translation, is the first paperback printing of the edition published by Abaris Books, Inc., in 1979); D. Archibugi, ‘Immanuel Kant, Cosmopolitan Law and Peace.’ [1995] 1(4) European Journal of International Relations, P 429.

³⁵³ Ibid

³⁵⁴ M. Girel, ‘The Metaphysics and Logic of Psychology: Peirce's Reading of James's "Principles.” [2003] 39(2) Transactions of the Charles S. Peirce, P163; J. Dewey, ‘Context and Thought.’ [1931]; J. Dewey, (Edited by L. Hickman, ‘The Influence of Darwin on Philosophy and other Essays in Contemporary Thought. [SIU Press, 2007]P1 [Presenting Dewey's new view of philosophical inquiry This critical edition of The Influence of Darwin on Philosophy and Other Essays in Contemporary Thought presents the results of John Dewey's patient construction]; CS Peirce, ‘Collected Papers of Charles Sanders Peirce. [HUP 1974] 5.

Ronald Dworkin. Immanuel Kant and John Locke proposed that each person has a “natural right” to life, liberty and property. The state must not exercise authority over individuals and governments must not violate human rights, for that would go against the social contract.

Liberalists generally oppose traditional conservatism and seek to replace government absolutism with representative democracy and the rule of one universal law.³⁵⁵ They believe that terrorism and targeted killings should be strictly regulated by the due process law enforcement regime of a state. In their view, targeted killing policies contravene the well-established rule of law that guarantees a fair hearing to everyone suspected of a crime regardless of the consequences.³⁵⁶ Here, the moral worth of an action is determined only by its resulting outcome. Liberalists clamour for liberty, equality and justice, holding that the ultimate value is to vindicate the rule of law through legality and equal rights.³⁵⁷

Liberalists who have contributed to this debate include Philip Alston, David Luban and Samuel Estreicher. This research makes a distinction between ‘hard liberals’, (sometimes referred to as restrictionists) and ‘soft liberals’ (otherwise known as counter-restrictionists,) due to a slight difference in their motivation for advocating the applicable law enforcement regime. The ‘hard liberals’ include scholars such as Philip Alston and Andrew Altman, who argue that terrorism is not an ‘act of war’.³⁵⁸ In their view, terrorists should undergo public trial and due process vindication in civilian courts. They should also have the right to a fair hearing and competent legal counsel.³⁵⁹ In contrast, ‘soft liberals,’ including scholars such as

³⁵⁵ D. Kelly, ‘Life, Liberty and Property.’ [1984] 1(2) Social Philosophy and Policy, P 108.

³⁵⁶ E. Bikundo, ‘*International Criminal Law: Using Or Abusing Legality?*’ [Routledge 2016] P33.

³⁵⁷ G.J Jacobsohn, *Apple of gold: constitutionalism in Israel and the United States.* [Princeton University Press 2017] P 35.

³⁵⁸ H.M. Roff, ‘Global justice, kant and the responsibility to protect: A provisional duty.’ [Routledge 2013] P3.

³⁵⁹ D. Sofer, ‘Targeted killings from Many Perspectives.’ [2013] 91Texas Law Review, P925.

Jeff McMahan and Jeremy Waldron, who recognise targeted killing as ‘moral’ in certain circumstances, make exceptions for notorious terrorists who may be challenging to capture and arrest.³⁶⁰ McMahan and Jeremy Waldron argue that domestic law-enforcement agencies should cooperate in criminal enforcement, but where this proves difficult, targeted killings pursuant to the law of war or new policies may be required.³⁶¹

The liberal cosmopolitan school generally recognises the need for self-defence against an armed attack as allowed under Article 51 of the UN Charter.³⁶² Otherwise every authority is under a moral and legal obligation to arrest rather than target and kill a suspected terrorist unless in self-defence from impending attack.³⁶³ Targeted killing launched in self-defence must also pass the ‘Caroline test’ for it to be regarded as lawful under customary international law.³⁶⁴ As noted in the last chapter, this test was first derived from an early diplomatic incident between the United Kingdom and U.S over the killing of a US citizen involved in an attack against Canada, then a British Colony. The Caroline case³⁶⁵ which was eventually resolved by a diplomatic letter between both countries, establishing the ‘imminent threat doctrine explained in chapter two.’³⁶⁶ The doctrine is accepted as an accurate description of the customary right of self-defence.³⁶⁷

³⁶⁰ J. Waldron, ‘Justifying targeted killings with a neutral principle?’ In Targeted killings’ Finkelstein Supra P 112; J. McMahan, ‘Targeted killing: Murder, Combat or Law Enforcement?’ in ‘Targeted killings: Finkelstein *et al* Supra P135.

³⁶¹ Ibid

³⁶² Charter ‘Article 51: ‘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 measures necessary to maintain international peace and security.

³⁶³ Universal Declaration of Human Rights (UDHR), Article 3 of the ‘Everyone has the right to life, liberty and security of person.’; ‘Article 51 UN Charter (if the act of self-defence complies with the list criteria prescribed by Judge Webster in the “Caroline Case” supra.

³⁶⁴ J. McMahan Supra P135.

³⁶⁵ Caroline Case supra

³⁶⁶ The imminent threat is a standard criterion of international law, developed by Daniel Webster as he litigated the Caroline affair, described as being "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." The criteria are used in the international law justification of pre-emptive strikes in self-defence even if there is no physical attack. (Illustrated in the Caroline case) This concept known as anticipatory-self defence law, was introduced to temper the strict definition of self-defence in Article 51 of the Charter of the United Nations, that implies that an action taken in self-defence must be in response to attacks that have already

When attempting to justify targeted killings under the ‘imminent threat clause’, The US and Israel argue that it is impractical for the language of the Article to expressly limit the exercise of self-defence only to the circumstance in which an armed attack has occurred. Rather, it is important for international law to also recognise the need to exercise the right of pre-emptive self defence. The strongest rationale for pre-emptive self-defence attacks like targeted killing is that terrorist attacks, especially suicide bombings, are never preceded by warning and victims are not usually presented with the opportunity to defend themselves before such attacks occur. Many suicide bombings have ended in numerous fatalities that could have been prevented only by taking proactive steps in self-defence.³⁶⁸ In order to successfully prevent future terrorist attacks and avoid the consequences, an approach that allows a state to proactively find and kill notorious suspected terrorists should be considered under international law.

The impracticality of the criteria of visibly anticipating terrorist attacks before defending against them has led to the US view that verbal threats from terrorists, their propaganda to promote further attacks and their past conducts give the anticipation and fear that danger is imminent. In their view, terrorists’ state of activity against them is sufficient proof of imminent threat. The need for international law of self-defence to progress from its current concept of imminent threat to one that puts terroristic attacks into perspective, has become very glaring. In the absence of such progress, legal documents that discuss self-defence have broadly construed ‘imminent threat’ to include ‘high suspicion of threat before an armed attack occurs.’³⁶⁹ In fact, former US President Obama has defined ‘imminent’ to mean that there are sixty days to find and kill a suspected terrorist. The White House spokesman,

occurred. B. Fritz, ‘Sorting Out the “Imminent Threat” Debate.’ [2003] Available at <http://www.spinsanity.org/columns/20031103.html> [Accessed on 02/02/18]

³⁶⁷ *Nicaragua Vs. The United States* [1989] I.C.J. 14.

³⁶⁸ P. Wilkinson, ‘Terrorism versus Democracy: The Liberal State Response.’ [Taylor & Francis, 2011], P4.

³⁶⁹ M. Byers, ‘Jumping the Gun’ [2002] 24 London review of Books, PP3-5.

Carney, defended the US white paper's definition of 'imminent threat', saying, "What we have in general with al-Qaeda is a continuing process of plotting against the US and American citizens. I think that's fairly irrefutable."³⁷⁰ This interpretation fills the gap in international law on self-defence.³⁷¹ However, as a result of the gap, the language of the Charter seems to admit both interpretations on the permissibility of self-defence when under imminent threat.³⁷²

The doctrine presages the notion intended by Article 51 of the UN Charter, but evokes a discussion between the *restrictionist* and *counter-restrictionist* notions of 'anticipatory self-defence'.³⁷³ *Counter-restrictionists* do not think it is possible for victims to defend against lethal attacks that have taken place so they broadly construe 'imminent threat' to include 'anticipatory threat before an armed attack occurs.'³⁷⁴ The second interpretation, proffered by what the literature sometimes refer to as the *restrictionist* perspective. These scholars believe that Article 51 is aimed at confining the use of force in self-defence to circumstances in which an armed attack has actually occurred. Thus, it would be unlawful to engage in any kind of pre-emptive action. A would be victim has to first be an actual victim before being able to use military force in self-defence.³⁷⁵

Counter-restrictionists on the other hand, reject this interpretation as illogical.³⁷⁶ In their opinion, the Charter did not intend to restrict the pre-existing customary right of anticipatory

³⁷⁰ Available at <http://www.mcclatchydc.com/news/nation-world/world/article24744379.html> [Accessed on 28/11/15]

³⁷¹ Nicaragua v. United States, the International Court of Justice, (ICJ)

³⁷² R. Van Steenberghe, 'The law of self-defence and the new argumentative landscape on the expansionists' side.' [2016] 29 (1) Leiden Journal of International Law, P43.

³⁷³ M. Goodman, 'First Amendment Tension: Advocacy and Clear and Present Danger.' [2015]15Communication Law Review, P1.

³⁷⁴ K. Pawlowska, 'Humanitarian Intervention: Transforming the Discourse.' [2005] 12 (4) International Peacekeeping, P487.

³⁷⁵ A.C. Arend, 'International law and the Pre-emptive use of Military Force.' [2003] 26(2) The Washington Quarterly, P 89.

³⁷⁶ J. Lundquist, 'Killing Terrorists: Armed Drones and the Ethics of War.' [2014] Global Political Studies and Human Rights, P45.

self-defence. The counter-restrictionists' reference to an 'inherent right' under Article 51 indicates that the Charter's drafters aimed to continue the broad pre-UN Charter customary right of anticipatory self-defence.³⁷⁷ To them, it is acceptable for the occurrence of an 'armed attack' to empower an aggrieved state to subsequently act in pre-emptive self-defence.³⁷⁸ The ICJ judge, Stephen Schwebel, noted in his dissent in *Nicaragua v. U.S.*, that Article 51 does not say "if, and only if, an armed attack occurs." It does not expressly limit the use of force in self-defence only to a situation in which an armed attack has actually occurred.³⁷⁹

Counter-restrictionists, who welcome a broad interpretation of Article 51 of the UN Charter, have however not identified specific circumstances in which international law may permit killing in self-defence against unforeseen impending attack. The scope of threats under customary international law is currently limited to the 'imminent threat' criteria. Whereas the unforeseeable nature of terrorist attacks is an indication that it is time to revise the imminent threat doctrine to consider pre-emptive actions in self-defence against unforeseeable attacks. Otherwise, opportunities may continue to exist for more acts of terrorism. This thesis identifies the need for new policies that accommodate reasonable cases of targeted killing in self-defence. Putting the covert nature of terrorist plots into perspective, it considers the extent to which terrorist threats should be anticipated to warrant killing in self-defence. However this thesis does not suggest new policies in relation to Article 51. Rather, it focuses

³⁷⁷ J. Mulcahy, C. O. Mahony. 'Anticipatory Self-Defence: A Discussion of the International Law.' [2006] 2 *Hanse L. Rev.* P231.

³⁷⁸ *Ibid*

³⁷⁹ M. Brailey, 'Pre-Emption and Prevention: An Ethical And Legal Critique of the Bush Doctrine and Anticipatory Use of Force in Defence of the State.' [2003]. P1.

on prescribing amendments to the Laws of Armed Conflict, which is an alternative regime preferred by the Realist school of thought to regulate terroristic conflicts.³⁸⁰

³⁸⁰ R. Russell, 'American Diplomatic Realism: A Tradition Practised and Preached by George F. Kennan, [2000] 11(3), *Diplomacy and Statecraft*, P159

3.9.2 The Realist Rationale for Targeted Killings

The realist school, including Niebuhr, the most influential 20th century realist Morgenthau, Carl Schmitt, Brian Schmidt, Long, and Carr, filter a nation's interests from moralistic and legalistic viewpoints and advocate the 'laws of war model' in dealing with conflict.³⁸¹ The first Realist to challenge the liberal ideology was Niebuhr in 1932.³⁸² His central argument is that liberals overestimate the ability of humans to work collectively in a way that is truly moral. A list of universally applicable moral principles can never be accomplished because human beings are unalterably selfish in nature and thus, every individual is more concerned about his/her own benefits and opportunities to gain power over others.³⁸³ Even though statesmen may have the capacity to be good, this is "always in conflict with the sinful acquisitive and aggressive drive present in human nature."³⁸⁴ Niebuhr's morality argument has been used to explain how international cooperation is unachievable due to the vagaries of human nature.³⁸⁵ Instead of international bodies seeking to impose unfeasible universal liberal standards, the Realists prefer to self-determine how they relate with other states.³⁸⁶

Realist scholars all enunciate the importance of state power and autonomy as the only way to eliminate most conflicts and ensure security in an anarchic world. They define power as the ability to apply coercive tactics to either accomplish or avoid something detrimental to the national interest. Power is achieved when a state possesses material and military resources necessary to induce harm or coerce other states (to fight and win wars). Morgenthau emphasises the need for a state to decide for itself what is right or wrong. He points out that

³⁸¹ M. Bohlander, 'Killing many to save a few' in K.H. Kaikobab, 'International Law and Power: Perspective on Legal Order and Justice' [LCC ed. 2009] P219.

³⁸² R. Niebuhr, 'Moral Man and Immoral Society-A study in Ethics and Politics.' [New York: Charles Scribner's Sons 1932] P1.

³⁸³ M. Stephen, 'One World, Many Theories.' [1998] 110 Foreign Policy, P29.

³⁸⁴ C. Lawson, 'Realism Theory and Individualism in the Work of Carl Menger.' [1996] 54(4) Review of Social Economy, P445.

³⁸⁵ Niebuhr, *Supra*

³⁸⁶ R. Russell, 'American Diplomatic Realism: A Tradition Practised and Preached by George F. Kennan.' [2000] 11(3) Diplomacy and Statecraft, P83

the minimum goal of any state is the battle for survival and only a powerful state can fight to survive enemy attacks.³⁸⁷

Realists regard international regimes and universal rules aimed at eliminating conflict and promoting unity of purpose as unrealistic and unachievable. Carl Schmitt believes that “conflict is what characterizes the human condition and one of the primary tasks of politics is to make conflict endure rather than to abolish it.”³⁸⁸ The central argument in his political theory is that “all social realms are based on particular distinctions; the realm of the political is based on the distinction between friend and enemy.”³⁸⁹ He suggests that, rather than focus on the insurmountable goal of avoiding world conflict, imposing world peace and promoting universal unity, a more realistic approach would be to generate standards for dealing with conflict because it is inevitable.

Schmitt condemns international regimes and organisations so celebrated by liberal institutionalism.³⁹⁰ The rationale for his conclusion is that most liberal principles and norms of international law are inchoate, ambiguous and not well thought through. Schmitt argues that humans have variable perspectives when deciding between right and wrong. It is therefore impractical to assert that liberal universal principles are generally applicable to all humans. He dismisses attempts by liberal states to regulate international warfare through the just war theory and legal globalism. According to him, the just war theory and legal globalism in general are the very expression of the powerlessness and abstractness of legal

³⁸⁷ K. Thompson, Hans Morgenthau, ‘Politics Among Nations: The Struggle for Power and Peace (7th Ed. Alfred A. Knopf 1985] P7

³⁸⁸ De Benoist, Alain, ‘Global Terrorism and the State of Permanent Exception, in Odysseous (Louza & Petito, Gabio ed. 2007)The International and Political Thought of Carl Schmitt [Oxford Routledge Chapter 4] P73

³⁸⁹ Ibid

³⁹⁰ Ibid

principles. He believes the liberal school lacks reference to a concrete institutional order and a substantive idea of justice.³⁹¹

Schmitt also criticizes the utopianism that forms the basis of liberal politics. In his work, 'The Concept of the Political,' Schmitt observes the absence of reality in democratically regulated liberal principles, the problems with legalism and its inability to give contemporary war a legal answer.³⁹² He argues that "politics is defined by the distinction between friend and enemy. This distinction denotes the utmost degree of intensity of a union or separation, of an association or dissociation."³⁹³

The most significant modern example of the realist approach is the Cold War, (1947-1991), characterised by military and political opposition between the Western Bloc (The North Atlantic Treaty Organisation referred to as NATO which was led by the US) versus the Eastern Bloc, (The Warsaw Pact headed by the USSR). Each side kept increasing its military and economic power in order to counterbalance the other.³⁹⁴ From the realist point of view, this decision, (particularly the possession of nuclear weapons by both side provided a nuclear deterrent against attack). For this reason the world had stability during those years.³⁹⁵

The realist perspective considers how any policy affects the power and interests of a state. War must be declared against any entity that threatens its sovereignty. In this way, a state effectively protects its national interests.³⁹⁶ Realists argue that this approach would probably have prevented Hitler from killing six million Jews during the Second World War. They also

³⁹¹ Ibid

³⁹² Carl. Schmitt, 'The Concept of the Political: A key Understanding, Carl Schmitt's Constructional Theory.' Edited by B. Ernst Wofgang [1997] 10 CJLJ, P 5.

³⁹³ Ibid, P 5.

³⁹⁴ P. Owens *et al*, 'The Globalization of World Politics: An Introduction to International Relations.' (OUP 2013] P1

³⁹⁵ Ibid

³⁹⁶ R. Rosecrance, *et al*, 'Beyond Realism: The study of grand strategy.' [2016] The Domestic Bases of Grand Strategy, P3.

adopt the utilitarian concept of dealing with harmful opposition by opting for effective methods of ending conflict, even if such methods are unlawful. While the Utilitarian school and the Realist school have similar approaches regarding the use of targeted killing, it is possible to differentiate one from the other. Realists are mainly guided by a practical approach to reasoning and decision making, while the Utilitarian school is guided by the opinion of 'a majority.' The utilitarian ideology proposed by classical scholars such as Jeremy Bentham,³⁹⁷ and John Stuart Mill applaud a quantitative and reductionist kind of approach to ethics.³⁹⁸ According to them, the value or rightness of an action rests on how well it promotes the welfare of those affected by it; aiming for 'the greatest happiness of the greatest number'.³⁹⁹

The Utilitarian school opines that this is the measure of right or wrong.⁴⁰⁰ Thus, if the greatest happiness is realised through targeted killings of those who through terrorism affect national security, then a utilitarian would regard this to be morally justifiable.⁴⁰¹ Mill has opined that even the killing of a sovereign for the common good was legally justifiable and in some instances, even noble.⁴⁰² His opinion was echoed by public figures, including Abraham Lincoln and the Italian thinker Alberico Gentili. In fact, the latter believed that it makes no difference whether you kill an enemy on the field of battle or in his camp.⁴⁰³

³⁹⁷ J. Bentham, 'The collected works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation.' [Clarendon Press, 1996]. IV 13. [The new critical edition of the works and correspondence of Jeremy Bentham (1748-1832) is being prepared and published under the supervision of the Bentham Committee of University College London].

³⁹⁸ J. Bentham, J.S. Mill, 'Utilitarianism and other essays.' [Penguin UK 2004].

³⁹⁹ S. Ratner, 'Predator and Prey: Seizing and Killing Suspected Terrorists Abroad.' [2007] 15(3), *Journal of Political Philosophy*, P 251

⁴⁰⁰ J. Driver, 'The History of Utilitarianism.' [2009], *Substantive Revision: Stanford Encyclopaedia of Philosophy*, <https://stanford.library.sydney.edu.au/archives/spr2015/entries/utilitarianism-history/> [Accessed on 12/05/20]

⁴⁰¹ W. Werner, et al, 'Extrajudicial Killing as Risk Management.' [2008] 39 (2.3) *Security Dialogue*, P289.

⁴⁰² . A. Ganesh, 'Unilateral Jurisdiction to Provide Global Public Goods: A Republican Account.' [2016] 42 *Brook. J. Int'l L.*, P571.

⁴⁰³ M. Bohlander, 'Killing many to save a few' in K.H. Kaikobab, 'International Law and Power: Perspective on Legal Order and Justice' [LCC ed. 2009]P 219.

Likewise, scholars arguing over the legality of targeted killings under this category, including Mark Maxwell,⁴⁰⁴ Anna Leander,⁴⁰⁵ David Ohlin,⁴⁰⁶ Sacsha Bachmann⁴⁰⁷ and Daniel Statman,⁴⁰⁸ are more concerned with determining the effectiveness of counterterrorism strategies than determining its legality. They conclude that ‘warfare’ is an equally proportionate response to the massive destructive attacks of terrorists.⁴⁰⁹ They consider the fact that Targeted killing is not expressly prohibited by the laws of war, arguing that this gives states and international organisations the right to use this tactic during warfare.⁴¹⁰ They consider terrorism to be an ‘act of war’ and targeted killings to be a lawful military tactic.⁴¹¹ This is not only because the quantitative capacity of terrorist groups bears similarities with the military forces of states, but also because of the involvement of NATO, the UNSC and international military cooperation in targeted killing operations.⁴¹² In their view, it is reasonable to engage terrorists in warfare within civilian territories when they deliberately refuse to separate themselves from the civilian populace. States utilize targeted killings because it allows them to effectively annihilate specifically selected threats from al-Qaeda and other terrorist groups.⁴¹³

From a realist perspective, the strategy of targeted killings benefits the US and Israel’s national interests. Scholars have demonstrated that the Israeli targeted killing tactic has so impaired Hamas that it decreased the frequency of its attacks in the mid-term and has

⁴⁰⁴ M. Maxwell, ‘Rebutting the Civilian Presumption: Playing Whack-a-mole Without A mallet?’ In C. Finkelstein, *et al*, ‘Targeted killings: Law and Morality in an Asymmetrical World.’ [OUP, 2012] P 31.

⁴⁰⁵ A. Leander, ‘Targeted Killings and Extrajudicial Assassinations: Technological Agency in the Politics of the Legal Expertise.’ International Law and the Construction of Knowledge. 2013.

⁴⁰⁶ D. Ohlin, ‘Targeting Co-belligerents.’ In, C. Finkelstein, *et al*, ‘Targeted Killings: Law and Morality in an Asymmetrical World. [OUP, 2012]. P 60.

⁴⁰⁷ S. D. Bachmann, ‘Targeted Killing as a Means of Asymmetric Warfare: A Provocative View and Invitation to Debate.’ [2011] 1, Law Crime and History, P9

⁴⁰⁸ D. Statman, ‘Targeted killing.’ [2004] 5(1) Theoretical Inquiries in Law, P179.

⁴⁰⁹ D. Soafer, ‘Targeted killings from Many Perspectives.’ [2013] 91Texas Law Review, P 925.

⁴¹⁰ Ibid

⁴¹¹ Baachman Supra P 14

⁴¹² Ibid

⁴¹³ Falk Supra 32

prompted its remaining leaders to negotiate.⁴¹⁴ This suggests that the objectives of targeted killings have been partly fulfilled. The targeted killing approach is yet to achieve a total elimination of terrorism or to coerce terrorists into refraining from terrorism. Moreover, it reaffirms the Realist hypothesis that ‘constant elimination of their leaders leave terrorist organizations in a state of confusion and disarray.’ To them, the targeted killing strategy has also obviated the need for other more costly means of subduing Hamas.⁴¹⁵

Arguing from a realist point of view, Maxwell, Bachmann, Ohlin, Leander and Statman believe that the US rightly abandoned the law-enforcement model in the wake of 9/11 in favour of the armed conflict model. However, they all point out that the current law offers terrorist organizations a critical advantage over states attempting to target them. The law of armed conflict allows terrorists to exploit its basic principle of distinction. Under this principle, combatants in armed conflict are legally permitted to kill combatants of opposing forces, but not to intentionally kill civilians. This means that combatants have a legal obligation to publicly and clearly distinguish themselves from civilians. The traditional way to accomplish this obligation is for combatants to wear uniforms or emblems and carry arms openly, among other things. However, terrorists deliberately disregard the provision of law mandating combatants to distinguish themselves from civilians. For this reason, Maxwell argues that terrorists cannot be regarded as combatants under the LOAC. Instead under international law, they can be regarded as civilians who directly partake in hostilities, giving them partial immunity. Terrorists are targetable only for such a time as they partake in hostilities under LOAC and if they cease Direct Participation in Hostilities (DPH), even if only temporarily, they regain civilian immunity. The problem with the DPH provision is that legal status fluctuates between ‘now immune, now not immune’. Some scholars refer to this

⁴¹⁴ V. Beck, ‘Divide and Rule: A Machiavellian Account of Israel’s Targeted Killings against Hamas Alexander.’ [2015] E-International Relations Study. <http://www.e-ir.info/2015/04/18/divide-and-rule-a-machiavellian-account-of-israels-targeted-killings/comment-page-4/> [Accessed on 16/12/19]

⁴¹⁵ Ibid

as ‘the revolving door of immunity.’⁴¹⁶

Maxwell compares terrorists to the moles in the children’s game ‘Whack a Mole’: The moles can be hit with a mallet but only when they come out of their underground homes; they regain their safety as soon as they duck back down into their burrows. A deliberately tactful mole is difficult to whack and so is a clever terrorist who claims to be a civilian and who aspires to stay immune and unnoticed even while participating in hostilities. Maxwell suggests that the laws of armed conflict be revised so that states can deal more effectively with threats posed by terrorist groups. He argues that terrorists who are members of an armed group should forfeit their civilian immunity the moment their “pattern of conduct” shows that they are contributing to the military function of the group.⁴¹⁷ However, Maxwell’s description is vague in describing where to draw the line between conducts that contribute to the military function of a group and those that are not contributory.

Bachmann believes that targeted killing operations form part of NATO’s⁴¹⁸ operational practice: depending on the circumstances, targeted killing represents just another option of the lawful use of force in an armed conflict or assimilated situations.⁴¹⁹ Consequently, his argument favours the concept that the terrorism vs. targeted killing conflict is admissible warfare. Thus, targeted killing can be regarded as a warfare tactic, since International Law

⁴¹⁶ G Solis, ‘Targeted killing and the law of armed conflict.’ [2007] Naval war college review, - usnwc.edu; B. Boothby, ‘And for such time as: the time dimension to direct participation in hostilities [2009] NYUJ int’l L. & Pol; D Williams, ‘Often-Vexed Question of Direct Participation in Hostilities: A Possible Solution to a Fraught Legal Position, (2009) J. Pol. & L; K Watkins, ‘Opportunity lost: organized armed groups and the ICRC direct participation in hostilities interpretive guidance [2009] NYUJ Int’l L. & Pol.; M. Chibundu, ‘International Human Rights and the International Law Project: The Revolving Door Academic Discourse and Practitioner Politics, [1999] 24 Md. J. Int’l L.P 309

⁴¹⁷ Maxwell, Supra P 58

⁴¹⁸ The North Atlantic Treaty Organization (NATO) is a formal alliance between the territories of North America and Europe. At inception, its main purpose was to defend member states from the possibility of a Soviet takeover. With the collapse of the Soviet Union and the Warsaw Pact, its role has been broadened to include defense against any attack whatever. Together, members decide the necessary steps to combat any threats against national sovereignty. Available at: https://www.nato.int/cps/en/natolive/topics_37356.htm [Accessed on 05/02/18]

⁴¹⁹ Bachmann, supra P 9.

does not expressly impose a ban on the lethal neutralization of certain persons during armed conflict.⁴²⁰ This position is justified on the ground that the United Nations Security Council (UNSC) Resolution 1373 which permits states to take ‘necessary steps’ to prevent future terrorist attacks, did not dismiss the use of targeted killing as a counterterrorism strategy.⁴²¹ Ohlin and Statman argue that targeted killing is not only a matter of how states should address terrorist threats but more generally, it is a question of how states should deal with threats posed by irregular forces in asymmetrical conflicts.⁴²²

Despite irregularities that occur within contemporary terroristic conflicts, the realists regard the conflict as warfare and targeted killings as a military tactic. Carl Schmitt is one of few realists who have attempted to explain ways in which terroristic conflicts can be regarded as warfare and the parties can be regarded as combatants under the LOAC. Schmitt believes the terrorism and counterterrorism strategies of the US and Israel present a ‘partisan’ type of warfare that is permissible but not specifically recognised by the Laws of war. He elucidated the concept of ‘partisan warfare’ in his, *Theory of the Partisan*.⁴²³ His political theory on war and enmity is based on the progressive changes in warfare. According to him, the word ‘partisan’ is derived from ‘party’ and refers to the tie to a fighting, belligerent, or politically active party or group.⁴²⁴

Schmitt identifies four specific characteristics of the partisan. Firstly, the partisan is an *irregular* fighter, whose actual target may or may not be the regular soldier in uniform.⁴²⁵

The armed partisan is always dependent on cooperation with a regular organization; he does

⁴²⁰ Bachmann, supra note 125 P 9 and

⁴²¹ S. Bachmann, ‘Targeted Killing: Contemporary Challenges, Risks and Opportunities.’ [2013] Journal of Conflict and Security law, P23.

⁴²² Ibid

⁴²³ C. Schmitt, Supra P 14

⁴²⁴ C. Schmitt, ‘Theory of the Partisan: Intermediate Commentary on the Concept of the Political’ [TPP New York] 2007. P15

⁴²⁵ De Benoist, Alain. ‘4 Global terrorism and the state of permanent exception.’ The International Political Thought of Carl Schmitt: terror, liberal war and the crisis of global order [2007] P 73.

not exist in a political no-man's-land.⁴²⁶ Partisans are driven by intense political commitment or extreme religious fervour. Such an unselfish characteristic sets the partisan apart from a bandit or pirate. Secondly, they usually fight a defensive type of warfare, (telluric) and the aim is always to repel a foreign invader and not necessarily to determine a winning team. Thirdly fighters are mobile, able to quickly attack and retreat from different areas of the enemy, even fighting behind enemy lines. Initially they existed connected to a regular army for supplies and orders but subsequently they became independent of a regular army. Fourthly, they might be driven to defend their own land, (although subsequently religious and political ideologies have become another driver).⁴²⁷

In the global political context, partisan fighters may be employed by a government; however they are more motivated to pursue their own interests. Although the partisan may have a duty to act on behalf of a state and cease to be essentially defensive, such duties may easily be overridden by his/her personal interests.⁴²⁸

Both sides of the conflict between states and terrorists show the third and fourth characteristics: mobility and principled (national or religious) defence. However, the main difference is that terrorists predominantly target civilians rather than uniformed combatants. This disruptive pattern of warfare is different from regular warfare in that terrorists have no status in any conventions of war. Terrorists strike out against the enemy in an irregular manner: in different places, at different times with varying impact, as do states.⁴²⁹

⁴²⁶ L. Odysseos, *et al*, 'The international political thought of Carl Schmitt: terror, liberal war and the crisis of global order.' [Routledge, 2007]. Part 11, P4.

⁴²⁷ C. Schmitt, 'The Nomos of the Earth in the International law of the Jus Publicum Europaeum, Telos Press Publishing 2006 [translation by G.L. Ulmen].

⁴²⁸ C. Shmitt, 'Theory of the Partisan' (2007) Telos P74

⁴²⁹ Ibid

Realist philosophers argue that suspected and known terrorists must be treated as enemy combatants who violate the principles of war. The threat they pose should therefore be met in large measure by military means, as a matter of collective and/or personal self-defence, on the basis of laws applicable during armed conflict.⁴³⁰ The discussion of targeted killings under the realist school of thought does not usually consider the need for creation of new policies. To them, “acts of terrorism against a country by non-state sponsored organizations like al-Qaeda or individuals need to be considered more than just criminal acts. Instead, they should be considered acts of war against the victim nation.”⁴³¹

They do not acknowledge the absence of a battlefield in the war on terror. In their view, there is a ‘battlefield’ but it is global, and targeting can be done wherever the terrorist may be identified, even in civilian territories. However, others believe that the realist concept of a global battle-field is flawed. This is because, unlike the liberalist or pragmatist approach, the realist approach does not prioritise the LOAC principle of distinction which aims to limit risks of harm to innocent civilians by limiting warfare to war-zones.

3.9.3 The Pragmatic Rationale for a ‘Guided’ use of Targeted Killings

As will emerge, this thesis agrees with the pragmatic school which adopts a different perspective to both the realist and liberal schools of thought. Pragmatism is not a single philosophy. General reference to pragmatism would be to a style or way of thinking and doing things.⁴³² However, the consolidation of the concepts termed ‘Pragmatism’ is a late 19th Century and early 20th Century innovation. Proponents of the pragmatic school include Charles Sanders Pierce of the 19th Century, William James and John Dewey both of the 20th

⁴³⁰ C. Schaller, ‘Using Force Against Terrorists ‘Outside Areas of Active Hostilities’—The Obama Approach and the Bin Laden Raid Revisited.’ [2015] *Journal of Conflict and Security Law*, kru0 P22.

⁴³¹ F. Biggio, ‘Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism.’ [2002] 34 *CASE W. RES. J. INT’L L.* P1

⁴³² Available at: http://www.philosophybasics.com/movements_pragmatism.html [Accessed on 08/08/17]

century.⁴³³ The pragmatic ideology considers practical consequences or real effects to be vital components of both meaning and truth. At its simplest, something is true only insofar as it works.⁴³⁴ The Pragmatic ideology also asserts that any theory that proves itself more successful in predicting and controlling our world than its rivals can be considered to be nearer the truth. It argues that the meaning of any concept can be equated with the conceivable operational or practical consequences of whatever the concept portrays.⁴³⁵ This school prioritises actual experience of critical issues over fixed principles and non-experimental reasoning.⁴³⁶ To a pragmatist, interpretations of 'reality' and 'truth' are not defined in terms of 'beliefs', 'logic' or 'correspondence'. In contrast, a pragmatist approach evaluates theories or beliefs in terms of the success of their practical application. Pragmatism generally holds that 'truth' is to be found in the process of 'verification.' Thus, the true interpretation of an idea is the successful working out of that idea.⁴³⁷

Since knowledge is socially constructed and validated, Peirce holds his scientific method, guided by 'the social impulse,' to be the only way of establishing valid beliefs.⁴³⁸ To him, the process of verifying the implication of an idea is to have it tested by societal factors. This is because the methods of tenacity, authority, and *a priori*, which liberal and realist philosophers adopt, do not include guiding principles for how to reason, and may thus contribute equally to maintain true and false beliefs.⁴³⁹ Pierce compares other non-practical

⁴³³ M. Girel, 'The Metaphysics and Logic of Psychology: Peirce's Reading of James's "Principles"' [2003] 39(2) Transactions of the Charles S. Peirce Society P163; J. Dewey, 'Essays in Experimental Logic.' [SIU Press 2007]; R. Ormerod, 'The History and Ideas of Pragmatism.' [2006] 57(8) Journal of the Operational Research Society, P892.

⁴³⁴ Peirce, Charles Sanders, 'The essential Peirce: selected philosophical writings.' [1998] 2 Indiana University Press, P373.

⁴³⁵ P. Siljander, *et al*, 'Theories of Bildung and Growth: Connections and Controversies between Continental Educational Thinking and American Pragmatism.' [Springer Science & Business Media, 2012]. P26.

⁴³⁶ Ibid

⁴³⁷ K. Hannes, C. Lockwood, 'Pragmatism as The Philosophical Foundation for the Joanna Briggs Meta-Aggregative Approach to Qualitative Evidence Synthesis.' [2011] 67(7) Journal of advanced nursing, P1632.

⁴³⁸ T. Strand, 'Peirce on Educational Beliefs.' [2005] 24(3 -4) Studies in philosophy and education, P269 .

⁴³⁹ Ibid

philosophical approaches to the behaviour of an ostrich which tends to stick its head in the sand while ignoring the risk of being stifled.⁴⁴⁰ In support of Pierce submission, James warns against upholding habitual beliefs and overlooking information that can challenge them.⁴⁴¹ In general, Pragmatists submit that it is better to turn away from generalization and insufficiency, verbal solutions, bad *a priori* reasons, closed systems, fixed principles, and pretended absolutes and origins: but turn towards concreteness and adequacy, facts and action.⁴⁴²

Legal pragmatists such as Claire Finklestein,⁴⁴³ Daniel Farber,⁴⁴⁴ Thomas Grey,⁴⁴⁵ and Richard Posner⁴⁴⁶ believe that liberal views are severely flawed. The legal pragmatist thinks that the classical view is overly legalistic, naively rationalistic and based upon misunderstandings of legal institutions. As opposed to the self-imposed limitations entailed by the classical view of legislations, legal pragmatists emphasise the eclectic nature and the diverse aims of the law. A legal Pragmatist would favour socio-legal research approaches that consider the implications of laws in action. The pragmatic concept of law is also forward-looking, which is a significant contrast to strict liberal rules that do not evolve in order to be made practically applicable to real life issues. More specifically, legal pragmatists largely agree upon four main aspects of a pragmatist version of the classical laws: (1) the importance of context; (2) the lack of foundations; (3) the instrumental nature of law; and (4) the unavoidable presence of alternate perspectives.⁴⁴⁷

⁴⁴⁰ Strand, *Supra* P 154

⁴⁴¹ W. James, 'The meaning of truth.' [HUP 1975] Vol. 2, P 1-123. At P 4 on Radical Empricism

⁴⁴² C. West, 'The American Evasion of Philosophy: A Genealogy of Pragmatism.' [Springer, 1989] P15.

⁴⁴³ Finklestein *Supra* P182.

⁴⁴⁴ A. D. Farber, *et al*, 'Beyond All Criticism.' [1998] 83 Minn. L. Rev. P1735.

⁴⁴⁵ T.C. Grey, *Modern American Legal Thought*. [1996] 493; R.A. Posner, 'What has Pragmatism to Offer Law.' [1989] 63 S. Cal. L. Rev. P 1657.

⁴⁴⁶ R.A. Posner, 'What has Pragmatism to Offer Law.' (1989) 63 S. Cal. L. Rev. P 1653 at P 1657.

⁴⁴⁷ Available at <http://www.iep.utm.edu/leglprag/> [Accessed on 16/12/19]

Modern legal pragmatic philosophers debating over targeted killings believe that neither the LOAC nor the Law enforcement models are applicable to terrorism.⁴⁴⁸ Anthony Clarke Arend,⁴⁴⁹ Colonel David Cavaleri⁴⁵⁰ and Paul Sikkema⁴⁵¹ believe that current international policies should be updated to adapt to the modern context in which conflict occurs. Their allegiance to pragmatism is based on its willingness to weigh the legal implications of targeted killings and terrorism against standards that make up traditional warfare or law enforcement.⁴⁵²

Pragmatists believe that it is not warfare when there is no identifiable combatant, battlefield or anticipation of an end to a conflict. It is also not a matter of law enforcement since arrest, due process and determining the guilt of suspected terrorists is time wasting and problematic, whilst an effective defence against terrorism is a matter of urgency. Legal pragmatists reason that there is no system that is one hundred percent liberal or realistic. The decision of the greatest good of the greatest number may sometimes overlap with legality and at other times it may not.⁴⁵³

The stance of the law in action towards contemporary targeted killing suggests that not every international conflict can be resolved in accordance with the liberal belief system of due process. Liberalists believe that terrorists are entitled to due process and fair trial simply because it will be more lawful to do so, i.e, the LOAC does not regard terrorists as combatants, therefore they possess civilian status and civilians suspected of committing crimes are entitled to a fair trial. Liberalists involved in legal debates over terroristic warfare

⁴⁴⁸ K Benson, 'Killing a Cleric: American Born Cleric'Anwar Al-Awlaki, Religious Personnel, and the Global War on Terror.' [2014] 1Buffalo Human Rights Law Review, P20.

⁴⁴⁹ A. Arend, 'International Law and the Use of Pre-emptive Force.' [2003] 26 (2) The Washington Spring. P89.

⁴⁵⁰ D.P. Cavaleri, 'The Law of War: Can 20th Century Standards Apply to the Global War on Terrorism?' [CSIPFL Kansas 2015] P 102

⁴⁵¹ P. Sikkema Supra note P 2.

⁴⁵² Arend, Cavaleri & Sikkema. Supra P10.

⁴⁵³ K. Benson, , 'Kill 'em and Sort it out Later:' Signature Drone Strikes and International Humanitarian Law.' [2014] (27) Pac. McGeorge Global Bus. & Dev.P 17.

do not consider the need to deviate from upholding what is lawful to what is unlawful but more practical.⁴⁵⁴ Some states with a realist view have found it necessary to disregard liberal standards in their response to terrorism. They are in favour of a more active realist approach that prioritises sovereign protection over any legal consequences.⁴⁵⁵

Research suggests that targeted killing counterterrorism tactic has helped reduce the frequency of terrorist attacks. Like Israel, the US, an otherwise liberal state, is a major perpetrator of targeted killings. Like other liberals, the US has in the past criticized Israel's targeted killing policy. The US expressed its discontent with the practice by dismissing it as extrajudicial and morally unjustifiable. The official position of the Bush administration as conveyed by both White House and State Department spokesmen has been for Israel to understand that targeted killings of Palestinians does not end the violence, but are only inflaming an already volatile situation and making it much harder to restore calm.⁴⁵⁶

The US maintained this position until the al-Qaeda attack on September 11, 2001, which claimed the lives of over three thousand US citizens.⁴⁵⁷ It became imperative to decide how future terroristic acts could be prevented and determine how the perpetrators of 9/11 would be penalised. It became clear that military intervention would be most effective in combating large terrorist entities such as al-Qaeda. It also became clear how impractical it would be to attempt to determine the guilt of every suspected terrorist on a case-by-case basis. The pragmatists have acknowledged that it would constitute a great risk to the national sovereignty of states to depend on time-consuming due process of law enforcement to

⁴⁵⁴ J. Troy, 'International Society's Challenge of Targeted Killing by Drones.' [2017] *International Politics*. P1.

⁴⁵⁵ D. Statman, 'Targeted killing.' [2004] 5 (1) *Theoretical Inquiries in Law*, P179

⁴⁵⁶ G. Luft, 'The logic of Israel's targeted killing. [2003] 10 (1) *Middle East Quarterly*, P3.

⁴⁵⁷ Available at: <http://www.bbc.co.uk/newsround/14854816> [accessed on 06/02/18]

guarantee their safety.⁴⁵⁸ These guarantees only go as far as being punitive, but are not proactive in guaranteeing the safety of those vulnerable to future terrorist attacks. On the other hand, legal pragmatists also acknowledge that targeted killing is not a legal warfare tactic.⁴⁵⁹ As explained above, there are three reasons for this: Terrorist culprits are not recognised as combatants under the LOAC; Although states can target civilians who directly take part in hostilities against them, the civilians must be physically ‘found’ carrying out acts of hostilities; military combatants of states fighting terrorism find it very difficult to comply with their LOAC mandatory obligation to distinguish terrorists from innocent civilians because the former fail to wear distinctive tags, uniforms or emblems.

Legal Pragmatic scholars like Finklestein, Arend and Sikemma argue that owing to the uniqueness of terroristic force, international law should devise a new and pre-emptive way of regarding terrorists other than as criminals; punishable under the domestic law enforcement regime of the state whose civilians are attacked, and, only if there is sufficient evidence to prove their guilt.⁴⁶⁰ Like realists, pragmatists believe it is more practical for the US to respond commensurately and pre-emptively to the 9/11 attack with military intervention rather than a less effective approach of ‘due process.’

This position is analogous to a utilitarian rationale for dealing with conflict.⁴⁶¹ The position held by utilitarian proponents such as Jeremy Bentham is also based on practicality.⁴⁶²

Utilitarianism is an effort to provide an answer to the practical question “What ought a person

⁴⁵⁸ Supra

⁴⁵⁹ D. Hovell, ‘Due process in the United Nations.’ [2016] 110(1) American Journal of International Law, P48.

⁴⁶⁰ Finklestein Supra

⁴⁶¹ C.M.J. Drake, ‘The Role of Ideology in Terrorists Target Selection.’ [1998] 10(2) Terrorism and Political Violence, P53

⁴⁶² J. Bentham, ‘The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation.’ [Clarendon Press, 1996].

to do?” The answer is that a person ought to act so as to produce the best consequences possible. To a utilitarian, the utility of a particular action in providing the greatest amount of happiness or pleasure to sentient beings is both necessary and sufficient to establish its *moral worth*.⁴⁶³

By contrast however, rather than merely establishing the *moral worth* of an action, a pragmatist would establish its normative truth value. The judgment of a pragmatist is not guided by moral evaluation; instead, it merely asks whether an ideology or proposition works successfully.⁴⁶⁴ The answer to that question is considered sufficient to establish such idea or proposal as true; meaning is found only in the practical consequences of accepting a notion. For example, in Finkelstein’s view of the realities of modern warfare, “... the practise of targeted killing departs from the traditional battlefield form of combat, and hence, from the core justification for killing in war.”⁴⁶⁵ She points that the process of identifying individuals by name before killing them and even the use of drones to take out the individuals that have been identified are practices that are alien to traditional laws of war. Regardless, she argues that these practises can be considered as attempts to minimise the risks that the target will cooperate with alternative approaches like surrendering or detention. It can also generally be seen as an attempt to minimise civilian casualties.⁴⁶⁶

Drawn to its logical conclusion, *impractical* ideas are necessarily rejected by pragmatists, not out of any strict moral code, but merely because they fail to satisfactorily guide the inquiry of knowledge.⁴⁶⁷ If it can be verified that an attack can only be alleviated by the use of targeted

⁴⁶³ Ibid

⁴⁶⁴ C.S. Peirce, ‘Pragmatism as a Principle and Method of Right Thinking.’ (The 1903 Harvard lectures on pragmatism. SUNY Press, 1997) P27.

⁴⁶⁵ C. Finkelstein, ‘Targeted Killing as a Pre-emptive Action,’ in C. Finkelstein *et al* *Supra*, P162.

⁴⁶⁶ Ibid Pp 164-165.

⁴⁶⁷ Ibid

killings, then a pragmatist would consider it ‘necessary’.⁴⁶⁸ It is noteworthy that a pragmatist may consider an approach to be ‘necessary’ but this does not mean they think it is ‘lawful’. Drawing from what is inferred above, a Pragmatist is apt to acknowledge targeted killing as unlawful under international law, in order to make recommendations upon law reforms that would contemplate regarding it as lawful. This is in contrast to the Realist tendency to defend targeted killing at all cost, on the grounds of technicality under the LOAC, even when it is glaring that the LOAC does not support targeted killing.

Pragmatists may consider the ‘partisan warfare’ through drone mechanisms as a practical approach for dealing with terrorism, if it proves to be effective in eliminating terrorist threats. They would also consider the drone mechanism to be effective if it can be proved that it complies with applicable laws.⁴⁶⁹ For example, if the US and Israel are engaged in the ‘war against terror’ a pragmatist would question whether the mechanisms used during warfare are designed and able to target only specifically selected combatants, such that the risk of harming civilians in the process is minimised.⁴⁷⁰ Anything short of these types of expectations may be proof to a pragmatist that the drone programme is an impractical approach, in that, it fails to achieve the goal it purports to achieve.

This thesis resonates with the pragmatist ideology because it aims to evaluate the viability of targeted killing tactics. In order to achieve this and to add a new form of analytical approach to existing literature on targeted killing counterterrorism strategy, this thesis adopts an economic/mathematical approach, in the form of game theory. This approach aims to

⁴⁶⁸ E. Schweiger, ‘The Risk or Remaining Silent: International Law Formation and the EU Silence on Drone Killings.’ [2015] 1(3)Global Affairs, P269 .

⁴⁶⁹ S. Bachmann, ‘Targeted Killing: Contemporary Challenges, Risks and Opportunities.’ [2013] Journal of Conflict and Security Law, P4

⁴⁷⁰ *ibid*

generate more accurately quantifiable results on the effectiveness of targeted killing than the opinion based approach predominant in the literature. Thus, the game theory semi-quantitative method for critically analysing the effectiveness of targeted killing tactic is used as a verification tool in this thesis. The results extracted from the study would help formulate a practical and general compromise standard for judging the effectiveness of targeted killings.⁴⁷¹

As noted above, Sikkemma, Leander and many other pragmatists are responsive to the need to address terrorism more intensively and actively. They have determined the fight against terrorism through targeted killings; firstly, as a unique type of armed conflict between a state and non-state actor that has not been addressed by international treaties and so requires separate, distinct international law agreements. This new agreement should verify terrorists' combatant status under international law and determine if, and how they can be better identified as combatants. It has been argued that a significant reason why states are unwilling to grant the status of combatants to insurgents and other non-state actors is because doing so would not only afford them an element of legitimacy, but would mean that they enjoy the two 'privileges' of combatants – immunity from criminal liability for fighting, and prisoner-of-war status when apprehended.⁴⁷² However, terrorists already assume these rights that are guaranteed under LOAC with or without state sanction. Moreover, it will be in the state's interest to formally recognise terrorists as combatants, as they will no longer be limited by the DPH principle when targeting terrorists. Secondly, according to the current law of armed

⁴⁷¹ J. T. Richardson. 'The sociology of religious freedom: A structural and socio-legal analysis' [2006] 67(3) *Sociology of religion* P271; W.Hong Chui and M. McConville., 'Research Methods for law. [Edinburg University Press, 2007]. P3'

⁴⁷² D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' [2005] 16(2) *European Journal of International Law*, P197.

conflict, terrorists taking part in hostilities against civilians or non-combatants can be targeted and killed. However, this is only after their combatant status has been verified by their direct and persistent acts in hostilities.

The impracticality of determining terrorist combat status is due to the ambiguity of the term, “direct participation in hostilities.” This and the problem of distinguishing between active participants who do not wear emblems or uniforms from innocent persons, are major grounds for the pragmatist argument for reform of the law. They clamour for the narrowing of the definition of a lawful civilian target who ‘maintains direct participation in hostilities’ against a state, by referring to specific acts which enable a line to be drawn between direct and indirect participation in hostilities. These scholars also argue for a more expedient way of fighting the unique war on terrorism; one which protects civilians whilst at the same time avoiding the reward to a notorious participant who refuses to distinguish himself from innocent civilians.⁴⁷³ Because of the tendency for terrorists to intermingle with civilians, civilian territories are *defacto* the battlefield for the global war on terrorism. Thus, the proposals put forward by pragmatist scholars include the consideration that targeted killing launched within civilian territories should be legally acceptable on the condition that a mechanism is devised to avoid mistaken identities.⁴⁷⁴ The ability of the US drone mechanisms to avoid mistaken identities, is currently debated by the Pragmatism, Realism and Liberalism schools of thought. Questions arise as to whether, generally, drones have the ability to comply with the *jus in bello* principles of war.

⁴⁷³ Ibid 44

⁴⁷⁴ A.D. Tutu, *Drones And Targeted Killing: Legal, Moral, And Geopolitical Issues.* [Interlink Publishing 2014] P 19; K. Grayson, *Cultural Politics of Targeted Killing: On Drones, Counter-Insurgency, and Violence.* (Routledge 2016) P 21.

3.10. Ethical Concerns by the Three Schools over the Use of Drones

Liberalists, realists and pragmatists have made conclusions on the legal implications of the use of drones.⁴⁷⁵ Should targeted killing be legalised under international law? The Liberal Cosmopolitan and Pragmatic schools of thought ask this question; when they do, they also intend to consider whether the drone mechanism should be prohibited under international law. In order to answer this question, it is important to consider whether or not drones can be relied upon to carry out targeted killings in compliance with the law. This is realisable by first assessing the legal debates by these two schools over the use of drones. The aim of this assessment is to highlight specific concerns over the targeting process. Both the Liberal and Pragmatic schools criticise the use of drones as a self-defence or warfare tactic. While the Liberalists scrutinise the legality of the drone programme, the Pragmatists scrutinise its legal efficiency and the Realists defend the tactic.

3.10.1. Drone Debate: The Liberalist Perspective

Firstly, liberalists are concerned that drone missiles are remotely launched by US military agents against terrorists, even if the latter are found in the midst of civilians. This suggests that the US ‘knowingly’ put the lives and property of innocent civilians at risk of harm.⁴⁷⁶ The increasing rate⁴⁷⁷ of war crimes (under the assumption that a state of war actually exists between terrorist organisations and the US) from each drone attack is suggestive of the fact that drone combatants accord little regard to the LOAC principle of distinction. It appears that operators do not ensure that the targets are in isolation of innocent civilian bystanders. The principle of distinction obligates every combatant in armed conflict to at all times distinguish between the civilian population and combatants and between civilian objects and

⁴⁷⁵ Ibid

⁴⁷⁶ J. Yoo, ‘Embracing the Machines: Rationalist War and New Weapons Technologies.’ [2017]105 Cal. L. Rev, P443.

⁴⁷⁷ B. Kellman, ‘Targeted Killings-Never Not an Act of International Criminal Law Enforcement.’ [2017] 40 BC Int'l & Comp. L. Rev P 27.

military objectives. Accordingly, operations are to be directed only against military objectives.⁴⁷⁸ This rule aims at ensuring respect for and protection of the civilian population and civilian objects. Concerns arise as to whether the drone is capable of complying with the LOAC discrimination and proportionality principles.⁴⁷⁹

Another contentious issue is the tendency for the drone mechanism to deviate from the standard mode of combat intended by the LOAC. To the liberalists, this requires an even representation of parties to a conflict on a battle-field, in order to promote fairness and equality during armed conflict. Instead, there is an asymmetrical type of conflict where one party has an obvious functional advantage over the other. In situations like this, the risk in collateral damage to the party being attacked is higher than that suffered by the attacking party, who is “remotely fighting the war” by drone with little risk. Scholars emphasize the urgency of addressing the use of lethal force in combating terrorism in order to re-install the standard combat mode, curb human rights violations and reduce collateral damage during armed conflicts. In the absence of such guidance, the use of drones remains unrestricted and the race to own such weapons may have only just begun.

Gregoire Chamayou,⁴⁸⁰ Addie Wagenknecht,⁴⁸¹ Jordan Paust,⁴⁸² Laurie Blank,⁴⁸³ Philip Alston⁴⁸⁴ and a host of other scholars have analysed the use of drones through the liberalist lens by maintaining a legalistic view on the US drone programme. Their objective is to

⁴⁷⁸ Article 48, API Geneva Convention 1948

⁴⁷⁹ G. Cameron, ‘WMD terrorism in the United States the threat and possible countermeasures’ [2000] *The non-proliferation Review* P162.

⁴⁸⁰ G. Chamayou, ‘Drone Theory.’ (Translated by J. Lloyd), [London: Penguin, 2015] P2.).

⁴⁸¹ A. Wagenknecht, ‘*Black Hawk Paint*’ in A.C. Hart, *et al*, ‘The Art of Drone Warfare: Artistic Representations of Unmanned Aerial Vehicles.’ [2015] P1.

⁴⁸² J. Paust, ‘Operationalizing Use of Drones Against Non-State Terrorists Under the International Law of Self-Defense.’ [2015] 8 *Alb. Gov’t L. Rev.* P166.

⁴⁸³ L.R Blank, ‘In Response to Professor Oren Gross’ the New Way of War: Is There a Duty to Use Drones.’ [2015] 67 *In Fla. L. Rev. Forum*, P 38.

⁴⁸⁴ P. Alston, A/HRC/14/24/Add.6 [2010]

preserve the rule of law in any given situation.⁴⁸⁵ From their perspective which is founded on human rights, targeted killing is an extreme measure that violates the general international rule of law, especially as the culprits are neither tried nor given an opportunity for fair hearing.⁴⁸⁶ They argue that drones should be prohibited weapons due to the collateral damage they are likely to cause. Even if drones are regulated to target with precision, they argue that its use poses potential risk to the development and interpretation of the law in ways that could endanger the central goal of protecting civilians and conducting hostilities in a lawful manner.

Chamayou's *Drone Theory* prose and Wagenknecht's artistic presentation of 'drone violence' describe drones as the most sophisticated tool of man-hunting yet. Chamayou presents an idealistic dismissal of the practice of modern drone warfare. He argues that drone warfare needs to be understood as a form of one-sided killing, since the drone—as a technology of remote killing—removes the very possibility for “reciprocity.” If war has been historically based on a mutual and shared risk of death (i.e. a “duel”), then the modern drone violence does not simply “transform” war; it bypasses the logic of conflict altogether, becoming the unilateral delivery of death.⁴⁸⁷ In her series *Black Hawk Paint*, started in 2007, Wagenknecht uses remote-controlled toy drones to smear and splatter black or hot pink paint across white canvas or vellum.⁴⁸⁸ She also uses viscous black acrylic paint to create two thick horizontal lines across the lower portion of the canvas. The two lines end in a swirling outburst that appears to have flung paint towards the outer extremities of the canvas.

⁴⁸⁵ L. Blank, 'After "Top Gun": How Drone Strikes Impact the Law of War' [2012] 33, *Pennsylvania Journal of International Law*, P3.

⁴⁸⁶ A. Guiora, 'Targeted killing as active self-defence' [2004] 36 *Case W. Res. J. Int'l L.* P319; C Gray, 'Targeted Killings: Recent US Attempts to Create a Legal Framework.' [2013] 58, *Current Legal Problems, The American Journal of Jurisprudence*. P1

⁴⁸⁷ M. Boyle, 'Drone Wars: Transforming Conflict, law, and Policy. Edited by P. L. Bergen and D. Rothenberg [2016] Pp 210-211.

⁴⁸⁸ A. Wagenknecht, 'Black Hawk Painting Series.'
<https://www.google.co.uk/search?tbm=isch&q=Addie+Wagenknecht%27s++Black+Hawk+Paint+&hl=en&>
[Accessed on 16/12/19]

Wagenknecht's art has insidious connotations because the paint marks in this painting look similar to that of blood splatter surrounding a viciously killed murder victim. It looks as though Wagenknecht's drone fired at some target on the canvas, causing it to violently explode across the surface of the painting. The aim of this Painting is to cause viewers to come face-to-face with an actual scene of a drone strike.⁴⁸⁹ The artistically simulated drone strike portrays psychological distance in such a way that it causes viewers to simultaneously comprehend the beauty of the art, but more so, the violence of the scene depicted.

The U.S. use of drones in Pakistan and Yemen is interpreted by these liberalists as instances of indiscriminate use of lethal force, resulting in incidental loss of lives and harm to civilians and their properties.⁴⁹⁰ These drones are used as weapons of warfare against suspected terrorists in other states. This policy disregards the direct prohibition from ICJ decision in *Nicaragua Vs. The United States*⁴⁹¹, against the use of such lethal force on another state.⁴⁹² These drones are unmanned aerial vehicles, armed with missiles and bombs but controlled by the US intelligence agencies on the ground.⁴⁹³ The missiles from drones are used to target oblivious, suspected terrorist members of al-Qaeda groups in Yemen and Pakistan.⁴⁹⁴ Following this process, missiles are fired intentionally from the drones to destroy vehicles or houses containing the terrorist targets.⁴⁹⁵ These pattern is sufficient to raise concern and demonstrate the need for greater caution. For these reasons, liberal scholars are sceptical

⁴⁸⁹ A Hart, 'The Art of Drone Warfare: Artistic Representations of Unmanned Aerial Vehicles.' [2015] INTL-I400 Capstone Thesis.

⁴⁹⁰ J. Paust, 'Self-Defence Targetings of Non-State Actors and Permissibility of US Use of Drones in Pakistan.' [2010] 19 (2). *Journal of Transnational Law and Policy*, P273

⁴⁹¹ *Nicaragua Vs. The United States* [1989] I.C.J. P14.

⁴⁹² C. Jenks, 'Law from above: Unmanned Aerial system, use of force and the law of armed conflict.' [2009] 85 *North Dakota Law Review*, P649

⁴⁹³ A. Jurgen, 'Arms control for armed uninhabited vehicles: an ethical issue.' [2013] *Ethics and Information Technology*, P16.

⁴⁹⁴ *Ibid*

⁴⁹⁵ *Ibid* 56

about whether the use of drones complies with the LOAC principle of distinction and proportionality.

A major concern however lies in the drone tendency to remove some of the deterrent effects of traditional warfare that requires an elementary paradigm of co-equal belligerents who meet at the war zone and run the reciprocal risk of killing and getting killed.⁴⁹⁶ Since drone strikes can be controlled from afar without risk to military personnel, authorities and commanders can be tempted to interpret the legal limitations on who can be killed and under what circumstances too broadly.⁴⁹⁷ What then is the legal fate of the American military drone operators who partake in armed conflict without personally appearing on the battle-zone to be equally involved in the risk of killing and getting killed?

There is the concern that the absence of drone combatants and remoteness of inflictions and injuries from incidences that occur on an actual battlefield robs the drone combatants of the moral responsibility to target with due care and compliance with the just war principles and anticipate an end to the war. The drone debate is thus narrowly focused on the legal question; do remotely controlled drones have the capacity to distinguish between innocent civilians and suspected terrorists who hide amongst them in order to avoid detection? This question can be explored by analysing the literature debate on each LOAC principle, starting with the criteria for complying with the principle of distinction.

The Liberalists resonate the principle of distinction under the LOAC; a lawful targeted killing is one that is directed against a legitimate military target.⁴⁹⁸ They are of the view that

⁴⁹⁶ J. Ohlin, 'Is Jus Bello in Crises?' [2012] Cornell Law Faculty Working Papers, P103.

⁴⁹⁷ Ibid

⁴⁹⁸ L. R. Blank, 'After "Top Gun": How Drone Strikes Impact the 'Law of War' [2012] 33 (3) U. Pa. J. Int'l L, P675.

only uniformed combatants on a battlefield are lawful targets.⁴⁹⁹ Moreover, the reliability of the information available to drone operators is questioned by liberalists. Is the information first hand or 100% accurate?⁵⁰⁰ Operational forces on the ground are more often than not uncertain about the combat position of targeted individuals and thus, it is highly likely that civilians and otherwise unlawful targets may also be killed in drone strikes. For example, there were several drone attempts by American and Yemeni intelligence to target and kill al-Awlaki, an alleged senior officer of the al-Qaeda group. This lasted two years and resulted in several targeted killings of people mistakenly identified. Eventually, he and another Yemeni commando, (who can be referred to as collateral damage) were killed in September 2011 via drone attack.⁵⁰¹

Further, the nature of drone strikes means that authorities and commanders can be tempted to interpret the legal limitations on who can be killed and under what circumstances too broadly.

⁵⁰² What can then be said to be their legal fate when they partake in armed conflict without the traditional opportunity for combat? Quinta's article metaphorically compares the use of drones to a 'play station mentality.'. ⁵⁰³ Since drone technology permits soldiers to "kill by remote control," which is synonymous to playing a video game, they may become lax in their moral restraint to kill. The article concludes that parties using drone mechanism can no longer be called soldiers as we know it.

⁴⁹⁹ J. Ohlin, 'Is Jus Bello in Crises?' [2012] Cornell Law Faculty Working Papers, P103.

⁵⁰⁰ McNeal G, 'Kill-List and Accountability' [2013] Penn State Law. The Dickson School of Law, P1

⁵⁰¹ D. Sell, 'The United States' Policy of Targeted Killing and the Use of Force: Another Exception to the United Nations Use of Force Regime.' [2012] P1

⁵⁰² Ibid

⁵⁰³ J. Quinta, 'Moral Theory and Drone Warfare: A literature Review' [2015] LAFARE <https://lawfareblog.com/moral-theory-and-drone-warfare-literature-review> [Accessed on 13/05/20].

One of the major liberalist criticisms against the U.S targeted killing practice is that it is usually covert. Moreover, reports on death statistics are inconsistent and there are deficiencies in accountability.⁵⁰⁴ This makes it difficult to discern whether a party has complied with the distinction principle to the letter. The Bureau of Investigative Journalism records 323 drone strikes between 2004 -July 2016, resulting in known deaths of 424-966 civilians in Pakistan. Other critics proffer rather lower numbers.⁵⁰⁵ A study carried out by the Columbia Law School estimates that 35 percent of the victims of drone strikes in 2011 were civilians.⁵⁰⁶ On the one hand, American counterterrorism officials account civilian casualties as low as 2.5 percent.⁵⁰⁷ On the other hand the Bureau of Investigative Journalism presents the number as high as 26.5 percent.⁵⁰⁸ Appendix 2 shows a bar graph of the annual drone strikes in Pakistan and Appendix 3 shows the annual civilian death rate compared with deaths of militants.⁵⁰⁹

It is hardly possible to resolve these differences. Realists and pragmatists reckon that problems of data precision are because drone strikes usually occur in areas that are inaccessible to independent eyewitnesses and the data is drawn from unreliable local officials and local media.⁵¹⁰ However, liberal critics believe that the fact that the US is known to hoard data on these attacks buttresses questions over its obligatory duty of accountability.⁵¹¹ Does the US have the right to hoard data on attacks? This hidden data prevents accurate records of

⁵⁰⁴ B. Sutherland, 'Modern Warfare Intelligence and Deterrence: The Technologies that are Transforming them [2012] Wiley P107 .

⁵⁰⁵ Bureau of Investigative Journalism <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> [Accessed on 16/12/19]; A. Misra, 'Legality of the Use of Drone Strikes in Pakistan' [2012] IAIS.

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid

⁵⁰⁸ The Drones Team, 'Covert War on Terror- Supra note 505 Data base.

⁵⁰⁹ Ibid

⁵¹⁰ A. Khan, 'Legality of Targeted Killings by Drones Attacks in Pakistan' [2011] SAN Analysis, PAK Institute for Peace Studies, P1.

⁵¹¹ Ibid

civilians killed from being presented as evidence. This data is necessary to assess collateral damage and inform relatives.⁵¹²

Current records of civilian casualties weaken the argument that the drone can actually comply with the principle of distinction to target with precision when the missiles hit the ground. A recent report shows that in 2012, there was a reduction in collateral damage, in terms of civilian deaths, from drone strikes (see Appendix 3).⁵¹³ According to John Brennan, the then US National Deputy Security Advisor for Homeland Security and Counterterrorism: “there has not been a single collateral death because of the exceptional proficiency, precision of the capabilities we have been able to develop.”⁵¹⁴ However, his testimony cannot be corroborated due to the fact that, in September 2012 the so called “smaller missile on drone” killed the target and 13 Yemeni civilians.⁵¹⁵ It is thus difficult to attribute the reduction in collateral damage to the newly designed “smaller drones” that is alleged to have been created to launch missiles with more precision.

3.10.2 Drone Debate: The Realist Perspective

Michael Schmitt, Gary Solis, Anna Leander, Pierre Bourdieu, Michael Coleman and David Gray have approached the subject of drones from a realist perspective.⁵¹⁶ Anna Leander’s

⁵¹² A. Basham, ‘Eichmann and Bin Laden: extraterritorial abduction and targeted killing as tools of national security.’ (2012). San- Diego State University Thesis, P3.

⁵¹³ CNN Wire Staff, ‘ Drone Strikes Kill, Maim and Traumatize too Many Civilians, its study says (2012) Available at: <http://edition.cnn.com/2012/09/25/world/asia/pakistan-us-drone-strikes> [Accessed 16/12/19]

⁵¹⁴ C. Heyns, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc, P350.

⁵¹⁵ H. Almasari, ‘Suspected U.S Drone Strike Kills Civilians in Yemen, Officials Say’ <http://edition.cnn.com/2012/09/03/world/meast/yemen-drone-strike> [Accessed 16/12/19].

⁵¹⁶ M. N. Schmitt, ‘Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing the ‘Fog of Law’ [2011] 13 Yearbook of International Humanitarian Law P 311; G. D. Solis, ‘The Law of Armed Conflict: International Humanitarian Law in War. [CUP 2016] P 23; A. Leander, ‘Technological agency in the co-constitution of legal expertise and the US drone program.’ (2013) 26 (4) Leiden Journal of International Law P811; M. Coleman, D. Gray, ‘The Legality behind Targeted Killings and the Use of Drones in the War on Terror. [2014] 5(1) Global Security Studies, J. Richard. ‘Pierre Bourdieu.’ [Routledge, 2013].

Socio-legal analysis observes that drones have ‘agency’, (under the control of an agent), in the ‘field’ of legal expertise and also within the drone program. This agency impacts on how to interpret the law for both drones and the drone program i.e co-constitution. With this perspective, scholars are redrawing the boundaries of legal expertise, by making associations to new forms of expertise and by generating technological expert roles.⁵¹⁷

The sociological research approach by Anna Leander and Pierre Bourdieu argues that where the appropriate battlefield law on precision, obligation and expertise is obeyed, the drone programme can be legally regulated.⁵¹⁸ The realists support of the drone programme is not isolated. Commentators like President Abdu Rabbu Mansour Hadi of Yemen, who was inaugurated in February 2012 has acknowledged the importance of the drone strikes in Yemen. He argued, “They pinpoint the target and have zero margin of error, if you know what target you are aiming at.”⁵¹⁹ In an attempt to clear the ‘fog of law,’ Michael Schmidt points out that the ‘fog’ surrounding the operation of drones stem mainly from misunderstandings over the weapon system. It may also be as a result of the refusal of the drone agents to comply with the law of ‘distinction’ and failure to limit targeting to instances where terrorists are isolated from innocent civilians.⁵²⁰ Otherwise, the drone cameras are specifically configured to zero in to launch missiles on specific targets.⁵²¹

Schmidt asserts that the use of drones may in some cases enhance protections to which various persons and objects are entitled under the LOAC. Thus, there may be no reason to

⁵¹⁷ Ibid

⁵¹⁸ Ibid

⁵¹⁹ S. Scott, ‘Yemeni Leader Praises US drone strikes’ (2012) The New York Times, P1

⁵²⁰ Ibid

⁵²¹ P. Fahlstrom, *et al*, ‘Introduction to UAV systems. (John Wiley & Sons 2012) P9.

treat drone weapon as distinct from other weapons simply because they are contemporary.⁵²² Gary Solis argues that drones and their missiles are traditionally lawful weapons that bear great similarity to artillery, naval gunfire or close air support by manned aircraft. Even when the targeting is done by the drone operators with precision, mistakes are bound to be made which would result in civilians killed. He argues that this consequence is the true reality of war that ought to be expected.⁵²³ Interestingly, segments of the Pakistani media have also affirmed the benefit, precision and justification for the use of drones.⁵²⁴ However, due to the reality of war on terrorism, in which the enemy combatants do not identify themselves, identifying lawful drone targets is what the liberalists regard as problematic.

In spite of the liberalist concern that the drone programme cannot be easily regulated to comply with the distinction and proportionality principle under the LOAC, the realists have argued that drones are capable of targeting with precision. They have demonstrated that drones offer extensive and enhanced opportunities for compliance with the LOAC 'proportionality' principle.⁵²⁵ However, liberalists would contend with this claim on grounds of technicality. The reliability of the information available to drone operators is in doubt, particularly whether such information is first hand or 100% accurate.⁵²⁶ At any rate there really is no proof from past events that drone missiles are capable of targeting only combatants when fired into civilian territories.

⁵²² Ibid

⁵²³ G. Solis, 'Viewpoint: drones, modern war and the US.' (2012) BBC News, <http://www.bbc.co.uk/news/world-us-canada-18896236> [Accessed 16/12/ 2019].

⁵²⁴ Staff Correspondent, 'Pakistan Arms Taliban by the Night.' [2001] Times of India

⁵²⁵ A. Etzioni, 'The great drone debate' [2013] Military Review.

A/68/382 [2013], 14, paras. 68---69;

⁵²⁶ J. . D. Ohlin, 'Is Jus in Bello in Crisis?' [2013], JICJ, P37

Statman has warned that even regular warfare incurs collateral damage, and leads to deaths and destruction of some civilians and their properties.⁵²⁷ Statman has observed that under the just war theory, the use of targeted killing of the enemy is permitted in war. Targeted killings through the use of drones, even in civilian territories are simply another military tactic used pursuant to that end. The fact that the enemy may intentionally choose to mingle in civilian territories does not suddenly strip a combatant of the right to hunt down and eliminate the threat posed. In spite of the liberalist view that drone warfare leads to unnecessary civilian harm, realist commentators and scholars evidence the civilian casualties as accidental loss and consequences of war that cannot constitute war crime.

Realists do not believe that drones contravene the principle of distinction, because the machine itself has been designed with the intention to distinguish and the capacity to target only specifically selected individuals. U.S officials argue that the drone programme and the process of ‘premeditatedly identifying a terrorist by name’ (personality strikes), before targeting, allows for easier compliance with the LOAC principle of distinction.

The Realist argument in favour of the drone programme is not isolated And as noted earlier, has received support from Yemen’s President Abdu Rabbu Mansour Hadi.⁵²⁸ Gary Solis supports the drone programme, maintaining that that even when the targeting is done by drone operators with precision, mistakes are bound to be made. Furthermore, civilians are also killed in warfare that does not involve the use of drones. He argues that this consequence is the true reality of war that ought to be expected.⁵²⁹

⁵²⁷ Ibid

⁵²⁸ S. Scott, ‘Yemeni Leader Praises US drone strikes’ [2012]The New York Times.

⁵²⁹ G. Solis, ‘Viewpoint: drones, modern war and the US.’ [2012] BBC News, <http://www.bbc.co.uk/news/world-us-canada-18896236> [Accessed on 16/12/ 2019].

3.10.3. Drones Debate: The Pragmatist Perspective and the Researchers Reflection

In contrast to the Liberalist and Realist views, Pragmatists require full proof that the drones have the potential to target with precision. Mistaken identities may occur; to a pragmatist, a mechanism is ineffective if it does not meet its required goal. Likewise, the drone targeted killing mechanism is ineffective if it does not succeed in targeting the real culprits intended. While liberalists maintain that drones should be prohibited under International law, pragmatists consider that it is the manner of use that should be addressed under guiding principles of laws regulating international force. This envisages new methods of allowing states to use targeted killing while avoiding indiscriminate attacks and, as much as possible, eliminating the risk of civilian casualties.

Pragmatists acknowledge that drone strikes launched from afar are intended to reduce risks to life or limb of US military personnel.⁵³⁰ However, they seek to verify these claims by asking: Firstly, is there any certainty that missiles fired from drones would hit only its target without incurring collateral damage? Secondly, how practical or safe is it to continue to regard civilian areas as battlefields? Thirdly, can drones be assessed on their capacity to target with precision? Fourthly, is it possible to utilize drones without violating the distinction, military necessity and proportionality principles under the LOAC? Fifthly, how effective is the drone mechanism in dealing with terrorism? Sixthly, should targeted killing through drones be legally endorsed?⁵³¹

To answer these questions, it must be recognized that there is a fundamental difference between IHRL (Law enforcement) and LOAC regarding civilian casualties. Both legal paradigms prohibit the intentional and premeditated killing of innocent civilians. However,

⁵³⁰ D. Milne, 'Pragmatism or what? The future of US foreign policy. International affairs.' [2012] 88(5) P935.

⁵³¹ Ibid

while under the IHRL there is an absolute prohibition on killing civilians, the LOAC does not regard all civilian casualties as war crimes.⁵³² This distinction is one of the reasons why commentators consider the LOAC to be better applicable to terrorism than Law Enforcement of IHRLs. For example, when carrying out targeted killing, collateral damage can result from errors and accidents, such as a technical malfunction. This would result in targeting of civilians whom the drone operators did not anticipate would be in close proximity. In order to strike a balance between the principles of humanity and military necessity, the proportionality principle seeks to minimize civilian casualties by requiring that the amount of casualties is not ‘excessive’ in relation to the military advantage sought. The ‘expected’ civilian casualties and ‘anticipated’ military advantage should be assessed based on the information available and the circumstances at the time of the attack, and not in hindsight. A breach of this fundamental principle constitutes a war crime under the Statute of the International Criminal Court.⁵³³

The principle of proportionality aims at minimizing collateral damage and ensuring that civilians are not deliberate objects of combatant attacks.⁵³⁴ The later principle weakens the claim that the LOAC is applicable to terroristic conflict owing to civilian status of the terrorist targets and innocent bystanders. It may be argued that drones offer the advantage for compliance with the principle of proportionality. As noted above, drones are capable of collecting specific information about a target, the civilian population in the vicinity around the target, and the possible civilian casualties that may result from a targeting process.⁵³⁵ This opportunity to observe the target and the possible strike arena(s) for protracted periods of

⁵³² United Nations War Crimes Commission, ‘Law Reports of Trials of War Criminals,’ United Nations War Crimes Commission, 1949(13).

⁵³³ Rome Statute of the International Criminal Court of 17 July 1998;

⁵³⁴ Article 48, 1977 Protocol to the Geneva Convention

⁵³⁵ Y. Dinstein, ‘The Principle of Distinction and Cyber War in International Armed Conflicts.’ [2012] 17(2) Journal of Conflict and Security Law, P261.

time, offer the opportunity of striking only when the chances of minimizing collateral damage is at its highest. In many cases, this process should significantly improve the accuracy of the attack. Drones should make it possible to observe more effectively the principle of proportionality.⁵³⁶ However, it is the principle of distinction that the drone agents struggle to comply with. The problems posed by the use of drones may thus be more intricate than concerns about its efficiency. Perhaps, it is the drone agents that should be schooled on how to comply with the principles of the LOAC when using drones.

The literature debate regards serious legal issues and interpretive contexts. The use of armed drones poses challenges to the interpretation of the principle of proportionality. How can one begin to define ‘expected’ collateral damages? How ‘military’ should be the advantage? How can civilian harm and military advantage be compared in different combat situations, for example with regard to terrorism, and across cultures? Moving forward, should parties to warfare be evenly represented by drones on a battle-field? Answers to these new questions on how to use drones during warfare should clear the ambiguities about their applicability and ease the uproar.

At any rate, the pragmatic approach would be to regard the new precision capabilities of drones as significant to legal debates on contexts and categories. Here, the legal interpretation of civilian casualties could be altered. It becomes obvious that there should be a shift from ‘no excessive casualties’ as a proportionality criterion to ‘no casualties at all’ during armed conflicts involving the use of drones. However, a zero casualty principle could be difficult to achieve, unless all persons in the battle zone are considered legitimate targets.

⁵³⁶ Ibid

Compliance with these principles during armed conflict usually requires absolute awareness and empathy towards humans and their rights, whether they are parties to the conflict or not. The central question parties from all three schools of thought struggle to answer is whether in the nearest future, armed robots will possess the ability to empathise and exercise discretion during warfare. For example, a screen-operated armed robot can be helpful to an operator because of its highly sophisticated sensors, but does it have the ability to withdraw from targeting an enemy combatant who at the last minute surrenders his/her arms? Some scientific philosophers doubt that this will ever be possible, because of the dynamic and complex battle environments in which the autonomous armed robots will have to operate.⁵³⁷

Scholars have identified the need for a broad international debate on the development of military robotics technology. This must consider the responsibilities of governments, industry, lawyers, the scientific community, non-governmental organisations and other stakeholders.⁵³⁸ Such a debate has not occurred due to the rapid development of military robotics in recent times. A first attempt at discussing the use of lethal autonomous weapons systems (LAWS) otherwise known as “killer robots,” was made at an informal meeting of experts at the United Nations in Geneva in May 2014⁵³⁹

A Top UN official in Geneva charged diplomats present at the LAWS meeting, categorically stating that: “You have the opportunity to take pre-emptive action and ensure that the ultimate decision to end life remains firmly under human control.”⁵⁴⁰ The discussions focused

⁵³⁷ R. Lamber, ‘A Literature Review on New Robotics: Automation From Love to War.’ [2015] 7 Int. Journal of Social Robotics 5, P549

⁵³⁸ Ibid

⁵³⁹ Ibid

⁵⁴⁰ http://www.un.org/apps/news/story.asp?NewsID=47794#.V6Sp8_krLcs [accessed on 05/08/16]

on ethical and sociological questions that arise from the development and deployment of contemporary autonomous technological weapons. The meeting included discussions on the competence and legal challenges such weapons pose to international law and their possible impact on military operations.⁵⁴¹ The experts sought to answer the following questions: “Is it morally permissible to delegate decisions about the use of lethal force to such systems? Who would be legally liable if the use results in war crime or serious human rights violation? If responsibility cannot be ascertained as required by international humanitarian and human rights law, is it ethical or legal to deploy such systems?” While the extent of the development of these autonomous weapons as a military technology remains unclear, and uncertain, discussion upon instituting contexts and objectives for purposes of establishing a Convention that regulates the use of LAWS has commenced effectively”⁵⁴²

The second lethal autonomous weapons (LAWS) meeting in 2015 entertained two broad views on the matter. One side was of the opinion that LAWS should be put in the same category as biological and chemical weapons and comprehensively and pre-emptively banned. The other view suggests that LAWS should be put in the same category as precision-guided weapons and regulated.⁵⁴³ In April 2016 however, the experts appeared to favour the liberalist argument that the use of autonomous weapons systems be restricted due to a high tendency for rapid proliferation and perhaps a new arms race. Moreover, LOAC cannot be guaranteed for the interaction of autonomous weapons systems. It is important to pass an international legally binding treaty that has a strong focus on ensuring that human control is meaningfully involved in all application of violent force.

⁵⁴¹ Available at: [http://www.unog.ch/80256EE600585943/\(httpPages\)/A038DEA1DA906F9DC1257DD90042E261](http://www.unog.ch/80256EE600585943/(httpPages)/A038DEA1DA906F9DC1257DD90042E261) [accessed on 16/12/19]

⁵⁴² Ibid

⁵⁴³ Ibid

Not all developments in military robotics can be qualified by many scholars as ethical. It is therefore important that all stakeholders enter into debate on how to supplement the use of drones with more meaningfully active weapons of war against terror. It is important to bear in mind that the US only considers targeted killing through drones to be the best weapon of warfare in civilian territories. Drones allow their users to remotely identify and specifically target the enemies deliberately intermingling within civilian domain to avoid detection. One argument in favour of using drones is to guide against the chaos that can be caused through constant entry of the US Infantry into Pakistani and Yemeni civilian territories that harbour terrorists. The premise of this argument is weak considering that those who experience drone invasions regard it to be extremely chaotic. However, in line with the pragmatic rationale, this thesis is not mainly arguing the need to reduce the use of drones applied in contemporary killings. Instead it expresses the need for an international legal framework to explicitly prescribe the use of force, that includes guidelines for the use of drones in transnational warfare involving non-state actors, for the purpose of accountability.

3.10.4. The Rationale for Exploring the Liberal, Realist and Pragmatist Perspectives

is an in-depth approach that identifies areas for further study on the subject of targeted killings. Insight gained by analyzing differing philosophical perspectives facilitates the formulation of a theoretical framework for dealing with terroristic conflicts, which effectively balances the conflicting values of involved stake-holders. This includes a thorough evaluation of the claim that targeted killing effectively counters terrorism where other approaches fail. A number of authors have clarified the effectiveness of targeted killing, using different approaches to the novel approach of game theory adopted in this thesis.

3.11. The Effectiveness of Targeted killing: Current Literature Analysis

Targeted killing has often been judged to be effective, if states succeed in eliminating the terrorists that they consider too dangerous to keep alive.⁵⁴⁴ The common approach is to determine *how many* notorious terrorists have been successfully eliminated. However, this thesis opines that this approach would yield unrealistic results. What makes a person notorious is when he/she has carried out or spearheaded acts of violence. This does not take into consideration the culprits that may be equally dangerous but are ‘unknown’ simply because they are yet to execute their first attacks. More than anything, it emphasizes the punitive nature of targeted killing. It may be true that targeted killing succeeds only to an extent in punishing terrorist culprits for acts of violence previously committed. However, the question is whether the targeted killings of ‘known’ culprits mean that terrorism is effectively dealt with? The literature has a variety of opinions on how the effectiveness of Israeli and US targeted killing counterterrorism activities are measured.

3.11.1. Israel’s Practice

On 14 December 2006, the Supreme Court of Israel ruled that targeted killing is a legitimate form of self-defence against terrorists. The court also outlined several conditions for its use.⁵⁴⁵ These include preventing imminent attacks when there is no discernible means of foiling it or making an arrest by other methods.⁵⁴⁶ Targeted killing of Palestinian terrorists has been actively practised by Israel ever since then.⁵⁴⁷

⁵⁴⁴ C. J. Fuller, ‘See It/Shoot It: The Secret History of the CIA’s Lethal Drone Program.’ [Yale University Press, 2017] P209.

⁵⁴⁵ M. Lesh, ‘*The Public Committee against Torture in Israel vs. The Government of Israel*’ [2007]8 The Israeli High Court of Justice Targeted Killings Decisions.” Melb. J. Int’l L. P373.

⁵⁴⁶ Ibid

⁵⁴⁷ K. Secker, ‘International Law and Targeted Killing in the Israeli-Palestinian Conflict.’ <https://lawjournalforsocialjustice.com/2018/01/07/international-law-and-targeted-killings-in-the-israeli-palestinian-conflict/> [Accessed on 26/01/19]

The effectiveness of Israel's targeted killing practices have been evaluated by several authors including Hepworth, Neumann and Wilner in a study of Taliban leaders in Afghanistan.⁵⁴⁸

The authors maintained that if the policy is selective, it is potentially able to 'degrade an organization's overall capability to plan, coordinate and carry out acts of violence.'⁵⁴⁹ Thus, overall violence in the middle east increased after the targeted killings of several terrorist leaders, but the use of more sophisticated tactics, like that of suicide bombing, decreased by more than 30%.⁵⁵⁰

Wilner *et al* concluded that a larger shift in operational abilities from terrorist organisations in the Middle East occurred at this time, which led the organisations to participate in more frequent, but less sophisticated, types of terrorism. Hepworth's study yielded few significant changes in the type of attacks perpetrated by al-Qaeda groups after the US drones killed four important leaders, save for a small decrease in average fatalities.⁵⁵¹ He concluded that groups may have already been "maxed out" on motivation, and the death of one more leader would not have caused any more backlash than already present.⁵⁵²

Zussman and Zussman maintain that terrorism is a form of "economic warfare."⁵⁵³ The authors investigated the role of 159 Israeli targeted killing attempts on stock market trends from September 2000 to April 2004. Basing target seniority on three criteria and an expert ranking, they determined that the stock market (both Israeli and Palestinian) experienced decline after the deaths of senior political leaders. The opposite was true of military leaders; in other words, the Israeli stock market reacted positively to these types of targeted killings.

⁵⁴⁸ J.V. Carson, 'Assessing the Effectiveness of High-Profile Targeted Killings in the "War on Terror.'" [2017] 16(1) *Criminology & Public Policy*, P191; A.Wilner, 'Targeted killings in Afghanistan: Measuring coercion and deterrence in counterterrorism and counterinsurgency.' [2010] 33 *Studies in Conflict & Terrorism*, P307.

⁵⁴⁹ *Ibid*

⁵⁵⁰ P. Neumann, Et Al, 'Locating Al Qaeda's Center of Gravity: The Role of Middle Managers.' (2011) 34 *Studies in Conflict & Terrorism*, P825.

⁵⁵¹ D. P. Hepworth *Supra* P 6-13

⁵⁵² *Ibid* P13

⁵⁵³ A. Zussman, et al, 'Assassinations: Evaluating the effectiveness of an Israeli counterterrorism policy using stock market data.' [2006] 20(2) *The Journal of Economic Perspectives*, P193.

The authors concluded that their findings are indicative of market perceptions and that the targeted killings of political leaders are viewed as counterproductive. However, the deaths of military leaders would demonstrate targeted killing as an effective counterterrorism strategy.

Similarly, Hafez and Hatfield assessed Israeli targeted killings on rates of Palestinian violence from September 2000 to June 2004, during the *Al-Aqsa* uprising.⁵⁵⁴ The authors found that targeted killings yielded a null effect on both long-term and short-term violence perpetrated by Palestinians. They noted that target hardening strategies like security checkpoints and the separation wall may have been responsible for the decrease in Palestinian violence, rather than the actual killings. Terrorism has not abated and terrorist organisations do not seem to struggle with recruiting members to replace the ones who have been targeted and killed.

3.11.2. The U.S. Practice:

Based on the expansion of US Public Law 107–40, Authorization for Use of Military Force, in 2001, targeted killings are justified by the US as a “necessary and appropriate force... in order to prevent any future acts of international terrorism against the US by such nations, organizations, or persons.”⁵⁵⁵ The intention to ‘prevent’ future terrorist attacks is suggestive of the goal of using targeted killing strategy to completely apprehend future terrorist attacks. Several scholars have applied a set of robust qualitative methods to address similar deficits in terrorism and counterterrorism literature.⁵⁵⁶ However, there is little empirical evidence to verify whether the use of targeted killing strategy effectively meets its said goal.

⁵⁵⁴ M. Hafez, M. Hatfield, ‘Do Targeted Assassinations Work? A Multivariate Analysis of Israel's Controversial Tactic During Al-Aqsa Uprising 1’. [2006] 29.4 Studies in Conflict & Terrorism, P359.

⁵⁵⁵ Congress, US, ‘Authorization for Use of Military Force.’ [2001] Public Law, P107; R.F. Grimm, ‘Authorization for use of Military Force in Response to the 9/11 Attacks.’ [2006] P107 Legislative History. Library of Congress Washington Dc Congressional Research Service.

⁵⁵⁶ J. Jordan, ‘When Heads Roll: Assessing the Effectiveness of Leadership Decapitation.’ [2009] 18(4) Security Studies, P719; P.B. Johnston, ‘Does Decapitation Work? Assessing the Effectiveness of Leadership Targeting in

The US targeted killing programme is deemed effective if all or most of the prominent (known) leaders of terrorist organisations have been killed.⁵⁵⁷ The rationale for this is that terroristic threats would abate once the main perpetrators have been executed.⁵⁵⁸ However, this rationale does not take into consideration the future of recruits who would possess similar notoriety. The effectiveness of the US practise of targeted killing from the standpoint of leadership decapitation has been approached in a related line of research including those concluded by Johnston, Jordan, Mannes, Price and Clifford.⁵⁵⁹

The conclusions of Clifford, Mannes and the US government are that it is an advantage when the targeting of terrorists culprits lowers the morale of terrorist groups, reduces their cumulative operational capabilities and increases the morale of the attacker's. However, these conclusions do not take into account the fact that Islamic terrorism is global. Research shows that new and active perpetrators have been easily instated to replace those who have been killed.⁵⁶⁰ Arguably, targeted killing is ineffective if it only serves to postpone terrorist activities, pending the reinstatement of new leaders. It may be inaccurate to conclude that so far, targeted killing strategy is most reliable for adequately combating terrorism.

Recent history is replete with often brazen attacks from *Jihadi* 'lone wolves' scattered around the globe.⁵⁶¹ The successful elimination of specific targets resident in Pakistan, Yemen and Somalia does not guarantee an end to terrorism. Instead, it may only help in eliminating the threats from those specific targets. Furthermore, previous incidents of suicide bombings

Counterinsurgency Campaigns.' [2012] 36(4) International Security, P47; B. C. Price, 'Targeting Top Terrorists: How Leadership Decapitation Contributes To Counterterrorism.' [2012] 36(4) International Security, P9.

⁵⁵⁷ Ibid

⁵⁵⁸ Ibid

⁵⁵⁹ P. Johnston, 'Does decapitation work? Assessing the Effectiveness of Leadership Targeting in Counterinsurgency Campaigns.' [2012] 36 International Security, P47; J. Jordan, 'When Heads Roll: Assessing the Effectiveness of Leadership Decapitation.' [2009] 18 Security Studies, P719; A. Mannes, Testing the Snake Head Strategy: Does killing or Capturing its Leaders Reduce a Terrorist Group's Activity?' [2008] 9 The Journal of International Policy Solutions, p40.

⁵⁶⁰ Ibid Johnston.

⁵⁶¹ E. Connolly, 'Home-grown Terrorism and the British Experience: A Historical Analysis of the Rise of British Muslim Radicalization.' [2015] P40.

show how terrorists place little value on life. They are not afraid to get killed, but usually ensure they pass on the mandate to others to guarantee a continuation of their cause.⁵⁶² Therefore, the chances that many of the deceased terrorists would have new terrorist trainees who would carry on with atrocities are high. Price acknowledges this When he examined the rate of mortality among 207 terrorist groups from 1970 through 2008.⁵⁶³ His conclusion bears some similarity to that in this thesis, in that, both consider it highly probable that targeted killing has started to become less effective just as the rate of terrorist movement increases around the world. However, the significant difference between Prices work and this thesis is that both use different methods to clarify the effectiveness of targeted killing. Whilst Price adopts the empirical approach, making a critical appraisal of the effectiveness of targeted killings, this thesis makes use of socio-legal, semi-quantitative deductions to make explicit conclusions about the effectiveness of targeted killing on a case by case basis.

Price argued that leadership removal should be effective at motivating organisational desistance, given that such organisations are secretive, violent and ideologically motivated.⁵⁶⁴ This is why this thesis argues that more than anything, it is the very ideology which spurs the acts of terror that needs to be addressed. This is the rationale for assessing the ideological perspectives of the schools of thought mentioned above. Price was probably accurate to have concluded that targeted killing of specific leaders of terrorist organisations would “most likely increase the group's chances of organisational death, but not nearly at the rate it would had it occurred during the group's early years.”⁵⁶⁵ Other authors like Jordan and Mannes have noted that the US compilation of the ‘kill list’ containing important information about who to target involves much planning and processing. The pace of such process cannot effectively

⁵⁶² A K. Cronin, ‘How Al-Qaida Ends: The Decline and Demise of Terrorist Groups.’ [2006] 31(1) International Security, P7; W. Ronald, ‘A Prolegomenon to a General Theory of Assassination.’ [2007] 5(1) Assassination Research, P10;

⁵⁶³ B. Price, ‘Targeting Top Terrorists: How Leadership Decapitation Contributes to Counterterrorism.’ [2012] 36International Security, P9.

⁵⁶⁴ Ibid

⁵⁶⁵ Ibid

prevent the overwhelming impact of the widespread violence instigating Jihadi movement.⁵⁶⁶ However, they both conclude that targeted killing is 'adequately effective' even if it only temporarily eliminates threats from those targeted, until future insurrections from new terrorist recruits. They both also believe it may be unrealistic to expect that all terrorist perpetrators can be apprehended. If the execution of some targets means that some threats have been eliminated, then targeted killing is effective.⁵⁶⁷

Even states using targeted killings believe that they can indefinitely postpone terrorist plots by continuously pursuing, targeting and killing those presumed to be plotting attacks, thus preventing the plots from materialising. Clifford also concludes that targeted killing is effective, even if it only succeeds in serving as a reprisal to terrorist attacks.⁵⁶⁸ Although, its rationale can be considered to be realistic, given that terrorism is far from abating, this thesis argues that the shortcomings of targeted killing is indications that a change in strategy is required. The continued threats posed by terrorist lone wolves require a reassessment of the effectiveness of targeted killing, to clarify whether it is imminently necessary for the US and Israel to contemplate new and better strategies.

3.11.3. Justification for Assessing the Effectiveness of Targeted Killing

The prevalent incidents of terror have made it that much more vital to assess whether the targeted killing counterterrorism strategy effectively deals with the problem. Only very few authors have assessed the effectiveness of targeted killing. Even then, there is scarcity in

⁵⁶⁶ Available at: http://www.un.org/en/terrorism/ctitf/pdfs/ctitf_financing_eng_final.pdf [Accessed on 16/11/17]

⁵⁶⁷ A. Kasher, *et al*, 'Military ethics of fighting terror: an Israeli perspective.' (2005) 4 (1) *Journal of Military Ethics*, P3.

⁵⁶⁸ G. Clifford, 'Just Counterterrorism.' [2017] 10(1) *Critical Studies on Terrorism*, P67

research that explicitly and empirically assesses whether targeted killing is effective in relation to the objective aim of a complete annihilation of terrorism.⁵⁶⁹

Perhaps the targeted killing of terrorist leaders has led to the increase in more dangerous spontaneous attacks from vengeful lone wolves. Notwithstanding, this thesis does not put off the self-defence claims made to justify targeted killing. This thesis initially set out to thoroughly assess the justification for targeted killings by analysing the legal debates and weighing the ideological perspectives of those who uphold the tactic against those that counter it. The effectiveness of targeted killing is assessed in this thesis to verify the realist argument that no other approach can effectively counter terrorism, and the pragmatic school which asks for a verification of the realist claim,. The semi-quantitative Game Theory method, under the Socio-legal methodology, gives insight into several less-known aspects, which arise in situations of conflicting interests. As would be enunciated in the following chapters, the Peace, War type of game theory is specifically adopted in this thesis because it serves as a method of arriving at a more objective conclusion on the effectiveness of targeted killing. The approach considers whether targeted killing is effective, in relation to set goals. It is however necessary to have a basic understanding of the concept of game theory.

3.11.4. Introduction to the use of Game Theory

3.11.4.1. What is a game?

The scope of game theory as covered in this thesis is based on definitions of game theory as a discipline of mathematics and economics, as well as other definitions by proponents and

⁵⁶⁹ J.V. Carson, 'Assessing the Effectiveness of High-Profile Targeted Killings in the "War on Terror"'. [2017] 16 (1)Criminology & Public Policy, P191.

scholars based on their analytical experiences from using game theory. John Von Neumann and Oskar Morgenstern in 'The Theory of Games and Economic Behaviour' have urged us to regard 'games' as the competitive or conflicting situational disposition between parties, in which they must make decisions on all of the following:⁵⁷⁰

1. Rules, which govern conduct of the players
2. Pay-offs, such as win, lose or draw
3. Strategies, which influence the decision making process.

3.11.4.2. What is Game Theory?

Game Theory is an economic analytical tool that has been applied in academic groups to study possible strategies in competitions and conflict situations.⁵⁷¹ It is simply defined as a *set of tools* and a *language* for describing and predicting strategic behaviour.⁵⁷² To Economists, 'Game' is defined as an activity between two or more persons as per a set of rules at the end of which each person gets some benefit or bears loss. The set of rules and procedures defines the *game*..⁵⁷³ The theory has become a part of the thinking in several academic disciplines, including economics, mathematics, social and behavioural sciences. It has now become an interdisciplinary methodology that can be used for the study of human behaviour.⁵⁷⁴

Game theory offers a semi-quantitative approach for studying how parties to a conflict or in a competition make strategic decisions, in relation to their goals, and how they struggle to use

⁵⁷⁰ J. Von Neumann, O. Morgenstern 'Theory of Games and Economic Behaviour (commemorative edition). [Princeton University Press 2007] P62.

⁵⁷¹ O. Shy, 'Industrial Organization: Theory and Applications.' [The MIT Press, Cambridge, 1996] P18.

⁵⁷² R.C. Picker, 'An Introduction to Game Theory and the Law [1994] Coase-Sandor Working Paper Series in Law and Economics, P2.

⁵⁷³ Tutors Globe, 'Introduction to Game Theory, 'Characteristics and Limitations.' <http://www.tutorsglobe.com/homework-help/operation-research/introduction-to-game-theory-7194.aspx> [Accessed 19/05/17]

⁵⁷⁴ N. Bellomo, et al, 'Human Behaviours in Evacuation Crowd Dynamics: From Modelling to "big data" Toward Crisis Management.' [2016] Physics of life reviews, P21.

the strategies they chose to derive optimum outcomes for themselves.⁵⁷⁵ In other words, game theory is the branch of mathematics concerned with the analysis of strategies used for dealing with competitive situations, where the outcome of a participant's choice of action depends critically on the actions of other participants.⁵⁷⁶ Osborne espouses that 'game theory' is a bag of analytical tools designed to help us understand the phenomena that we observe when decision-makers interact.

Game theory does not decide how a 'game' must be played, but it tells the process and principles by which a particular action should be chosen.⁵⁷⁷ In other words, game theory describes the conclusions gained from studying how the move choices of all the 'players' (in this case, the game theory analysts representing parties of the 'war against terror') collectively determine the possible outcomes of the 'game' (strategies used). A reference to game theory analysis is in actual fact a reference to the study that provides information about the potential effects of strategies for dealing with conflicts or competitions.⁵⁷⁸

The point worthy of note in this chapter is that game theory is a decision theory; helpful in observing conflict and competitive situations. 'What' the game theory does is to help a party to a conflict (or a person making analysis on behalf of a party) predict the process and outcome leading to the resolution of complex negotiations or potentially coercive situations, including the possibility that they end with agreement, breakdown, or eventuate in the use of

⁵⁷⁵ C. T. Schelling, 'The strategy of conflict.' [Harvard University Press, 1980] P54.

⁵⁷⁶ D. Mueller, 'The usability and suitability of allocation schemes for corporate cost accounting. In Game Theory in Management Accounting.' [Springer, Cham 2018] P 401.

⁵⁷⁷ E. Aarseth, 'Playing Research: Methodological Approaches to Game Analysis.' In Proceedings of the Digital Arts and Culture Conference [2003] pp. 28-29.

⁵⁷⁸ Ibid.

force.⁵⁷⁹ ‘How’ the game theory does this is to rely on logic and facts (evidence) to anticipate future outcomes of human activity.⁵⁸⁰ The answer to the question, ‘why’ people feel the need to predict the future and why game theory significantly serves this purpose in this thesis is simple. The urge to predict future behaviour has long been an interest of humankind.⁵⁸¹ Whether by studying sheep entrails, star gazing, palm reading, or consulting oracles, people have wanted to find the means to discover the future.⁵⁸²

From early times, mathematicians and scientists have offered alternatives to divination, seers, and prophesy. They used logic for example, to describe the area of any triangle, past, present or future, to discern when a body immersed in a fluid will experience an up-thrust, or the limits of number series, again whether in the present, the past or the future.⁵⁸³ In the 17th century, the urge to predict pushed deductive theorists such as Hobbes and experimentalists such as Boyle to attempt to discover the laws governing physical phenomena. These were laws that could be used to predict the future state of the world and analyse the activities of past states.⁵⁸⁴ Isaac Newton also propelled science forward by identifying laws governing motion – and the means through calculus to measure change – that could be used to project the location of heavenly bodies into the distant future. Indeed, Newton’s logic was used in the nineteenth century to discover Neptune, purely from mathematical logic.⁵⁸⁵ Today, the urge to predict through science has motivated the development of numerous tools, including game theory, that rely on logic and evidence to anticipate outcomes of human activity into the

⁵⁷⁹ B. de Mesquita, ‘A New Model for Predicting Policy Choices: Preliminary Tests’. [2011] 28(1) Conflict Management and Peace Science, P65.

⁵⁸⁰ D. Loveridge, ‘Foresight: The Art and Science of Anticipating the Future.’ [Routledge, 2009], P27.

⁵⁸¹ De Mesquita Supra P 2

⁵⁸² Ibid

⁵⁸³ K. Branting, ‘Data-centric and logic-based models for automated legal problem solving.’[2017] 25 (1) Artificial Intelligence and Law P 27.

⁵⁸⁴ S. Shapin, S. Shaffer, ‘Leviathan and the Air-Pump: Hobbes, Boyle and the Experimental Life.’ [Princeton: Princeton University Press1989], PP 32 and 36.

⁵⁸⁵ Ibid 36.

future.⁵⁸⁶ These tools include evolutionary theory, computational models, probability theory, classical statistics and Bayesian estimation techniques, game theory, and many other modelling strategies. These have all proven to be of value through countless applications. This is why Game Theory is inculcated into this thesis to conduct a predictive inquiry into the future implications of the continued use of targeted killing counterterrorism strategy.

The game theory concept was discovered by the great mathematician John von Neumann.⁵⁸⁷ His novel idea provides a decision theory in which one's alternative action is determined after taking into consideration all possible alternatives available to an opponent playing the same game, rather than just by the possibilities of various outcome results.⁵⁸⁸ As would be shown in subsequent chapters, game theory analysis can make use of numeric and diagrammatic illustrations to demonstrate strategic decisions that parties make when trying to decide what action to take, in order to optimise their expectations in conflicts.⁵⁸⁹ This allows for more logical and disciplined analysis of strategic decision making.⁵⁹⁰ The game theory offers this thesis an opportunity to precisely confront strategic issues in order to derive more constructive details that could otherwise be overlooked by non-empirical socio-legal reviews.⁵⁹¹

⁵⁸⁶ Bueno de Mesquita, 'A new model for predicting policy choices: Preliminary tests.' [2011] 28(1) Conflict Management and Peace Science, P65.

⁵⁸⁷ V. J. Neumann, O. Morgenstern, 'Theory of Games and Economic Behaviour.' (Princeton University Press, 2007) P2.

⁵⁸⁸ Ibid

⁵⁸⁹ J. Nash, 'Non-Cooperative Games.' [1951] Annals of Mathematics, P286; G. Zaccour *et al*, 'Developments in Differential Game Theory And Numerical Methods: Economic And Management Applications.' [2007] 4 (2) Computational Management Science, P 159.

⁵⁹⁰ R. Whittington, *et al*, 'Exploring Corporate Strategy: Text & Cases.' [Pearson Education, 2008] P29.

⁵⁹¹ Jasanoff, Sheila. 'The fifth branch: Science advisers as policymakers.' [Harvard University Press, 2009] P3; C. Davies, *et al*, 'Links Between Governance, Incentives and Outcomes: A Review of the Literature.[2005] National Co-ordinating Centre for NHS Service Delivery and Organisation R&D (NCCSDO).

Economists rely on game theory to help a party in a conflict or competition develop frameworks for strategic decision making. This is especially in situations where parties do not communicate their strategic choices to opponents, and where interdependence of parties is involved.⁵⁹² In other words, parties' decision to use certain strategies in conflicts or competitions is largely what they consider to be appropriate responses to an opponent's strategic approach for dealing with the same conflict or competition. The predictive element that game theory offers is that it proactively and calculatedly allows a party to map out (write down), ahead of time, the responses anticipated from its use of a particular strategy. This is a way of engineering the outcomes it desires from the conflict interaction.⁵⁹³

Game theory is mathematical and economic because it involves the process of quantifying past or anticipated outcomes in figures which is a 'matter of fact' approach that proposes a more dynamic method of assessing the effectiveness of targeted killings. One advantage of this is that the approach prompts 'players' to reassess issues relating to the strategic choices they make. This is why Game Theory is referred to in economics and statistics as a basis for promoting and improving rational decision making process.⁵⁹⁴

Game theory does not decide how a game must be played, it tells the process and principles by which a particular action should be chosen.⁵⁹⁵ In other words, Game theory describes the conclusions gained from studying how the move choices of all the 'players' (in this case, the 'parties' to terroristic conflicts) collectively determine the possible outcomes of the 'game' (strategies used). A reference to game theory analysis is in actual fact a reference to

⁵⁹² 'Zero-sum is a situation in game theory which one person's gain is equivalent to another's loss, so the net change in wealth or benefit is zero. A zero-sum game may have as few as two players, or millions of participants': [Zero-Sum Game](http://www.investopedia.com/terms/z/zero-sumgame.asp#ixzz4jJOCLmnS) <http://www.investopedia.com/terms/z/zero-sumgame.asp#ixzz4jJOCLmnS> [Accessed on 16/12/19].

⁵⁹³ Ibid

⁵⁹⁴ Available at: <http://www.universalteachpublications.com/univ/ebooks/or/Ch9/limit.htm> [Accessed on 06/06/19]

⁵⁹⁵ E. Aarseth, 'Playing Research: Methodological Approaches to Game Analysis.' In Proceedings of the Digital Arts and Culture Conference [2003] pp. 28-29

the study that provides information about the potential effects of strategies for dealing with conflicts or competitions.⁵⁹⁶

The critical analysis of strategic values using the *Peace War* type of game theory approach in the following chapters illustrates how prior methodological approaches to measuring the effectiveness of targeted killing may lead to inaccurate conclusions. However, the following paragraphs offer a brief review of where the literature is up to with using game theory to study terrorism.

3.11.5. Previous Economics and Game Theory Researches.

Critical analysis using game theory methods has been applied to contexts in war, business and biology.⁵⁹⁷ Economics methodologies that include game theory are typically well-suited to provide insights over and beyond those from a political science approach, which has stressed definitions, institutional factors, and case studies in an inductive framework.⁵⁹⁸ Economics analysis can account for the strategic interactions amongst opposing interests, i.e, the terrorists and the states.⁵⁹⁹

Game theory application in the literature evolved with authors like Aumann, Sandler, De Mesquita, Russell, Wright, Ullmann-Margalit's and a host of others, using the method to make analogies. Several researchers such as Drezner, Bueno, De Mesquita, and Downs have used the game theory approach to assess political issues, including the evolving study of war

⁵⁹⁶ Ibid.

⁵⁹⁷ C. Camerer, 'Behavioral game theory: Experiments in strategic interaction.' [Princeton University Press, 2003] P1.

⁵⁹⁸ M. Crenshaw, Martha, 'Current Research on Terrorism: The Academic Perspective.' [1992] 15(1) *Studies in Conflict and Terrorism*, P11; B. Hoffman, 'The Confluence of International and Domestic Trends in Terrorism.' [1997] 9 (2) *Terrorism and Political Violence*, P 15.

⁵⁹⁹ Ibid

and peace. They believe that the methodology offers not only analytic insights, but also practically accessible policy guidance to decision making.⁶⁰⁰

As disciplines, law and economics evolved on a strong foundation of classical microeconomics.⁶⁰¹ Individual decision-makers maximized utility or profits subject to constraints. These individuals were perfectly informed and treated either as price-takers in competitive settings, or price-setters in monopolies. A sizable and largely successful academic legal literature grew out of taking first derivatives and ruthlessly applying the discipline of the micro-economist's marginal analysis to a vast array of legal problems.⁶⁰²

The application of an economics methodology to the legal study relating to terrorism began with Landes, who applied the economics of crime and punishment to the study of skyjackings in the United States.⁶⁰³ Sandler's and Ender demonstrates how economic analysis can be used to aid enlightened policy making on issues relating to transnational terrorism.⁶⁰⁴ It concludes that rational-choice models that include game theory and other micro-economic principles can be applied to ascertain how terrorists are able to respond to policy-induced changes.⁶⁰⁵ Their theoretical study that included the use of game theory and utility maximizing models, was used to put modern-day terrorism into perspective and suggest policy reforms. They suggest that the same methods can be used to study how governments

⁶⁰⁰ De Mesquita, *et al*, 'Testing Novel Implications from the Selectorate Theory of War.' [2004] 56 World Politics 363–88; W. Downs, *et al*. 'Conflict, Agency, and Gambling for Resurrection.' [1994] 38 American Journal of Political Science P80; D. Drezner, *et al* , 'The Outsourcing Bogeyman.' [2004] 83 Foreign Affairs 22–34; W. Easterly, 'Think Again: Debt Relief' [2001] 127 Foreign Policy P 20; De Mesquita, B. Bueno, 'Game Theory, Political Economy and the Evolving Study of War and Peace.' [2006] 100(4) American Political Science Review, P 637

⁶⁰¹ P.A. David, 'Path Dependence, its Critics and the Quest for 'Historical Economics'. [2001] 15 Evolution and Path Dependence In Economic Ideas: Past And Present, P 40.

⁶⁰² David Supra P2.

⁶⁰³ W. Landes, 'An Economic Study of US Aircraft Hijackings.' [1978] 21 (1) Journal of Law & Economics, P31.

⁶⁰⁴ T. Sandler, et al, 'An Economic Perspective on Transnational Terrorism.' [2004] 20 (2)European Journal of Political Economy, P 27.

⁶⁰⁵ Ibid

react to terrorist induced changes to their policymaking.⁶⁰⁶ These led them to suggest policy insights ranging from hostage negotiations to the installation of technological barriers (e.g., metal detectors and embassy fortification).

Russell and Wright have suggested that the danger in conflicts can be minimised by assessing interactions between 'players' to discern what contributes to the risk of war.⁶⁰⁷ Their joint research demonstrates how revolutions in game theory technology and political economy modelling are currently helping to advance such goals.⁶⁰⁸ This can be attested to by the fact that game theory's development accelerated at a record pace during World War two.. It has now become common wisdom that in the late 1940s and 1950s, game theory strongly influenced thinking on nuclear strategy.⁶⁰⁹ Though it was intended for economics, both the US and Soviet Union quickly saw its value in forming war strategies during the Cold War.⁶¹⁰ Nye and Lynn-Jones noted that as the field of strategic studies was developing around East-West problems, 'deterrence theory and game theory provided a powerful unifying framework for those central issues.'⁶¹¹ These point to the fact that the early study of the Post War Soviet-American arms race was dominated by game theory and strategic rational-actor approaches.'

⁶⁰⁶ Ibid P 256

⁶⁰⁷ J. Russell, 'Game Theory, Political Economy, and the Evolving Study of War and Peace.' [2006]100(4) American Political Science Review, P637.

⁶⁰⁸ B. Mesquita, 'Game Theory Political Economy, and the Evolving Study of War and Peace.' [2006] 100 (4) American Political Science Review, P637.

⁶⁰⁹ B. O'Neill, 'Game Theory Models of Peace and War.' [1994] 2 Handbook of Game Theory with Economic Applications, P995.

⁶¹⁰ T. Scheve, 'How Game Theory Works.' Game Theory and the Cold War - How Game Theory Works _ HowStuffWorks.htm <http://science.howstuffworks.com/game-theory.htm> [Accessed on 17/05/2017]

⁶¹¹ J. S. Nye, 'Nuclear Learning and US-Soviet Security Regimes.' [1987] 41 (3) International Organizations, P371; H. Haftendorn, 'The Security Puzzle: Theory-Building and Discipline-Building in International Security.' [1991]35 (1) International Studies Quarterly, P3.

3.11.6. Derivations on Morality Using Game Theory

The Prisoners Dilemma game theory approach has been used to identify the *function* of morality.⁶¹² It describes the problem(s) that can occur with decision making processes that do not consider moral implications of decisions made. Inferences about the remedial or ameliorative function of morality are drawn from this description. Consequently, game theory has proved to be relevant to ethics and political philosophy in a variety of ways.⁶¹³ A good example is Ullmann-Margalit's *The Emergence of Norms*, in which she argues that moral norms enable agents to cooperate and coordinate their actions in situations where the pursuit of self-interest prevents this.⁶¹⁴ Her classic example is that of two artillery men who are faced with two choices: to flee from the advancing enemy or to stay and operate their gun. Their gun is located in a strategically important pass. If both stay, they have a significant chance of being injured, but it is certain that the advance of the enemy will be halted. If both flee, the enemy will be able to take the mountain pass, overtake and capture them. If just one of them stays while the other flees, the brave artillerist will die in battle, but the other gunner will have just enough time to escape safely.

Supposing that both try to survive this ordeal, preferably unhurt, each soldier has reason to flee. The reason for this is that they are engaged in a prisoner's dilemma.⁶¹⁵ Each gunner has to choose between fleeing or staying to fight. This choice is represented in the rows for gunner 1 and the columns for gunner 2. Each cell in the matrix represents the outcome of each possible pair of choices. Each cell has a pair of numbers. The number in the lower left corner of each cell represents how gunner 1 ranks this outcome, relative to the other possible outcomes—ranks represented by “utility” numbers. The number in the upper right corner represents the ranking of this outcome by 2.

⁶¹² J. Dreier, 'Decision Theory and Morality, In the Oxford Handbook of Rationality'. [OUP 2004]. P156

⁶¹³ Ibid

⁶¹⁴ E. Ullmann-Margalit, 'The Emergence of Norms'. [OUP, 2015] P36.

⁶¹⁵ Ibid

		artillerist #2	
		<i>stay</i>	<i>flee</i>
artillerist #1	<i>stay</i>	2, 2	0, 3
	<i>flee</i>	3, 0	1, 1

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Firstly, the game play considers the case for 1. If 2 decides to stay and fight, then 1 is best off by fleeing. He will likely survive without getting hurt. In the formal representation of the matrix, he will secure a higher ranking (3 rather than 2). Suppose 2 decides to flee, again, 1 does best by fleeing. He will survive the battle, although he will be imprisoned for the duration of the war. If he were to stay and fight, it is highly likely that he would die; by fleeing he will secure a higher ranking (1 rather than 0). Gunner 2 is in the same position as 1: for him as for gunner 1, whatever the other does, he fares best by fleeing.

In short, each individual gunner would be better off fleeing, regardless of what the other does. However, it can also be argued that each would be better off if they both stood their ground. The outcome of individually rational action is uncertain (*Pareto-inefficient* or sub-optimal) outcomes. In the event that both understand the structure of their predicament and see that each has good reasons to flee, they could try to rule out this possibility. For example, they could chain each other to the gun, thus preventing flight.

Ullmann-Margalit argues that the situation of the gunners (i.e., the prisoner's dilemma) is structurally equivalent to many everyday interactions governed by morality, in which the

⁶¹⁶ Ullmann- Margalit Supra P83.

mutual chaining commits the gunners to stay and fight.⁶¹⁷ The moral and ethical issues that the parties to terroristic conflicts face, which is discussed in chapter 5, can influence the strategic decision making. However, the norm in game theory is for players to choose strategies that enable them to secure the best outcome for themselves. Again, decisions made out of selfish interest are a bit of a gamble in that they may not always result in the outcomes anticipated. This is why many experienced game theory analysts often conclude that after repeated cycles of violence, opponents achieve better and stable outcomes when they cooperate together to negotiate the conflict.⁶¹⁸ Using the Peace War Game theory approach in this thesis allows the researcher to derive answers to questions on policy effectiveness, from studying strategic decision making interactions between parties to current terroristic conflicts.

⁶¹⁷ Ibid

⁶¹⁸ J. Rojot, 'Negotiation: from Theory to Practice.' [Springer, 2016] P113; R. Layton, 'Evolutionary Anthropology, Co-operation and Warfare. In: Gibson M., Lawson D. (eds) Applied Evolutionary Anthropology. Advances in the Evolutionary Analysis of Human Behaviour, [Springer, New York, 2014]

3.12. The Gaps in the Literature

A few scholars have researched the tactics used to kill targets, but most historical works have dwelt instead on the killing of popular political leaders. For instance, the works of Harris Lentz and Laucella⁶¹⁹ observe the killing of political figures from 1865 to 1986.⁶²⁰ As earlier shown, Tal Tovy has expanded the scope in the literature on historical events by studying ‘the US phoenix programme’ that involved the killing of members of the National Liberation Front of South Vietnam (NFL or Viet Cong).⁶²¹ When targeted killings evolved as a counterterrorism strategy, several academic works studied historical cases of assassination and compared them to targeted killings. The authors felt the need to distinguish this strategy from assassination.⁶²²

Few scholars judge the effectiveness of targeted killings of only notorious terrorist leaders.⁶²³ Their general notion is that targeting terrorist leaders paralyses the groups and so eliminates the major threats. Arguably, this type of research is inconclusive and dated; this is because the states that do the targeting are now motivated to target ordinary members of terrorist organisations and lone wolves, who contribute maximally toward the ‘jihadi movement.’⁶²⁴ An assessment of the effectiveness of a strategy is based on whether the strategy is able to counter a problem. This thesis does not limit the assessment to terrorist leaders alone. This thesis considers whether targeted killing has so far been able to adequately obstruct terrorist plots and eliminate future threats. Various researchers define ‘effectiveness’ in different ways, using different criteria to measure success or failure. For example, Amos N. Giora

⁶¹⁹ L. Laucella, ‘Assassination: The politics of murder’ [1998] Los Angeles, CA: Lowell House] P ix.

⁶²⁰ H. Lentz, ‘Assassination and Executions: An encyclopaedia of political violence.’ [1988] Jefferson, NC: McFarland & Company Inc. P1865.

⁶²¹ See generally, T. Tovy, ‘The Theoretical Aspects of targeted killings : The phoenix programme as a case study.’ [2009] 11 (4) JMSS Pp1-24.

⁶²² M. Morehouse, ‘Hellfire and grey drones: An empirical examination of the effectiveness of targeted killings.’ [2011] Political Science Department: Theses, Dissertation and Student Scholarship, P1; M. Kramer, ‘Nation and Assassination in the Middle East’ 11 (3) Middle East Quarterly P59. Governance

⁶²³ Ibid

⁶²⁴ Ibid P41.

suggests a conceptual definition that “Effective counterterrorism causes the terrorist infrastructure to suffer serious damage—including damage to finances, intelligence, resources, or personnel—thereby preventing a particular, planned attack from going forth and/or postponing or impacting plans for future attacks while minimizing collateral damage, exercising fiscal responsibility, and preserving civil liberties.”⁶²⁵ However, this thesis argues that for targeted killing to be effective, it should be measured against its capability of producing a desired result. Simply put, when something is deemed effective, it means it has achieved an intended outcome. This is a better approach than regarding effectiveness to be the extent of damage caused by each case of targeted killing. The latter approach is faulty because it does not guarantee an end to terrorism. It does not clarify whether the threat of targeted killing forces surviving terrorists to refrain from terrorism. In the context of this study it is important to determine how targeted killing strategy achieves an end to terrorism. Previous paragraphs have hinted on the gaps that are present in the literature. However, for the sake of clarity, the gaps in the academic literature and conflict regulatory policies are as follows:

3.12.1A deficit in empirical socio-legal research

Empirical and socio-legal based analysis via the application of, for example, empirical observation and other social science approaches are scarce in the literature of targeted killings. There is no critical and empirical research based analysis in the literature that leads to the proposal of realistic self-defence mechanisms against terrorism under law enforcement regime. Whereas, Empirical and Socio-legal studies complement doctrinal analysis and promote a more critical analysis of the practicalities of laws and acts of targeted killings and terrorism. The initial basis for the studies of targeted killing in the current literature was to

⁶²⁵ A. N. Guiora, ‘Accountability and Effectiveness in Homeland Security.’ [2008] University of Utah Legal Studies Paper No. 08-02, P1.

determine its legality.⁶²⁶ Hence, there is an increasing debate over the legality of targeted killings.

The studies that focus on determining the legality of targeted killings seem to have ended up concluding that targeted killings are illegal. This is true because no existent law supports targeted killing. However, this one-sided conclusion has evolved as a result of a singular approach of doctrinal analysis of legislations. A more empirical based approach will conclude that although the new tactic of targeted killing is not currently recognised under international law, it may be more practical in dealing with terrorism. An empirically based research would contemplate ways in which targeted killing may be adopted under the laws that regulate the use of force.⁶²⁷ A singular approach to research through the doctrinal analysis does not expose discrepancies between laws in writing and laws in action.

3.12.2 A gap in holistic analysis of the Philosophical/Ideological backgrounds that inform the legal debate over the war against terror.

Very few authors have assessed the ideological basis of terrorism, none has thoroughly assessed the ideological basis for targeted killing, and none has assessed the ideological viewpoints of scholars involved in legal debates over targeted killings. Authors like Reich,⁶²⁸ Freeman⁶²⁹ and Cronin⁶³⁰ have assessed the ideological perspectives of terrorists from different angles, offering extremely insightful conclusions about terrorist traits. Reich

⁶²⁶O. Ben-Naftali, & K. R. Michaeli, 'We must not make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings.' [200] 36 Cornell Int'l LJ, P 233; W.C. Banks, et al, 'Targeted killing and Assassination: The US Legal Framework.' [2002] 37 U. Rich. L. Rev. P667.

⁶²⁷ F. Cownie, 'Researching (Socio) legal academics' [2004] 42(1) Socio-Legal Newsletter

⁶²⁸ W. Reich, 'Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind.' [Woodrow Wilson Center Press, 1998] P xi

⁶²⁹ M. Freeman, 'A Theory of Terrorist Leadership and its Consequences for Leadership Targeting.' [2014] 26 (4) Terrorism and Political Violence, P666.

⁶³⁰ A. K. Cronin, 'When should we talk to Terrorists?' [2010] United States Institute of Peace Special Report. P2.

conducted a psychological assessment of terrorists, Freeman analysed certain traits in terrorist leadership that serve as inspiration to members and Cronin assessed the emotional cycles of terrorists.⁶³¹

Reich attempts to understand the motivation and actions of terrorist individuals and groups, so his conclusion lends insight into the moral logic behind terrorism.⁶³² While he admits that the general motivation for terrorism cannot be narrowed down to one particular detail, he succeeded to an extent, in determining certain characteristic traits about terrorists. He recognised the fact that terrorists may or may not be intelligent about their ends and tools, but they can change them. When they do, it is presumably because they believe there are benefits in doing so.⁶³³ This informs the literature that terrorists are by no means rigid in their tactical approaches for dealing with conflicts. This suggests that however difficult it may be, it is not impossible to negotiate diplomatic measures with them, unless these are beset with aggression. Further, Reich echoes the points made earlier in this chapter when he argues that ideological terrorism does not emerge from a vacuum or from an inexplicable urge on the part of some radicals to go berserk. Rather, it is the psycho-political product of a profound process of indoctrination, that a large number of people undergo in relation to an established social and political order.⁶³⁴ In sum, Reich warns about the severity of terrorism, stating that ‘ideological terrorism is the simulation of revolution of the isolated few.’

On the other hand, Freeman observes the effect that targeted killing of terrorist leaders have on the latter’s organisation. His aim was to determine circumstances in which targeting terrorist leaders are effective in terms of destabilising terrorist activities and when they are not. He argues that it is only the targeted killing of a leader who provides inspiration and/or

⁶³¹ Freeman Supra P 108

⁶³² Reich Supra P 329

⁶³³ Ibid

⁶³⁴ Ibid P 256.

operational direction to a group that destabilises terrorist activities. To Freeman, the effectiveness of targeted killing varies.

Cronin has aptly determined the right moment when negotiations with terrorists should commence.⁶³⁵ He did not study state use of violence; instead, he limited his study to the phenomenon of terrorism by non-state actors. He acknowledges that government policymakers understandably respond with righteous anger and determination after a horrible terrorist attack. The priority is to prop up the safety of the population, stabilize the state, avoid legitimising the group that attacked, punish those responsible and remove incentives for future attacks by demonstrating that terrorism is wrong. Under some conditions, other counterterrorism approaches such as military patrolling, policing, targeted killings, arrest, reform movements, or marginalization may be ineffective. Such actions may be insufficient on their own to end a campaign, or may even incur more acts of terror. Even the violence necessary to obliterate a terrorist campaign may be so bloody and indiscriminate that it also kills innocent people, violates the laws of war, destabilises a state, and is just as morally repulsive as the initial terrorist acts. Cronin warns that the solution may be worse than the problem. He points out that if the goal is to end terrorist attacks, history demonstrates that there are situations where there may be no viable alternative to entering negotiations. The hallmark of Cronin's work was to suggest that negotiations are best initiated when both sides sense that they have reached a situation where further violence is counterproductive. Important as these authors' conclusions are to the literature, it must be pointed out that their researches are narrowly focused on understanding terrorists' ideologies and are not balanced by a thorough assessment of states ideological incentives for using targeted killing.

⁶³⁵ Ibid

3.12.3 Suggestions of cogent reforms of some policies:

There is no adequate contextual analysis, policy consensus, common legal standard, or a single cohesive vision promoting action for reform in the literature.⁶³⁶ Although the empirical studies of Morehouse utilized both qualitative and quantitative research methods to examine the US programme, he concluded that targeted killings against terrorists are innovative tactics of warfare that can be justifiably used against an equally innovative enemy.⁶³⁷ Thus, he recognized the need for revision of the laws of war that redefine ‘the battlefield’ and ‘acceptable tactics’ in the war against terror.⁶³⁸ However, Morehouse and other scholars have not proffered suggestions on how terrorists can be regarded under international; law.⁶³⁹ Apparently, neither targeted killings by the US and Israel, nor terrorists’ status and activities are consistent with the character of conflict defined by the laws of war.

Combatants in uniforms and emblems defined the character of traditional conflict, regulated under the auspices of the Geneva Convention. Now, states are unexpectedly confronted by armed attacks from terrorists who are not state-actors identifiable by uniform or emblem; they usually operate in civilian territories.⁶⁴⁰ Academic scholars who assess the ‘war like’ nature of terroristic conflicts propose that the laws that regulate warfare must be made applicable to targeted killings and terrorism. On the other hand, research reveals that the transnational nature of terrorist activities limits law enforcement attempts to arrest culprits, leaving terrorised civilians open to recurrent attack. So, what part of the literature has shied

⁶³⁶ Bachmann, *supra*

⁶³⁷ M. Morehouse, ‘Hellfire and Grey Drones: An Empirical Examination of the Effectiveness of Targeted Killings.’ [2011] PSDDSS, S1.

⁶³⁸ *Ibid*

⁶³⁹ L. Wojtek, ‘Legal and Moral Dilemmas of Targeted Killing by Drones.’ [Springer International Publishing, 2017] *Technology, Society and Sustainability*, P169; M. Schulzke, ‘The Politics of Drone Warfare: Enacting Restrictions Based on Jus ad Bellum.’ *The Morality of Drone Warfare and the Politics of Regulation* (Palgrave Macmillan UK, 2017) P173; B. Jose, ‘Bin Laden’s Targeted Killing and Emerging Norms.’ [2017] 10 (1) *Critical Studies on Terrorism*, P44.

⁶⁴⁰ C. A. Choudhury, et al, *‘Islamophobia and the Law in the United States.* [Cambridge University Press 2020]. P172.

away from the realities that the armed conflict regulatory laws of war and human rights enforcement laws cannot properly regulate terroristic warfare. Others that acknowledge these gaps have identified aspects of both laws that require reform, but have failed to provide adequate suggestions on how they can be tweaked to make them more relevant to terroristic conflicts. Both laws are lacking in suggestions that consider the following:

- i. Suggestions on the ‘pattern of behaviour’ that is suggestive of active contribution to the military function of a group, in order to kill participants with more certainty by following the principle of distinction. The ‘pattern of behavior,’ should distinguish a terrorist civilian who may be targeted under the LOAC from the civilians genuinely entitled to immunity.
- ii. As shown above, acts of terror are spontaneously carried out by lone wolves against unsuspecting civilians, whilst they go about their day to day activities. How can victims of this type of attack invoke Article 51 of the UN Charter, in the absence of war and against terroristic plots, if the extent to which the right to exercise self-defence is only against foreseeable threats.⁶⁴¹ In other words, what is the catalyst for victims of terrorism - who do not have an *overwhelming imminent* threat experience - to enable them to mount an effective defence? This is in consideration of the fact that terroristic plots are usually covertly planned and executed instantaneously.
- iii. Assuming terroristic conflicts are clarified as warfare under international law, how can states fulfil the condition under the laws of armed conflict, of *finding* terrorists *engaged* in the act of hostilities, in order to fulfil the present criteria

⁶⁴¹ A. Plaw, ‘Targeting Terrorists: A License to Kill’ [Ashgate Publishing, Ltd., 2008] P24.

for ‘lawful targeting processes’ when terrorists covertly plot and execute attacks.?

This thesis identifies the above grey areas that future researchers on the subject of modern conflict involving terrorism might wish to explore. It is limited in scope, due to word count constraint. It does not fill all the gaps in the literature and the laws identified above. For instance, it does not propose to identify a cluster of situations that can prove active functionality of terrorists in terrorist organisations under the laws of armed conflict. Instead, this thesis fills three of the gaps detailed below.

3.13.The Scope of this thesis and the Gaps it intends to fill.

This thesis only fills the first, second, and number one of the third gap mentioned above. They specifically include the following:

In terms of policy amendments

Existing international law provisions (Human Rights Laws and the Laws of Armed Conflict), appearing to permit killing in self-defence and as an ‘act of war’ respectively, within limited parameters, are underdeveloped. The legality of targeted killing is therefore debateable. However, suggestions on policy reforms in this thesis are limited to the Laws of Armed conflict. The suggestions aim to strike a balance between protecting the civilian rights of those adversely affected by targeted killings and those who perpetrate it. This is done by reconsidering alternative counterterrorism solutions, if targeted killing fails the evaluative test of effectiveness under the game theory assessment test. If the test finds targeted killing to be

relevant, the suggestions on reforms will consider when it is necessary to use it and when other strategies including verbal or written negotiations are more appropriate.

In terms of research analysis

Whilst several researchers have extensively analyzed issues relating to terrorism and targeted killings, this thesis covers two gaps that have existed in research practice, as follows:

- i. This thesis unprecedentedly studies the ideological perspectives of those engaged in legal debate over terrorism and targeted killings. It is original and different to other critical analysis found in the literature. This is because while many critical analyses of legal debates over targeted killing and terrorism are simply evidence based, only a few have gone in-depth to put the ideological debates into perspective. Those found to have made ideological assessments have done so only in relation to terrorism. This thesis includes targeted killing under the scope of ideological analysis, using Hermeneutics Analysis methodology. Moreover, it associates Liberal Cosmopolitan, Realist, and Pragmatist schools of thoughts with the three main points of view (those disheartened by the use of targeted killing counterterrorism strategy, those who argue in favour of targeted killing counterterrorism strategy and those who believe that the strategy should be used under strict guidelines, respectively) that dominate the legal debates over terrorism and targeted killing. The main aim of normative assessments is to lend more insight into the motivations for terrorism and targeted killing, because the knowledge will serve as a guide to deciding what can be done to quell both practices as well as pacify parties to terroristic conflicts.

- ii. This thesis also fills the gap in the literature analysis of the effectiveness of targeted killings, by adopting the interdisciplinary, semi-quantitative game theory method of socio-

legal enquiry. Current literature is lacking in more empirical approaches to deriving explicit answers to questions on the effectiveness of targeted killing counterterrorism strategy. Whereas, Game theory ought to be tested for its ability to cover the gap in the formation of empirically guided data. The overall aim is to derive a more accurate standard for judging targeted killings and alternative strategies than those offered by merely critical approaches.

3.14. Conclusion

This chapter has identified gaps which the research attempts to fill with new insights, grounded in critical analysis of the philosophical debates over targeted killings. This thesis aligns diverse perspectives from the Liberal Cosmopolitan, Realist and Pragmatic Schools of thought, in order to deduce practical theories. Therefore, as an original contribution to the literature, this chapter has made a comprehensive assessment of the philosophies that underpin transnational terrorism and the use of targeted killings. The rationale for doing so was to enable a thorough assessment of the US and Israel's legal and ideological reasons for adopting targeted killings. Without this, it would be difficult to understand why they continue to use the tactic amidst intense criticism. A thorough assessment of the ideological perspectives that justify the use of targeted killing has been made. This thesis considers the proactively pre-emptive use of targeted killing under guided parameters, supported by the Pragmatic schools of thought. The aim is to provide a more realistic and practical counterterrorism approach than the passively reactive one offered by the liberal school. The grievous consequences of terrorist violence are something to be avoided, so a set of liberal

human right standards that place more significance on 'being right' than 'being safe' goes against reasonable expectations of what is fair.

States may be justified to devise ways to exercise their inherent right of self-defence. It is on the basis of these arguments that this thesis does not condemn targeted killing as a practical solution for engaging in contemporary warfare. Instead, it contemplates suggestions on reforms on the laws of war that may consider the need to uphold the use of targeted killing. However, before a constructive framework for policy reforms that may include targeted killing is made, it is important to first run an evaluative test on the effectiveness of the strategy against alternatives. By clarifying and establishing the status of targeted killing as a viable long-term counterterrorism strategy, the stage is set for a re-evaluation of its practice under the LOAC. As has been explained in the previous chapter, this avoids the difficulties and confusion often associated with the application of either the LOAC or Law Enforcement norms to targeted killing. It is by assessing the practice and implementation of targeted killing that questions on its suitability and practicability can be answered. This thesis is limited to assessing only a little fraction of controversial debates about the deficits in the law and literature on targeted killings. However, rather than accord the status of perfection to current international laws that regulate the use of force, such assessment permits more suggestions on both theoretical and practical reforms.

Following in a progressive fashion, the next chapter proceeds to explain the methodology adopted and how it facilitates the resolution of the research aims. Overall, it is argued that new policies that address modern warfare and explores various targeted killing scenarios should be considered.

3.Appendix

- i. Black Hawk artistic description of drone violence:

CHAPTER FOUR

RESEARCH METHODOLOGIES AND THEORETICAL UNDERPININGS

4.1. Introduction

This chapter details the research methodologies used in this thesis and how they have guided data collection, analysis and interpretation of the phenomenon explored. This thesis mainly makes use of three methodologies: the Doctrinal Analysis in chapter two; the Hermeneutical approach to reviewing the literature in chapter three; and the Socio-legal methodology, using the semi-quantitative *Peace War Game Theory* method in chapters five and six. The doctrinal analysis employed in chapter one and two of this thesis and the hermeneutical methodology applied in chapter three is not given in detail. This allows for an elaborate discuss of the interdisciplinary game theory method adopted in this thesis as a novel alternative to analysis in the field of law.⁶⁴²

As part of a socio-legal inquiry into the ‘law in action’ regarding targeted killings, the semi-quantitative *Peace War Game Theory* interdisciplinary methodology is applied in chapters four and five of this thesis, and detailed in the third and last section of this chapter. Game theory attempts to mathematically and logically determine the actions that “players” should take to secure the best outcomes for themselves in a wide array of “games”(in conflicts, contracts or competitions).⁶⁴³ The approach is also employed to assess how terrorists would respond to targeted killings. This is aimed at further clarifying whether targeted killing is

⁶⁴² R.C. Picker, ‘An introduction to game theory and the law.’ [2003] P ix .

⁶⁴³ Ibid P 1.

effective or counter-productive. This thesis assesses the effectiveness of targeted killing counterterrorism strategy using the *Peace War* Game theory approach.

The application of game theory in this thesis is reliant on conclusions from the hermeneutic analysis. Without an understanding of the values and inclinations of parties, it will have been difficult to correctly narrow down the strategic options available to each party in a game theory matrix. For example, from a hermeneutical analysis, the paradox of terrorist parties feeling religiously rewarded and exonerated by carrying out attacks using self destructive means is better understood. This informs the researcher of the need to refrain from generalizing the impact of death, or the values each party places on human lives, when applying game theory to the study of terroristic conflict.

The rationale for adopting each method, the preliminary report and the process of data analysis are also explored in the last section of this chapter. However, this chapter does not offer a detailed assessment of the risks and limitations of the ‘game theory’ methodology. Owing to the elaborate caveat when relying on a game theory forecast, this chapter does not discuss the limitations of the game theory method, or how these are experienced or overcome in this thesis. These are detailed in chapter six, which follows the game theory analysis chapter.

The adoption of mixed methodologies aims to achieve three things: Firstly, it broadens the insight into targeted killing in the literature. Secondly; it offers the knowledge needed to facilitate the formulation of international legal framework regarding terroristic conflict in

general and targeted killing strategy in particular. Thirdly, the scope of readers is broadened beyond the purview of legal inquiry to include the socio-science context.

4.2. Research aims and objectives

The application of the doctrinal, hermeneutical and Peace war game theory analytical approaches entail a systematic stage by stage analysis of the following research aims:

4.2.1. Research Aims

Briefly stated, the aims of this research are:

1. To clarify the current legal interpretation of targeted killings.
2. To critically evaluate the relevance of the laws of war and conflict in relation to targeted killings.
3. To critically evaluate the impact of terrorism and targeted killings on the human rights of victims.
4. To explore and clarify the contribution of targeted killings in the pursuance of a legitimate counter-terrorism strategy.
5. To enhance and supplement the international legal framework, by identifying a range of standards by which states can effectively defend themselves against terrorists.

4.3. Overview of the Doctrinal Analysis

The methodological approach of doctrinal analysis in chapters one and two allowed for a detailed and highly technical commentary and methodical exposition of the legal doctrine surrounding the rights to use lethal force.⁶⁴⁴ This analysis culminated in identifying the failure of current armed conflict laws to explicitly widen their provisions to encompass terroristic vs. targeted killing conflicts. The doctrinal approach also shows breaches of laws

⁶⁴⁴ M. Salter, J. Mason, 'Writing Legal Dissertations. [Pearson Longman, 2007] P46

(including human rights) by both terrorists and states practicing targeted killing. The legal arguments used to justify targeted killing and the rebutting arguments were examined, along with their legal implications under the doctrines of law that regulate the use of force.

4.4. Overview of the Hermeneutical Analysis made.

Hermeneutical analysis is applied in this thesis as a methodology for exploring the founding philosophies, mandates and doctrines of parties to terroristic conflicts, or those who debate the conflicts. These regard the ideologies behind the al-Qaeda jihadi movement and other terrorist groups under study. The directive prohibiting Palestinians from invading the ‘promise land’ of Israel is also studied and interpreted. Hermeneutic Analysis was also applied to investigate, interpret, and analyse contents found in religious and constitutional texts including the Israeli Torah, the Islamic propaganda materials and the US ‘White Paper’. These all bear the fundamental philosophies that underpin the so called ‘war against terror.’ Inferences drawn from these materials further enhanced a critical assessment of the defences used by authors, commentators and stake-holders, to justify and rebut terrorism and targeted killings.

4.5. Empirical Socio-Legal Methodology

4.5.1 Overview:

Socio-legal studies can be defined as an interdisciplinary approach to analysing law, legal phenomena and relationships between the law and society at large. Both theoretical and empirical work is included, so perspectives and methodologies are derived from the social sciences.⁶⁴⁵ The socio-legal approach is the study of both qualitative and quantitative law in action, as opposed to the restricted study of the law in books, which characterizes the

⁶⁴⁵D.W. Vick, ‘Interdisciplinarity and the Discipline of Law.’ [2004] 31(2) Journal of Law and Society, P164

doctrinal (black-letter) approach.⁶⁴⁶ The peace war game theory defined and explained in the next paragraph, is the socio-legal method employed in this thesis. By employing this method, this research studies the implementation and execution of targeted killings by states. Thus, there is no limitation on theory as envisaged under statutory law. Rather emphasis is placed on targeted killing 'in action.' The main reason for using the peace war game theory socio-legal methodology is to expose discrepancies between laws in books and laws in action.⁶⁴⁷ Generally, socio-legal research addresses what appears to be actually taking place in the light of today's reality. It also investigates the impact of law in action and the role played by ideological factors, including public policy.⁶⁴⁸

The socio-legal approach fills the gap between two extremes of a methodological spectrum. A strict doctrinal approach relies predominantly on self-informed analysis of legislation and judicial decisions from the superior courts.⁶⁴⁹ On the other hand, socio-legal approaches such as critical legal studies and economic analysis of law, are responsive to the concerns, theories and informants of external perspectives.⁶⁵⁰ Apart from determining the strict legality of targeted killings through doctrinal enquiry, this research is balanced by also assessing the impact targeted killings has on terrorist organisations. This allows the researcher to determine the effectiveness of targeted killing.

The previous chapter has defined game theory and explored the current literature over its application to research practice. The next chapter applies the peace war game theory to the analysis of terroristic conflict. However, the next paragraph explores its concept. This enables

⁶⁴⁶ M. Adler, et al, 'Stepwise progression: The past, present, and possible future of empirical research on law in the United States and the United Kingdom.' [2004] 41(2) Journal of Law and Society, P175.

⁶⁴⁷ C. Menkel-Meadow, 'Uses and abuses of socio-legal studies.' [Routledge 2019] P3

⁶⁴⁸ Ibid

⁶⁴⁹ W. Baude, *et al*, 'A Call for Developing a Field of Positive Legal Methodology'. [2017] 84 (1) University of Chicago Law Review, P1.

⁶⁵⁰ Ibid

the reader to understand what is to be derived from applying the game theory method in this thesis.

4.3.4 The concept of Interdisciplinary Game Theory Method

In this thesis, game theory serves as a new lens for assessing the effectiveness of targeted killing tactic and determining the long-term outcome from utilizing targeted killings. Game theory is also the analysis of how decision makers interact to take into account reactions and choices of the other decision makers.⁶⁵¹

International conflict and other phenomena in international relations occur as a result of decisions made by people.⁶⁵² These may be leaders of states, members of the legislature or military, members of nongovernmental organizations, or citizens of a country. Given the central importance of decisions, many scholars argue that to explain international conflict, one needs to focus on exploring decision choices.⁶⁵³ But how are such decisions explained? Game theory offers a systematic approach to exploring what triggers strategic decision making processes, and the effect of the decisions made.

Game theory is therefore the theory of independent and interdependent strategic decision making in organisations, where the outcome depends on the decision of two or more autonomous players, one of which may be nature itself, and where no single decision maker has full control over the outcomes.⁶⁵⁴ The aim of game theory is to find optimal solutions to situations of conflict and co-operation under the assumption that players are instrumentally rational and act in their own self interests. In some cases, solutions can be found. In others, although attempts at solution may fail, the analytical synthesis may illuminate different facets

⁶⁵¹ H. Pülzl, et al, 'Implementing public policy.' In Handbook of public policy analysis, [Routledge, 2017] P16.

⁶⁵² N. Halevy, 'Chapter One-Strategic Thinking.' [2016] 54 Advances in Experimental Social Psychology, P1.

⁶⁵³ L. B. Bolman, et al, 'Reframing organizations: Artistry, choice, and leadership.' [John Wiley & Sons 2017], pp6-8.

⁶⁵⁴ A. Kelly, 'Decision Making Using Game Theory: An introduction for Managers.' [CUP 2003] P1.

of the problem in question. Either way, game theory offers an interesting perspective of the nature of strategic selection in familiar and unfamiliar circumstances.⁶⁵⁵ In this thesis, it illuminates the main interests and weaknesses of parties to terroristic warfare, in order to determine what is realistically achievable in terms of the goals parties seek for engaging in the conflict. For example, it is clear that the US and Israel still seek to pursue an end to terrorism by using targeted killing strategy.⁶⁵⁶ It is also clear that terrorists still thrive on spontaneous attacks as their optimal strategy for pursuing several purposes, including seeking religious reliefs and securing territories.⁶⁵⁷ Game theory allows the researcher to explore and exploit the ‘breaking points’ of each party; this includes what each party needs the other to do in order to each get the outcomes they want.⁶⁵⁸ Game theory systematically allows the researcher to explore the questions: What optimal strategies can parties adapt to enable them engineer the outcomes they want for themselves? ⁶⁵⁹ If targeted killing is not achieving the desired outcomes, what better alternatives exist?

While in search of a better strategy, one can begin to extrapolate the extent to which targeted killing is helpful. This thesis also compares the outcomes of targeted killings with other non-violent alternative approaches. When a party compares outcomes in order to determine the best strategy, one party’s outcome is not compared with an opponent’s outcome. Instead, a party (or researcher) compares the outcomes of two or more strategies he has previously used

⁶⁵⁵ A. Katz, ‘The strategic structure of offer and acceptance: game theory and the law of contract formation.’ [1990] 89 Mich. L. Rev.P 215.

⁶⁵⁶L. Hajjar, ‘The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US “War on Terror”.’ [2019] Law & Social Inquiry, P1.

⁶⁵⁷ H.S. Kassab, ‘Terrorist Recruitment and Weak States in the International System.’ [Lexington Books 2019] P85.

⁶⁵⁸ A.E. Roth, et al, ‘How Market Design Emerged from Game Theory: A Mutual Interview.’ [2019] 33(3), Journal of Economic Perspectives, P127.

⁶⁵⁹ B.B. De Mesquita, et al, ‘An institutional explanation of the democratic peace.’ [1999] 93(4), American Political Science Review, P805.

or intends to use in order to determine which of them offers the best outcome.⁶⁶⁰ The aim is primarily to determine the potential implications for choosing to use a strategy for dealing with the conflict.

Game theory is preferred to other socio-legal approaches such as semi-structured interviews with commentators who may offer biased opinions. Such opinions may also be difficult to consolidate to form a single theory, making the empirical data unreliable. Although game theory suffers similar limitations as other socio-legal inquiries, the approach is subject to the researcher's willingness to objectively make conclusions. Its method of closely reflecting on the potential implications of using a strategy allows the researcher to narrowly identify the risks or benefits associated with the use of targeted killings; such information may not be detailed in interviews. As the main proponents of game theory intended, the approach is most relevant to the study of uncertainties in competitive markets and arms control negotiations, as well as in conflicts like terroristic warfare. It is intended to be a more substantive way of clarifying the contribution of targeted killings to an effective and legitimate counter-terrorism strategy, than the varied opinions of commentators.

4.3.4.1 How Game Theory Works.

Research shows that the economic discipline of game theory is not the study of how to win a game, neither is it a study of how to play a game. Often, game theory does not remotely relate to what is commonly considered to be a game.⁶⁶¹ At its most basic level, game theory is the study of how people, companies or nations (referred to as agents or players) determine strategies in different situations in the face of competing or conflicting strategies acted out by

⁶⁶⁰ J.M. Osborne, et al, 'Games with procedurally rational players.' [1998] *American Economic Review* [1998] P837.

⁶⁶¹ H. Gintis, 'Game Theory Evolving: A Problem-Centred Introduction to Modelling Strategic Behaviour.' [PUP 2000]. Pp1-6.

other agents or players.⁶⁶² This theory aims at providing a systematic approach to business decision making of organizations or decision making on conflict strategies. It is applied to evaluate situations where individuals and organizations have contradictory objectives.⁶⁶³ Game theory helps organizations by increasing the probability of earning maximum profit and reducing the probability of losses.

For example, in a war between two states, every state tries to get the settlement in its favour only during peace meetings/negotiations. In such a case, game theory helps in solving the problem and arriving at a common consensus.⁶⁶⁴ The essence of a game is the interdependence of player strategies. The overall purpose of game theory is to detect the best strategies for resolving particular problems.⁶⁶⁵

The game theory analysis can make use of numeric and diagrammatic illustrations to demonstrate strategic decisions parties make when trying to decide what line of action can be taken to optimise their expectations in conflicts.⁶⁶⁶ Such techniques allow for more substantiated and disciplined analysis of strategic decision making.⁶⁶⁷ The aim is that game theory offers an opportunity to precisely confront the strategic choices that the parties to the ‘war against terror’ have chosen to use in order to derive more constructive quantitative

⁶⁶² D. Besanko, *et al*, ‘Economics of Strategy.’ [John Wiley & Sons, 2009], P 1.

⁶⁶³ Ibid

⁶⁶⁴ S. Jasanoff, ‘The Fifth Branch: Science Advisers as Policymakers.’ [Harvard University Press 2009]; C. Davies, *et al*, ‘Links Between Governance, Incentives and Outcomes: A Review of the Literature.’ (2005) National Co-ordinating Centre for NHS Service Delivery and Organisation R&D (NCCSDO) P665.

⁶⁶⁵ T.R. Burns, *et al*, ‘Generalized game theory: Assumptions, principles, and elaborations grounded in social theory.’ [2005] 8(21), *Studies in Logic, Grammar, and Rhetoric*, pp7.

⁶⁶⁶ J. Nash, ‘Non-Cooperative Games.’ 1951] *Annals of Mathematics*, P286; G. Zaccour, *et al*, ‘Developments in Differential Game Theory And Numerical Methods: Economic And Management Applications.’ [2007] 4 (2) *Computational Management Science*, P159.

⁶⁶⁷ D. Rios Insua, *et al*, ‘Adversarial risk analysis.’ *Journal of the American Statistical Association*, [2009]104(486), P843.

results that could otherwise have been overlooked by other non-empirical socio-legal reviews. The following section highlights the basic assumptions in game theory.

4.3.4.2 Basic Assumptions and Terminologies in Game Theory

When deciding upon the best strategy for dealing with conflict or competition; parties make rational decisions at all times, to improve their outcome.⁶⁶⁸ In game theory, a person's behaviour is rational if it is in his best interests, given his information.⁶⁶⁹ This assumption is highly debatable especially in regard to terrorists. It may seem inappropriate to regard subversive Islamic extremism as rational, because of the extremely subversive and irrational ideologies that drive them. However, what passes for irrational behaviour by most of society (a build-up of nuclear weapon for instance) may be considered to be rational by game theory standards.⁶⁷⁰ When making a game theory analysis, even seemingly irrational actions are rational in some way.⁶⁷¹

Aumann, a notable game theory analyst, warns that it is wrong to dismiss all the evils of the world as irrational. He claims for instance, that suicide bombers are very rational. They are not rational because of their decision to kill and injure others. Contrarily, their decision to commit acts of terror is generally abhorred by all, except those in support of terrorism. However, in game theory, every player is motivated by maximizing his own payoff (outcome). Rationality in a stricter sense implies that every player (party) always maximizes his utility, thus being able to accurately calculate the probabilistic result of every action.⁶⁷²

⁶⁶⁸C. Camerer, 'Behavioural Game Theory: Experiments in Strategic Interaction.' [PUP 2003], P1

⁶⁶⁹J. Aumann, 'War and Peace.' [2006] 103 (46) Proceedings of the National Academy of Sciences, pp17075.

⁶⁷⁰R. B. Myerson, 'Game Theory: Analysis of Conflict.' [HUP 1999]. P 1. Chapter-preview links, pp. vii–xi; Oxford Online Dictionary

⁶⁷¹M. Levi, 'A model, a method, and a map: Rational choice in comparative and historical analysis.' [1997] 28 Comparative politics: Rationality, culture, and structure, P78.

⁶⁷²M. Peterson 'An introduction to decision theory.' [Cambridge University Press 2017] P141

For example, when terrorists plot attacks, their goal is to maximise the number of their victims. Thus, they favour spontaneous strategies such as suicide bombings, air-craft hijackings, and random decapitations, using vehicles to run down pedestrians and knifing unsuspecting civilians from the rear; making it easier to achieve their goal.⁶⁷³ Like the US and Israel, terrorists strategically make decisions on how to achieve the goals they set for themselves. This makes terrorists rational to game theorists, but only on the basis that they have committed themselves to a cause and have devised a strategy for achieving their goals. This is the measuring standard for rationality under game theory; which is why Aumann stresses that only by facing up to such realistic rationales for assessing wars and other forms of violence can the right strategies for dealing with them be developed.⁶⁷⁴ Given, that the acts of terror are to the radical Muslims, rational expressions of Islamic religious obligations, the game theory approach is an impartial method for critically assessing terrorists' strategies, as well as targeted killing strategy used by the US and Israel. Detailed insights into what both parties are strategically inclined to commit to will help determine factors that may persuade them to co-operate with one another in order to resolve the conflict.

Players in the game are aware of the game rules as well as outcomes of other players. Players in a game know every possible action that the other players can make. They also know all possible outcomes. All players have preferences regarding these possible outcomes, and as players, they know not only their own preferences but also those of the other players.⁶⁷⁵ This offers parties the opportunities to anticipate and mount favourable defences, or competent competition against their opponents. For instance, both parties in the 'war against terror' are aware of each other's favoured strategies and preferred scene of attacks, albeit imprecisely. It

⁶⁷³Conflict and Countering Extremism: Literature Review assets.publishing.service.gov.uk/...edia/57a0897ae... [Accessed on 07/06/19]

⁶⁷⁴ E. Beck, 'War Games: A Provocative Theory of War and Peace.' [Based on Aumann's and Schelling's interview explanation on conflict and cooperation through game-theory analysis.] P1.

⁶⁷⁵ Ibid

is common knowledge that whilst states using targeted killing are prompted by a premeditated list to go after terrorists in their home land, terrorists on the other hand are known to spontaneously execute attacks in public places.

A game is any scenario in which the number of players or competitors is finite. Usually, two players strategically conflict with or compete against one another, and the strategy chosen by one player will affect the actions of the other player. One-player games, such as solitaire are not considered by game theorists to be games, because they do not require strategic interaction between two players.⁶⁷⁶ Outcomes can be measured (by the person assessing), by the amount of utility, or value, a player derives. If a player prefers to reach point A in order to reach point B, then point A has higher utility. Knowing that a player values A over B, and B over C means that a player can anticipate the other players' actions and plan strategies that account for such actions.⁶⁷⁷

If no player can reach a better outcome by switching strategies, the game reaches an impasse called the 'Nash Equilibrium.' Essentially, this boils down to players keeping their current strategies (even if they do not have the highest preference) because switching would not accomplish anything.⁶⁷⁸ For instance, targeted killing is Nash Equilibrium if, regardless of whether terrorists change their strategy, an alternative strategy does not facilitate an end to terrorism.⁶⁷⁹ Players are in equilibrium if a change in strategies by any one of them would lead that player to earn less than if it remained with its current strategy. So 'Nash equilibrium', named after John Nash, is a set of strategies, one for each player, such that no

⁶⁷⁶G. Bacci, *et al*, 'Game Theory for Networks: A Tutorial on Game-Theoretic Tools for Emerging Signal Processing Applications.' [2016]33 (1) IEEE Signal Processing Magazine, P94.

⁶⁷⁷ Ibid

⁶⁷⁸ S. Sadri, 'A Non Mathematical Exposition of Game Theory.' [2015] 1(11) Economics, P655

⁶⁷⁹ Ibid

player has an incentive to change its action.⁶⁸⁰ For games in which players randomize (mixed strategies) the *expected* or average payoff must be at least as large as that obtainable by any other strategy. This equilibrium is sufficiently general to allow for the analysis of non-cooperative games in addition to cooperative ones.⁶⁸¹ A decision giving a good outcome for one, whatever the enemy decides, is called a ‘dominant’ decision. Strategic decisions that yield in Nash Equilibrium are known as the ‘dominant’ decisions.⁶⁸² A player can also adopt multiple strategies for solving a problem.⁶⁸³

With game theory, the measure for determining the best outcome of a player is not to compare both players’ outcomes. In other words, a party does not evaluate its result against that of its opponent. Instead, a player evaluates the results gained from its use of several strategies. The player retrospectively makes a personal assessment to determine which, of all strategies he has used, has yielded the best outcome.⁶⁸⁴ This is done by comparing the outcome gained from using one strategy with the outcome achieved from using other strategies during the same conflict. This game theory’s design is so that a player (party) can choose strategies that optimise its outcomes during conflicts or competitions.⁶⁸⁵ It is a stable outcome where both sides are pleased with the outcome.⁶⁸⁶

If opponents could communicate with one another, they could agree the best outcome for both parties.⁶⁸⁷ In some game types (conflict situations) however, no form of communication of intended strategies exists between parties. In game theory, this is referred to as a game of

⁶⁸⁰ B. Chatterjee, ‘An optimization formulation to compute Nash equilibrium in finite games.’ [2009] Proceeding of International Conference on Methods and Models in Computer Science, Pp.1-5

⁶⁸¹ T. C. Schelling, ‘The Strategy of Conflict’ [HUP 1980] P291

⁶⁸² A. K. Dixit, et al, ‘Games of Strategy.’ [Fourth International Student Edition, WW Norton & Company, 2015], P146.

⁶⁸³ *Ibid*, P20.

⁶⁸⁴ *Ibid*

⁶⁸⁵ *Li Supra*

⁶⁸⁶ *Ibid*

⁶⁸⁷ D. Mago, *et al*, ‘Facing your Opponents: Social Identification and Information Feedback in Contests.’ [2016] 60 (3) Journal of Conflict Resolution, P591.

‘incomplete information.’⁶⁸⁸ A typical example is an auction, in which each player knows its own valuation of an item, but does not know how other players have valued the item. Similarly, in games such as Prisoners’ Dilemma, peace war and even terroristic conflicts, players (parties) do not possess full information about their opponents.

The attack vs. counter attack interaction between terrorists and states using targeted killing has some features of a game of incomplete information, where opponents can make decisions on strategy based on actions of opponents. These interactions may not follow a predefined order. In this situation it becomes a game of incomplete information because on these occasions, neither party can see or anticipate the opponents attack in order to modify theirs.⁶⁸⁹ This is partly because some attacks occur instantaneously. In essence, each player has to consider what response choice will lead to the best outcome for themselves, bearing in mind the other parties likely choices. One player’s action can therefore influence the other’s choice of response.⁶⁹⁰ In such cases, a player does whatever will result in its largest payoff. For example, in terroristic conflicts, the spontaneous/surprise attack’ strategy offers terrorists larger payoffs than attacks which can be anticipated and so proportionately defended against.⁶⁹¹

4.3.4.3 The ‘Game’ in Game Theory

Game theory is the fourth in a sequence of paradigms below, explaining how people attempt to achieve goals; these may be referred to as type I, II, III, and IV rationales: in type I rationale, the question is whether a goal can be met. In type II rationale, the decision maker, satisfied that the goal can be met, tries to meet this goal in the most effective way, (at

⁶⁸⁸ Osbourne Supra P834.

⁶⁸⁹ A. Mishra, *et al.*, ‘Pre-emptive Bribery and Incomplete Information: Does Prior Knowledge Matter?’ [2017] *Journal of Public Economic Theory*, P685

⁶⁹⁰ Ibid

⁶⁹¹ Ibid

minimal cost); alternatively, having decided that the goal cannot be met, the decision maker tries to come as close as possible to meeting the goal by choosing the best strategy possible. In type III rationale, the decision maker realizes he is faced not by nature, but by other decision makers he can influence.⁶⁹² He therefore tries to influence them so that, (acting according to type II rationale) they will carry out actions helpful to him. In type IV rationale, the decision maker realizes that he is faced by other individuals whose actions can affect him, and who in turn are trying to influence his actions.⁶⁹³ Thus, he is generally faced with the decisions of either to outsmart the others or to cooperate with some or all of them; ultimately seeking and attempting to eradicate the impediments that hinder him from getting what he wants. It is this last type which represents game theory.⁶⁹⁴

Generally, games may be non-cooperative or co-operative. A co-operative game is one in which players, through their iterated interaction, are able to make enforceable contracts. These are not games in which players actually do cooperate, but as games in which any cooperation is enforceable by an outside party (e.g., a judge, police, etc.).⁶⁹⁵ Such opportunities for cooperation are usually possible in iterated games (conflict or competitions) like in peace war games, where repeated interactions through violence between players can eventually lead to co-operation.⁶⁹⁶ In non-cooperative games, an analyst is mainly interested in the initial strategies chosen by each player. In the co-operative case, an analyst is interested in the process of bargaining and coalition formation. Games may also have complete or incomplete information. When information is incomplete, the interest is in the process of

⁶⁹² P. Slovic, et al 'Decision processes, rationality and adjustment to natural hazards. In *The perception of risk.*' [Routledge. 2016] P40.

⁶⁹³ Ibid

⁶⁹⁴ B. Bueno de Mesquita, 'A New Model for Predicting Policy Choices: Preliminary Tests.' [2011] 28 (1) *Conflict Management and Peace Science*, P65.

⁶⁹⁵ S. Skaperdas, 'Cooperation, Conflict, and Power in the Absence of Property Rights.' [1992] 1 *The American Economic Review*, P720.

⁶⁹⁶ Ibid

learning, as players elicit information during the play of a game.⁶⁹⁷ The co-operative, iterative peace war game is relevant to this thesis and will be explained in detail in following sections. Essentially however, game theory tries to answer the following questions:⁶⁹⁸

- (a) What strategies should each player use?
- (b) Where there are gains to be made from co-operation, how should the players bargain?
- (c) Where there are many players, what coalitions should form?
- (d) What information can be deduced from the actions of other players?

By applying the same analogy to the ‘game’ regarding ‘terroristic conflict’, game theory analysis of the US targeted killing programme, of which other states using targeted killing can make reference to, tries to answer the following questions:

- (a) What strategies should be used to tackle terrorism?
- (b) What are the gains to be made from co-operating with the demands from terrorist organisations, and how should both parties to the conflict bargain to each achieve what they want? Or would ‘targeted killing’ suffice?
- (c) In order for opposing parties to achieve their goals, do the US and Israel need to choose the strategy of cooperation with terrorists, (i.e. ‘peace’ through negotiated settlement), rather than the defect strategy (war)? Is this achievable? If so, then, to what extent?
- (d) Are terrorists acting in a way that suggests that they are ready to co-operate? Are they currently determined to negotiate a peaceful settlement of the conflict that sees an end to terrorism? If yes, then targeted killing may have been a strong lever in this. It would then be a good time for the US and Israel to stop targeted killing to encourage dialogue. If there

⁶⁹⁷ de Mesquita Supra P 158.

⁶⁹⁸ Ibid

is no sign of terrorist capitulation, targeted killing may not be capable of achieving its main goal. In that case, what is the best strategy that can achieve the cessation of terrorism?

Game theory analysis made on behalf of terrorist organisations will, in the same vein, consider answering the following questions:

- (a) What strategy is best for introducing an Islamic style state to the western world?
- (b) Where there are gains to be made from 'co-operation,' how should terrorists bargain in such a way that they get what they want while also giving western states what they want?
- (c) To what extent should both parties negotiate a middle ground?
- (d) Are the states acting as if they want to co-operate by meeting the demands for an Islamic style state? If not what is the next best strategy if terrorism is not achieving this goal.

Proponents have shown how based on the above underlining principles, game theory can be used to analyse activities such as legal and political strategies and economic behaviour. Proponents of game theory including Newmann, Mogerstern, Aumann, Schelling, Neymann, De-Mesquita, Scheve, Osborne and Ullmann-Margalit, have espoused how 'it can help us understand the phenomena that we observe when decision-makers interact. They have also shown how long-term interactions in violence induce conflicts, such as terroristic conflicts, can lead to co-operation and negotiations between parties. The authors have also shown how to make analysis using game theory.⁶⁹⁹ They all have, in one way or the other, suggested that

⁶⁹⁹ R.J. Aumann, 'Rationality and Bounded Rationality.' [1997] 21(1) Games and Economic Behavior. P 14; V. Neumann, J. Morgenstern, O. Mogerstern, 'Theory of Games and Economic Behaviour [2007 Princeton University Press] P 20; A. Neyman, 'Bounded Complexity Justifies Cooperation in the Finitely Repeated Prisoners' Dilemma.' [1985] 19 (3) Economics Letters, Pp 227-229 ; M. J. Osborne, 'An Introduction to Game Theory.' [OUP, 2004] P 3

one of the best ways to understand basic game theory principles is to look at a classic game theory example: the prisoner's dilemma.

The discipline of game theory describes how iterated (repeated) games model long-term interaction.⁷⁰⁰ A single stage game, one-shot games or single shot game are names for non-repeated games.⁷⁰¹ These are games played once; the pay-offs (outcomes) may be such that a game might be impossible to play twice;⁷⁰² E.g. mutually assured nuclear destruction or the dueling conflicts which were medieval methods for settling trade or conjugal disputes.⁷⁰³ It is important to clarify and distinguish 'iterated games' (repeated games) from 'non-iterated games (non repeated or one shot games), and to justify its selection in this thesis. The one-shot game of 'Chicken', which was used to issue a caveat to the US and its allies about the disaster and counter-productivity of nuclear warfare will serve as an illustration.

At the start of the Cold War, the Eisenhower administration considered the use of nuclear weapons, alongside other weapons of war that the US had at its disposal.⁷⁰⁴ Henry Kissinger, the secretary of state at the time, who had an experience in game theory analysis proposed that the game theory analogy be used to predetermine the possible outcome of actually launching nuclear attacks.⁷⁰⁵ He employed the analytical skill of another game theory specialist, Thomas Schelling. Together they assessed each country's potential to use nuclear weapons as a strategy for winning the war. A forecast of the likely consequences (payoffs) that would arise from the exchange of nuclear attacks and exploring different dominant strategies was based on the following considerations:

⁷⁰⁰ V. Vinoba, et al, 'The Reliable Energy Efficient Routing Protocol Based on Cooperative and Non-Cooperative Repeated Game Theory in Wireless Sensor Networks.' [2017], P658.

⁷⁰¹ M. Greiff, *et al*, 'The Pay-What-You-Want Game: What can be learned from the Experimental Evidence on Dictator and Trust Games?' [2017] 12.(1) Management & Marketing, P124.

⁷⁰² M. Wiemker, et al, 'Escape room games.' [Game Based Learning, 2015] P55.

⁷⁰³ J.P.F. Melese, 'A Game Theory View of Preventive Defense Against Ballistic Missile Attack.' [2001]17(2), Defense Analysis, P212.

⁷⁰⁴ S.I. Schwartz, 'Atomic Audit: The Costs and Consequences of US Nuclear Weapons since 1940.' [Brookings Institution Press, 2011] P2.

⁷⁰⁵ Melese Supra P 212

-Nuclear weapons are no larger than traditional bombs, but a single blast can devastate an entire city, emitting fire and radiation. Nuclear weapons are in fact weapons of mass destructions, and therefore, a major form of deliberation and consideration is required before they can be used. The grievous impact of nuclear weapons cannot easily be undone.⁷⁰⁶

-Neither state could gain advantage through a nuclear attack -- the reprisals would be too devastating. This was known as Mutual Assured Destruction (MAD). So a balance was struck, requiring open acknowledgment of the strengths and vulnerabilities of each state. As Aumann put it, "Nations must learn war in order not to fight," ...You can have peace, but the swords must continue to be there."⁷⁰⁷ However, as prisoner's dilemma exemplifies, both players must assume the other is only concerned with self-interest; therefore, each must limit risk by adopting a dominant strategy.⁷⁰⁸

-If one country changes the balance of power and adopts a dominant strategy (by building a missile-defence shield for instance), would it still lead to a strategic blunder that resulted in nuclear war? (In fact, one country built missile silos, the other targeted them.⁷⁰⁹ The Soviet Union and the US then spread out and hid their launch sites around the globe, which required each to commit more missiles to a potential first strike in order to diminish the retaliatory abilities of the other.⁷¹⁰ Each also kept nuclear-armed aircraft aloft in the skies at all times, to provide a deterrent in case the silos were destroyed.⁷¹¹ As another deterrent, each superpower also established nuclear-armed submarines, thus, ground, air and sea. The atmosphere was so tense that was a constant threat and miscommunication which could have led to disastrous

⁷⁰⁶ Ibid

⁷⁰⁷ Available at: <http://www.columbia.edu/cu/news/06/07/wargames.html> [Accessed on 17/12/19]

⁷⁰⁸ Ibid

⁷⁰⁹ Melese supra P213

⁷¹⁰ D. Reiter, 'Preventive War and its Alternatives: The Lessons of History.' [2006] Army War College Strategic Studies Inst Carlisle Barracks, P18.

⁷¹¹ Melese Supra P213

results. In the midst of such massive distrust, even a defensive move like building fallout shelters was supposedly provocative).⁷¹²

-However, by no rational or logical measure would it make sense for one country to launch nuclear weapons after it had already taken a significant hit. It achieves nothing apart from world destruction for the sake of revenge. The question is, if revenge is not even a deterrent, what can prevent either country from launching a first strike? The best strategy to counteract the threat of a 'first strike' was for American and Soviet leaders to sometimes use a 'madman strategy' or issue propaganda that they were mentally unstable or blind with rage to keep the other off guard.⁷¹³

Eventually, weapons control and disarmament negotiations began and the conflict moved from a one-shot into a Peace War iterated game scenario. This allowed both parties to reward cooperation and punish defection. Through repeated meetings and increased communication, trust and co-operation led to (some) disarmament and less strategic posturing. This was largely due to the expense of maintaining an ever-growing nuclear capability. Neither country was willing to play the final stage of a game in which the best possible outcome involved a victory that could only be celebrated by a handful of survivors underground.⁷¹⁴

The point is that in a non iterative (one-shot) game like *Chicken*, in which players have mutually assured destructive weapons as their dominant strategies, players only need apply the strategy once to generate the ultimate and many times detrimental consequences in pay-offs.⁷¹⁵ This is why serious caution is to be taken before making decisions and acting on them. Unlike non-cooperative one shot games where there is no possibility of alliances,

⁷¹² Ibid

⁷¹³ Ibid

⁷¹⁴ Ibid

⁷¹⁵ A. B. Eisenbruch, 'Evidence of partner choice heuristics in a one-shot bargaining game.' [201] 37 (6) *Evolution and Human Behaviour*, P429

cooperative games can result in parties expressing interest in cooperating to form coalitions for the purpose of entering into an agreement.⁷¹⁶

In contrast, one shot games feature players in pursuit of individual interests, such that, one person's gain always is another's loss.⁷¹⁷ One-shot games are games that are played only once and thus deemed as non-cooperative. This is due to the absence of external means to enforce cooperative behaviour (e.g. contract law) as opposed to co-operative games.⁷¹⁸ Iterated (repeated) games like the Peace War and Prisoner's Dilemma trigger strategies in small doses such as *tit for tat* can therefore encourage cooperation. On the other hand, in iterated games, a strategy may be contingent on past moves, thus allowing for reputation effects and retribution.

In game theory, an iterated game is an extensive form of game that consists of a number of repetitions of some base game (called a stage game).⁷¹⁹ The stage game is usually one of the well-studied two-party games. Iterated games capture the idea that a player will have to take into account the impact of his or her current action on the future. So, game theorists have found the pay-offs of a game of cooperation to be more beneficial to both players.⁷²⁰ With iterated games, there is more scope for co-operative strategies to emerge.⁷²¹

Some proponents of game theory have observed the benefits of co-operation by parties, and how iterated interaction can yield in co-operation. Neyman, Aumann, Schelling, de Mesquita, Kandori and a host of other scholars have shown how this is possible. Neyman has shown

⁷¹⁶R. Cottle, *et al*, 'The Linear Complementarity Problem.' [2009] Society for Industrial and Applied Mathematics, P10.

⁷¹⁷ D. Avinash, *et al*, 'Games of Strategy' (2d ed. New York: W. W. Norton, 2004). Pp 1-4

⁷¹⁸ R. Chandrasekaran, 'Cooperative Game Theory.' Available at www.utdallas.edu/~chandra/documents/6311/coopgames.pdf at P3, [Accessed on 08/11/19]

⁷¹⁹ R. J Aumann, M. Maschler, '[Repeated Games with Incomplete Information](#).' [1995 Cambridge London: MIT Press] P66.

⁷²⁰ G. Neil, *et al*, 'A Compositional Approach to Economic Game Theory.' arXiv preprint arXiv:1603.04641 [2016], P3 Available at: <http://www.gametheory.net/Dictionary/IteratedGame.html> (for definition). Accessed on 22/08/19]

⁷²¹ Ibid

that cooperation can result from a finitely repeated prisoners' dilemma.⁷²² Aumann, Schelling and Kandori have also demonstrated how players benefit most by co-operating with each other.

4.3.4.4 Conflict Enhancing Co-operation

These authors show how even self-interested parties are sometimes able, or forced from lack of better alternatives, to co-operate in a long-term relationship. When parties first interact or interact only once, as is the nature of non-iterated games they often have a natural incentive to 'not co-operate' with one another. Instead, they selfishly defend their individual interests using strategies they deem fit. One such example is US president George W. Bush's aggravated declaration of war, following the 9/11 al-Qaeda attack. Such response is only an expected initial reaction and rational to game theorists. As Aumann puts it:

‘... can war be rational? Unfortunately, the answer is yes; it can be. In one of the greatest speeches of all time – his second inaugural – Abraham Lincoln said: “Both parties deprecated war; but one would make war rather than let the nation survive; and the other would accept war rather than let it perish. And the war came.”⁷²³

In iterated games (pro-longed conflict) it is not uncommon for violence to initially be the dominant strategy. It is only after a conflict is prolonged that parties may begin to consider the benefits of co-operating to achieve better outcomes individually and collectively.⁷²⁴

The theory of iterated interaction proposes that any mutually beneficial outcome can be sustained in 'equilibrium.' Such outcomes are able to account for phenomena such as

⁷²² O. Gossner, *et al*, 'Special Issue in Honour of Abraham Neyman.' [2016] 4 (1-2) International Journal of Game Theory P9.

⁷²³ Auman, *Supra* P 136.

⁷²⁴ *Ibid* P137.

altruism, cooperation, trust, loyalty, revenge, threats (self-destructive or otherwise) – phenomena that may at first seem irrational – in terms of the “selfish” utility-maximizing paradigm of game theory.⁷²⁵ That it accounts for such phenomena does not mean that people deliberately decide to take revenge or to be purposefully generous and self-serving; having rational motives. Rather, over the millennia, people have evolved norms of behaviour that are by and large successful and indeed optimal.⁷²⁶

Aumann, whose fundamental works have both clarified the internal logic of game-theoretic reasoning and expanded game theory’s domain of applicability, lends insight into the impact of long-term interaction (Iterated games) and compares this with short-term interaction (non-iterated or one-shot games) in conflict.⁷²⁷ Amongst Aumann’s many contributions to the study of factors that facilitate co-operation includes an illustration using a prisoner’s dilemma scenario.⁷²⁸ He points out that the difference between short-term and long-term interaction is perhaps most easily illustrated by the well-known prisoners’ dilemma game. His precise and general statement offers proof that laid the foundation for subsequent analyses of repeated interactions.⁷²⁹

In his work with Schelling, Aumann concludes that the ‘equilibrium’ outcome is worse for both players than the strategy pair where both “cooperate.”⁷³⁰ In other words, parties derive

⁷²⁵R. Aumann, ‘Robert Aumann’s and Thomas Schelling’s Contributions to Game Theory: Analyses of Conflict and Co-operation.’ (2005)10 Advanced information on the Bank of Sweden Prize in Economic Science in Memory of Alfred Nobel, P2.

⁷²⁶ Ibid

⁷²⁷ R.J. Ormerod, ‘OR as rational choice: A decision and game theory perspective.’[2010] 61 (12) Journal of the Operational Research Society, P1761.

⁷²⁸ R. J. Aumann, *et al*, ‘Long-Term Competition: A Game-Theoretic Analysis.’[1994] Essays in Game Theory.

⁷²⁹ Ibid P 23

⁷³⁰ Ibid

larger pay-offs (better outcomes) when they cooperate with each other.⁷³¹ They concluded that sometimes conflicts of interest may appear very strong as to be insoluble. However, the best strategy for an individual may result in the worst outcome for a group. Schelling noted that many agreements are made enforceable only upon recognition of future opportunities for agreement,⁷³² which will be eliminated if mutual trust is not created and maintained. Thus, if the parties take a long perspective and do in fact interact repeatedly; their common interests may be sufficiently strong to sustain co-operation.⁷³³

Using the first Prisoners Dilemma scenario (and game matrix) given below, the game can be played iteratively for a number of rounds until the interrogation ends (as if the players are repeatedly interrogated).⁷³⁴ Each player may decide to answer the same questions, differently, which will lead to different payoffs. In many cases, a series of interrogations can lead to bargaining, for instance, the promise of a lesser sentence if they decide to confess. It should be noted here that this thesis makes use of the Peace War game theory that is modelled after the prisoner's dilemma. Peace War game theory is also a two person game, but the two main strategic options of 'cooperate' or 'defect' in the prisoners dilemma is replaced with the options of either to perpetrate 'peace' or go into 'war' in the Peace, War game.

4.3.4.5. The Prisoner's Dilemma Game

The prisoner's dilemma provides a means of investigating the fitness consequences of cooperation on the basis of reciprocity. The prisoner's dilemma is a symmetric, two-player game with two alternate strategies, 'cooperate' and 'defect.'⁷³⁵ This game of strategic interaction seems to be a common introductory example in many game theory textbooks. It is

⁷³¹ In A. M. Colman, 'Cooperation, Psychological Game Theory, and Limitations of Rationality in Social Interaction.' [2003] 26(2) Behavioural and Brain Sciences, P139.

⁷³² Ibid P169

⁷³³ In, K. Binmore, 'Game Theory: A Very Short Introduction.' [OUP, 2007] P173.

⁷³⁴ Ibid

⁷³⁵ S. Rajiv, E. Somanathan, 'Understanding Reciprocity.' [2003] 50 (1) Journal of Economic Behaviour & Organization, P3.

a standard example of a game that shows why two completely “rational” individuals might not cooperate, even if it appears that it is in their best interests to do so.⁷³⁶ This is a two-person game, where each player decides on either of two options: to “cooperate” (C) or “defect” (D). The players choose their options simultaneously.⁷³⁷ Each player’s dominant choice is D—that is, D is an optimal choice irrespective of the other’s choice—but both players gain if they both play C. When played once, the game thus admits only one Nash equilibrium: that both players “defect.”⁷³⁸ For clarity, hypothetical examples of typical prisoner’s dilemma game are represented below:

Tom and Harry have been arrested for robbing the Savannah Savings Bank and placed in separate isolation cells. Both care much more about their personal freedom than about the freedom or welfare of their accomplice. An intelligent interrogator makes the following offer to each. “You may choose to confess or remain silent. If you confess and your accomplice remains silent we shall drop all charges against you and use your testimony to ensure that your accomplice does serious time. Similarly, if your accomplice confesses while you remain silent, he will be set free whilst you do the jail time. If you both confess I will get two convictions, but I will also ensure that you both get lesser sentences with high chances of parole. If you both remain silent, I will have to settle for small sentences on firearms possession charges. You have twenty four hours to decide.”

The “dilemma” faced by the prisoners here is that whatever the other does, each is better off confessing than remaining silent. But the outcome derived when both confess is worse for each than the outcome they would have derived had both remained silent. A closely related

⁷³⁶ E. Ostrom, ‘Collective Action and the Evolution of Social Norms.’[2014] 6(4) *Journal of Natural Resources Policy Research*, P235.

⁷³⁷ *Ibid*

⁷³⁸ R. Aumann, ‘Robert Aumann’s and Thomas Schelling’s Contributions to Game Theory: Analyses of Conflict and Cooperation.’ [2005]10 *Advanced Information on the Bank of Sweden Prize in Economic Science in Memory of Alfred Nobel*, P4.

view is that the prisoner’s dilemma games model familiar situations in which it is difficult to get rational, selfish agents to cooperate for their common good. Much of the contemporary literature has focused on identifying conditions under which players would or should make the “cooperative” move corresponding to remaining silent.

The logic behind the Prisoners Dilemma game is diagrammatically represented in the game theory matrix as follows:

		Player 2	
		confess	don't confess
Player 1	confess	(-6, -6)	(0, -10)
	don't confess	(-10, 0)	(-1, -1)

- (i) The two players in the above matrix have been accused of a crime and have been placed in separate rooms for interrogation so that they cannot communicate with each other.⁷³⁹
- (ii) Each player is asked independently whether he is going to confess to the crime or remain silent.⁷⁴⁰
- (iii) Because each of the two players has two possible options (strategies), there are four possible outcomes to the game.⁷⁴¹
- (iv) If both players confess, they each get sent to jail, but for fewer years than if one of the players got ratted out by the other.⁷⁴²

⁷³⁹M. A. Colman, ‘Game theory and experimental games: The study of strategic interaction.’ [Elsevier2016] P3.

⁷⁴⁰ Ibid

⁷⁴¹ Coleman Supra P5

- (v) If one player confesses and the other remains silent, the silent player gets punished severely while the player who confessed gets to go free.⁷⁴³
- (vi) If both players remain silent, they each get a punishment that is less severe than if they both confess.⁷⁴⁴

In the game, punishments (and rewards, where relevant) are represented by utility numbers. Positive numbers represent good outcomes, negative numbers represent bad outcomes, and one outcome is better than another if the number associated with it is greater. One must be careful however, of how this works for negative numbers, since -5, for example, is greater than -20.⁷⁴⁵

Once a game is defined on a 'matrix', the next step in analyzing the game is to assess the players' strategies and try to understand how the players are likely to behave. One easy initial approach is to look for what are called *dominant strategies*- strategies that are best regardless of what the other player chooses. In the example above, choosing to confess is a dominant strategy for both players:⁷⁴⁶

- (i) Confess is better for player 1 if player 2 chooses to confess, since -6 is better than -10.
- (ii) Confess is better for player 1 if player 2 chooses to remain silent, since 0 is better than -1.
- (iii) Confess is better for player 2 if player 1 chooses to confess, since -6 is better than -10.
- (iv) Confess is better for player 2 if player 1 chooses to remain silent, since 0 is better than -1.

⁷⁴² Ibid P150

⁷⁴³ Coleman supra P193

⁷⁴⁴ Ibid

⁷⁴⁵ J.H. Kagel, *et al*, 'Team Versus Individual Play in Finitely Repeated Prisoner Dilemma Games.' [2016] 8 (2) American Economic Journal: Microeconomics, P253.

⁷⁴⁶ K. I. Geckil, *et al*, 'Applied Game Theory and Strategic Behaviour.' [CRC Press, 2016].P56

Given that confessing is best for both players, it is not surprising that the outcome where both players confess is an equilibrium outcome of the game.

The Nash equilibrium matrix represented below shows the outcome where player 2's strategy is the best response to player 1's strategy and player 1's strategy is the best response to player 2's strategy:

		Player 2	
		Confess	Don't confess
Player 1	confess	(-6, -6)	(0, -10)
	don't confess	(-10, 0)	(-1, -1)

Finding the Nash equilibrium through this principle can be illustrated in the table of outcomes. In this example, player 2's best responses to player one are circled in green. If player 1 confesses, player 2's best response is to confess, since -6 is better than -10. If player 1 does not confess, player 2's best response is to confess, since 0 is better than -1. (Note that this reasoning is very similar to the reasoning used to identify dominant strategies.)⁷⁴⁷ Player 1's best responses are circled in blue. If player 2 confesses, player 1's best response is to confess, since -6 is better than -10. If player 2 does not confess, player 1's best response is to confess, since 0 is better than -1. In many games like the Prisoner's Dilemma, game theory

⁷⁴⁷ Ibid.

predicts suboptimal outcomes, since each agent acts in their self-interest, which may not be the common interest.⁷⁴⁸

Another example of a typical Prisoner's Dilemma is the one explained by Osborne. This dilemma is about how two players interact based on an understanding of motives and strategies (see Appendix 2; a pictorial representation of prisoner's dilemma game theory matrix with affixed numeric values of payoffs).⁷⁴⁹ They are both arrested and brought into a police station. If both suspects protect each other by staying quiet (called cooperation in game theory terms), the police have only enough evidence to put each in jail for five years. However, each suspect is offered a deal. If either one confesses (defection from a cooperative relationship), and the other suspect does not, the defector will be rewarded with freedom, while the tight-lipped suspect will get 20 years in jail. If both confess, both get 10 years in jail.⁷⁵⁰

Receiving a 20-year jail term is an unacceptable outcome. Since there is an opportunity for one of them to go scot-free by defecting, both players know the other is thinking along these same lines, both must defect out of self-interest.⁷⁵¹ In doing so, the suspects receive 10 year sentences. This is certainly not the best outcome (Nash-Equilibrium), but it is the best strategy for the situation the players find themselves in. Any agreement or heartfelt promise between the two players to cooperate only guarantees that both will, in fact, secretly defect. A mutual promise not to confess actually encourages confession, which leads to freedom (the optimal individual outcome) for the self-interested. This is the prisoner's dilemma. Game theorists have determined that confessing is always the answer (optimal strategy) for both

⁷⁴⁸ Ibid

⁷⁴⁹R.J. Aumann, 'War and Peace.' Nobel Price Lecture.' (2005) Available at: https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2005/aumann-lecture.html [Accessed on 30/10/19]; M. J. Osborne, 'An Introduction to Game Theory.' [OUP, 200] P3.

⁷⁵⁰ Ibid

⁷⁵¹ N. Jensen, et al, 'Introduction: Survey and Experimental Research in International Political Economy.' [2014] 40(.3) International Interactions P287.

parties in this case.⁷⁵² The reason for this is that, in the event that neither communicates intended moves (strategies) to each other, each party must assume that the other will act with only self-interest in mind.

This situation is better understood with the examples of game theory matrices charted below. The matrices allow the researcher to anticipate and explore all possible strategic approaches for dealing with a conflict, as well as the responses to the approaches in order to determine the best strategy that produces the most desirable outcomes.⁷⁵³ It is for this reason that the game theory is introduced in this thesis. The game theory technique allows the researcher to test the potential that targeted killing strategy has in achieving its goals.

Using the example stated above, a range of preferences are assigned to the different outcomes below to determine motives, with 1 representing the worst outcome (20 years' imprisonment) and for the best (going free):

- (i) 20 years: 1
- (ii) 10 years: 2
- (iii) 5 years: 3
- (iv) Go free: 4

Now the outcomes and preferences are known, as well as the available strategies: do not confess (cooperation between players) or confess (defection). It is possible to see how different combinations of strategies will create different results. The outcomes are represented by number-pairs, with the first number representing Player 1, and the second number representing the outcome of Player 2. (see the matrix in Appendix 2). Now, the options are evaluated by examining the outcomes represented in each column. The first

⁷⁵² C. Camerer, 'Behavioural Game Theory: Experiments in Strategic Interaction.' [PUP, 2011] P221.

⁷⁵³ Available at: <http://science.howstuffworks.com/game-theory1.htm> [Accessed on 17/08/19]

column shows that 2 is greater than 1, and in the second column, 4 is greater than 3. So, each player's best strategy, no matter what the other person does, is to defect (confess). Since the outcomes of one's co-operation (confession) are better than the outcomes of defecting (not confessing), this is called a strictly dominant action or dominant strategy.

Scheve's however cautions, giving examples of how a player's decision to co-operate can pan out differently and may not always be the best outcome.⁷⁵⁴ It explains that a reader could imagine himself or herself to be a soldier posted on a defensive line. The next day, there will be a great battle. There are two possible outcomes of the battle (victory or defeat), and two possible outcomes for the soldier (surviving or dying).⁷⁵⁵ The norm is to assume everyone's preference is to survive. If the soldier's line is breached, he or she will die. However, even if the defensive line holds, the soldier may die in battle. It seems that the soldier's best option is to run away. But if the soldier does run, the ones who stay behind and fight may die. Every other person on the defensive line is thinking this very same thing. So if the soldier decides to stay and cooperate but everyone else flees, he or she will certainly die.⁷⁵⁶

This problem has plagued military strategists since the beginning of warfare.⁷⁵⁷ That is why in some jurisdictions, a new condition entered into the equation: if you flee or defect, you will be shot as a traitor.⁷⁵⁸ Therefore, the best chance you have of surviving is to keep your position on the line and fight for victory. However, if the soldier knows that he will be shot as a traitor on a later date, he still may decide that fleeing is a better, immediate, decision to make. This is simply because he may later end up with a lesser sentence once he is able to

⁷⁵⁴ C. von Scheve, *et al*, 'The Blame Game: Economic Crisis Responsibility, Discourse and Affective Framings.' [2016] 50(4) *Sociology*, P635.

⁷⁵⁵ *Ibid*

⁷⁵⁶ Scheve *Supra*

⁷⁵⁷ J.A. Marshall, *et al*, 'Corporate Psychopathy: Can 'Search And Destroy' and 'Hearts And Minds' Military Metaphors Inspire HRM Solutions?' [2015]128(3) *Journal of Business Ethics*, P495.

⁷⁵⁸ Available at: <http://newsinfo.inquirer.net/929085/philippine-news-updates-marawi-maute-group-islamic-state-terrorism-mindanao> and https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-12.pdf at P3, [Accessed on 15/11/17]

negotiate the case in his favour. So, if he is interested in making a decision out of self-interest, fleeing will offer a better outcome. However, co-operating would be the best strategy to choose if the soldier decides to do what is morally justifiable.⁷⁵⁹

This exemplifies how the decision to co-operate may not always be in the best self-interest of a party. At any rate these examples highlight how parties in conflict struggle to make decisions that are beneficial in bringing out the best outcomes in their favour. It also highlights why game theorists make this type of analysis; it is not easy to determine what strategy will achieve the best outcome without first making a contextual analysis of the issue at hand. Having explored the prisoner's dilemma game, it is time to show how it relates to the peace war game and how the latter is applicable to this thesis. Similarly, the following peace war matrix exemplifies how co-operation can be anticipated following iterative interaction through violence related conflicts.

4.3.4.6. The Peace War Game Theory Approach

The Peace War Game is a game theory approach to peace and conflict studies.⁷⁶⁰ The game was played for decades in academic groups and by computer simulations, to study possible strategies of cooperation and aggression.⁷⁶¹ In this thesis, the peace war game theory method allows for a systematic review of US and Israel's targeted killing dominant strategy, which is 'to kill', in the 'war against terror.'⁷⁶² The iterated approach using the Peace War game underscores the long term interaction between the parties engaged in the war against terror, in which both players (parties) repeatedly use the same 'kill' strategy. The peace war game theory approach is relevant to the study of terrorism and targeted killing conflict because it

⁷⁵⁹ Ibid

⁷⁶⁰ B. O'Neill, 'Game Theory Models of Peace and War.' [1994] 2 Handbook of Game Theory with Economic Applications, P995

⁷⁶¹ B. De Mesquita, 'Game Theory, Political Economy and the Evolving Study of War and Peace.' [2006] 100, American Political Science Review, P4.

⁷⁶² R. Jervis, 'Realism, Game Theory, and Cooperation.' [1988] 40. (03) World politics P317.

helps to answer the question: how does one determine the best strategies for dealing with such violence related conflicts.⁷⁶³

The Peace War game is a variation of an iterated (repetitive), prisoner's dilemma in which the decisions available to each opponent, essentially limited to two strategies, (confess, defect) is replaced by (Peace, War). Further, like the prisoner's dilemma which is modelled after the interaction carried out during an interrogation process between law enforcers and suspected culprits; the Peace, war game is basically modelled after the recurrent (iterated) interaction between states during armed conflict. A major reliance on iterated games, such as peace war is in the high possibility for trigger strategies such as '*tit-for-tat*' to eventually encourage co-operation; which is typically the ultimate goal game theorists anticipate in conflict situations. In game theory, *tit-for-tat* is a type of trigger strategy usually applied to the repeated prisoner's dilemma and peace war, in which a player (party) responds in one period with the same action her opponent used in the last period.⁷⁶⁴ However, strategies remain the same with reciprocal altruism '*tit-for-tat*' (make war if an opponent does) or 'make peace while posturing in preparedness for war' as the best deterministic strategies.⁷⁶⁵ The latter strategy is simply to make peace on the first iteration of the game; after that, as expected, the player does what his opponent did on the previous move.⁷⁶⁶

⁷⁶³ G. Vinod, *et al.* 'The seats of reason? An Imaging Study of Deductive and Inductive Reasoning.' [1997] (8)5 NeuroReport, P1305. (Inductive reasoning begins with a specific observation or inference. It fuels more exploration to test if the judgment or probable inference is right or wrong. Deductive reasoning amasses observations and then gets specific.)

⁷⁶⁴ 'Glossary of Game Theory Terms.' Available at: <http://www.gametheory.net/dictionary/TitforTat.html> [Accessed on 15/03/18]

⁷⁶⁵ Shy, *Supra*

⁷⁶⁶ *Ibid*

Another strategy is the ‘*tit-for-tat* with forgiveness.’ When the opponent makes war, on the next move, the player sometimes makes peace anyway, with a small probability. This prevents the sometimes counter-productive cycles of retribution. ‘*tit-for-tat* with forgiveness’ is the best strategy to be adopted when miscommunication is introduced, i.e., when one party’s move is incorrectly reported to the other party.⁷⁶⁷ Otherwise, the general essence of all games is the interdependence of player strategies, of which there are two distinct types of strategic interdependence: sequential and simultaneous.⁷⁶⁸ In the former, the players move in sequence, each aware of the others’ previous actions. In the latter, the players act at the same time, each ignorant of the others’ actions.⁷⁶⁹ These are the applicable strategies under a peace war evaluation.

Instead of prisoners, the parties are neighbouring countries; and instead of either staying silent or ratting, each year the countries declare peace or war against the opposing country, scoring a number of points based on who declares peace or war. The game continues for a number of years and the winner is the country with the most points.⁷⁷⁰ As noted above, in game theory, a game is ‘iterated’ (repetitive) when players interact by playing a similar stage game (such as the prisoners dilemma numerous times. This means a strategy can be contingent on past moves, thus allowing for reputation effects, retribution and then possibly eventual co-operation involving bargaining and negotiations.⁷⁷¹ The typical Peace War matrix below exemplifies this:

⁷⁶⁷ A. Rapoport, *et al*, ‘Is Tit-for-Tat the Answer? On the Conclusions Drawn from Axelrod’s Tournaments.’ [2015]10 (7) P 128.

⁷⁶⁸ T. Schelling, ‘The Strategy of Conflict.’ [Harvard University Press, 1960], P83

⁷⁶⁹ Ibid

⁷⁷⁰ Available at: <http://www.cis.upenn.edu/~cis110/11fa/hw/hw05/index.html> [Accessed on 23/03/18]

⁷⁷¹ B. Singh, ‘Repeated Games for Inter-operator Spectrum Sharing.’ [2015] arXiv preprint arXiv:1505.04041. P3

	A declares peace	A declares war
B declares peace	A and B get 3 points	A gets 5 points; B gets no points
B declares war	A gets no points; B gets 5 points	A and B get 1 point

If country A declares peace, country B's best response is to declare peace, practically, both neither lose nor gain from the interaction and so it is scored at an average mark of 3. However this gives both parties a good optimum outcome rather than when one declares war and the other declares peace.

If country A declares war, country B's best strategic response is to declare war as well (*tit for tat*), since the outcome of 1 point is better than no point at all i.e country B will lose if A declares war and B declares peace. So, each declaring war will be the dominant strategy and the best strategies for both parties should one party persist in declaring war.

It must be noted by both parties that based on the inflictions and cost of engaging in warfare; the point scored for both going to war is 1 which is a lot less than if both decide to choose peace which is scored at 3 points. This argument is most realisable after an iterated interaction by both countries, where each chooses to go to war. However, it is upon the recognition that the decision to go to war yields a much lower outcome than peace, that parties begin to realise the benefits of co-operating by negotiating and bargaining. Understandably however, parties do not wish to portray weakness to their opponents at the initial stage of a conflict. They tend instead towards retributive violence as a form of protest, before deciding to renegotiate the conflict.

It can be deduced from the matrix above that it is important for both parties to realise the relevance of the peace strategy at the same time, because the scores above show how the

party that chooses peace loses by having the lowest score of 0, while the party that, regardless, chooses to go to war, scores 5.

Although modelled after the peace war game, the decision making in this thesis is reduced to 'Kill', 'no Kill', where 'kill' replaces 'war' and 'no kill' replaces 'peace'. This is because of the inconclusive legal description of terrorist status and terroristic conflicts under international law. At any rate, the kill, no kill specification can more appropriately be applied to the conflict between the US and Israel vs. terrorists. As each side has the incentive (choice) to either 'kill' or 'not to kill'. The US chooses to use targeted killing or not to target and kill (one alternative is arrest); terrorists choose a fatal terroristic act or not (one alternative is capture and keep hostage). This too is a repetitive choice, (iterative). This type of game offers each side the opportunity to change strategy in order to achieve a better outcome, each time the game is played. There is also an opportunity to learn from previous games (conflict scenarios), react or retaliate. Each can also try to modify an opponents' behaviour by signalling a desire for peace, playing 'no kill' even if preceded by a 'kill' by the opponent, or choosing an entirely different strategy. Ultimately, the thesis discovers the extent to which targeted killing strategy is optimal in deriving the anti-terror goals of the US and Israel.

4.3.4.7 Evaluating Targeted killing using the Peace War Game

The first step of the game theory application under the socio-legal inquiry of this thesis begins with reflectively identifying and outlining some recent targeted killing scenarios and quantifying their outcomes. Different scenarios will be reduced to a picture game plan (the game theory matrix), as shown in the examples above. In the game theory application, the outcomes derived are numeric values the researcher realistically awards against each party's

strategic choice, including targeted killing. Game theory is applied to this thesis to derive the following advantages:

Advantages of the Peace war game theory approach

1. Game theory is helpful in mapping assumptions into logically valid conclusions.⁷⁷²

This comes with the understanding of how parties in conflict interact. Parties interact strategically; what one does affects the other. Game theory is a decision-making tool that analyzes the players, strategies and payoffs of situations, which can be represented in payoff matrices.⁷⁷³ Such investigations can guide the behaviour of individuals or entities, including parties to terroristic conflict, who seek the outcome that best satisfies their goals. This concept is quite relevant to law, specifically in regards to negotiations which are expected to lead to the formulation of policies. It should be noted that negotiations and other forms of agreements are attempts to resolve conflicts between parties through compromise.

Resolutions can be drafted by using the reasoning of game theory. In order to achieve this, one must realize that game theory calls for each player to take into consideration the other players' strategies and desired outcomes, not just his own. In doing so, the players act in ways that maximize their payoffs. Game theory analysis derives the payoff matrix for the specific case, interprets it, and uses the analysis to lead the parties to the most beneficial settlement.⁷⁷⁴ How does it do this? If for instance, as shown in

⁷⁷² K.Goeree, *et al* 'Stochastic Game Theory: For Playing Games, not just for Doing Theory.' [1999] 96 (19) Proceedings of the National Academy of Sciences P 10564.

⁷⁷³ M. Esmaili, *et.al*, 'Using Game Theory Approach to Interpret Stable Policies for Iran's Oil and Gas Common Resources Conflicts with Iraq and Qatar.' [2015] '11(4) Journal of Industrial Engineering International, P543.

⁷⁷⁴ The US Legal Intelligence, 'The Application of Game Theory to Legal Negotiation and Mediation.' [2015] Available at <http://blogs.cornell.edu/info2040/2015/10/14/the-applicability-of-game-theory-to-legal-negotiations-and-mediations/> [Accessed on 02/04/2018]

the matrix below, each opponent has the choice of two strategic options: to kill or not kill. Then each option of the first player could be combined with either option of the opponent resulting in four different combinations of conflict. This is drawn in the matrix below:

		Player 1	
		Kill	Not Kill
Player 2	Kill	Kill, kill	Kill, Not kill
	Not Kill	Not Kill, Kill	Not kill, Not kill

Knowing what each opponent values, one can suggest a value outcome for each ‘player strategy’ in each cell. For instance, the fact that some terrorists favour the strategy of suicide bombing but The US is alien to the idea only suggests how ineffective the threat of death to such terrorists will be compared to the impact of the death of US citizens on the US generally.

Bearing in mind that the optimum outcome sought from targeted killing strategy is to eliminate terrorism; one can begin to presume how unlikely it is for the much lauded targeted killing strategy to yield the much needed effect. In a game theory matrix, the general numeric value in outcome of targeted killing response to terrorism will be scored lower than the lethal consequences of terrorism, even though, as a matter of fact, both parties apply strategies that result in similar consequences. The reason is that the outcomes that determine the effectiveness of a strategy are measured in consideration of how much a party is impacted by an opponent’s strategy. This must not be confused with a party deciding which of several strategies at its disposal works

best in achieving set goals. In this case the party compares what it has achieved from using one strategy with what it achieved from using another.

The measurement of outcomes is what awards game theory a predictive character. From narrowly assessing past and present consequences of using a strategy, it becomes easier to deduce its future implications. It is not that other methods are incapable of offering similar conclusions, but game theory simplifies the complex nature of terroristic conflict by illuminating the main forces that are at work but not plainly visible when explored in all its detail.⁷⁷⁵ Like other economic methodologies, Game theory is designed to simplify an analysis so as to be able to focus on what is important about the issue at hand.⁷⁷⁶ In this thesis, it brings into sharper focus the implications of strategic options facing the parties to terroristic conflict. Game theory facilitates the determination of the viability of targeted killing, in relation to its goal.

There is often a combination of strategies' that gives the best payoff for both sides in a conflict. Neither side would wish to change their strategy (i.e. the Nash equilibrium). This is the solution to aim for, with education, diplomacy, negotiation, legislation and sanctions, to bring understanding, trust, agreement, confidence and a peaceful settlement.

1. Game theory allows players to understand their opponents better because it enables close scrutiny of the opponent's inclinations and inhibitions. A general principle for a player in a game is to look ahead and reason back. Each player should figure out how the other players will respond to his current move, how he will respond in

⁷⁷⁵ D.G. Baired, *et al*, 'Game Theory and the Law.' [HUP 1998] P7.

⁷⁷⁶ *Ibid*

turn, and so on. The player anticipates where his initial decisions will ultimately lead and uses this information to calculate his current best choice.⁷⁷⁷ When thinking about how others will respond, he must put himself in their shoes and think as they would; he should not impose his own reasoning on them.⁷⁷⁸ This offers the player an objective viewpoint of the outcome of a conflict, which then guides realistic planning of effective strategies for the future.

2. Armed with an understanding of each party and their aims, a game theory analyst is able to determine two important details when making observations. The first is whether the strategies in use by parties have necessitated a change to a different strategy (based on the outcome, this is the point where a strategy is not yielding the desired outcome, and there is need for a player to explore a different option). The second is ‘when’ it is time to change, possibly to a more diplomatic means of settlement of the conflict. (The timing of this is important). For example: targeted killing strategy may be impacting in two ways: Firstly, its gruesome impact on terrorists and their families is intended to force terrorists to negotiate the conflict using diplomatic means.

Secondly, targeted killing may, in itself, be effective in bringing an end to the conflict if every single terrorist on earth has been successfully eliminated. Whilst the latter is unachievable, the former may be possible. This however depends on whether the overwhelming impact of targeted killing strategy succeeds in compelling terrorists to cooperate. To a game theory analyst, it is very important for an opponent to identify, through observing interactions in conflict, ‘when’ such a party who is at the receiving end of the conflict has reached the overwhelming

⁷⁷⁷ Ibid

⁷⁷⁸ B. Myerson, ‘Game Theory.’ [HUP, 2013] P18.

stage. This may be followed by the party's willingness to change its strategy; which its opponent takes advantage of by suggesting other strategies that both parties may benefit from. Aumann has cautioned however that this stage does not usually occur at the start of a conflict because when conflicts commence, parties are by nature inclined to act in self-interest.⁷⁷⁹ They would rather engage in a chain of retributive violence until they are weakened by the counter-productivity of such approach. From studying the interactions in ongoing war against terror, the game theory analysis is able to interpret the stages of the conflict. This leads to the third advantage;

3. Game theory acts as a prompt, navigation tool and measure, in exploring the above mentioned and other strategic options that are available to all the parties to terroristic warfare.

As there are advantages to game theory, there are also limitations that this thesis makes note of. However, chapter six will detail the limitations encountered and addressed in the course of the research while chapter five uses the game theory method to analyse the strategic options facing parties to terroristic conflicts.

⁷⁷⁹ R.J. Aumann, 'Game Theory' [2017]The New Palgrave Dictionary of Economics, P 40.

4.4. Conclusion

This chapter set out to explain and establish the role of the Doctrinal, Hermeneutical and Game theory methodologies used in this thesis. It did this by mainly highlighting the characteristics uses and advantages of each methodology. The doctrinal evaluation answers questions on the legality of targeted killing and its current interpretation under international law. The approach shows us the complexity of modern warfare and the difficulties of applying ‘lethal force’ regulatory laws to terroristic conflicts. Through the doctrinal approach, the researcher is able to identify ambiguous doctrines that do not have provisos that explain their application to modern conflicts. Doctrinal investigations based on predominantly formal conclusions in the literature of targeted killing have arrived at logical conclusions on the general premise that the legality of targeted killing is debatable. It considers targeted killing to be illegal under the LOAC because it involves the premeditated use of lethal force, against civilians and within civilian territories. This contravenes the LOAC precept that prohibits targeting directed against civilians.

Targeted killing process also contravenes human rights laws for failure to fairly determine the guilt of suspected terrorists before awarding punishment. However, whilst the doctrinal approach addresses numbers one and two of the aims and objectives of this thesis (clarifies the current legal interpretation of targeted killings and critically evaluate the relevance of the laws of war and conflict in relation to targeted killings) it does not address numbers three and four aims and objectives. The doctrinal approach does not determine the impact targeted killings and terrorism have on its victims, neither does it clarify the contribution of targeted killings in the pursuance of a legitimate counter-terrorism strategy. The hermeneutical methodology is employed in this thesis to assess the impact of targeted killing and terrorism and the justification for targeted killing counterterrorism strategy.

Because of gaps in the doctrines that regulate the use of lethal force, there are diverse interpretations in the literature about how the laws should be made applicable to terroristic conflicts. The hermeneutic approach is employed in this thesis to explore the diverse interpretations. It explores the reasons why targeted killing strategy is used despite criticisms of its 'not so legal' status. The claim made by those in favour of the controversial strategy of targeted killing is that it involves a more practical process of apprehending terrorists who hide from detection than the impracticable guidance stipulated under existing laws.

The diverse hermeneutical analysis includes the rationale and ideologies that drive terrorism and targeted killing. This novel approach gives multiple view points of the Liberal Cosmopolitan, Realist and Pragmatic schools of thought that inform the debates around targeted killing. It is appropriate to assess these schools because highlighting their values enables the researcher determine the factors that spur the actions of parties involved. This lends realistic insights into strategic options to consider when determining factors that may quell terroristic conflict. Notwithstanding the insight the hermeneutical approach offers, it does not provide a system for guaranteeing the effectiveness of strategic approaches to conflicts.

As stated in the introduction to this chapter, the ultimate aim of this thesis is to arrive at suggestions in the form of a *modus operandi* for legally and effectively defending against terrorism. This includes suggestions that dismisses or entertain the use of targeted killing; depending on the conclusion arrived at from using game theory analysis. Thus, the socio-legal Peace War game theory method is employed to address the fourth aim of this thesis. It is applied to assess, clarify and possibly forecast future implications of strategic decisions made in terroristic conflicts. It is narrowed down to clarifying the effectiveness of targeted killing

strategy. The game theory method allows the researcher to give a visual picture of how terroristic conflict can pan out in different ways, depending on the strategic choices parties make. Game theory serves as a precautionary scale for measuring the future implications of targeted killing. It clarifies the extent to which targeted killing counterterrorism strategy is helpful in winning the war against terror. In this thesis, the game theory approach draws attention to the reality that in addition to the economic cost of using targeted killings as verified by a game theory analysis, targeted killing is nowhere close to achieving the goal of complete elimination of terrorism.

A combination of the above methodologies is best suited to achieving a comprehensive study on targeted killings. This is opposed to purely opinion based critiques which are often based on transcendent standards, for which little basis are provided. Following this description of the scope and expectation of game theory, the following chapter will, in applying the game theory method, propose and critically evaluate some pragmatic steps aimed at tackling terrorism.

Having explored the application of the game theory method in this chapter, the following chapter applies the method to study the effectiveness of targeted killing, using the US programme as case study.

Appendices:

Appendix 1:

Game theory expressions:

Parties – players

Table- Matrix

Game- Competition or Conflict situation

A GAME consists of:

- (i) Players- A collection of decision-makers,;
- (ii) Perfect or imperfect information-The possible information states of each player at each decision time;
- (iii) moves- The collection of possible moves (decisions, actions, plays,..) that each player can choose to make in each of his possible information states;
- (iv) Decision node- A procedure for determining how the move choices of all the players collectively determine the possible outcomes of the game. The decision is not a part of the game matrices. It is usually added to the game form merely to allow us to discuss the player's reasoning in the state of doubt.
- (v) Numeric values - Preferences of the individual players over these possible outcomes, typically measured by a utility or pay-off function.
- (vi) A pure strategy- for a player in a particular game is a complete contingency plan, i.e., a plan describing what move that player should take in each of his possible information states.

- (vii) A mixed strategy - - for a player in a particular game is a probability distribution defined over the collection A of the player's possible pure strategy choices.
- (viii) A one-stage simultaneous-move n -player game -The game is played just once among N players. Each of the N players simultaneously chooses a strategy based on his current information state, where this information state does not include knowledge of the strategy choices of any other player.
- (ix) A pay-off - (reward, return, utility outcome,...) for each player is then determined as a function of the N simultaneously-chosen strategies of the N players.

For iterated games there are multiple decision times. Consequently, a choice of a move based on a current information state does not constitute a strategy (complete contingency plan). Rather, a strategy is the choice of a move for the current iteration, given the current information state, together with a designation of what move to choose in future iteration, conditional on every possible future information state .Nash equilibrium for an n -player game: (See explanation in text)

Dominant strategy for an n -player game - A feasible strategy for a player in an N -player game is said to be a dominant strategy for this player if it is this player's best response to any feasible choice of strategies for the other players.

Appendix 2: (Culled from google images)



CHAPTER FIVE

A SEMI-QUANTITATIVE ANALYSIS OF THE EFFECTIVENESS OF TARGETED KILLING COUNTERTERRORISM STRATEGY USING THE *PEACE, WAR GAME* THEORY METHOD

5.1. Introduction:

Both terrorist organizations and states choose strategies based on their expected effectiveness. This explains why suicide bombings and other types of spontaneous attacks were adopted by over thirty different terrorist organizations, with attacks carried out in more than thirty countries in four continents.⁷⁸⁰ Based on the same logic of expected effectiveness, targeted killing became a prime method applied by Israel and US during the first decade of the 21st century, as they sought to prevent future spontaneous terrorist attacks. The strategies adopted clearly shows that death of those attacked is the main outcome sought by parties to terroristic conflict.

Views differ as to the rationalization of targeted killing, yet ultimately, the “effectiveness in the short and long term remains the lynchpin of any justification for named target killing.”⁷⁸¹

The alleged effectiveness of targeted killing is the rationale for its use. Both the US white paper and the legal document endorsing the Israeli targeted killing programme have given the

⁷⁸⁰ Y. Schweitzer, S. Goldstein Ferber, ‘Al-Qaeda and the Internationalization of Suicide Terrorism.’ [2005] Jaffe Centre for Strategic Studies, Tel Aviv University, P78; B. Hoffman, G. H. McCormick, ‘Terrorism, Signaling, and Suicide Attack’ [2004] 27(4) Studies in Conflict & Terrorism, P243; M. Crenshaw, ‘Explaining Suicide Terrorism: A Review Essay’ [2007]16(1) Security Studies P133; M. Arce, *et al*, ‘Suicide Terrorism and the Weakest Link [2009] P 2753 CESifo Working Paper Series.

⁷⁸¹ L. Michael Gross, ‘Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict.’ [New York: CUP, 2010], P135.

rationale for the use of targeted killing as a means of pre-emptive self-defence against terrorism.⁷⁸² This analysis chapter uses game theory to study the strategic interaction between the US and al-Qaeda with the aim of assessing the effectiveness of targeted killing and other strategies sampled in the matrices. The effectiveness is measured against the goals the parties, particularly the US intend to achieve from their conflict with al-Qaeda.

5.2. The US Counterterrorism Goals:

The obvious goal sought from using targeted killing is to:

- i. Successfully kill all terrorist threats; leading to a cessation of terrorism and or
- ii. Act as a deterrent, in which the fear of being targeted and killed forces terrorists to refrain from engaging in terrorism.⁷⁸³

In light of the fact that terrorism has not abated despite targeted killing being the prime measure used by a number of states, it is important that its effectiveness be assessed, in the context of its goals. This is the main research problem explored in this chapter. Its importance is more strongly recognized today as terrorist attacks against the US, Israel and western states persist. In fact, this thesis asserts that due to covert plotting and spontaneous execution of attacks from lone terrorists, there is a global increase in terrorism. This challenges the assertion made by Moshe Yaalon, Israel's Minister of Defense that targeted killing disrupts the daily routine of terrorists: "The potential target tries to avoid being seen in public, doesn't use means of communication since he understands we're listening. He is forced to rely on

⁷⁸² The US Justice Department White Paper on Targeted Killing; Available at: <https://www.aclu.org/blog/national-security/justice-departments-white-paper-targeted-killing> [Accessed on 13/05/2020]; HCJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel [2006] (Isr.) [hereinafter the Israeli Targeted Killings case].

⁷⁸³ Ibid

messengers and face to face meetings”.⁷⁸⁴ In other words, the threat of targeted killing forces terrorists to become preoccupied with the need to survive rather than attack. Calculated targeting is expected to reduce terrorists’ drive, render their operational capabilities redundant and, of course, boost the morale of the attackers.

On the other hand, the threat of targeted killing may force terrorists to be even more discrete, making surveillance even more difficult. Even the successful killing of terrorist targets may create new “martyrs”, evoking in terrorists the desire to revenge and cause risk to innocent civilians. Also the fact that a significant portion of terrorist organisations choose suicide bombings as their main strategy suggests that perhaps the threat of death is not enough to deter terrorists or eliminate terrorism. In fact the general explanation for suicide terrorism is that there are no losses to be counted when death occurs in the name of Allah.⁷⁸⁵ These are the consequential effects that the states which endorsed targeted killing failed to consider when lauding the strategy as the best counter-terrorism solution. The concern that it may be counter-productive stimulates a reassessment of the effectiveness of targeted killing in this chapter. The aim is to clarify, with the help of the peace war game theory, the contribution of targeted killing to an effective counterterrorism strategy.

⁷⁸⁴ Moshe Yaalon, IDF Chief of Staff 2002–2005, interviewed by Falk on 9 October 2007, in O. Falk, ‘Measuring the Effectiveness of Targeted Killing Campaign’ [2015] 9(1) Terrorism Research Initiative 1

⁷⁸⁵ R.A Pape, ‘Dying to Win: The Strategic Logic of Suicide Terrorism.’ [Random House Incorporated, 2006] Pp100-101.

De Mesquita has defined game theory as logic written down, thereby offering transparency to what is being analysed.⁷⁸⁶ Game theory is applicable in this chapter because of its mathematical nature. It is structured to provide a succinct yet holistic, reflective, objective and futuristic point of view of the effectiveness of targeted killing than any other study. It does this by breaking down the question of the effectiveness of targeted killing counter-terrorism strategy and analysing it from different angles. This has been compared to the need to have all the pieces of a tricky jigsaw puzzle in one place before trying to put them all together. Usually, the end result of a game theory analysis is simply to work out how events will unfold as people and organisations act in what they perceive to be their best interests. Numerical values are placed on the goals, motivations and influence of “players”—negotiators, business leaders, political parties and organisations of all stripes, and in some cases, their officials and supporters. It is a mathematical approach which proposes a more substantiated and systematic way of analysing the effectiveness of targeted killing, than theoretical underpinnings of opinion based claims and counter-claims.

Game theory approach forces the researcher to analyse the effectiveness of targeted killing in relation to the overall goal for which it is used. It asks the questions: What is the outcome expected from using targeted killing? Is targeted killing able to achieve the expected outcome of coercing terrorists into cooperating, leading to a cessation of terrorism? An answer in the affirmative to the latter question would suggest that targeted killing is effective in achieving the goal for which it is used. This is as opposed to an arguably flawed conclusion that targeted killing is effective simply because of an increase in the rate of successful killing of ‘listed’ notorious terrorists.

⁷⁸⁶ Bruno de Mesquita, ‘Predictioner: How to Predict the future with Game Theory.’ [2009] London School of Economic and Political Science Conference video. Available at: <https://www.youtube.com/watch?v=rIEq305SizA> [Accessed on 08/05/18]

The effectiveness of targeted killing is determined by exploring terrorists' response to targeted killing. This regards breaking the varied impact targeted killing has on terrorists into pieces. It must however be borne in mind that game theory is all about a party exploring different strategies for achieving set goals. The approach will be to weigh the US and Israel's strategy of targeted killing against the value system of terrorists in general and their reaction to past cases of targeted killings in particular. Likewise, spontaneous killing and suicide bombings, which are the main strategies used by terrorists, are weighed against the US and Israel's value system and desired outcome from terroristic conflict. This in-depth study better articulates the effect of targeted killings of terrorists than an exploration of theoretical underpinnings.

Peace war game theory is used as a semi-quantitative tool for exploring the strategy of 'killing,' and the impact of death on both parties in terroristic conflict. The result surprisingly yields insights into the counter-productivity of targeted killing strategy. Targeted killing may be a practical strategy for dealing with the changed face of modern terroristic conflicts, but the strategy is not helpful in putting an end to terrorism. Although each party applies a similar strategy of 'kill', (the killing of individuals from opposing sides), this does not mean that the impact is equally felt by both parties.

The strategies adopted by each party to the terroristic conflicts suggest that states at the receiving end of terrorism are wearier of deaths and harm caused through terrorism than terrorists are of targeted killing. It is unusual to find actors on behalf of a state using suicide bombing as a strategy for combating terrorism. Whereas, suicide bombings became the most

significant 21st century's strategy used by some terrorist organizations, including al-Qaeda and Palestinian terrorists.⁷⁸⁷ For some, loss of terrorist life is counted as gain: of dead enemies and gain of 'heavenly blessing.' This is exemplified by suicide bombing being one of their main strategies. Further, they successfully continue to recruit and train to replace losses, despite successful cases of targeted killing and elimination of terrorists through suicide bombings. On the other hand, if there were no targeted killings, the US, Israel and other western states may very well have faced more terror incidences. At any rate, there is a deficit in research that specifically assesses the effectiveness of targeted killing in relation to the goal for which it is used.

Economists use game theory to describe, predict and explain behaviour during conflicts as well as responses to conflict related policies.⁷⁸⁸ In this chapter, game theory analysis is used to: describe the impact of targeted killing policy on terrorists; attempt to decipher the future implications of a continued use of targeted killing counter-terrorism strategy and; facilitate logical conclusions on whether counterterrorism goals are being achieved. The aim is to stimulate new thought and enquiry on alternative strategies to the seemingly unending war against terror. Using the most basic of game theory matrices, the mathematical illustrations below anticipate a more precise reflection upon the effectiveness of targeted killing strategy. Further, the choices a player (party) makes give insights into how it makes strategic decisions. While working through the game theory map that outlines conflict scenarios and a party's strategy (for instance, party A) the researcher will also be able to simultaneously outline on the game theory map, the opposing party's strategy (for instance party B) and

⁷⁸⁷ A. N. Guiora, 'Accountability and Effectiveness in Homeland Security.' [2008] No. 08-02 University of Utah Legal Studies Paper, P18.

⁷⁸⁸R. Gittins, 'How Economists put Game Theory to Practical use.' [2012] The Sunday Herald Available at: <https://www.smh.com.au/business/how-economists-put-game-theory-to-practical-use-20121019-27wq1.html> [Accessed on 13/05/18]

response to various scenarios within the terrorism vs targeted killing conflict. This is first done in hindsight and then in foresight. In other words, the long-term interaction between terrorists and states using targeted killing is replicated on a game theory map; this is then studied in order to determine a trend in strategies and outcomes. This helps in predicting future outcomes from using the same strategies under study, thereby working out the effectiveness of such strategies. While setting aside the legal issues around targeted killing and focusing on determining its effectiveness, game theory helps to accentuate findings that clarify whether the optimal 'terror elimination' gain to be achieved from the use of targeted killing substantiates its use.

5.3. Data collection/ procedure

This chapter generally analyses targeted killing as a response to terrorism, with the strategy of killing being the main focus when presuming and quantifying outcomes. The examples used are hypothetical; however they take into consideration real life interactions between terrorists and the states using targeted killing strategy. In other words, when hypothetically making illustrations, the quantification of pay offs is subject to the ideological values the parties to the terroristic conflicts hold.⁷⁸⁹

This analysis is not dependant on statistics. In other words, it is not important to specify the number of targeted killing events that have occurred in order to make the analysis using game theory. A game theory research may commence when the researcher has up to date knowledge about the strategic interaction between parties under study, and is armed with an understanding of parties' ideological values, goals and objectives.⁷⁹⁰ Thus, the game theory

⁷⁸⁹ In any game, payoffs are numbers which represent the motivations of players. Payoffs may represent profit, quantity, "utility," or other continuous measures ([cardinal payoffs](#)), or may simply rank the desirability of outcomes ([ordinal payoffs](#)). In all cases, the payoffs must reflect the motivations of the particular player. Available at: <http://www.gametheory.net/dictionary/Payoffs.html> [accessed on 11/05/18].

⁷⁹⁰ F. Hayes, *et al.*, 'Is Game Theory Useful for the Analysis and Understanding of Decision Making in Economics Setting,' - Formulation of a Game Available at: https://www.tcd.ie/Economics/assets/pdf/SER/1994/Fiona_Hayes.html .[Accessed on 15/05/18]

analysis in this chapter is reliant on the hermeneutical analysis carried out in chapter three of this thesis. This is because information gained from determining the ideological values of parties and commentators to terroristic conflict serves as a standard when determining parties' payoffs under the game theory analysis.

The information used to carry out this analysis was gathered by reviewing leading media sources (by means of organizational websites and other search engines such as Westlaw and Google for Scholars), governmental and non-governmental organization sources and data attained through personal communication with other top researchers (Antonio Cerella, Peter Lee) about their personal interviews with persons directly involved in the ongoing terroristic conflict. Information on the US rationale and objective for targeted killing, including detailed accounts of al-Qaeda attacks was found mainly in the US white paper, Department of defence websites, International Committee of the Red Cross website, news articles and academic literature. Information on Israel's targeted killing regime is limited as most Israeli security activities seem to be classified. However, Israeli's targeted killing case offers necessary information about Israel's rationale and its intention to indefinitely rely on targeted killing as its main counter-terrorism strategy.⁷⁹¹ Information on suicide bombings carried out by Palestinians against Israel was mainly gathered by Falk from Israeli Security Agency Reports, Israel's office of Foreign Affairs, and detailed databases.⁷⁹² Some of the information on Palestinian attacks against Israel and al-Qaeda against the US (including those concerning worldwide suicide and terror attacks) have been previously analysed and published by Falk and Morgenstern in *Suicide Terror: Understanding and Confronting the Threat*.⁷⁹³ Recorded

⁷⁹¹ Supra note 3 Par. 60

⁷⁹² Suicide Attack Database from Ami Pedahzur, *Suicide Terrorism* [Cambridge: Polity Press, 2005], pp.241–253 in O. Falk, 'Measuring the Effectiveness of Targeted Killing Campaign'[2015] 9(1) *Terrorism Research Initiative*, P1.

⁷⁹³ O. Falk, H. Morgenstern, *Suicide Terror: Understanding and Confronting the Threat* [Wiley 2009] P9.

data in the latter include the date and location of suicide bombings, origin and the number of resultant fatalities.⁷⁹⁴

The analysis, including matrices, summaries and conclusions contained in this chapter were generated by me while working on the thesis. However, it is reliant on the previous work of Schelling, Aumann, Osbourne and De-mesquita on the concept and application of the peace war game theory. The formant for designing the matrices was derived from Schelling.⁷⁹⁵ These works could only serve as a guide in developing my analysis, as there is little research on applying peace war game theory to conflicts, let alone terroristic conflict. These authors directed that analysis related to Peace and war which they tag ‘peace war game theory’ should follow the model of prisoners dilemma. The only difference is in the name and the strategic decision to either make peace or war rather than cooperate and defect as envisaged under prisoners dilemma. Thus, the originality of peace war game theory approach to this thesis is multifaceted. The peace war game theory analysis of war efforts is still developing, as only a few authors have applied this method. This is the first time the approach has been used to analyse terrorism v. targeted killing conflict in a law thesis.

5.4. Game theory method

In order to verify implications of relying on targeted killing, game theory reduces each scenario to a picture game plan called the game theory map or matrix. Setting the various potential conflicts within a matrix framework brings order, precision, complete analysis and reflection. By taking the view point of one opponent at a time and bearing in mind their beliefs and values, the outcomes can be judged and the researcher can convert that judgement

⁷⁹⁴ Ibid

⁷⁹⁵ T.C. Schelling, ‘The Strategy of Conflict.’ [Harvard University Press 1980] Pp 128, 257

into a numeric value, this is done for each strategy. This gives the analysis a semi-quantitative component, which in turn gives insights into how one player might behave when faced with an opponent's strategy. Indeed it might be clearly seen that there is a best strategic choice for the player against both strategies of the opponent (deciphers future implications).

In order to provide a balance in analysis, this chapter must regard terrorists as rational decision makers, even though it can be argued that it is against reasonable judgment to do so. It is a basic assumption of game theory that must be made. However, it does not in any way impair the ability to objectively evaluate the optimum strategies available to the states; which is what the application of game theory seeks to achieve in this chapter. Furthermore, the assumption of rationality is only to the extent of accepting that terrorist organisations also make strategic decisions when plotting attacks. This affords a level playing field to all parties.

Arguably, the war against terror is an ideological one so the different model approaches of game theory below would consider preliminary ideological factors. Further, the analysis uses people centred decision networks, i.e the people involved in making a decision for (1)state and (2)Terrorists. However, the analysis specifically acts on behalf of the states using targeted killing. In other words, it is narrowed down, to answering questions on the reliability of the strategy of targeted killing. The aim of this chapter is to sample and compare strategies, so that it is easier to choose which offers the best outcome. However, it does not in any way refute the idea that more than one strategy can be applied at a time by parties or assessed at the same time using game theory. Game theory is flexible enough to analyse

multiple strategies in one matrix.⁷⁹⁶ However, the game theory application is kept simple in this thesis by comparing the strategic options, to killings in general and targeted killing in particular. It is considered that it is better to introduce game theory to a law research analysis using the most basic applications.

Targeted killing is practised by both the US and Israel. However, it is the strategic interaction between the US and the al-Qaeda organisation that will be used as the main case study examples in this chapter. Interactions with other terrorist groups will simply serve as reference points. Nevertheless, the results achieved from the study should serve as helpful tips towards a reassessment in reconsideration of Israel's targeted killing programme. The result can also serve as a guide to strategic decision making for other states which consider making targeted killing their counter-terrorism strategy. The basic iterated Peace War (Prisoners Dilemma) game theory method is used in the next section to explore the following arguments made in favour of targeted killing strategy, raised in chapters two and three of this thesis:

- i. The argument that targeted killing is effective in achieving the counterterrorism goals for which it is used. It does this by using game theory to help determine the impact of targeted killing on terrorists.
- ii. The argument that consider targeted killing to be a last resort counterterrorism strategy. It does this by comparing targeted killing to some alternative strategies like attacking terrorist assets, Media Campaign and ceasefire negotiations.

⁷⁹⁶ S. Netessine, 'Game theory in supply chain analysis. In Models, methods, and applications for innovative decision making [INFORMS 2006] pp. 200-233; Available at: <http://www.gametheory.net/dictionary/MixedStrategy.html> [Accessed 26/06/18]

- iii. The argument that targeted killing, (especially of terrorist leaders) reduces risk of terrorism. It does this by considering whether terrorism is quelled or fuelled by targeted killings. The scenarios consider the counter-productivity of targeted killing from exploring vengeful responses from terrorists.

In consideration of the ideologies of al-Qaeda terrorists and the US, explored through a hermeneutic analysis of the literature in chapter three of this thesis, an empirical model was built for this study. It ultimately tests the hypothesis that targeted killing is effective in achieving the counter-terrorism goals for which it is used (eliminating terrorist threats by successfully killing some and forcing others to refrain from terrorism for fear of being killed). The model also facilitates the examination of the effect of targeted killings in Pakistan, as well as the effect of targeting one type (i.e. ideologically motivated terrorists) in comparison to a different type (i.e. politically motivated terrorists). An examination that groups both types of targets into a singular unit is also studied. It is important to note that the numeric outcomes of a matrix depend on how outcomes are valued by a researcher. As a guide, the ideological values will inform results on terrorists' outcomes in this chapter. This chapter also takes into consideration the ideological values of the US when determining their outcomes.

The matrices are a two-party game, where each player decides on one of two options: 'to kill' or 'not to kill'. Both players are not in communication, therefore their actions may occur simultaneously or sequentially. Each player's dominant choice is 'to kill'—that is an optimal choice where they would not prefer a different strategy irrespective of the other's choice.⁷⁹⁷

⁷⁹⁷ R. Aumann, 'Robert Aumann's and Thomas Schelling's Contributions to Game Theory: Analyses of Conflict and Cooperation.' [2005]10 Advanced Information on the Bank of Sweden Prize in Economic Science in Memory of Alfred Nobel, P5.

This is succinctly listed in the game plan below.

5.5. Game plan

The game theory matrices will each be played using the format below:

- i. By identifying the parties,
- ii. By identifying the strategic choices, goals and outcome sought by both parties
- iii. By presenting scenarios of the strategic interaction involving i and ii above, and then rationally awarding numeric values to the outcomes achieved from the interaction in comparison to the outcome and goal sought.
- iv. Presentation and discussion of the results of each matrix will be made following each matrix.

5.6. Components of the Matrices

The opposing parties (players) are al-Qaeda Terrorists vs. The US.

The strategic options to be explored simultaneously by both parties in the matrices consist of the following:

Suicide bombing (killing) or no action (choosing not to kill);

The 'no kill' strategic option means 'no response'. Other strategic options to be considered in the matrices below may include media campaign, sanctions, attacking assets and ceasefire negotiations. Each of these will be explored in the matrices below.

5.7. The goal and values of the parties:

Bearing in mind that game theory study is concerned with finding the best strategy that gives the most desired outcome:

For al-Qaeda Terrorists it is the desire for an Islamic state and/or simply to kill as a means of promoting the jihadi ideology in return for presumed heavenly reward.⁷⁹⁸

For the US, it is the desire to put an end to terrorism by targeting and killing some terrorists, while forcing others to be preoccupied with avoiding detection rather than carrying out acts of terror.

It remains to be seen whether the optimum outcome sought from using targeted killing can be achieved given that terrorist organisations may place higher value on the death of their members than life. Matrix 1 has two scenarios that can be argued from two different angles. The strategic options of whether to ‘kill’ or ‘not kill’ can be used to argue two different viewpoints, depending on the value system employed. Relying on Schelling’s matrices model/map but without the tables, the matrices are presented below.⁷⁹⁹ The first scenario offers some decisional explanation of suicide bombers. It shows where killing is awarded greater numeric value on both sides than the option of not killing. The second scenario awards both parties greater values to the choice of ‘not killing’ than ‘killing’, under a different value system. The numeric values of al-Qaeda are represented on the left and that of the US are represented on the right hand side of the matrices.

5.8. Matrices Analysis

Where both players value the outcome of the strategy of killing more than not killing: Where 5 is the highest score obtainable in the matrix, a suicide bomber may value a successful mission (where the bomb is successfully detonated) as score **4** versus no attempt as score **0**. It

⁷⁹⁸J. Russell, H. Rafiq, ‘Countering Islamist Extremist Narratives: A Strategic Briefing.’ [Quilliam Foundation, 2016] P5; B. Fishman, ‘The Master Plan: ISIS, Al-Qaeda, and the Jihadi Strategy for Final Victory.’ [Yale University Press 2016] P182

⁷⁹⁹ Schelling Supra P128

is proposed that US would value a ‘kill’ (a successful case of targeted killing) as 2 and ‘no kill’ as (0). In order to distinguish one from the other, the terrorist strategic choices and outcome values are in bold whilst the US strategic choices and outcome values are written in italics. If we input this into a game matrix:

5.8.1. Game matrix 1: War (killing) or Peace (no killing) options

Where the outcome of killing is preferred (given greater numeric score)	<i>US Kill (Tk)</i>	<i>US No Kill</i>
Al-Qaeda Terrorists kill (suicide)	4,2	4,0
Terrorist No Kill	0,2	0,0

5.8.2. The rationale behind the suicide bombers scores:

From the suicide bombers rational view it is better to have a strategy of ‘kill’, scores **4** (rather than ‘no kill’ scores **0**); out of the two options this gives the better value outcome i.e. whatever the US strategy. The total score given to terrorists outcome is 4 looking at it from the terrorists viewpoint: one point is for sacrificial suicide, one point is for inflicting death on the enemy, and two points is for generally inciting terror.

There is a high possibility that the suicide bomber does not count his own death as a loss. Further, the suicide bomber believes that there is a reward for killing opponents in holy war. If we follow the norm of terrorist organisations, suicide bombers are likely to have recruited

more persons to continue their cause. So, in his opinion he will have lost nothing. It should be noted again that each numeric value is to be awarded in consideration of each player's perspective.

5.8.3. The rationale for the US scores:

From the matrix above, where to kill is valued, the best strategy for the US appears also to be to 'kill', (targeted killing): scoring an average point of 2 for each of the terrorist strategic choices of 'kill' or 'no kill' rather than 0 for the no kill strategy, for each of the terrorist strategy choices.

As argued above, an Islamic suicide bomber who believes that there is reward in dying for his/her cause will not be threatened by targeted killing. For ostensible reasons, it is argued that al-Qaeda terrorists who engage in suicide bombing would not consider their deaths as a loss like the US would consider the deaths of its soldiers or agents. This is one of the reasons why terrorism may be more impacting on victims than targeted killing on target culprits. The focus of game theory is not to award numeric values based on competition i.e by comparing each party's outcome to decide who is winning the war. However, it is useful in realising that the fact that a party may thrive using a particular strategy does not mean that its opponent will thrive by responding with the same strategy. Suicide bombing is arguably similar to drone attacks. Just as the perpetrator of a suicide attack is killed alongside his/her victims, the drone also targets terrorists alongside bystanders. These bystanders may or may not be members of terrorist organisations. If they are and they hold the same values as suicide bombers, then some may consider it to be gain to die for their cause as well; thus reducing the feeling of loss of its members. This illustration is aimed at emphasizing that it is the resultant impact a strategy has on its targets, and how much of a goal a party achieves from using the strategy that are measured in game theory numeric valuation. So in the matrix, the US is

awarded less points for using the same 'kill' strategy as terrorists. Thus, one targeted killing of a terrorist yields one point. Another generous point is given to the US from possibly eliminating threats from that one terrorist making everything a total of two points.

Another rationale for awarding the US only two points is because: the impact of targeted killing of one terrorist yields little compared to the efforts put in place to carry out each targeted killing attack, in terms of the cost of targeted killing; the little impact it has on terrorists and the very minimal number of terrorists the US are usually able to successfully eliminate per time. This goes without including the rate at which terrorists are radicalised to replace those killed.

5.8.4. Conclusion on Matrix 1.

The game theory matrix employed realistically and numerically rates the performance of the chosen strategies each party has employed in the specific interaction above. To summarise using game theory terms, the following is true of suicide bombers:

Their dominant strategy when seeking to achieve their goal is to kill rather than refrain from killing. In the matrix above, the optimum score of '5' is not awarded to the suicide bomber. This is because he will regard suicide killing as the best of the two options, even though the approach does not necessarily oblige the US to cooperate with terrorists demands. A strategy that results in terrorists achieving their goals, for example including the establishment of an Islamic state, would optimise their outcome score to 5. However, he/she is able to achieve three goals (die for his reward, kill for his cause, and inflict fear through terrorism) out of four goals (kill for his cause, die for his reward, establish an Islamic state and inflict fear through terrorism).

5.8.5. Matrix 2: War (killing) or Peace (no killing) options with alternative value systems.

This is a reverse of matrix one, giving a different value system is considered to the matrix, (see below) i.e. if al-Qaeda regards the targeted killing of its members and suicide bombing as loss, meaning preservation of life has higher value. The best of the options between whether to carry out suicide bombing or not will be not to carry out suicide bombing, because the perpetrator loses his or her life in the process. Depending on the angle from we are assessing the issue, two options are available to the US options: In response to terrorists refraining from attacking US altogether, the latter's best option is also not to carry out targeted killing. The strategy does not attract any significant advantage because it is only to refrain from provoking the opponent. Should al-Qaeda terrorists who place value on their lives succeed in escaping after launching attacks, the US benefits from the strategic response of targeted killing. However, the US has to consider whether counter attacks of targeted killing benefits the country in the long run, as it may be counter-productive should al-Qaeda terrorists respond in the same vein. Matrix 2 represents the first example.

Where Preservation of Life is Valued	<i>US Kill (Tk)</i>	<i>US No Kill</i>
Al-Qaeda terrorists -	1, 1	1,-3
Kill suicide		
Al-Qaeda terrorists -	-2, 1	0, 0
No Kill		

5.8.6. Rationale for the US score

The US is awarded -3 for failing to respond to the killing of victims by terrorists. This is because, in that round of interaction, the US has lost some of its citizens to terrorism but has not gained anything by not fighting back through targeted killing. This considers the fact that in that interaction, targeted killing could be a better strategic option than the option of not responding at all. In such situations, peace war game theorists would regard targeted killing to be a strategic option resulting in a Nash equilibrium, but not an optimal strategy. In the former, neither party has an incentive to change their strategy. In the latter, a party's objectives are met by applying such a strategy. It is very likely that parties will be able to devise a strategy that yields optimal results until the warfare has gone on for a protracted period. This is because the interactions allow parties to understand their opponents and sample strategies in order to devise an optimal strategy. The matrix above shows how at the start of terroristic conflicts or warfare, the parties were inclined to remain in a state of Nash equilibrium. i.e the US value outcome from using targeted killing is higher than when it does not use targeted killing. Thus, the country has no incentive to change its strategy from its dominant strategy of targeted killing. Game theorists reason that it is unrealistic to facilitate a peaceful negotiation at the beginning of the war, when parties are more inclined to vengeful acts of aggression.⁸⁰⁰

5.8.7. Rationale for terrorist scores:

Terrorist 'kill' strategy outcome values: 1 point for the death of the terrorist.

If the terrorist values his/her own life, in the process of carrying out terror through suicide bombing, he/she will have achieved only one goal, which is terrorism. Only one point is awarded, instead of between 2-5 points. This is because the suicide bomber will have lost

⁸⁰⁰ P R. Neumann, 'Negotiating with Terrorists.' [2007] Foreign Affairs, P128.

his/her life in the process, and more than one point is placed on life, especially if he/she will rather preserve his/her life.

On the other hand, if the same perpetrator was not a suicide bomber and had escaped after carrying out the acts of terror, he will have scored either 3 or 4 points. This is because of the future implications of having a dangerous terrorist roaming free. This would mean that future threats have not been eliminated from that one perpetrator, making the public vulnerable to future attacks from him. Thus, the terrorist will have met some of his or her goals with the following points: two points go to staying alive, another goes to generally inflicting terrorism, another for causing deaths and harm making 4 points. Again, the maximum of 5 points are not awarded because the terrorist has not achieved his entire goal from that one act; for instance, it has not facilitated the creation of an Islamic state. The 0 score is awarded to both opponents when they have neither gained nor lost from their actions. Note that the decision 'not to kill' suggests no action, so it excludes every other alternative option. Alternative options will be explored in subsequent matrices.

5.8.8. Conclusion on matrix 2

Following a game theory thought process; it is usually after a repeated use of targeted killing that the US will be inclined to weigh the outcomes from using targeted killing against possible outcomes of applying other strategies. It is only after doing this that it becomes clear that, not only is targeted killing inadequate, but other potential strategies may facilitate the quelling of the conflict. Matrices one and two above score the US low points of 2 and 1 when targeted killing is used as a response, whether or not terrorists attack. This is calculated based on the advantage targeted killing offers. The low scores depict how, although yielding some desired outcome, targeted killing is nowhere near meeting the target goal of properly addressing terrorism. Interestingly, the value of targeted killing drops further in scenarios that

consider the counter-productivity of the tactic. The next matrix suggests how targeted killing may even fuel the conflict further. As will be illustrated, targeted killing may not only yield little results but also lead to counter-productive outcomes. For example; the event that an eliminated terrorist has 5 recruits ready to avenge his or her death.

5.8.9. Matrix 3: Tit- for-tat Responses

Islamic terrorism occurs today with the following motivations: To achieve a geographic caliphate state with Sharia rule, ambitions of world domination and suppression of western culture and ideology; to win hearts and minds to Islam; in response to the call of being part of a holy war where there is value and perceived reward for killing and dying for allah.⁸⁰¹ These deep rooted ideological causes are pursued whether or not a western state resorts to targeted killing of terrorists. In addition to an already subversively motivated cause, it goes without saying what is to be expected from such causes; they become frothed with vengeance. Al-Qaeda's refusal to succumb to targeted killing was perhaps not anticipated by the US; neither will the US have anticipated that targeted killing will even invoke terrorism further. This matrix offers possible reactions of terrorist organisations and lone wolves to the targeted killing of their leaders and those they hold in high esteem.

Where targeted killing		<i>The US - kill (tk)</i>	<i>The US - No kill</i>
incites terrorism			
further			
Al-Qaeda	Terrorist	4, - 5	4, 0
vengeful killing			

⁸⁰¹ J. Burke, 'The New Threat from Islamic Militancy.' [The Bodley Head 2015] Pp 80, 89.

Terrorists - No kill 0, 2 0, 0
strategy

5.8.10. Rationale for US Scores

Matrix one has already argued that terrorists, especially suicide bombers are not fazed by the threat of death. Matrix 3 argues that it is highly plausible for the targeted killing of al-Qaeda terrorist leaders to serve as a motivation and reminder to terrorists to vehemently pursue terrorism even further. For example, it seemed that the targeted killing of former al-Qaeda leader, Osama bin Laden, was a major antiterrorism breakthrough for the US. However, it turns out that that one case led to a threat of revenge by bin-ladens son⁸⁰² followed by multiple instances of terrorism by al-Qaeda and its allies.⁸⁰³ Home-grown terrorists (lone wolves) seem highly supportive of al-Qaeda; some declare their attacks on behalf of the organisation (like the assault on the Paris offices of *Charlie Hebdo* in January 2015).⁸⁰⁴ The constant targeted killing of al-Qaeda leaders and most certainly, the killing of bin Laden are arguably effective in diminishing in some way the threats from those killed. For example, it was reported that al-Zawahiri who replaced bin-Laden is more preoccupied with being discreet and under the raider; as a result he has been unable to function or publicize propaganda materials.⁸⁰⁵ Thus, it can be argued that to an extent, the constant decapitation of al-Qaeda leaders may be effective in destabilising the organisation. However the effect has not been felt: The emergence of the Islamic State of Syria (ISIS) has in many ways filled al-

⁸⁰² Available at: <https://www.independent.co.uk/news/world/middle-east/osama-bin-laden-son-hamza-vows-revenge-us-for-killing-his-father-in-video-posted-online-a7129281.html> [Accessed on 14/05/18]

⁸⁰³ Available at: <https://www.theguardian.com/us-news/2017/nov/01/america-since-911-terrorist-attacks-linked-to-the-war-on-terror> [Accessed on 26/06/18]

⁸⁰⁴ Available at: <https://www.nytimes.com/2015/01/08/world/europe/charlie-hebdo-paris-shooting.html> [Accessed on 26/06/18]

⁸⁰⁵ Available at: <https://www.nbcnews.com/news/us-news/why-hasn-t-u-s-kill-bin-laden-s-wingman-n574986> [Accessed on 26/06/18]

Qaeda's void. ISIS claims to be responsible for the most recent terrorist attacks in Paris and Brussels. It now poses the bigger immediate threat. al Qaeda may have been hurt by the demise of its charismatic leader. However, it has not in any way hampered the motivation for terrorism.

5.8.11. Rationale for Terrorists scores

Matrix 3 scores the US -5 for not achieving any of its goal through targeted killing, but instead invoking terrorism on the US in particular and on the world in general. Al-Qaeda is scored 4 because terrorism continues to occur in spite of targeted killing. In addition to that, as the tit for tat characteristic of a peace war game theory envisages, targeted killings may potentially instigate revenge terrorism. As hinted above, the 0 score is awarded for failure to act. This means the situation of things remains unchanged. The party which takes action in that same interaction (targeted killing for instance) is bound to achieve more points than the one which does not. This will be different were both parties do not act and thus are both scored zero. This does not necessarily depict a low score, instead it places both on a *status quo* where the absence of conflict and interaction suggests that they neither gained nor lost.

5.8.12. Conclusion on Matrix 3

The *tit for tat* nature of the peace war game theory describes how conflicts can be prolonged when each party retaliates the actions of the other.⁸⁰⁶ This chain reaction may continue until one party decides to choose a different strategy. Targeted killing may have gone as far as proving that the US has the power and intelligence to retaliate, but it does not seem to lend itself as a solution to winning the so called war against terror. It is with realisations like this that a party should begin to model different strategies to determine which may be instrumental in achieving an end to such a protracted conflict. Perhaps peace negotiations are

⁸⁰⁶R. Jordan, 'An Essay on Thomas Schelling's Arms and Influence.' [2015] P2.

not the next option that come to mind. As much as possible, this chapter is a narrative of realistic expectations from conflict interactions; especially between states. In other words, it models the matrices based on the most realistic ways in which parties will respond to each other during conflicts. The realisation that targeted killing is a failed strategy may not quickly result in the desire to negotiate a peaceful settlement of the conflict. This is understandable because, not only will a state be concerned that initiating peace may depict weakness on its part, it may also imply that it is ready to imbibe whatever standards the opponent tries to impose. As much as possible, states are more interested in strategic posturing: In which they take different actions to prove that they are capable of subduing unwanted impositions. Other options that include attacks on terrorist assets; sanctions against terrorist assets; media campaigns will be explored one after the other in the following matrices, ceasefire negotiations will be the last to be explored. Using the same matrix template as above, the killing option (targeted killing and killings done by al-Qaeda) will be compared to the above alternative options. In other words, both party's outcome using the 'killing' strategy will be objectively compared to the outcomes from using each alternative strategy. This is aimed at deciding if and when the alternatives yield better outcomes than killing.

5.8.13. Matrix 4 : Attacks on assets

By substituting the 'no kill' (no action) strategy with the options stated above, matrix 4 compares the outcomes from killing members of the opponents party to the outcomes derived from attacking the opponents asset. Bearing in mind the possible responses to be had from the 'kill' strategy as explored in the previous matrices, the following matrices considers what responses can possibly be invoked from using strategies other than killing.

	<i>US Targeted Killing</i>	<i>US Attack on terrorist assets</i>
Al-Qaeda terrorists' killing	3, 2	3, 4
Terrorist financial and cyber-attack on US	4, 2	4, 4

As discussed earlier, al-Qaeda terrorists seem to achieve more of their objectives from killing than the US from targeted killing. If targeted killing is ineffective in promoting the desired response from terrorists, a reconsideration of the strategy is advised. A good approach will be for the US to apply strategies that not only achieve its counterterrorism goals, but are also unique and inaccessible to its opponent. In other words, a strategy should not only be effective in limiting the function of an opponent, it may also be one that an opponent is not able to use as a device for retaliation. A strategy that is accessible to an opponent only shows that the opponent will be able to get some satisfaction from issuing similar threats.⁸⁰⁷ With the help of the game theory matrix 4, it is important to determine the effect the US attack on al-Qaedas assets and of course the assets of the allies that fund and support al-Qaeda.

5.8.14. Rationale for the US scores

In response to al-Qaeda's killings, the US scores 2 points For carrying out targeted killing compared to 4 points for attacking al-Qaeda's assets. The same scores are awarded when responding the same way to terrorists cyber attacks. The rationale for a higher score of 4 compared to that gained from targeted killing is that: compared to merely eliminating a terrorist per time through targeted killing, the US is able to paralyse the facilities that enable terrorism. However is it enough to bring about the expulsion of terrorism?

⁸⁰⁷ Ibid

5.8.15. Rationale for al-Qaeda's scores

Looking at the scores awarded terrorists, the *tit for tat* response by al-Qaeda is an equally rewarding 4 points. In addition, the outcome values for terrorist killing strategy (3) are higher than the effect of targeted killing. More importantly, the 4 points awarded for US strategic attacks on terrorist assets is the same awarded to terrorists for using the same approach. Some peace war game theory authors who have studied interactions during conflict envisage that conflicts involving *tit for tat* interaction will always be prolonged.⁸⁰⁸ This is because by nature, a party is more interested in proving that it is powerful and insubordinate to the other party.⁸⁰⁹ Parties do not normally back down until either of two things happen: the party is effectively subdued by the other party or; both parties unanimously commit to a settlement of the conflict.⁸¹⁰

5.8.16. Conclusion of Matrix 4

From this illustration, the outcome of the attacks on terrorist assets, however impacting, is not effective enough in seeing an end to terrorism. Instead, terrorists are in many cases able to recover and mobilise forces to carry out similar attacks. The 9/11 attacks on the twin towers in one of the world's most industrious trade centres was not only an attack on lives, but also on the economy of the country. The mere fact that an attack on assets does not subdue terrorists or facilitate a response that sees an end to terroristic activities means that an attack on assets is not achieving the counterterrorism goals. This suggests that a better strategy should be sought.

⁸⁰⁸ S. Hutchinson et al, 'Sudan's Prolonged Second Civil War and the Militarization of Nuer and Dinka Ethnic Identities.' [1999] 42 (2) African Studies Review P 125; D. Diego, 'Can We Trust Trust.' [2000] 13 Trust: Making and Breaking Cooperative Relations, P213.

⁸⁰⁹ Ibid

⁸¹⁰ T. Mason, *et al*, 'How Civil Wars end: A Rational Choice Approach.' [1996] 40 (4) Journal of Conflict Resolution P546.

5.8.17. Matrix 5: Sanctions

‘The Office of Foreign Assets Control administers and enforces economic sanctions primarily against countries and groups of individuals, such as terrorists and narcotics traffickers. The sanctions can be either comprehensive or selective, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals.’⁸¹¹ For clarity, sanctions in this context refers to a special form of embargo or restriction taken by one country against another.⁸¹² International sanctions are measures that are designed to bring a delinquent or renegade state into compliance with expected rules of conduct. International sanctions may be either non-forceful or military.⁸¹³ Military sanctions include cutting off access, limited strikes and full-scale war. Non-forceful international sanctions include diplomatic measures such as the withdrawal of an ambassador, the severing of diplomatic relations, or the filing of a protest with the United Nations financial sanctions such as denying aid or cutting off access to financial institutions; and economic sanctions such as partial or total trade embargoes. The U.N. Security Council has the authority to impose economic and military sanctions on states that pose a threat to international peace and security.’⁸¹⁴ One example is when UK and other European states withdrew their diplomats from Russia following a poison attack in the UK.⁸¹⁵ In another example, the US imposed financial barriers to business between North Korea and China until North Korea gives up its nuclear missile program.⁸¹⁶

⁸¹¹ E.G. Cyber sanctions ‘Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities [Executive Order 13694]. (09/02/10)’ Available at: https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#cyber Accessed on 21/06/18]

⁸¹² Available at: <https://www.government.nl/topics/international-peace-and-security/compliance-with-international-sanctions>. [Accessed on 21/06/18]

⁸¹³ From Blacks Law dictionary: Available at: <https://thelawdictionary.org/sanction/> [Accessed on 21/06/18]

⁸¹⁴ Article 42, UN Charter.

⁸¹⁵ A. Dewan, *et al*, ‘These are all the countries that are expelling Russian Diplomats.’ Available at: <https://edition.cnn.com/2018/03/26/europe/full-list-of-russian-diplomats-expelled-over-s-intl/index.html> [Accessed on 21/06/18]

⁸¹⁶ E. Albert, ‘What to know about the Sanctions on North Korea.’ The US Council on Foreign Relations: Available at <https://www.cfr.org/backgrounder/what-know-about-sanctions-north-korea> [Accessed on 21/06/18]

The International Community in general and the US in particular have limited ISIS, al-Qaeda and their allies from having access to the US financial system.⁸¹⁷ US Cyber-sanctions were imposed to incapacitate the terrorism machine, by freezing assets, preventing funds from flowing to fund terrorist activities.⁸¹⁸ Islamic extremist materials were banned on the internet to inhibit terrorists' plots and recruitment.⁸¹⁹

These sanctions are part of a larger comprehensive plan to defeat Al-Qaeda, ISIS and their allies. The aim is to destroy terrorists in their safe havens, denying them the ability to recruit foreign terrorist fighters, stifling their financial resources, countering the false propaganda they disseminate over the internet and social media, and helping to stabilize liberated areas in Iraq and Syria so the displaced can return to their homes and begin to rebuild their lives.⁸²⁰ By modifying matrix 4 above, the US option of attacking terrorist assets is changed to the sanctioning (freezing) of assets:

	<i>US Targeted Killing</i>	<i>US sanctions</i>
Terrorism Killing	3, 2	3, 3
Terrorist Financial, Cyber- attack	2, 2	2, 3

⁸¹⁷US Department of State Executive Order 13224: Available at: <https://www.state.gov/j/ct/rls/other/des/122570.htm> [Accessed on 21/06/18]

⁸¹⁸BBC News; Available at: <http://news.bbc.co.uk/1/hi/world/americas/3603862.stm> [accessed on 22/06/18]

⁸¹⁹ Ibid

⁸²⁰ Office of the Spokesperson, Washington DC, 'State Department Terrorist Designation of ISIS in the Greater Sahara (ISIS-GS) and Adnan Abu Walid al-Sahrawi (May 16, 2018) Available at:

<https://www.state.gov/r/pa/prs/ps/2018/05/282168.htm> [Accessed n 21/06/18]

5.8.18. Rationale for the US Scores:

The US scores higher points (3) than terrorists (2) when they both use sanctions. States have the advantage of issuing sanctions that invoke the cooperation of other countries and organisations. This may be because organisations like internet providers and search engines are more sympathetic to victims of terrorists than to terrorist groups. This is one of the reasons why international legislators are unconvinced that it is a good idea to confer state like powers on terrorist organisations.

US scores 2 points for targeted killing which is less than the 3 points they score for carrying out sanctions against terrorists. This suggests that the decision to inhibit terrorists activities through sanctions is better than carrying out targeted killing. However, no more than the average score of only 3 is given because the proliferation of terrorism across the globe suggests that sanctions will not succeed in inhibiting unknown terrorists covertly acting on behalf of al-Qaeda. It is easy to issue sanctions against those the US can identify as terrorists of interest. As noted earlier recent cases of spontaneous attacks from lone wolves using domestic machineries as weapons against unsuspecting victims are sufficient proof that sanctioning cannot achieve the goal of completely defeating terrorism.

5.8.19. Rationale for Al-Qaeda terrorists scores:

Al-Qaeda gains a higher score of 3 from terrorism that involves killing and harming than the 2 points obtainable when it attempts to impose sanctions on the US. Although this is not good news for the US, it is important to note, for the sake of objectively determining realistic results from this analysis, that al-Qaeda will choose a strategy that it benefits from. This makes the one that offers the higher points the obvious choice.

5.8.20. Conclusion on Matrix 5

It is not likely that al-Qaeda or any party for that matter will choose to rely on a strategy that yields little benefit. The reality is that parties will always choose strategies that they think generate the best outcomes. It is obvious that the freezing of US assets by al-Qaeda is not the strategy that the latter is inclined to utilise, since it has little authority to do this, except forcefully. The US on the other hand benefits more from an imposition of sanctions on al-Qaeda's assets. However, only assets that can be accounted for and attributed to al-Qaeda can be frozen.

Moreover, the BBC has reported the results of the investigation by the UN Committee on the flexibility of al-Qaeda following the sanctioning of their assets and restrictions of their activities. The report states that "while al-Qaeda's access to funding had been curtailed as result of international co-operation, so too has its need for money".⁸²¹ since the executive order for sanctions on September 23rd 2001, only 19 governments had recorded the presence in their countries, of any group or person thought to be linked to al-Qaeda as at 2004. This is much less than the number of places where the group is thought to be operating.⁸²² The investigators also noted that most al-Qaeda attacks since 9/11 have involved arms not covered by sanctions. The report gives the example of the Madrid train bombings in March 2004, in which nearly 200 people were killed by devices made from locally available mining explosives detonated by mobile telephones.⁸²³ The report further says that al-Qaeda has spent less than \$50,000 (£28,000) on each of its major attacks since the 9/11 incident, making it the only one to have required significant funding of over six figures.⁸²⁴

⁸²¹ BBC NEWS: Al-Qaeda Sanctions 'Ineffective'. (27/08/04) Available at: <http://news.bbc.co.uk/1/hi/world/americas/3603862.stm> [Accessed on 23/06/18]

⁸²² Available at: <https://www.cnn.com/2017/12/28/terror-isis-and-al-qaeda-likely-to-carry-out-more-attacks-in-2018.html> [Accessed on 23/06/18]

⁸²³ Available at: <http://news.bbc.co.uk/1/shared/spl/hi/guides/457000/457031/html/> [Accessed on 29/06/18]

⁸²⁴ Supra note 41

Even after the UN Security council has reacted to incidents, and all kinds of sanctions have been imposed on the al-Qaeda group, the latter has shown great flexibility and stayed ahead of them. Whilst these examples are proof of the little effect sanctioning of assets has on al-Qaeda and other terrorist groups, it does not mean that the US should give up the strategy altogether. In fact, these sanctions are argued to be a starting point to gaining some form of control over terrorist groups. However, the caveat is that sanctioning should not be relied upon to defeat terrorism. The following strategy to be considered; ‘media campaigns’, is one that may seem weak and inconsequential to winning the war against terror. However, some of its strengths should not be overlooked.

5.8.21. Matrix 6: Media Campaigns

There is a battle of ideology; democracy versus Islamism, a battle for the individual’s mind and senses. Mass media technology is used to convey information about the ideologies to the general public. The most common platforms for disseminating information are through newspapers, magazines, radio, television and the internet.

- i. Terrorist media campaign:** Terrorists select the vulnerable and impressionable by using Facebook ‘friend request’, Twitter ‘follows’, direct messaging, you tube videos and apps to recruit children and youth.⁸²⁵ Social media is the main terrorist medium for recruitment and fundraising, whilst some more advanced terrorist organisations regularly publish magazines for their campaigns. For example, ISIS publishes magazines called Rimiyah, where images normalize brutality and glorify extremist religion.⁸²⁶

⁸²⁵ Available at: <https://www.operation250.org/how-terrorists-use-the-internet/> [Accessed on 24/06/18]

⁸²⁶ Available at: <https://www.camstoll.com/wp-content/uploads/2016/04/Social-Media-Report-4.22.16.pdf> [Accessed on 24/06/18]

ii. **Us media campaign:** ‘Think Again Turn Away ’is a 5 million dollar budget project which has been operating since 2012. The conglomerate has a 45 man staff tasked with the responsibility of tweeting warnings against terrorism recruitment.⁸²⁷ There is an increasing pressure on facebook and twitter to do more to detect and close accounts that propagate religious extremism. Facebook now uses artificial intelligence (AI) to find and remove “terrorist content” immediately after they are posted, rather than waiting till users flag them up. According to facebook, two million of such posts were taken down in the first five months of 2018.⁸²⁸ The general effectiveness of both parties’ social media campaigns is analyzed in comparison to the option of killing, using the game theory matrix below. Terrorist party in this matrix does not mean al-Qaeda alone. Owing to the media support Islamic extremists give one another, reference to terrorists in this matrix represents al-Qaeda, ISIS and subsidiary groups.

	<i>US Targeted Killing</i>	<i>US Anti Terrorism Media Campaign</i>
Terrorism killing	3, 2	3, 2.5
Terrorists Media campaign	2, 2	2, 2.5

⁸²⁷ Available at: <https://www.motherjones.com/politics/2014/09/isis-social-media-state-department/> [Accessed on 24/06/18]

⁸²⁸ Available at: https://www.upi.com/Top_News/US/2018/05/15/Facebook-says-it-took-down-2-million-terrorism-posts-in-2018/1271526406870/ [Accessed on 24/06/18]

5.8.22. Rationale for US Scores:

The US scores a higher mark of 2.5 for its antiterrorism campaign which is > (greater than) the 2 it scores for carrying out targeted killings. It is also the only time it scores a higher mark than the terrorists score of 2 for using the same strategy. The rationale behind an average score of 2.5 is because media campaigns warn and possibly restrict radicalisation. The media campaigns that warn are merely persuasive and not actively preventative of terrorism. It is still up to the general public to decide whether or not to agree with antiterrorism campaigns. The media campaigns that restrict may be more effective than the persuasive campaigns in that they help to prevent and monitor terrorism radicalisation. They do these by identifying, through social media, culprits responsible for propagating terrorism. They also identify victims of radicalisation who may go on to become culprits, should the radicalisation process become successful.

Another rationale for awarding the US media campaign an average 2.5 points is because the campaigns do not especially prevent 'word of mouth' radicalisation. Radicalisations can occur through word of mouth in worship centres and covert face to face meetings. Furthermore, it is difficult to be suspicious of a culprit who intends to perpetrate terrorism by using his vehicle to run pedestrians over. While media antiterrorism campaigns may curb some radicalisation, it may not prevent it altogether.

5.8.23. Rationale for Terrorists Score:

The outcome of terrorists' killings is 3 compared to 2 for media campaigns which is less, as the killings will always be more grievous than the effect of their campaigns. The more grievous it is to the victims of terrorism and the public, the better the outcome for terrorists. This is why, in the eyes of terrorists, regardless of the US strategy the killings scores higher.

5.8.24. Conclusion on matrix 6

The extent to which anti-terror media campaigns may curb terrorism is questionable especially because terrorist radicalisation can occur in other different forums, not to mention the already published magazines and books containing such ideologies. However, it suffices to consider the obvious fact that it is considered a slightly better strategy than targeted killing, which may have counterproductive results. At any rate, the advantages of antiterrorism media campaigns stated above cannot be overlooked. It should not be abandoned whilst the quest for a goal oriented antiterrorism strategy continues. Some authors have concluded that many times the answers to resolving conflicts of aggression are embedded in the peace making strategies that are easily overlooked.⁸²⁹ This peace option is further analyzed in the next matrix.

5.8.25. Matrix 7: Cease-fire & negotiate terms for peace.

It may seem far-fetched to rely on or even expect some form of negotiations with al-Qaeda. This is a terrorist group that seems to kill to achieve several objectives that include gratification from killing itself. However, this matrix challenges the US targeted killing of al-Qaeda leaders. It asks the question: Was it actually in the best interest of the US to kill influential al-Qaeda leaders like Osama bin Laden and Anwar al- Aulahi. At the time, it may have seemed the most gratifying counter-terrorism decision the US will ever have made. However, this matrix challenges us to consider the negative implications the killing of these people have or will have on the US. It may be an unpopular argument, especially where it is strongly considered that keeping such people alive means putting innocent lives at risk.

⁸²⁹ B.L. Slantchev, 'How Initiators End their Wars: The Duration of Warfare and the Terms of Peace.' [2004] 48 (4) American Journal of Political Science, P813.

However, the motive here is to consider the fact that killing an opponent, even as a last resort in such serious conflict of aggression, may not always necessarily be the best option.

	<i>US Targeted Killing</i>	<i>US Cease fire and negotiate</i>
Terrorists killing	3, 2	3, 0
Terrorists cease fire and negotiate	0, 3	5, 5

5.8.26. Rationale for the US Scores

As explained in chapter 4 of this thesis, game theory recognises that both parties achieve their goals from negotiations only when there is a mutual commitment to the deal. As experts of prisoners dilemma envisage, a culprit that cooperates whilst the other defects gets the maximum sentence.⁸³⁰ In other words, should one party default a ceasefire negotiation and carry on killing, this will be counted as a disadvantage to the party who does not default. This is depicted by the score of 0 awarded cease fire whilst terrorists carry on killing because it is under the assumption that the US acts upon a ceasefire bargain it has with al-Qaeda, whilst al-Qaeda breaches the agreement. However, should both cooperate to negotiate the conflict, they both score the maximum points because the settlement implies that both parties are happy with the bargain. Granted, it is possible that not all parties objectives can be met in

⁸³⁰ A. Neyman, 'Bounded complexity justifies cooperation in the finitely repeated prisoners' dilemma.' [1985]19 (3) Economics letters, P227; P. Barclay, 'Proximate and Ultimate Causes of Punishment and Strong Reciprocity.' [2012] 35(1) Behavioural and Brain Sciences, P7; K. T. Kattelman, 'Testing the Prisoners' Dilemma of Counterterrorism: an Aggregate Analysis of Counterterrorist Efforts from 2001 to 2010' [2016] 19(4) Journal of International Relations and Development, P583.

peace negotiations, which is why parties resort to bargaining.⁸³¹ However, the rationale for awarding 5 points for mutual commitment to negotiate is in the decision that both parties have facilitated an end to the conflict on favourable terms. When both carry on killing each other, the matrix defaults to the usual score that has been awarded for killing in previous matrices.

5.8.27. Rationale for terrorists' scores

As in the US rationale, al-Qaeda terrorists also score 0 if they oblige the ceasefire option whilst the US carries on targeted killing. Al-Qaeda score a higher mark of 3 for terrorism that results in deaths whether or not the US uses targeted killing. However, al-Qaeda scores the maximum of 5 should it make a settlement with the US.

5.8.28. Conclusion on matrix 7

Matrix 7 shows a reversal of strategy for both opponents. Value systems differ and so do expectations in conflicts (as exemplified in matrix one). In the above matrix, the US scores 2 points; not only because it achieves little from targeted killing but because it may not be in the interest of the US in the long run to carry on targeting and killing terrorists. Sometimes, it may be more important to the US to keep terrorist leaders alive rather than kill them. This is so that the right authorities that can agree upon ceasefire negotiations are alive to do so. For example, it was claimed that al-Qaeda has not been able to appoint new leaders who are as influential as Bin-Laden.⁸³² Thus, it is expected that out of loyalty to bin Laden, al-Qaeda members are obligated to obey his last dictates. These are dictates regarding strategic decisions that others may not feel too keen to revise in his stead. This ultimately makes the group's willingness to participate in peace negotiations even more unlikely.

⁸³¹ P. R. Pillar, 'Negotiating Peace: War Termination as a Bargaining Process.' [PUP 2014] P45

⁸³² A. Y. Zelin, 'The War between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement.' [2014] 20 (1) The Washington Institute for Near East Policy, P1.

Knowing that one of al-Qaeda's objectives is to carry out terrorism, there are no guarantees, that favourable negotiations that potentially alleviates terrorism will arise from the US interaction with terrorists groups. There is a high possibility that if the leaders were kept alive, they will have pioneered more dangerous acts of terror. Furthermore, the expectation that peace negotiations with al-Qaeda will generally end in relief from terrorism is far-fetched, considering that al-Qaeda is not the only terrorist group in conflict with the US. Where peace settlements with al-Qaeda are unlikely but possible, the proliferation of terrorism and terrorist organisations casts doubt on the ability of the US to generally eliminate terrorism. On the other hand, if the US wishes that the end result to terroristic conflict is peace, a prolonged use of targeted killing may not be the best option because the strategy itself does not initiate peace. However, when it is considered unlikely that al-Qaeda will yield to peace negotiations, it may be necessary to carry on using other strategies like targeted killing, attacks on al-Qaeda terrorists' assets and sanctioning which are better alternatives to no response. Notwithstanding, it is argued that the importance of peace negotiations should not be overlooked, as it may be the most important strategy of all. The political conflict between the Irish Republican Army (IRA) and the UK, also popularly known as the 'Guerrilla war', between 1969 and 1997 may illustrate this argument better.

The IRA (which fought to achieve the independence of Northern Ireland from the UK) was formerly referred to by the UK as a terrorist group.⁸³³ The conflict claimed about 3500 lives, 52% of which were civilians from both sides. 32% of the deaths were members of the British security forces and 16% were members of the parliamentary groups.⁸³⁴ After three decades of

⁸³³ B. Dickson, 'The Detention of Suspected Terrorists in Northern Ireland and Great Britain.' [2008] 43 U. Rich. L. Rev. P927.

⁸³⁴ N. Cunningham, I. Gregory, 'Hard to Miss, Easy to Blame? Peace lines, Interfaces and Political Deaths in Belfast During the Troubles.' [2014] 40 Political Geography, P64.

seemingly unending war, neither party felt it would gain from carrying on fighting. Instead they stood to lose in every aspect including economically and fatally. So both parties decided that instead, they stood to gain from a peace settlement.⁸³⁵

The war was brought to an end by a peace process that included the declaration of ceasefires by most parliamentary organisations, the total decommissioning of the IRA's weapons, the reform of police and the withdrawal of the British armed forces from the streets of Northern Ireland and its borders.⁸³⁶ Another part of the peace agreement was for Northern Ireland to remain within the United Kingdom unless a majority of the Northern Irish electorate vote to the contrary.⁸³⁷ Except for a little variation in terms of the global nature of terrorist participation, the IRA conflict was very similar to terroristic conflicts. The IRA conflict was, arguably, also an ideological one, that involved the killing of civilians as a means of protesting against a regime on the one hand, or the imposition of a new regime on the other. One must not overlook the possibility that terroristic conflicts can reach peaceful resolution. An attempt may be made to that effect; as game theorists argue, parties in conflicts realise their interests through tacit cooperation, formal bilateral and multinational negotiations.⁸³⁸ "A minimum of cooperation is a prerequisite for a prosperous society."⁸³⁹

5.9. Conclusion

The results of the game theory analysis suggests that the US, even more than terrorists, are disadvantaged by their strategy of targeted killing. Having analysed some of the strategic

⁸³⁵ Ibid

⁸³⁶ B. Rolston, 'Demobilization and Reintegration of Ex-Combatants: The Irish Case in International Perspective.' [2007] 16 (2) Social & Legal Studies, P259.

⁸³⁷ J. McGarry, et al, 'Consociational Theory, Northern Ireland's conflict, and its Agreement. Part 1: What Consociationalists can learn from Northern Ireland.' [2006] 41(1) Government and Opposition, P43.

⁸³⁸ K. A. Oye, 'Explaining Cooperation under Anarchy: Hypotheses and Strategies.' [1985] 38 (1) World Politics, P1.

⁸³⁹ R. J. Aumann, T. Schelling, 'Contributions to Game Theory: Analyses of Conflict and Cooperation.' [2005] Information on the Bank of Sweden Prize Economic Sciences in Memory of Alfred Nobel, P1.

options available to al-Qaeda terrorists and the US, it is clear that the US will benefit more from a better strategy than targeted killing. Terroristic conflicts are ideological in nature, thus the goals sought by parties to the conflict are influenced by their ideological values. The ideological values of the parties played a vital role in deciding numeric outcomes to award parties for the strategies analysed in each matrix. Judging from al-Qaeda's value in killing and dying for the sake of Islam and its use of strategies like suicide bombings and suicide attacks, it is clear why targeted killing is not sufficient to coerce al-Qaeda into giving up terrorism. This is why the matrices do not generally award high points to targeted killing. However, matrix 1 and 2 have shown that targeted killing will always be a better strategy than a total lack of response to terrorism.

On the other hand, terrorists seem to achieve more of their goals by killing and attacking the US assets, than alternative strategies modelled in this chapter, including media campaigning and sanctioning. Baring terrorists' achievement is definitely not aimed at upholding terrorism. Instead it is used to objectively decide which party seems to be winning the war against terror. The idea is to incite the US to devise a better strategy than targeted killing, that will defeat terrorism and more importantly, influence terrorists into deciding to stop. This is the type of strategy that the US should consider if it wants to achieve an end to terrorism. It is in consideration of such strategy that the cease fire negotiations option was modelled in matrices in this chapter. If commitment to a peaceful settlement was agreed, the outcome value would be (5) which is the optimum numerical value awardable in the matrices. A mutual strategy of cease-fire may be agreed by both parties when they come to the realisation that it offers new opportunities of gain: peace, security, less death and civilian collateral damage, order, trust, investment, infrastructure, growth and development in areas of finance, economy, health, education, provision and wealth. At the same time, it reduces waste and cost from expensive killing programs for both sides. However, the major limitations of this

game theory analysis are the concern that not all of these advantages that are sought by both parties. The limitations of game theory and other methods used in this thesis will be discussed in the following chapter.

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

6.1. Introduction:

This chapter details the limitations, overview of outcomes despite the limitations have been several limitations to the stage by stage analysis of targeted killing. The research included exploring its legal stance under international law, determining the ideological justification for which it is used and assessing its effectiveness. Some limitations encountered were due to inadequacies within the methodologies used. However, the main limitation is the novelty of targeted killings as a subject matter of research.

This chapter begins with an exposition of the general limitation encountered in the course of the research of terroristic conflicts as a whole, before specifically highlighting the limitations of the methodologies used. The second part discusses the limitations of the doctrinal approach. The third part discusses the limitations encountered in the course of conducting a hermeneutical analysis of terroristic conflicts in general and targeted killing counterterrorism in particular. The fourth paragraph details the limitations encountered from using peace war game theory. For ease of reference, each limitation encountered is enumerated below.

6.2. Limitation of the research

The limitations encountered in carrying out this research range from a limitation in scope that considers word count constraint and the vastness of the subject matter. This is distinguished from the limitations from using the doctrinal, hermeneutical and socio-legal (game theory)

methodologies employed in this thesis. The paragraphs portray how the subject matter of targeted killing and the methodologies employed impacted or influenced the interpretation of the findings.

6.2.1. Limitation in Scope

This considers the limitations in terms of what could realistically be achieved from the research. The limitation in scope distinguishes between the subject matters related to target killing that were explored in this thesis and those that were unachieved. It also offers reasons for the omissions.

6.2.1. Word count constraint:

Targeted killing counterterrorism strategy is a topical issue. Ideally, every issue related to the subject matter in question ought to be explored for a comprehensive analysis. Omissions of relevant issues may create a gap in the analysis. However, in order to meet the word count criterion, it was impossible to carry out a comprehensive analysis of every topical issue related to targeted killing. For example, this thesis did not elaborate on issues about civilian casualties and collateral damages which are the resultant effect of both targeted killing and terrorism. These issues were mentioned in pages 51 – 54 of chapter two, only as a means of assessing arguments over the capability of the US drones to comply with the LOAC principles of distinction. This is not to say that the subjects omitted were irrelevant in helping to determine the effectiveness of targeted killing. Statistical data on collateral damages for each targeted killing case may have helped generate more specific and accurate outcomes when applying game theory to clarifying the effectiveness of targeted killing. It may have rendered the game theory analysis less abstract than it currently is. For instance, if in a real case the killing of a culprit results in the deaths of ten civilians, then it becomes easier to compare the gains achieved from targeting culprits to the loss of innocent lives. This would remove the burden on game theory to decide what to award outcomes in scenarios like the

above. The theory will only be required to further clarify what has been established by a statistical evaluation. This will also result in more objective awards of numerical values, depending less on my perception. On the downside, a combination of a statistical evaluation and game theory evaluation may be too cumbersome to achieve in a singular thesis. On the other hand, a statistical evaluation is unnecessary in this thesis because the rationale for applying game theory is to introduce to the literature one of several ways of substantiating one's perception about the effectiveness of targeted killings and other counterterrorism strategies. A statistical analysis may have more or less arrived at similar conclusions. However it is argued that game theory is a better approach, than a statistical approach, for analysing the effectiveness of targeted killing. This is mainly because a statistical analysis may not reflect the true state of the conflict; it is difficult and sometimes impossible to collate realistic data of terroristic conflicts owing to the covert nature of the parties approach to the conflict.⁸⁴⁰

Although it is difficult to analyse every issue relating to targeted killing, there was comprehensive detailing of the topical issues that led to the conclusions contained here. These topical issues include the exploration of the debatable legal issues surrounding targeted killing and the ideological debates in the literature, which were examined in chapters 2 and 3. These explorations fed into the conclusions on the reality of modern warfare.

6.2.2. The vastness of the subject of targeted killing

There is usually overwhelming literature on topical subject matters such as targeted killings. Although this may be time consuming, it is due diligence to study as much of the available literature as are relevant. Regardless, this thesis explored a vast range of topics as enlisted

⁸⁴⁰ J. D. Ohlin, 'The Combatant's Privilege in Asymmetric and Covert Conflicts.' [2015] 40 Yale J. Int'l L. P337.

below. The downside to this was that it was difficult, but possible in the end, to streamline the main issues to be explored. This was surmounted by specifically distinguishing in the introductory chapter between issues explored in the thesis and those briefly mentioned only as they related to the main issues. The acquaintance with a vast amount of literature informed this thesis of topics that are belaboured in existing literature. These include:

- i. Historical reviews of both the US and Israel's targeted killing operations;
- ii. Researches debating and making recommendations over the legality of targeted killing;
- iii. Ethical evaluations of targeted killing and terrorism;
- iv. Statistical evaluations of the US drone collateral damages;
- v. Researches that theoretically assess the effectiveness of US and Israel's targeted killing of terrorist leaders.

The painstaking and time consuming research facilitated the realisation of the following gaps in research practice:

- i. Ideological debates upon which the war against terror is predicated;
- ii. Empirical evaluation of the effectiveness of US and Israel's targeted killing operations in relation to the goals for which the strategy is used;
- iii. Recommendations for reforms of the laws of war in order to define what constitutes civilian participation and determine the best status to be given to terrorists.

This thesis explores all the gaps listed, but time and word constraints limited its scope to addressing only the first and second gaps.

6.2.3. Methodological limitations

This concerns the limitations encountered from using the methodologies applied in the thesis. It considers the implications of using the doctrinal, hermeneutical and socio-legal (game theory) methodologies. It also states how in spite of the limitations, the thesis was able to achieve its objects. Admittedly, not specific questions which are answerable could not be fully addressed, but these should be dealt with in future researches.

6.2.3.1 Doctrinal Analysis limitation:

In doctrinal research, one is expected to only make clarifications about the position of the law. The doctrinal methodology is often criticised for being disconnected from reality - by focussing on legal sources it often does not question or challenge the application of the law, but instead analyses the law only in terms of internal consistency. However, this limitation was a strength in thesis, because not finding answers to the questions made the researcher aware of the gaps in the law. It did this by allowing the researcher compare what was found in legal sources with what obtains in practise (the law in action). It is the socio-legal inquiry into the law in action on targeted killing that helps us answer questions normally asked when conducting a doctrinal inquiry.

There is little clarification to be achieved when relying on doctrinal analysis for facts about the practical application of existing laws to targeted killing. This is a well known limitation of the doctrinal approach; the result is that several doctrinal researches (including this thesis) are accompanied by other supplementary methodologies like the socio-legal methodology. This thesis did not anticipate answers to questions as to why and how the US and Israel utilize targeted killing through the doctrinal approach. It was already anticipated that the doctrinal

approach could not answer such questions. Therefore, the doctrinal approach was supplemented by the all important hermeneutical and game theory socio-legal approaches.

In essence, this general limitation of the doctrinal approach did not pose a problem in this thesis because they were anticipated. However, it was the order in which the methodologies were applied and the research was carried out, which proved a limitation. This thesis contains a doctrinal, hermeneutical and then the socio-legal analysis of terroristic conflict in general and targeted killing in particular. It was time consuming and cumbersome to apply the research methodologies in this order, because the doctrinal approach as a starting point offered no answers to questions researchers usually ask at the start of a research. These questions include: What is targeted killing? How is targeted killing utilised? Under what conditions can targeted killing be legally done? What are the limits for using targeted killings?

In hindsight, the first point of research on targeted killing should be the socio-legal inquiry: to obtain general knowledge on the subject matter of targeted killings; to discover the legal definition and function of targeted killings; or even to identify subsidiary laws which are the only thing close to legal documents that describe the subject matter of targeted killings. The term ‘targeted killing’ does not come up in any of the main substantive international laws that regulate the use of force. It is however used in subsidiary rules like the interpretive guidance of the International Committee of the Red Cross (ICRC) which relates the contents of legal doctrines to targeted killings. If the law in action is first clarified by a socio-legal inquiry, a researcher can identify contentious issues that occur as a result of the gaps in the law. The researcher can then clarify these using the doctrinal approach.

Since targeted killing is novel, the doctrinal analysis did not enlighten the researcher on its definition or functionality. This thesis therefore finds that when applying the mixed methodologies to the subject matter, it is less challenging to first conduct a socio-legal research before a doctrinal research. This reduces the time spent searching for answers where they may not be found; because they are unavailable in legal doctrines which, in the first place, have not legislated on the subject. This is a caveat for researchers to revise similar arrangements of methodological approaches for novel issues like targeted killing. Making the doctrinal analysis the first point of inquiry may end in such consequences as making non-emotive conclusions or discontinuing the research for lack of articles that clarify the true position of targeted killings. In this thesis, the first approach which was the doctrinal approach was discontinued in order to conduct a sociological analysis; afterwards a doctrinal analysis was conducted. Therefore, in this thesis, the approaches to analysis were conducted in the following more cohesive order: Socio-legal, doctrinal, hermeneutic and game theory.

6.2.3.2 Hermeneutical Analysis limitation

This section discusses both the limitations and strengths of the hermeneutical approach as experienced in the course of its application in the literature review chapter. Generally, this chapter exposes the limitations experienced in the course of carrying out the research. However, the strengths discussed are aimed at explaining how, in spite of the limitations, the strengths of a hermeneutical approach, which can be easily overlooked by the reader, surpassed the limitations.

The hermeneutical approach of interpreting texts, although lauded for its ability to evoke critical thinking, is not without limitations: A major problem that authors in this tradition

wrestle with is what is termed ‘the hermeneutic circle’ —the fact that there is no neutral, external standpoint from which to objectively measure the meaning of a system or an action.⁸⁴¹ Instead, interpretation begins and ends with the given—the text or the action—and the only evidence available for assessing the interpretation is interior to the text itself.⁸⁴² It may therefore appear that interpretations are self-confirming and heavily reliant on the researchers own ability to make logical conclusions that are unique to him or her.⁸⁴³ This may be unsatisfactory as such conclusions ought to be supported by rational and empirical justifications.

Owing to the fact that interpretations through hermeneutical analysis are unique to the researcher, findings may not be generalised to a larger population, nor can findings be easily relied upon as the basis for theoretical frameworks or policy decisions.⁸⁴⁴ For example, not every single vision contained in the mandate of al-Qaeda organisation is shared by other terrorist groups. For example, al-Qaeda indulges in suicide bombings and aims at an Islamic state governed by sharia laws just like the Islamic State of Syria and Iraq (hereinafter ISIS) or Boko Haram of Nigeria. However, these groups differ in other areas.⁸⁴⁵ For instance, despite the prohibition of female participation in the Jihad in the Islamic ideology, Al-Qaeda and ISIS have claimed approximately 24,7% of all female suicide attacks.⁸⁴⁶

Firstly, there were uncertainties as to how to interpret the ideologies upon which terroristic conflicts are predicated. This is because there was no knowledge of original texts or case studies to be relied upon that contained the mandate, rationale and plots of the terrorists. This

⁸⁴¹ Ibid

⁸⁴² Little, *Supra*

⁸⁴³ A. Scott-Baumann, ‘Reconstructive Hermeneutical Philosophy: Return Ticket to the Human Condition.’ [2003] 29 (6) *Philosophy & Social Criticism*, P721.

⁸⁴⁴ Little *Supra*

⁸⁴⁵ J. Davis, ‘Evolution of the global jihad: Female suicide bombers in Iraq.’ [2013] 36(4) *Studies in Conflict & Terrorism*, P281.

⁸⁴⁶ Ibid P7

may be due to the randomness and variations of terrorist mandates and government restrictions on terrorist activities on the internet.⁸⁴⁷ The risk of interrogation or detention by law enforcement officers restrained the researcher from intensive searches of terrorist materials and texts that may be available on the internet. Such searches could trigger the attention of intelligence and security officers; to avoid this, the researcher relied on information generally derived from text books, news materials and other Islamic narratives.⁸⁴⁸

In addition, authors, commentators and even governments may make analysis based on their perspectives of Islamism and jihadi war. Information derived from such analysis may be tainted with the author or commentators personal views. Such materials may not even portray every single ideological concept that terrorists hold. Furthermore, there is no access to any material that divulges information on how or if terrorists consider the impact terrorism has on victim states and on terrorists themselves. Such information would have been helpful in properly determining and understanding how terrorists reflect on the current terrorism v targeted killing conflict under study.

The same can be said about the states (the US and Israel) that are under scrutiny in this thesis for using targeted killing. The objectives and mandates that instigate the use of targeted killing are either inaccessible or ambiguous. For example, the US white paper that describes the country's endorsement of targeted killing is not a detailed document in that it does not cohesively declare the objectives sought to be achieved from using targeted killing

⁸⁴⁷ HM Government, 'Tackling Extremism in the UK' [2013] Report from the Prime Ministers Task Force on Tackling Radicalisation and Extremism P3

⁸⁴⁸ C. Schmitt, 'Theory of the Partisan: Immediate Commentary on the Concept of the Political.' (Translated by G.L. Ulmen) [Telos Press Publishing 2007] Translators introduction page xvii; L. Khatib, 'The Islamic States Strategy: Lasting and Expanding [2015] Carnegie Middle East Centre, P1; C.J. Santifort, T. Sandler, 'An Empirical Study of Suicide Terrorism: A global Analysis.' [2014] 80 (4) Southern Economic Journal, P981.

counterterrorism strategy.⁸⁴⁹ Perhaps the country's initial desire to covertly carry out targeting operations in order to avoid legal scrutiny, has made the drafters of the document refrain from clarifying the objectives of the strategy and when such objectives should be met.⁸⁵⁰ Likewise, Israel's targeted killing mandate and rationale is contained in only one document, the judgment in *the Israeli case*.⁸⁵¹ Although the judgment clearly defines and states the objectives the country seeks to achieve from targeted killing, it does not link the current conflict to its inception. In addition, the case does not clearly determine the objectives in terms of what it would take for Israel to negotiate a truce or ceasefire.

It can be easily presumed however, that any country fighting against terrorism seeks the optimum outcome of ending terrorism through their adopted countermeasures. It should be for this rationale that targeted killing strategy is adopted. Clarifications of the rationale of the parties were obtained from textbooks, journals, news materials and articles.⁸⁵² Some of these contained first hand information derived from interviews with those with a stake, or privy to information about the conflict.⁸⁵³ For example, it took expositions in news items to clarify that the passage in the Torah/Bible⁸⁵⁴ mandating Israel to repossess Gaza strip (which is also

⁸⁴⁹ D. Kaye, 'International Law Issues in the Department of Justice White Paper on Targeted Killing [2013] ASIL Insights. Issue P8.

⁸⁵⁰ T. McCrisken, 'Obama's Drone War.' [2013] 55 (2) *Survival*, P97; A. Birdsall, 'Drone Warfare in Counterterrorism and Normative Change: US Policy and the Politics of International Law.' [2018] 17 *Global Society*, P1.

⁸⁵¹ The Israeli Supreme Court in *Public Committee against Torture in Israel v. the Government of Israel* Available at: <http://www.nlg.org/news/statements/Israeli_Supreme_Court.pdf> PCATI [2006] HCI 769/02, [15]. [Accessed on 20/02/18]

⁸⁵² B. Fishman, 'The Master Plan: ISIS, Al-Qaeda and the Jihadi Strategy for Final Victory.' (YUP 2016) P182, 215, 247.

⁸⁵³ J. M. Berger, 'Jihad Joe: Americans who go to war in the name of Islam.' [2011 Potomac Books, Inc] P 57; J.C. Liow, 'Muslim resistance in Southern Thailand and Southern Philippines: Religion, ideology, and politics.' (2006) 24 *Policy Studies*, P 1; L. Khatib, 'The Islamic State's Strategy: Lasting and Expanding.' [2015] *Carnegie Middle East Centre* Pp 9, 10, 29-33.

⁸⁵⁴ (The Holy Bible Deuteronomy 20: 10-18)

claimed and currently occupied by Palestinians) is indeed the motivation of Israel's war against Palestine, in which the strategy of targeted killing is used as a means.⁸⁵⁵

Ironically, an incoherent text is no barrier to a hermeneutic analyst because the approach is apt in prompting a researcher to offer explanations and make logical deductions on such texts.⁸⁵⁶ A critical evaluation which includes the improvisation of meanings in texts, making the researchers conclusions the crux of reasoning, is characteristic of hermeneutical analysis.⁸⁵⁷

Using the hermeneutical approach, the texts of authors debating the terroristic conflict have been studied and interpreted in this thesis. The result is that scholars have been characterised as either liberalist, realist or pragmatist. Conclusions that either justify or castigate the use of targeted killing were made based on how each school perceive that the strategy should be addressed. The conclusions show how much the hermeneutic process is subjective to an author's opinion. However, by not relying on hermeneutical analysis to make empirical evidence based conclusions, this thesis is able to curb the tendency to abuse of bias. Furthermore, the incentive to attribute certain scholars to the different schools of thought are not solely based on the researchers own opinion. Instead, the incentive is informed by a wide range of research and understanding of the ideologies that predicate certain belief systems.

⁸⁵⁵ Z. Beauchamp, 'Everything you need to know about Israel-Palestine.' (recent ed. 2018) Available at: <https://www.vox.com/cards/israel-palestine/intro> [Accessed on 04/06/18]

⁸⁵⁶ Bleicher Supra

⁸⁵⁷ M. Soboleva, "Hermeneutical Logics" and "Analytical Hermeneutics" as a New Turn in Philosophical Hermeneutics. [2018] 30 In Proceedings of the XXIII World Congress of Philosophy, P 61.

The choice of the hermeneutic method allowed the experiences of the respondents to be presented in a direct and evocative manner, encouraging the reader to enter imaginatively into the experiences described.⁸⁵⁸ In so doing, the method provided a vehicle for an in-depth understanding of the ideological nature of terroristic conflicts. It also allowed for the researcher to reflect on changes in the character of warfare. This was accomplished by comparing the components of traditional warfare as we know it to the terroristic type that dominates 21st century conflicts.⁸⁵⁹ The exploratory nature of the method also allowed the uncovering of parties own interpretations of their involvement. Interestingly, it portrays how each party to the conflict sees itself as a victim. Terrorists believe they are victimised because their lives had been shaped by western standards.⁸⁶⁰ The states at war with terrorists, particularly the US and Israel studied in this thesis, see themselves as victims of constant terror.⁸⁶¹

While keeping the above limitations in mind, the study presented findings that deepened our understanding of certain aspects of terroristic conflicts, and suggested directions for furthering the knowledge of the law in action regarding targeted killing. The study made explicit the disadvantages with applying the LOAC and IHRL to terroristic conflicts, just to satisfy the need to legally categorise the conflict and impose sanctions. The study reminds us that terroristic conflicts are more complex than current regulatory laws recognise.

⁸⁵⁸ P. Anushuman, 'The Contest over Meaning: Hermeneutics as an Interpretive Methodology for Understanding Texts.' [2005] (5)1 SAGE Journals, P12.

⁸⁵⁹ Chapter 3 of this thesis.

⁸⁶⁰ A. Bandura, 'Mechanisms of Moral Disengagement in Insurgent Terrorism.' [Routledge 2017] P 85.

⁸⁶¹ M. Aksenova, 'Of Victims and Villains in the Fight against International Terrorism.' [2017] 10 Eur. J. Legal Studies P 17.

6.2.3.3. Game Theory Limitations

Game theory is employed in this thesis to help determine the effectiveness of targeted killing in eliminating terrorism. Game theorists would ask the question: is targeted killing the best strategic option for eliminating terrorism? However, terroristic conflicts are much more unpredictable than the strategic modelling of game theory. Notwithstanding, it was possible to model the interaction between terrorists and the states in conflict with them and invoke a much more guided approach to decision making.

Some authors in the field of game theory (including Aarseth, Katz, Thaler, Wood and Coleman) have laid emphasis on the fact that Game Theory is a method rather than a theory, since the approach is empirical, and not limited to any particular theoretical result or model.⁸⁶² Thus, they are quick to warn that the method is not without limitations.⁸⁶³ These consist of limitations within the method and the novelty of the subject matter of terroristic conflicts in general and targeted killing in particular. The limitations encountered followed by approaches to surmounting them in this thesis are addressed below in a way that counters the assumptions and advantages of game theory. For ease of reference, these are enumerated below:

6.2.2.3.1. Limitation within the Method

1. **Assumption that all players choose intelligent and rational strategies.**

⁸⁶² <http://www.universalteacherpublications.com/univ/ebooks/or/Ch9/limit.htm> [Accessed on 06/06/17]

⁸⁶³ A. Katz, 'The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation.' [1990] 89 (2) Michigan Law Review P 215; R. Thaler, et al, 'A behavioural Approach to Law and Economics.' [1998] Stanford Law Review P1471; S. Wood, et al, 'International law and international relations theory: A new generation of interdisciplinary scholarship.' [1998] American Journal of International Law P 367; M. Colman, 'Cooperation, Psychological Game Theory, and Limitations of Rationality in Social Interaction.' [2003] 26 (2) Behavioural and Brain Sciences P 139.

Game theory is based on rationality, which in traditional economic models is the maximization of one's own payoff.⁸⁶⁴ Every action, good or bad, can be rationalized in the name of self-interest. Therefore, in every situation, one is bound to always act to gain as much as possible, regardless of how it affects others. Thus, an intelligent-rational player will choose the decision that leads to the best outcome for him or herself, while bearing in mind the decisions of the opponent. Interestingly, studies have found that those most likely to exercise the economic model of a self-serving, payoff-maximizing agent are kindergarten students, but as they grow older, their behaviour begins to favour cooperative strategies.⁸⁶⁵ However, a constant difficulty with game theory modelling is defining, limiting, isolating or accounting for every single factor and variable that influences strategy and outcome. In many cases, there is usually a factor that simply cannot be accounted for.⁸⁶⁶ For instance, no strategy can predict the actions of a party in the throes of a religious revelation. Thus the game theory assumption that players have knowledge about their own and opponent's pay-offs is not practical in all cases.

It has been pointed out that game theory can help only so much if an attempt is made at predicting realistic behaviour.⁸⁶⁷ In regard to the study of terrorism, the author of this thesis considers that intelligent rational thought may not rule in every strategic decision: Firstly, on the terrorists side there are more primitive motivators than best strategic decision to optimize outcomes. For example, some terrorist organisations are inclined to kill to satisfy a primal appetite for brutality without necessarily considering if it serves their interests in the long run.

⁸⁶⁴ R. J. Aumann, 'Correlated Equilibrium as an Expression of Bayesian Rationality.' [1987] *Econometrica*: Journal of the Econometric Society, P2.

⁸⁶⁵ J. Henrich, 'Cooperation, Punishment, and the Evolution of Human Institutions.' [2006] 312(5770) *Science*, P60.

⁸⁶⁶ <http://www.universalteacherpublications.com/univ/ebooks/or/Ch9/limit.htm#sthash.lhzUIOdvdv.dpuf> Accessed on 06/06/17]

⁸⁶⁷ T. Scheve, 'How Game Theory Works: Criticisms of Game Theory.' Available at: <https://science.howstuffworks.com/game-theory7.htm> [Accessed on 05/06/18].

Secondly, an intelligent decision making process might not operate because the behaviour, values and actions of the opponents of terroristic conflicts are not known. This is because they do not communicate each other's decision options. They might not be capable of getting their most desired outcome until a series of different interactions have occurred. The following hypothetical illustration of 'dangling a carrot in the face of a proverbial horse' may help illustrate what is usually sought to be achieved from using game theory:

A reluctant horse would not take its cart driver to a destination. The cart driver cannot make the horse do as he/she says without luring the horse out of the stables. What he or she must think about is how to lure the horse out of the stable without forcing it out, but instead making the horse think it is doing what it wants to do. The cart driver knows that if a carrot is dangled in front of the horse whilst stepping backwards and out of the stable, the horse would likely follow. The carrot treat is the motivation for stepping out of the stable and possibly doing as the rider says.

Game theory is about answering the question 'what strategy can be applied to make an opponent do what I want?' It helps to know what to anticipate when making a rational intelligent decision. This way, it is easier to consider a response when applying game theory and pre-determining outcomes in payoffs. Unless parties know the decisions their enemies are likely to take and how those enemies would likely respond to their strategic decisions, they would be making responsive decisions intuitively as is the case with terroristic conflicts. Game theory will be of little advantage where it is difficult to pre-determine the strategy that is likely to invoke compliance. On the other hand, it may be anticipated that there are at least

three ways of deciding in terroristic conflicts: brutally motivated, intuitive decision and intelligent rational decision. Since game theory allows for assessment of iterative interaction to determine strategic behaviour, it creates the opportunity to possibly predict some terrorist actions.

2. The assumption that the number of players or competitors is finite.

This assumption presumes that interactions analyzed by game theory are simple. However, some interactions such as that between terrorists and states using targeted killing are complex and difficult to streamline. Elster notes that generally game-theoretic and econometric analyses of the intentions of the organizers of suicide attacks are doomed to fail, because the organizers may not be as rational as the theory requires, and the theory has very little to say about the equilibrium outcome of strategic interaction among more than two actors.⁸⁶⁸ A comprehensive model would have to take into account divisions within the parties to the conflict—government and dissident organizations—as well as foreign supporters of both sides.⁸⁶⁹ Indeed, through global media communication, individuals are now being radicalized and incited to acts of terror. There are an unknown but large number of independent terrorist ‘players’, including those formerly part of a known group; all expressing similar mandates against the same countries.⁸⁷⁰ Autonomy and unpredictability of terrorist participants are increasing, and numbers of players exceed the standard two person game; analysing strategic interactions between parties thus becomes more complex and decisions and conclusions less certain. Even a researcher would find it difficult to know which interaction to focus on considering the proliferation of terrorism.

⁸⁶⁸ J. Elster, in D. Gambetta, ‘Motivations and Beliefs in Suicide Missions: Making Sense of Suicide Missions.’ [OUP 2005] P233.

⁸⁶⁹ Ibid

⁸⁷⁰ G. N. Parker, TAM-C Solutions Intelligence Officer, ‘The Terror Next Door: A Security Analysis of the Escalating Threat of Lone Wolf Terrorists Lone actors: An Emerging Security Threat’ [IOS Press 2015] P41.

Secondly, even the designing of matrices for a two player interaction can seem unlimited and inexhaustible as one scenario prompts the analysis of others. It becomes necessary to streamline and focus on a few scenarios that can be used as reference points. This was the approach used in this thesis, considering the word count limitation. This is not to suggest that other scenarios are discarded as unimportant. The point is that game theory can be used to analyse a vast number of issues under one subject matter. This can either be an advantage or disadvantage:

6.2.3.3.1 *Advantages*

The vastness of the game theory approach shows that it can serve as a navigation tool for analysing and deriving answers to several issues of strategic decision making. Indeed game theory achieves all that it proposed to do, as stated in chapter 4 of this thesis. It prompted the analysis of the effectiveness of targeted killing from different standpoints than theoretical approaches may have offered. It modelled several strategic options in order to decipher which of them offer the best outcome.⁸⁷¹ Indeed, it broke general questions into smaller units to analyse every aspect of the question in detail.

6.2.3.3.2 *Disadvantages*

⁸⁷¹ B. Bueno de Mesquita, 'A New Model for Predicting Policy Choices: Preliminary Tests.' [2011] 28 (1) Conflict Management and Peace Science, P65.

Firstly, a lot of effort was put into designing the game matrices and then describing its application to the scenarios. It may have been easier to simply make the same analysis without using game theory. At the start, the application of game theory to the issues stated in chapter five seemed a very complex and difficult process. Several mistakes were, making the whole process time consuming. For example, when quantifying outcomes, the researcher had to make a constant note to refrain from comparing a party's outcomes with its opponent in order to award numeric values; this is not a game theory approach. Game theory compares the outcomes a player' derives from the various strategic options. The player does this by awarding numeric values to each option depending on best outcomes. It was only after much practise that the game theory approach seemed less complex to apply. However logically simple the approach may seem to economic experts or researchers who have gained experience over time, it may be unpopular to legal academics.

Secondly, outcome values are arbitrarily decided by the designer of game theory matrices. Thus, it is possible for a researcher to bias both the results and conclusion, by inputting personal impression of outcome values. Indeed, in this thesis, extra care was taken to avoid influencing the end result outcomes with personal viewpoints. To avoid this, the designer needs to know the historical interactions between opponents, in order to know what they value. This is one reason why a hermeneutical analysis of ideological perspectives was conducted in this thesis. The game theory analysis cannot generate information on its own without prior in-depth knowledge of the inclinations and inhibitions of the parties . Each opponent was found to have different values for the same decision strategy. It would be systematically wrong for the designer to insert his own personal values. It is very important to stand in one of the players shoes and give outcome values with that perspective. The same rule applies to giving outcome values to decision options for the opponent.

6.2.3.4 Limitations as a result of the novelty of terroristic conflict

Game theory application to the terroristic conflict under study was not limited by the weakness of the method alone. It was also limited by the novelty of the conflict, between states (state actors) and terrorists (non state actors). When reference is made to peace and war game theory, which is modelled after Prisoners dilemma, it considers the decision whether to make peace or wage war against an enemy. Usually, such peace war game theory analysis is done in reference to conflicts between states or organisations with established and defined regimen.⁸⁷² It takes into account expected responses by foreign and domestic adversaries, supporters etc. These are done in a bid to assist decision making on national and international policies. For example, a game-theoretic focus on strategic interaction that assumes that states are rational unitary actors shows that war, being costly, is always ex post inefficient.⁸⁷³ This comes under one of the assumptions of game theory; that each player has a definite course of action.⁸⁷⁴

Conflicts involving terrorists have proved more complex than those between states. It has shown how terrorists adopt mixed strategies, some of which are not all goal oriented but random.⁸⁷⁵ This randomness may be a calculated attempt at remaining unpredictable to their opponent. Notwithstanding, terrorists' course appears to be indefinite and unpredictable. For example, it may be easier to presume under a *tit for tat* (Peace, War) approach that the US is

⁸⁷² B. Bueno De Mesquita, 'Game Theory, Political Economy and the Evolving Study of War and Peace.' [2006] 100 (4) American Political Science Review, P637.

⁸⁷³ J. D. Fearon, 'Rationalist Explanations for War.' [2005] (49) International Organization, P379.

⁸⁷⁴ A. M. Colman, 'Cooperation, Psychological Game Theory, and Limitations of Rationality in Social Interaction.' [2003] 26 (2) Behavioural and Brain Sciences, P139.

⁸⁷⁵ S.M. W MacDermid, 'Family Risk and Resilience in the Context of War and Terrorism.' [2010] 72(3) Journal of Marriage and Family, P537.

less likely to wage war if al-Qaeda terrorists make peace (initiate a ceasefire and re-negotiation of the conflict so as to benefit both parties). Whereas, there are no guarantees that terrorists would respond by making peace should the US choose to make peace (that considers ceasefire and negotiate terms that benefit both parties). This means that the war against terror is as alien to the LOAC as it is to game theory discussions modelled after the peace and war game,. However, this method made the following contributions to research practice: It provided an alternative approach to analysing the effectiveness of targeted killing; it broadened the scope of readers of targeted killing; it created an awareness of the existence of the method of game theory which can serve as a precautionary guide from bad decision making involving conflict strategies.

6.2.4 Overview of outcomes

The doctrinal, hermeneutical and game theory methods were applied to articulate the understanding of the terrorism vs. targeted killing conflict. Limitations were encountered in using the methodologies. Whilst some of the limitations were anticipated and easily overcome, others were dominant and irresistible.

The deficit in legal resources for comprehensively determining the legal implications of targeted killing counter-terrorism strategy proved that the subject matter is completely novel to the legislations enacted to regulate conflicts. By first making a comprehensive study of the law in action through text books, journals, articles and other secondary news materials, it becomes easier to understand the legal issues, dilemmas and debates over targeted killing. It was soon realised that the absence of legal categories that describe the terrorism v targeted killing conflict is the major issue causing controversy in legal debates.

The hermeneutical approach was relied upon to explore the foundational basis for targeted killing and terrorism, including the legal and philosophical perspectives of the ongoing war against terror. Although there were limitations of resources that fully described the philosophies that instigate terrorism and targeted killings, the hermeneutic approach is suited to explore issues under such limitations. Notwithstanding, care was taken that conclusions, which are predominantly the views of the researcher, were not coated with bias.

A major reliance on infinitely repeated games, such as peace war is in the tendency for trigger strategies such as *'tit-for-tat'* to eventually encourage cooperation that facilitates ceasefire and negotiation of the conflict; this is typically the ultimate aim in conflict situations. This is however not a realistic expectation from the terrorists who mainly get satisfaction from the act of killing. However, through the application of the hermeneutic and game theory approaches, in that sequence, this thesis is able to achieve better understanding of how the parties to the terroristic conflict under study reason and strategically interact with one another. Together, both approaches are useful in cautioning unrealistic expectations of the extent to which targeted killing is helpful in achieving its anti-terrorism goals.

6.3. Overview of findings

The first findings related to the actual application of the LOAC and Law Enforcement (IHRL) regimes to terroristic conflicts. Overall, it was concluded that, as a result of the novelty of the conflict (unusually involving terrorists who are non-state actors; terror and counter-terrorism operations done within civilian territories if considered under the LOAC or killing without fair trial when considered under IHRL); there were serious discrepancies between the legal standards that generally regulate conflicts and the actual practices in the war against terror. It was found that the enforcement of the LOAC was generally characterised by the US's unconventional use of drone missiles against terrorist civilians and

within civilian territories. It was also found that the terrorists (of al-Qaeda and Hamas) are unperturbed by their actions that consistently contravene all the laws that regulate conflict and human actions. Further, it was found that the enforcement of Article 51 of the United Nations Charter which is generally applicable during warfare or peace-time, was characterised by the US and Israel's unconventional use of force in anticipation of unforeseeable attacks.

The UN Charter's Article 51 right to self-defence generally applicable to all humans were inadequately implemented by terrorist organisations and the states using targeted killing. While the former insist on defending terrorism as an expression of their self-defence rights against ideologies and claim that conflict with theirs; the latter claim the same self-defence right to use pre-emptive force against terrorists as a preventative measure against future terrorist attacks. Thus, the application of the right to attack in self-defence, through the use of targeted killing had not fully met the standard of Article 51, UN Charter. While it is right to use force in self-defence, whether in the name of warfare or peacetime, it is important that the force is applied only against impending danger. The standard does not legalise the cases of targeted killings launched against terrorists unforeseeable threats.

The research identified key themes and reasons for partial or non-fulfilment of both states' obligations under the charter to wait to see a lethal threat advance before defending against it in a similar manner. These were the lack of practicality of such expectations under the Charter and the lack of alternatives for preventing future terrorists attacks other than the pre-emptive use of targeted killing. This theme formed the basis for analysis of the literature in Chapter 3 which sought to understand and interpret the discrepancies mentioned above. Overall, the opinions in favour of the practicality of targeted killing were weighed against

those in favour of the rigid dictates of the conflict regulatory laws that prohibit warfare involving civilian participation and proximity. The chapter also compared two different interpretations of Article 51 of the UN Charter: the one that insist that the Charter intends that a victim must first see a lethal attack advance before defending against it; and the one that considers attacks anticipated (by hints from intelligence sources) but not seen, to be valuable proof of imminent threat.

It was found that terrorists attack without warning, thus the first option is impractical. Spontaneity, especially in the use of suicide bombings, knives, vehicles and guns against unsuspecting victims have formed and will continue to form the main strategy that terrorists use when attacking western states.⁸⁷⁶ Prior to such attacks, terrorists may give hints, through mediums such as propaganda videos, of intentions to carry out attacks. They do not usually precede their attacks with warning so their intended victims are unprepared to defend against the attacks. However, such hints, which happen to be the only ‘conducts’ of terrorists that are indicative of the imminence of an attack, may not reach the intensity level necessary to be qualified as an ‘armed attack,’ deserving of response in self-defence, in the absence of war, in accordance with Article 51 of the UN Charter and the landmark *Caroline* case. Practically, owing to the spontaneous nature of terrorist attacks, a victim becomes aware that he/she is under armed attack, only at the time, or after the occurrence, but not immediately before the attack. Because such attacks cannot be easily prevented, terrorist plots will, most certainly, continue to thrive.

It seems that as long as terrorists favour spontaneity as a tactic, any strategy aimed at effectively averting attacks must be pre-emptively used. Such concerns drive commentators to conclude that a proactive, *tit for tat* strategy, similar to what obtains within the scope of

⁸⁷⁶ W.C. Banks, ‘New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare.’ [CUP 2013] P82.

warfare, is more practicable for combating terrorism.⁸⁷⁷ It is in consideration of this that the US and Israel adopted the pre-emptive counterterrorism strategy of targeted killing, albeit illegal under international law. The practice of targeted killing counterterrorism strategy varies slightly from how the LOAC currently directs that lethal force can be applied. For example, the targeting process aims at complying with the principle of distinction by premeditatedly identifying the real terrorist culprits, in order to target and kill them on a future date and as a way of distinguishing them from other innocent civilians.

The above classification was important in demonstrating the limits of earlier works that generally attribute targeted killing solely to unwillingness on the part of the governments of US and Israel to comply with the rule of law without paying sufficient and necessary attention to the significant impediments occasioned by the practical challenges of terrorism. The research demonstrated that, even if it were the case that every government combating terrorism was willing to optimally comply with the warfare principles, it would mean limiting the targeted killing of terrorists to the times where the latter can be found in isolation of other civilians. In fact, a strict compliance with the LOAC will mean that the states cannot target and kill terrorists at any time because terrorists are still valued as civilians with immunity from being targeted under international law. If warfare is not applicable to terroristic conflict, then an attempt to strictly comply with Article 51, UN Charter which is applicable during peace time, will also mean that unless everyone who walks the streets is aware of an impending danger and is armed and ready to defend against it, the attacks against them will be successful. Knowing that the states are under obligation to obey this principle of distinction, terrorists do everything in their power to thwart the states' efforts and avoid being targeted and killed by constantly remaining within civilian proximity.

⁸⁷⁷ S. Kaare, 'The Mind of a Terrorist: David Headley, the Mumbai Massacre, and His European Revenge.' [Skyhorse Publishing, Inc., 2016] P302.

Terrorists are also aware of their civilian immunity status that protects them from being attacked during warfare, so once they finish carrying out attacks they easily revert to pretending to be innocent civilians. With deceptions like these, it is difficult for states to easily identify terrorists. This is one reason why the targeting process does not offer undue advantage to terrorists; it does not award terrorists the same immunity that civilians (non-combatants) are entitled to under the LOAC. Instead it relies on the intelligence of a kill list containing the names of terrorists in order to be alerted about potential terrorist threats. These unconventional ways of exercising the rights to use force under the LOAC and human rights generally is what causes uproar. Whereas, all that both states intend to do is strike a balance between what is lawful and what is expedient. It is important to comply with the doctrines of the LOAC, however, to the US and Israel, it is even more important to defend their sovereignties from terrorism without limitations from these same laws that permit the use of lethal force in self-defence.

Terrorism is considered, by the US and Israel, to be a serious threat deserving of commensurate responses. Both states find themselves in a position where they have to actively defend against terrorism amidst argument over its legality. Even when they cannot comply with legality, they seem prepared to contend against it with an approach that seems practicable. To the US and Israel, targeted killing is practicable so they defend targeted killing on the basis of practicality. The states are determined not to be bound by legality if it causes them to 'passively' address terrorism. They even call for an international recognition of the approach, considering it to be the best counterterrorism solution to modern day terrorism. Contingent upon this appeal was the need to study the effectiveness of targeted killing strategy in this thesis. It sought to answer the question: Is targeted killing deserving of this type of international recognition? Is there any truth to the states claims that seem to

contradict those of human rights activists and special rapporteurs that dismiss targeted killing on legal and humanitarian grounds?

The thesis temporarily set aside the issue of legality and analysed targeted killing by weighing targeted killing, based on past cases, against the optimum goals for which the strategy was devised. An empirical method of game theory that originates from the fields of Mathematics and Economics was employed to make this analysis. Game theory was applied as a tool for studying and making examples of how the US and Al-Qaeda try to do what is in their best interest so that it can be possible to determine their optimal strategies.⁸⁷⁸ The Game theory assessment prompted the researcher to thoroughly explore facts relating to previous interactions between the US and al-Qaeda. This allowed for the observation of specific responses to the different cases of targeted killing upon which the numerical values awarded in the matrices were based. Without this it would have been difficult to objectively derive the real implications of targeted killing strategy and envisage that a prolonged reliance on targeted killing may yield in counter-productive outcomes in future. The questions explored were whether, so far:

1. The US targeted killing of al-Qaeda leaders and notorious members has effectively eliminated threats from al-Qaeda organisation and its allies?
2. If yes, to what extent and at what cost?
3. If no, what other viable alternatives to targeted killings can be explored to give the US desired counterterrorism outcome?

The game theory format called a game theory 'matrix' which is a simple mathematical table was used to numerically summarise the US and al-Qaeda's feasible outcomes from using

⁸⁷⁸ B. Bueno de Mesquita, 'A New Model for Predicting Policy Choices: Preliminary Tests.' [2011] 28 (1) Conflict Management and Peace Science, P65.

alternative strategies to killing. The table was used to emphasize the weakness and the strengths of the alternative strategies whilst weighing them against the US targeted killing and terrorist killing. The researcher decided a score margin between 1 – 5, with 5 being the maximum and 1 the lowest that was awarded based on the opponents response. This was an attempt at measuring the perceived impact targeted killing had on terrorists and the impact terrorists killings had on the US. These scores were later measured against other strategies, including the parties attacks on each other's assets, sanctioning of each other's assets, media campaigns against each other and the cliché of peace negotiations. A party is awarded points ranging from 4-1, depending on the extent to which it is able or unable to invoke a desired response from its opponent. Through further research inspired by game theory, it was found that targeted killing so far, has not overpowered al-Qaeda, instead, it seemed to have fuelled the conflict between the two entities. It was the seemly old fashioned peace negotiations strategy, if mutually decided by all parties to terroristic conflicts that was perceived to be a better strategy for achieving an end to terrorism generally. In this way, the parties can make compromise standards that balance the rights of the perpetrators and victims of targeted killings.

6.4. Concluding Remarks

This research has analysed the effectiveness of targeted killing counterterrorism strategy. Although the US and Israel's use of targeted killing were the main focus of legal, historical and ideological inquiry, only the US strategic interaction with al-Qaeda terrorists served as a case study for analysing the effectiveness of targeted killing. The aim of the analysis was to evaluate how the practice of targeted killing measured up to the expectations of the US; with the purpose of identifying and highlighting the unproductive and sometimes

counterproductive implications of using targeted killing and possible paths for reform. The adoption of hermeneutical analysis for studying targeted killing is not novel in the literature. However, it is the attribution of the liberal cosmopolitan, realists and pragmatic ideologies to the parties of the war against terror in general and the debaters of targeted killing in particular, in exercise of the hermeneutic approach that is new to the literature. It is believed that this method allows for a new and critical perspective of the justification for terrorism and targeted killing. Also, the game theory method for examining and evaluating the effectiveness of targeted killing was believed to offer an original and fresh approach to the general literature on the subject. The adoption of this approach has, aside allowing for new and critical perspectives, resulted in a number of findings and suggestions for reconsidering the use of targeted killing strategy and improving the strategic interaction between states and terrorist organisations. Some of these are reviewed below.

6.5 Recommendations

In arguing and justifying the choices of the doctrinal, hermeneutical and game theory approaches, one of the points raised was that this approach required the researcher to, after making the necessary legal and socio-legal analyses, go further to establish grounds for reforms based on those analyses. It was found in the course of this research that such proposals and ideas, in addition to being a distinct element of the research, flowed naturally during each stage of analysis. It is believed that this research has set a clear path for future legislative reforms and highlighted areas for future research on how to improve the study of the effectiveness of targeted killing counterterrorism strategy or any other conflict related strategy for that matter.

One area in need of practical and proactive counterterrorism measures is the LOACs weak protective mandate of those defending against terrorism. The protection of civilians is understandably lauded. As it turns out, however, terrorists benefit from the protective influences of the LOAC more than states. It was argued that the LOAC could still be made effective without departing from the original intention of its drafters but by deciding what statuses to award terrorists under international law. If, for political and practical reasons terrorists cannot be regarded as state actors under the LOAC or criminals under Law enforcement, then international legislators must not shy away from the need to enact a whole new set of laws that specifically determines how terrorism can be addressed. Although it seems that such laws will be acknowledged only by the states at war with terrorism as terrorists generally feel non committal to western laws. This would entail that the legislators take the extra step of specially drafting the laws in such a way that it regards states needs to adequately combat terrorism. It seems that the states will go ahead to use targeted killings whether or not it is illegal, however it was argued in the thesis that states do not deliberately contravene international law, they only derogate from it when the laws do not cater for their all important counter-terrorism needs.

A number of strategies were also highlighted by which the US, Israel and other western states could counter terrorism other than through the use of targeted killings. Some of the important strategies that stood out include an attack on terrorist assets and the ceasefire peace negotiations. Out of the two options, it was clear from the research that the surest way to effectiveness was in the mutual agreement upon a cease fire peace settlement as it is likely to produce better counterterrorism outcomes. Although it may seem that, owing to terrorists subversive nature, arriving at rational conclusions are unlikely, however, this thesis invites us

to note that even terrorists themselves have goals; they want to achieve something from the conflict. If they compare the option of ceasefire and peace negotiations with the risk of being targeted; especially if targeted killing campaign intensifies against terrorist who are unprepared to die for their causes, then terrorists may rightly consider the former option. This conclusion was based on the finding that aside from the spiritual obligation to generally invoke terror, terrorism is also done in protest against the western governmental system. Should the international committee choose to negotiate some terms with terrorists, it remains to be seen whether terrorists will be willing to reach a compromise.

On the issue of the ideological backgrounds upon which the war against terror is predicated, it was pointed out that the literature is concerned with making attempts at understanding terrorists' ideologies. Granted, terrorism is done as an expression of terrorists ideologies; however, it was argued that this is not limited to terrorists alone as all parties are motivated by their ideologies when they express themselves during conflicts. The need to understand the US, Israel, and other western states motivations for targeted killing and other reactions to terrorism cannot be underestimated. From it comes a better understanding of the goals they seek to achieve from the strategies they choose. Thus, the literature is balanced and progresses further by the thorough assessment of states ideological incentives for using targeted killing made in this thesis. It was important to make this assessment because the effectiveness of targeted killing was measured against these goals.

The scarcity in empirical and socio-legal based observations in the literature over the effectiveness of targeted killings is observed to be as a result of the fact that many scholars have not progressed beyond dismissing targeted killing as illegal or defending the strategy under the laws that regulate conflicts. The few that acknowledged the importance of evaluating the effectiveness of targeted killings have either confirmed or refuted the claims

that it is effective. There is no critical and empirical research based analysis in the literature that leads to the proposal of realistic counterterrorism mechanisms against terrorism under either the law enforcement regime or the LOAC. Falk's literature statistically assessed the effectiveness of Israel's targeted killing of Hamas terrorist leaders of Palestine and made conclusions that Israel's strategy has been effective only to the extent of reducing suicide bombing fatalities. However, Israel's targeted killing programme has not been effective in eliminating all threats from Hamas.

This thesis is a progression of Falk's literature and recommendation in which he suggested that future researchers adopt his empirical/statistical evaluative approach to assess targeted killing done by other states apart from Israel. His mention that from his research, it was not completely clear what makes the targeted killing strategy effective, prompts this research to adopt a different empirical approach for assessing the effectiveness of targeted killings. The aim was not only to derive answers but also to understand why the answers were generated. The game theory alternative approach has proved to be one that stimulates a researcher to further investigate and to understand his or her rationale for awarding numerical values in outcome against strategic choices. This promotes objectivity when numerically concluding on the effectiveness of a chosen strategy. Through this approach, it was made clear that although targeted killing may seem effective, it is only because it generates the satisfaction of being able to successfully avenge al-Qaeda terrorists' attacks. However, an assessment of targeted killing in relation to the goal for which it is used suggests that targeted killing is nowhere near achieving its counterterrorism goals. The game theory approach to evaluating the effectiveness of a strategy should be relied upon more by researchers who make reflective analysis and study decision making. Like a conventional game, with game theory comes the stimulation to explore a subject matter from different angles.

6.6. Implications for Future Research and Development

The research done indicates that targeted killing is effective in retaliating terrorism and showing that the states doing the targeting have the assets needed to avenge terrorism. It is established that targeted killing is unsuccessful in mitigating an end to terrorism. Firstly, the conclusions drawn and the manner in which the said effectiveness was evaluated as it pertains to the US, may also be relevant when evaluating the effectiveness of targeted killing, or any other conflict strategy carried out by different states. Secondly, it has shown how an appreciation of the limitations under the LOAC and IHRL are necessary for any future reforms. Unfortunately, specific suggestions on the most realistic ways in which terrorists should be regarded under international law was not offered. Thirdly, the research has demonstrated that ceasefire peace negotiations will be more beneficial to the US than targeted killing, however, it does not take into account the unlikelihood of arriving at cease fire peace negotiations with al-Qaeda terrorists and what action should be taken if an attempt at such negotiations fail.

Should such negotiation proceed into fruition, then it is expected that the international committee of states would generally continue to be faced with difficulties of accepting and living with the unconventional terms terrorists will bring to the agreement table. For such proposed approach to work, perhaps terrorists should be isolated from the democratic living of western states. One possible area for future research would be on how to get terrorists to enter into rational peace agreement with states. Whether or not such negotiation can potentially succeed or if it does, whether or not terrorists will remain bound to such agreement is an issue which was not explored.

Finally, this research has revealed the need for further discussions and research on the effectiveness of targeted killing and the proffering of suggestions on ways to combat

terrorism. While the US and Israel have at different times achieved cooperation from other affluent states in curbing terrorism, it is clear that attention is needed from international bodies as a whole. In terms of research; other researches that either disagree or build up on researches current literatures will contribute maximally to enriching and improving the literature on the effectiveness of targeted killings.

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