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A Shift in the Geographical Scope of IHL? The Implementation of Targeting and Extraterritoriality in the Context of NonInternational Armed Conflict

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A Shift in the Geographical Scope of IHL? The Implementation of Targeting and Extraterritoriality in the Context of Non- International Armed Conflicts

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1. Introduction

In the last decades, the nature of warfare has changed, where in times past most conflicts were fought between states (Inter-State Warfare), the majority is now being fought between states and Armed Non-State Actors (ANSAs) (Cerone, 2007, pp. 396-398). The new opponents that states now face, and in particular how they are combatted, have brought a myriad of ethical and legal questions. One of the key challenges of fighting these new opponents is the apparent unclarity about which legal regime states are bound by and in turn what measures states may employ against non-state actors. This is because the rules that govern armed conflict were written in a state-centric time (Cerone, 2007, 396-398). The possibility that states would also be entrenched in long-lasting extraterritorial conflict with non-state actors was not fully considered. Thus, the rules which states have to abide by when engaged in an inter-state war, are quite well-established, whilst these rules for present-day conflict more contested. The application of the law that governs armed conflict, International Humanitarian Law (IHL), also known as the Laws of Armed Conflict (LOAC), is divided into two types: International Armed Conflicts (IAC) and non-international armed conflicts (NIAC). The former deals with a war between at least two states, whilst the latter governs (internal) conflict between a state's government forces and armed groups or armed groups fighting against each other, such as in civil wars, in the territory of the state (IRRC, 2008). Looking at the definition of what constitutes a NIAC, it can be seen that the definition is not a fully accurate description of the conflicts that states are currently engaged in against non-state actors, as the wars are not necessarily fought within the borders of the state with which the non-state actor is in conflict. Rather, many of the conflicts happen extraterritorially, that is to say on the territory of a second state without there being a conflict between the two states. Due to the wording of what constitutes a NIAC, a scholarly debate has ensued about whether extraterritorial armed conflict

with armed non-state actors, can be qualified as NIACs and be subjected to IHL, or whether they should be governed under International Humanitarian Rights Law (IHRL) (Hlavkova, 2014). The problem of categorizing under which legal regime these types of conflict take place becomes even more complicated if we consider that members of armed non-state actors can also cross state borders beyond the one where the conflict takes place. If we subscribe to view that extraterritorial conflicts with armed non-state actors can be defined as NIAC under IHL, does this mean that when armed non-state actors cross state boundaries, outside of the conflict zone, they are to be regarded as mere civilians or do they hold a combatant status that still makes them targetable despite not being within the confines of the territory where the conflict is taking place? Moreover, if they are still targetable, how do we square the fact that the civilian population, of the country where the armed non-state actor has fled to, is not connected to the armed conflict from which the ANSA is fleeing? Do the laxer rules, with regard to civilian casualties, that exist in IHL to target opponents, also hold in another territory where there is no armed conflict, or is only the more restrictive IHRL regime applicable? These questions are hard to answer due to the ambiguities that exist within the law itself (Hlavkova, 2014). Moreover, due to the relatively new nature of how conflicts with armed non-state actors are increasingly being fought transnationally, the amount of case law that could give guidance on these issues is limited (Sassòli & Olson, 2008). Without case law as a clear legal guidance, it is important to examine how states approach these new challenges. Not only because states might seek to exploit the perceived gaps in established law, but also because repeated state practice can play a pivotal role in establishing new legal norms (Jose, 2017). Thus, by examining state conduct, and the international reactions to these practices, this thesis examines if new norms have been established with regard to the lawfulness of applying the Laws of Armed Conflict to extraterritorial NIACs, especially with regards to targeted killings, when the ANSAs move beyond the scope of the battlefield?

The evolution of norms that form the basis for the interpretation of international law, can only be analysed correctly with the proper research methodology. To best describe this evolutionary process, a qualitative research approach, that is able to take into account how norms evolve, whilst also connecting them to legal statutes, is taken. This is done through a case study.

To examine the research question, first, the applicable legal statutes will be analysed, paying particular attention to their evolution within the context of the ‘new’ type of war, then an analysis of how (repeated) state action influences norm creation will be discussed. Following these analyses, the theory will be put in practice with a case study, it is examined how the United States applies the Laws of Armed Conflict to extraterritorial NIACs after the events of September 11th, 2001, how their interpretations of the law have generally been received by the international community and if there have been any critical junctures that shifted the normative approval in the way of an expanded interpretation of what constitutes an extraterritorial NIACs and what measure may be employed.

Particular attention will be paid to the US-mission that lead to the killing of Osama Bin-Laden in Pakistan, as an example of the US’s expanded interpretation of extraterritorial NIACs. It is hypothesized that even before the raid on Bin-Laden’s compound there was an ongoing expansion about what constitutes a NIAC within legal scholarship, but that afterwards, a normative evolution occurred that further expanded what is permissible with regards to targeting members of Armed Non-State Actors.

2. Legal Framework

International Humanitarian Law (IHL) was created to try to limit the undue suffering of civilians during wartime, IHL is distinctly separate from the laws that govern whether a war was started with just cause (Jus ad Bellum) (IRRC, 2008, pp. 1-4). This was done to ensure, that even when there is ambiguity if a war was started with just cause, legal protections were still provided. IHL, also called Jus in Bello, is divided into two categories: (1) International Armed Conflict (IAC) and (2) Non-International Armed Conflict. IAC, regulates inter-state warfare, whilst NIAC regulates conflicts in the territory of a state, fought between the army of the government and Armed Non-State Actors (ANSAs), or between two ANSAs in that same territory (IRRC, 2008 pp. 991-994). Because states, when writing IHL, did not want to limit themselves when fighting rebellions or insurgencies in their own territory, the rules regulating what protections civilians would have during a conflict, were much less well defined (Hlavovka, 2014, pp. 252-253). Moreover, very little was said about how and when ANSAs were allowed to be targeted. The rules for what was prohibited were ambiguous. The opposite is true for IACs, there the prohibitions were so well defined that they in effect authorized what is permissible – this is outlined in Hague law (IRRC, 2008, pp. 998-1000). Most importantly, because the war was between two states armies, it could easily be determined who was a civilian and who was a combatant. With the emergence of ANSAs that cross borders, with states engaging in conflict with ANSAs on the territory of another state, the lack of legal clarity, became a problem.

2.1 Article 3 & Additional Protocol II

Two treaties govern NIACs: article 3 to the 1949 Geneva Conventions and the additional protocols II of 1977. article 3 defines NIACs as: "armed conflicts not of an international

character occurring in the territory of one of the High Contracting Parties [to the Geneva conventions]" (IRRC, 2008, pp 1003-1005). Two of the preconditions for categorizing a conflict as an armed conflict, is that there must be a minimum level of intensity between the fighting parties, that goes beyond actions that could be reasonably considered to be of a law-enforcement nature, moreover, ANSA must have certain military capabilities, and a hierarchical command and control structure (IRRC, 2008, pp 1004-1005). Unlike the additional protocol II definition, it adopts a much more general definition of when an armed conflict is happening. Additional protocol II, which was developed as a supplement to common article 3, thus has a much more restrictive definition of what constitutes a NIAC. For the additional protocol to apply, an ANSA must have territorial control over parts of the state in which it fights (Hlavovka, 2014, pp. 252-253). Moreover, unlike under the Article 3 definition, it does not cover NIACs between only ANSAs, rather to be subject to the additional protocol, a NIAC between a state actor and a non-state actor is required.

Because the additional protocol II only applies to NIACs between state armies and ANSAs, broader authorizations were built in to enable states to fight these threats. Unlike, under only article 3, it clearly classifies civilians and combatants in two distinctly different groups (Bassiouni, 2008, pp. 725-733). Under additional protocol II, just as with IACs, the combatants are seen as an extension of the group (or state in the case of IAC) that they represent, engaged in armed conflict, and thus targetable at any time regardless of the fact if they pose an immediate threat (IRRC, 2010, pp. 4-6). However, most NIACs do not meet the additional protocol II criteria, as most armed groups do not have control over territory. Since protocol II is not applicable in most NIACs, the question arises if the mere fact that article 3 does not specify who is a combatant, it also means that a different right regime is applicable when it comes to targeting members of ANSAs.

2.2 IHRL: Filling in the gaps of LOAC?

Some have interpreted the lack of clear guidance under the article 3 regime to mean that the legal regime that regulates the targeting of ANSAs, should be governed under International Humanitarian Rights Law (IHRL) (Kretzmer et al., 2007, p. 306). IHRL, which is the legal regime in times of peace (unlike IHL) gives far-reaching protections to individuals, both civilians and members of armed groups. Because IHRL was designed for times of peace, it only allots a very limited scope in which states have to operate (Droege, 2007, p. 314). The essential element of IHRL is that it accords all individuals with the right to life, even members of armed groups (Doswald-Beck, 1993, p. 312). It can be seen as much more of a law-enforcement regime. For example, under the regime, the killing of someone by the state is only allowed if that person poses a credible and immediate threat to someone else – in the same manner as restrictions of force apply to police officers (Doswald-Beck, 1993, p. 344-346). However, such an interpretation would place an incredible burden on states who are in the midst of an armed conflict. It cannot be expected of states that they have to adhere to the same regime that is used in peacetime, as they would not be able to target their opponents. Because of limits that such a regime would pose on a state's ability to fight in a conflict, the opinion that IHRL fills the full gap of that exist in NIAC governed by only article 3, is in the minority (Hlavkova, 2014, p. 256).). However, there is a general consensus amongst scholars, that more and more of the norms of IHRL are also becoming applicable under the laws that govern armed conflict (Droege, 2007). The overreaching view, is that some of IAC and protocol II rules, can also be applied to fill in the gaps in article 3.

2.3 Precedent for an expanded NIAC Framework

In the International Committee for the Red Crescent's (ICRC) interpretative guidance of Non-International Armed conflicts it goes beyond the article 3 definition, it defines all ANSA in NIACs as: "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" (IRRC, 2012, p. 995). According to this expanded definition, which is not based on the treaty itself, members of those armed groups would legally be able to be attacked at any time, just like members of state armies in IAC. They do add, however, that civilians who are only sporadically taking part in combat activity are only targetable for the duration that they directly participate in combat action. This interpretation could partially be seen as an interpretation of article 3. As explained before, article 3 to the Geneva Convention only lays out what is prohibited, unlike with AIC there are no overt rules regarding what is permissible as laid out in Hague law. However, by looking at the wording of the prohibitions, inferences can be made to establish what in certain cases may be authorized – in other words targeting. It is stated in article 3 that members of armed forces that have laid down their weapons and surrendered – and thus are no longer combatants – are entitled to the same protections as civilians. From this wording it can be inferred, that since there is a special category of when armed forces are to be regarded as civilians, there is also a special category when they are not considered as such and can be targeted (Hlavkova, 2014, p. 257). Moreover, international tribunals such as the United Nations International Criminal Tribunal for Rwanda (ICTR) and The International Criminal Tribunal for the former Yugoslavia (ICTY) have taken the same view that members of armed groups cannot be labelled as mere civilians just because they are not members of a state's army (Bellal et al., 2011, pp.53-58). Furthermore, state practice is very important in setting norms of allowable behaviour, if we look at recent behaviour of the United

States, we can conclude that they have also taken the view that armed actors do not fall into the civilian category.

2.4 Who is Targetable?

Now that it is established that in NIACs where only article 3 is applicable, ANSA can be defined as combatants and thus targeted at any time. However, another problem arises, namely, how it is established that a person is part of the armed group? Unlike a state's army personnel, ANSA often do not wear distinctive uniforms, from which their membership to the group can be identified (Banka & Quinn, 2018, pp. 695-696). Moreover, the distinction should be made between members that belong to a group that commits armed attacks and the members of that group who are actually part of the 'combat' wing of that group. This is especially the case with groups that have an explicitly political wing separated from the rest of the group that commits armed acts. However, with many of these groups the categorization between the combat and political wing is not that apparent, as those involved in the political wing may also have some type of command function in the military wing (Melzner, 2010, pp. 846-848). Additionally, distinctions must be made between members who only serve in combat roles and those who only occasionally take up arms or serve in support functions. The approach taken by the ICRC, favours only defining members of armed groups that serve in continuous combat positions as targetable at any time. The ICRC feared that if members of armed groups, who primarily fulfil non-combatant functions, are at any time targetable, it would incur many civilian casualties, as those who primarily fulfil non-combat roles would be more likely to be often in the vicinity of civilians than those members who primarily act in a combat role (Hlavkova, 2014, p. 262-263). This distinction is unlikely to be properly executed in practice, though, as accurately assessing who a continuous combatant and who only performs support activities is hard.

The distinction of who is targetable because of his membership in the armed non-state group, becomes even more important if we consider that armed non-state actors operate transnationally, sometimes beyond the area of the NIAC. States often still want to pursue these actors across state boundaries, because of the threats they still could pose (planning/supporting/training) even beyond the extent of the battlefield. Especially the expanded use of drones to target and kill members of these groups, gives rise to the question under which legal regime these action fall and whether they are permissible.

2.5 Territorial Scope of Targeting

The traditional view about the realm of Non-International Armed Conflicts, is that they take place within a defined territory (ICRC, 2015, pp. 13-16). Within this territory the Laws of Armed Conflict are applicable, IHRL, which governs during peacetime, is less important. Because it is known that during wars, civilian casualties are inevitable, the less stringent and more practically feasible laws of war are more applicable (ICRC, 2015, pp. 36-37). However, the question becomes when members of armed groups cross the territorial bounds of where the conflict is raging to other countries or territories, where it cannot be reasonably stated that a NIAC is going on, which legal regime is applicable. A traditional view would suggest that once a person exists the conflict zone, to a place where there is no armed conflict, IHRL would apply (ICRC, 2015, pp. 13-14). This reasoning, however, would mean that members of armed groups could easily create zones where they would be immune from being targeted. With the transnational behaviour of ANSAs, such a view would mean that states have a significant disadvantage if they are not allowed to these groups. It is thus not so strange that some states do not seem to abide by these criteria (Cerone, 2007, pp. 406-408).

Instead of taking the approach that only IHL holds within the conflict zone, it seems that a shift has taken place in which people belonging to ANSAs are targeted as combatants beyond the

territorial scope of where the armed conflict is taking place. In other words, instead of only defining the ANSAs that are directly within the territory where the conflict is taking place as being targetable at any time, to a scenario where the status of combatant moves beyond any territory and is rather placed on the individual (Hlavkova, 2014, pp. 268-270). This new definition is logical, considering how ANSAs operate, however, it also has highly troublesome implications.

According to this new *modus operandi*, the targeting of combatants beyond the geographical scope of the armed conflict would mean, that members could be targeted anywhere in the world, this also means that uninvolved persons who reside in areas where there is no armed conflict, would most likely get in the crosshairs of armed attacks. If we are to accept that the new realities of transnational conflict necessitate, that armed actors who continue to plot attacks, beyond the geographical reach of the conflict zone, can be targeted anywhere, we must take into consideration that the uninvolved population cannot be treated under the laxer rules of IHL. Thus, states operating beyond the armed conflict zone, to target members of armed organisations must respect IHRL when it comes to rest of the population – only the armed actor holds a targetable status under IHL (Hlavkova, 2014, pp. 270-271). More precisely, governments would have to be absolutely sure that when they carry out a strike against those actors, that the rest of the population remains unharmed – there would be zero tolerance for any resulting casualties on the uninvolved.

Such strikes, in which the death of the uninvolved would be unacceptable, unlike under IHL, would likely pose more risk to states' military personnel. Because of the higher risk to civilians, drone strikes would only be acceptable under very limited circumstances.

3. Case Study: The US

The civilian casualties caused by the drone strikes in Yemen and Pakistan, conducted by the United States, have because of this higher risk of civilian casualties caused criticism by the international community (Anderson, 2011, p. 1). However, lately the criticism from the international community, on targeted killings of members of ANSAs outside of armed conflicts, has decreased. This decrease was especially significant after the killing of Osama bin-Laden (Jose, 2017, p. 52). The targeted killing of Bin-Laden was seen by many scholars of International Law, as unlawful (Jose, 2017, p. 49). Although, the US government first described the objective of the operation to either capture or kill Bin-Laden, the legal defence that the government provided after the operation clearly signalled that the objective was to kill Bin-Laden (Paust, 2011, p. 578). Bin-Laden was residing in Abbottabad, a city far from the Afghanistan border, near Pakistan's capital (Paust, 2011, p. 578). It was far from the armed conflict that the US is fighting in Afghanistan against the Taliban (the US sees Al-Qaeda also as party to this conflict) – not in the tribal border areas between Pakistan and Afghanistan where armed actors often flee to, the targeting of Bin-Laden in this city is emblematic for the American interpretation that combatants are targetable across borders because of their status, instead of only in the geographical territory of the armed conflict (Hlavkova, 2014, pp. 273-274). However, even with this interpretation, it is doubtfully if Al-Qaida, and thus also by extension Bin-Laden, falls within this expanded paradigm of NIACs, as Al-Qaida was not organized enough to be considered a party to a NIAC (Ambos & Alkatout, 2012, p. 341).

Moreover, it can be highly debated whether Bin-Laden was still heading the organization or even capable of plotting attacks against the United States. It could even be argued that Bin-Laden, at the point in time in which he was targeted, he was much more of an inspirational or political figure, rather than someone actively involved in planning attacks. Yet, the international reaction to his killing, was almost only positive, with little critique of the US governments'

legal justification. It will be argued, that the killing of Bin-Laden was a critical juncture in the evolution of norms in IHL, especially when it comes to targeting members of armed groups beyond the scope of the battlefield.

3.1 Normative Framework

Norms, including legal ones, evolve over time. The progression of norms is often described through Finnemore and Sikkink's life cycle model (1998). Norms first emerge, with norm entrepreneurs that have the conviction that something in the system needs to be changed, they try to adopt to these new changes and attempt to convince others that new measures must be taken to conform to these changes, once this thinking has garnet enough support, a tipping point has arrived (Jose, 2012, pp. 7-8). When a norm cascades, states, try to convince/pressure other states and non-state bodies that they should conform to these new norms, then when a norm finally becomes internalized, having reached what is called intersubjective agreement about the justness of this norm. However, recently there has also been a new stage added to this cycle model, namely the pre-emergence phase. In this phase, "no shared assessments about the universal applicability of a practice for actors (...) [exist] (Jose, 2017, p. 241). This is the phase in which only the norm entrepreneur beliefs in this change of the norm, as the new norm often violates already established norms (Jose, 2017, pp. 9-11). This phase is very useful to study the evolution of norms when it comes to extraterritorial NIACs, especially when it comes to targeted assassinations, because before the United States started to engage in this practice, there was a normative agreement against such target killings. Quickly, after the September 11th attacks on the World Trade Centre in New York, the United States governments' interpretation of when a NIAC is occurring and what measures they were allowed to take against it, which evolved far beyond the scope of what was commonly accepted by the international community at that time (Ambos & Alkatout, 2012). In particular, the targeted killings of 'terrorist

operatives', more often through the use of drones, beyond the geographical scope of what was normally seen as the theatre of combat, was seen by the majority of the international community as illegitimate. What will be argued here is, that this (perceived) view of illegitimacy, has undergone an evolution after the operation that killed Bin-Laden. Using the Life cycle model, to compare the normative change with regard to this expanded interpretation of IHL, the international communities view towards such action will be examined before and after the killing of Bin-Laden. It will be argued that even though the military action which resulted in the death of Bin Laden can hardly be considered legal under IHL, even under the expanded view, the international community's response, that is approval of the operation, and lack of criticism towards the legal justification, leads to a situation in which this state behaviour is to a certain extent normalised. This normalization in and of itself could lead to different legal norms.

3.2 Evolution of American Targeted Killings

The first US targeted killing beyond the scope of the battlefield was in 2002, in Yemen, against an Al-Qaida operative (Banka & Quinn, 2018, p. 671). In the first stage of the US's drone programme where it targeted what it called 'combatants' in their global war against Al-Qaida, the target killings were conducted mostly in secret. There were very few public mentioning's of the attacks and the US often did not claim responsibility for the attacks it conducted (Banka & Quinn, 2018, pp. 670-671). Despite the covert nature of the first years in which the US conducted these attacks, there was international criticism of these attacks. Before the United States started conducting these targeted killing under the paradigm of a global NIAC with Al-Qaeda, Israel had been conducted similar killings of members ANSA, albeit often times under circumstances which could more easily be interpreted as NIACs (UNHCR, 2010, pp. 5-7). The US, along with most of the international community condemned such attacks (UNHCR, 2010, pp. 7-8). The United Nations General Assembly (UN) spoke out against the Israeli attacks under

numerous circumstances, it did the same with the drone attacks the US used later on. However, during the earlier stages of the targeting programme, due to the fact that the American government did not openly admit that it was conducting such attacks, the amount of international criticism was more limited. Calls, by governments and NGOs, for the US to justify its actions and accusation that the US was violating's persons' right to life followed (Anderson, 2011, p. 1). With the covert nature of the US's actions, very little justifications for its actions were put out by the American government – because they did not want to admit what they were doing in the first place. This lack of justifying their actions can be seen as one of the most important obstacles to the creation of a norm, namely legitimacy. If the government does not explain why their actions are the only way of fighting against a 'new asymmetrical threat', then the probability that it could gain normative acceptance is slim (Jose, 2017, pp. 47-56). At the end of George W. Bush's presidential tenure, the government began to give more insight into its practices. The Obama administration continued this trend, perhaps especially because under his presidency the number of targeted killings of Al-Qaeda members and affiliated groups, grew exponentially (Ambos & Alkatout, 2012, p. 341-342).

By explaining their actions, the government could start to create legitimacy for its actions by explaining why they viewed that they were necessary. Logically, this also led to more debate about whether the actions were moral and legal. The United Nations, in response to the rise of what it called extrajudicial killings, commissioned a special rapporteur to write a rapport for the UN Human Rights Council (UNHRC) and the UN General Assembly (UNGA) in 2010, the report stated that "target killings are increasingly being conducted far from the battlefield" and questioning in particular the legality of the US's doctrine that Al-Qaida member can be targeted beyond the battlefield of an armed conflict (such as with Drone attacks in Yemen and Pakistan) (UNHCR, 2010, pp. 7-8) . Moreover, the special rapporteur brings up serious concerns over the uninvolved population in the area where strikes are conducted and where

they may be killed in such strikes in violation of the right to life under IHRL. Germany also criticized the American governments' doctrine, by refusing to provide intelligence to the US that could lead to the targeted killing of the subjects of that intelligence (Jose, 2017, p. 51). This at the very least shows moral objections to the American policy but could also signal that by providing the information that leads to killing they might be complicit in the violation of IHL or IHRL.

3.3 Bin-Laden

With the targeted killing of Bin-Laden, many of the same principles to which the international community objected too with the target killings with drones, apply. As with many of the targeted killings with drones, the basis of justifying the extraterritorial targeting of Al-Qaida operatives was that they were engaged in a NIAC, on the basis of the war in Afghanistan. However, many legal scholars have disputed the fact that the group is organized enough to be in an armed conflict with them (Hlavkova, 2014, pp. 274-276). Thus, making extraterritorial targeting not justifiable on this basis. Moreover, it is highly questionable if Bin-Laden was still plotting against the US or directing the group in Afghanistan. Therefore, it is very interesting how positively the international community reacted to the killing of Bin-Laden, without much mentioning the possible breaches of law.

The reaction of the UN secretary-general Ban-Ki-Moon, to the announcement of US President Barack Obama that the US had conducted an operation in which it had killed Bin-Laden, was especially positive, mentioning the relief he felt with the death/killing of Bin-Laden:

“Personally, I am very much relieved by the news that justice has been done to such a mastermind of international terrorism. I would like to commend the work and the determined and principled commitment of many people in the world who have been struggling to eradicate international terrorism.”

He went on to call the announcement of the death of Bin-Laden, “(...) a watershed moment in our common global fight against terrorism”.

He also condemned terrorism in all its forms and reaffirmed the UN’s commitment to combat terrorism – a campaign in which according to him the UN takes a leadership position in and he thanked all the world leaders committed to the UN’s fight against terrorism (OUNSG, 2011).

Moreover, he talked about the actions that the UN is taking to combat terrorism: “The United Nations General Assembly has adopted a global counter-terrorism strategy, and on the basis of that, we will continue to work together with Member States of the United Nations to completely eradicate global terrorism. Thank you very much. I need your support (OUNSG, 2011).

The secretary-general, in calling the killing of Bin-Laden ‘A watershed moment’ and saying that with his killing “justice was done’ gives moral legitimacy to the actions taken by the United States. In the statement, the UN chief did not question what justified the operation and its apparent violations of International Law. Moreover, by touting the action taken by the UN and its member states in combating terrorism, and in asking for further support, he places the moral righteousness of the US operation in with the other measures taken by the UN and the international community.

Much like Ban-Ki-Moon, the North Atlantic Treaty Associations' (NATO) secretary-general, Anders Rasmussen, congratulated everyone involved in the operation that killed Bin-Laden, calling it "a significant success for the security of NATO Allies". He connected the Killing of Bin-Laden, to NATO's involvement in the war in Afghanistan, saying that "NATO Allies and partners will continue their mission to ensure that Afghanistan never again becomes a safe haven for extremism" (NATO, 2011). Linking the war in Afghanistan to Bin Laden's killing seems to suggest that he subscribes to US governments' expanded interpretation of the geographical scope of NIACs as a justification of the targeting of Bin-Laden as a combatant. Moreover, from this can also be inferred that NATO accepts the American viewpoint that Al-Qaeda is sufficiently organised to fully be seen as an opponent in a NIAC, or perhaps more likely, that in practice the degree organization is becoming less important in the designation of armed groups as combatants engaged in a NIAC.

In a press conference, German Chancellor Angela Merkel lauded the US operation. She was 'pleased that the US managed to kill Bin-Laden,' calling his death a victory (Office of the Chancellor, 2011). A reporter questioned the chancellor about the method used by the US – which was likely a targeted killing – and asked if German forces should also be employing these methods against terrorist leaders (Office of the Chancellor, 2011). She deflected the question by saying that she's happy with the death of Bin-Laden, because now he could not hurt others anymore, that is what counts. She went on to say that this is why she congratulated those involved in the mission and the US president. It is important to note that Germany has in the past criticized American policy regarding targeted killings beyond the battlefield, like the ones conducted with drones in Pakistan and Yemen.

The reaction of the Belgian Prime-Minister, was perhaps more telling than Merkel's, saying that "under normal circumstances one would expect a trial to take place, but that given the acts that were committed on the initiative of Osama Bin-Laden, this is a good solution [referring to the killing, instead of the arrest of Bin-Laden] (De Standaard, 2011).

Russia's reaction to Bin-Laden's death was overwhelmingly positive, noting that Russia had also fallen victim to attacks from Al-Quada, adding that "retribution will inevitably reach all terrorists (CNN, 2011)." Moreover, then president Dimitry Medvedev, when speaking about the killing, noted that "the liquidation of terrorists, even on the level of bin Laden, has a direct relationship to the level of security on the territory of our state" (Anishchuk, 2011). Medvedev's characterization of the killing as a liquidation – and his positive connotation of such acts – signals Russia's approval of these targeted killings. This is highly interesting as Russia has often been highly critical of US policy in the middle east that pursues members of armed groups and its general adversarial relationship on foreign policy matters. That being said, however, Russia has in the past themselves also executed similar targeted killing operations.

The statement made by world leaders, almost all lack the criticism that could reasonably be expected to emerge given the rather slim legal argument that could be made in favour of the killing. Most, characterize the death of Bin-Laden as a moral victory against terrorism, commending the intelligence and military professionals involved in the operation. With the hailing of this operation as a moral victory and not criticizing the illegality of the operation, the legitimacy of the operation is reinforced. With more legitimacy for these kinds of military operations, that operate on the outskirts of what is commonly accepted practice in international humanitarian law, not just new moral standards appear, but also a new legitimization of a new kind of state behaviour takes place. Since much of international law, including IHL, heavily

depends on case law, which in turn relies on state practice to help define what is acceptable, repeated behaviour by states can help shape it (Hlavkova, 2014, p. 269).

3.4 Norm Setting: NGOs

In developing new norms, it is usually, non-governmental organisations (NGOs), such as human rights groups that try to promote the introduction of new norms on to the agenda. Most of the norms that these kinds of groups try to promote are restrictive in nature, trying to curb state power and applying more expansive human rights regimes. This is also what human rights groups try to do with the LOAC (Jose 2017, pp. 238-242), pushing for more and more of the IHRL norms to be applied more conjointly. Thus far, in the examination of the evolution of targeting beyond the theatre of a NIAC, most attention has been paid to how states attempt to push the boundaries in which they are allowed to operate in a way that is less restrictive, instead giving them more authorizations. However, in testing how commonly accepted the expanded interpretation of the law is, after the target killing of Bin-Laden, we can instead look at how their methods for challenging this expanded interpretation of targeted killings beyond the geographical scope of a NIAC, manifested.

The reactions of human rights organisations such as Human Rights Watch (HRW) and Amnesty International, were different than the one from states as they did not only commend the moral victory over terrorism that the death of Bin-Laden represented, instead, they were, from the very beginning wary of the legal justification that the United States provided and the possible norm setting implication that the killing of Bin-Laden could have. Challenging that Bin Laden was a combatant who could be targeted at any time, they argued that it was only appropriate for Bin Laden to be killed if he posed an imminent threat to American soldiers (Jose 2017, pp. 240-247). They also criticize the statements made by UN secretary-general, in which

he said that with the killing of Bin-Laden justice was done. Amnesty also criticised the operation – and international reaction to it – by stating that if there was no intention to capture Bin-Laden alive, that would constitute a breach of international law (The Telegraph, 2012). Both HRW and Amnesty called for the US to release more information about the raid, asking for the exact scope of the operation.

3.5 From Contestation to Mitigation

In Jose (2017), it is examined how HRW has responded to the US's expanded interpretation of IHL, special attention is paid to how HRW tries to combat the emergence of normative agreement on target killings as an acceptable practice. In the study, the process through which the organization has gone was examined. The organization first tried to combat this emerging practice, by attempting to deny a norm for targeted killing altogether, but has later moved to a strategy of mitigation by trying to prevent the emergence of a targeted killing norm in which the accepted codes of conduct are unrestrained (Jose, 2017, pp. 245-247). Jose, concludes, that especially after the killing of Bin-Laden, the road to intersubjective agreement about a targeted killing norm has come closer. Where HRW before the killing of Bin-Laden, seemed to entirely contest the expanded geographical scope beyond the zone of armed conflict, after the killing it only said that since Al-Qaeda cannot be designated as a participant to an armed conflict, the killing did not fall within the realm of IHL. But, not trying to refute that in some cases, ANSA can be targeted beyond the theatre of the armed conflict. Furthermore, instead of standing by the position that civilian casualties in such strikes are unacceptable, to a position that places the emphasis on the minimization of civilian casualties. That HRW has evolved so extensively, from first trying to contest and suppress the norm in its entirety, to now trying to curb under which circumstances they are permissible, also gives an indication to how states view such actions. If HRW is convinced that it can only narrow the scope of this norm, instead of

nullifying it in its entirety, it is not unreasonable to see this as an indicator that states have adopted a broader definition of the justness of targeted killings beyond a NIAC. Especially, if we consider that there usually is a power struggle between NGOs, who want to expand prohibitive norms to protect human rights, and states who want the room to effectively operate against emerging threats, the NGOs change in strategy towards mitigation signals that they believe that states have adopted a broader definition of the justness of targeted killings.

3.6 Bin-Laden's Killing: Lasting Consensus?

The question that now arises is whether the international community's seeming acceptance of the US's actions with regards to the Bin-laden, killing is also setting a precedent for other operations? After the death of Bin-Laden, the US continued with its expansion of targeted killings using drone strikes, especially in Yemen (Jose, 2017, pp. 54-57). The international community has largely remained silent about these strikes, in contrast to their response to the targeted killings of the Bush administration, that also happened outside the confines of a NIAC (Jose, 2017, p. 54). Jose notes, after the killing of Bin-Laden the European Union (EU) still has not come up with an official policy position regarding target killings beyond the scope of a NIAC, despite calls to do so. Moreover, there is evidence that suggests that other states are now also using the same tactics employed by the US government. The United Kingdom, which alongside the US – in the pre-9/11 era – condemned Israel for its use of targeted killings, is now itself employing these tactics. In August 2015, through a drone strike, it killed two of its own citizens in Syria, whilst not being engaged in an active military conflict there as the British parliament only authorized airstrikes against ISIS in Iraq (MacAskill, 2015). With the international community now seemingly unwilling to condemn these strikes, unwilling to form concrete policy measures against it, or even adopting some of the strategies employed by the United States, it seems reasonable to suggest that these types of targeted killing have gained a

certain amount of legitimacy. The shift in strategy by HRW, from entirely trying to suppress this norm too, attempting limit the scope where such attacks would be carried out, seems to support this statement. This is further reinforced by a panel held by the UN about the use of targeted killings in which the panel chair said of the use of targeted killings “this form of warfare is here to stay”, concluding that since it will remain in use, states will need to regulate these practices to prevent an ever-expanding scope in which these killings would be used, contrary to international law (Emmerson, 2013). That the opinion about such actions, among state has evolved seems quite clear. Looking at the fact that the international community, before the attacks of 9/11, almost universally condemned targeted killings beyond the geographical scope of an armed conflict, still being very critical during the first years of the American war against terrorism, especially when the government conducted these operations covertly and thus without much explanation. When the US started to be more open of its actions and detail the reasons behind it, there was no complete rejection of this doctrine, but states were far from endorsing their actions. After the attack that killed Bin-Laden, a normative shift that has taken place, with states not just saying that they are happy that Bin-Laden no longer poses a threat, but also commending the operation in and of itself. Thus, also, all be it tacitly, approving of such actions. That Bin-Laden was mostly likely seen as a hated figure by the majority of the international community, for the indiscriminate attacks on civilians, but also for military action(s) that took place in the middle east as a reaction to the attack that his organization spearheaded, likely contributed to the acceptance of American operation that killed him.

Moreover, the manner in which the killing of Bin-Laden was conducted, namely in a precise boots on the ground mission, that was for the most part able to leave the uninvolved population unharmed, contributed to its acceptance. However, since this targeted killing also seems to have

shifted the legitimacy of the act itself, other methods of targeted killings, such as with drones, are now in certain instances more acceptable.

Although the international community seems to be more accepting of the fact that targeted killings beyond the geographical scope of a NIAC is now a reality of modern-day conflict, this does not mean that the targeted killing norm has broken through. Much of the international community, is likely still uncomfortable with implications that such a norm would have, especially since coming to an agreement about when they are permissible would likely be difficult. Jose (2017), concludes that until intersubjective agreement can be reached about under which circumstances, they are permissible, the norm has not fully emerged and is still in its pre-emergence phase. Once, this agreement has been reached the norm can start to become institutionalized. When a large portion of the international community signs on to a treaty, then the norm is cascaded.

4. Analysis

The laws of armed conflict that govern NIACs, are in many ways quite vague. This was, for the most part, the intent when they were created, as states did not want to limit themselves when fighting against ANSAs who challenged a state's power. With the changing nature of threats faces by states, the lack of clear guidance resulted in states interpreting the law in very different ways, as some suggested that the laws of armed conflict, because of its unclarities, was not applicable in some of the current conflicts. Instead, it was suggested that often the more restrictive IHRL rules should apply, state practice has shown that many do not share this interpretation. International tribunals in the limited judgments about this matter, and the ICRC, have shown that a broader interpretation of when a conflict constitutes a NIAC can be applied, and that thus a broader view of which actions can be taken against ANSAs can also be taken.

Although there are very few judgements that deal with targeted killings, the broader moral acceptance that targeted killings can be under some circumstances justified, will possibly help shape future judicial rulings. Moreover, since it is possible that other states will also start using the same tactics – the UK is an example of this – and repeated state behaviour is an important factor in shaping, what is legally permissible under international law, it is probable that conversation will increasingly shift to not if, but when such targeted killings are permissible. The question will then not focus on if the ANSA is targetable, but rather, what rights the uninvolved population in the vicinity of the target, will get accorded.

5. Conclusion

It is too early to say that a new norm about the permissibility of targeted killings in the realm of extraterritorial NIACs has fully emerged. However, it can be concluded that a normative shift in favour of allowing, at least in some instances, targeted killings, has occurred. Especially after the killing of Osama Bin-Laden, the majority of the international community, including the United Nations, stood behind the tactics of this operation. Such a surge of support for these kinds of operations had never been shown before. After Bin-Laden's killing, the UNHRC, admitted that targeted killings are 'here to stay'. Indicating that there must come a consensus about when such tactics may be deployed and how to protect the uninvolved population in the vicinity of the target. Moreover, how HRW changed its strategy of attempting to suppress the emergence of the norm altogether, to a strategy that only tries to suppress the scope of such a norm, shows that acceptance of targeted killings is no longer an outlier.

In conclusion, it can be assumed, that with the broadened acceptance of these targeted killings, states will continue with this practice, it would seem probable that without a common standard of when and how these tactics are permitted, states will try to 'test the water' to see how far they can take their actions, without being condemned. If states try to further expand the scope

of targeted killings and go too far, this might eventually lead to a consensus about when and how these killing are permitted. With international humanitarian law, slow to catch up, however, having a clear line of demarcation of what is, and what is not, permitted, when it comes to this subject, will not likely to be clear anytime soon.

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