Leiden Journal of International Law (2019), **32**, pp. 741–757
doi:10.1017/S0922156519000475

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

'Targeted killing' and the lack of acquiescence

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Abstract

Over the last decade, the concept targeted killing has received much attention in debates on the customary interpretation of the right to self-defence, particularly in the context of practices such as US armed drone attacks. In these debates, government silence has often been invoked as acquiescence to the *jus ad bellum* aspects of targeted killing. Focusing on the question of state silence on targeted killing practices by the Israeli and US governments in recent years, this article investigates over 900 UN Security Council and Human Rights Council debates and argues that there has been no tacit consent to targeted killing. The analysis firstly shows that the majority of states have condemned Israeli targeted killing practices and have raised concerns about armed drone attacks, while falling short of directly protesting against US practices. The article, secondly, applies the customary international law requirements for acquiescence and challenges the idea that silence on US armed drone attacks can be understood as a legal stance towards targeted killing. The article, finally, investigates the political context and engages with alternative interpretations of silence. Contextualizing acts of protest and lack of protest within an asymmetrical political context, the article posits that the invocation of silence as acquiescence in the case of targeted killing is problematic and risks complicity of legal knowledge production with the violence of hegemonic actors.

Keywords: acquiescence; armed drone attacks; self-defence; state silence; targeted killing

1. Introduction

In April 2015, the European think tank International Centre for Counter-Terrorism (ICCT) published a paper titled 'Towards a European Position on Armed Drones and Targeted Killing'.[1] The document is one of many contributions which show the immense interest the concept targeted killing has received from scholars, legal experts, and policy makers in the last decade.[2] It links into a heated debate over whether or not traditional interpretations of the right to self-defence have

[1]J. Dorsey and C. Paulussen, 'Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counter-terrorism Perspectives', *ICCT*, April 2015, available at icct.nl/wp-content/uploads/2015/05/ICCT-Dorsey-Paulussen-Towards-A-European-Position-On-Armed-Drones-And-Targeted-Killing-Surveying-EU-Counterterrorism-Perspectives.pdf.

[2]HRC, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philipp Alston, UN Doc. A/HRC/14/24/Add.6(2010); HRC, Summary of the Human Rights Council Interactive Panel Discussion of Experts on the Use of Remotely Piloted Aircraft or Armed Drones in Compliance with International Law, UN Doc. A/HRC/28/38(2014); House of Lords, House of Commons, Joint Committee on Human Rights, 'The Government's Policy on the Use of Drones for Targeted Killing, Second Report of Session 2015-16', 10 May 2016, available at publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf; European Parliament, Resolution of 27 February 2014 on the use of armed drones, 2014/2567(RSP); M. E. O'Connell, 'Remarks: The Resort to Drones Under International Law', (2010) 39 *Denver Journal of International Law and Policy* 661; K. Anderson, 'Targeted Killing in U.S. Counterterrorism Strategy and Law', 11 May 2009, *SSRN*, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1415070; S. Krasmann, 'Targeted Killing and Its Law: On a Mutually Constitutive Relationship', (2012) 25 LJIL 665; K. J. Heller, '"One Hell of a Killing Machine": Signature Strikes and International Law', (2013) 11 *Journal of International Criminal Justice* 89.

changed, or could change, to encompass the use of force against particular individuals on foreign territory without consent of the host state.[3] This has been seen as particularly pertinent because of 'the increasing use of UAVs to conduct targeted strikes, especially in areas outside of active hostilities'.[4]

In the ICCT paper on targeted killing, the authors draw attention to the question of the 'public silence on the issue of drone use'[5] and whether this silence could potentially be read as acquiescence. Because customary international law develops from consistent state practice and the explicit – or implicit – acceptance by a majority of governments,[6] non-objection can play a crucial role in the development of new customary international interpretations.[7] It is in this context that a number of scholars have noted silence regarding armed drone attacks and similar targeted killing operations as evidence for *opinio juris*. Referring to the 'muted reaction . . . in regard to the US drone campaign',[8] Plaw and Reis have, for example, argued that 'most other states seem to be willing to acquiesce in this reinterpretation of the customary law of self-defense'.[9]

This article challenges the claim that targeted killing has been acquiesced to. Investigating reactions to the *jus ad bellum* aspects of Israeli and US targeted killing practices, in particular in the context of armed drone attacks, the article proceeds along three lines of enquiry. After a brief overview of the concept targeted killing and the acquiescence doctrine, the article first questions the invocation of silence at an empirical level. Examining 975 Security Council debates and documents at the Human Rights Council (HRC) between 2000 and 2016 the article demonstrates that the majority of states have protested against Israeli targeted killing practices. A discussion of US targeted killing practices, such as armed drone attacks, seems to have been avoided at the Security Council, although it has taken place at the HRC.

Consequently, the article questions the interpretation of silence as acquiescence in the case of US armed drone attacks based on the customary international law requirements for acquiescence. It problematizes whether silence in this case can be understood as a consistent, legal stance towards a public and openly known state practice, which demonstrates legal commitment and advances a general, legal claim. Instead, the covert nature of targeted killing practices and the inconsistency and ambiguity of the legal claims advanced with armed drone attacks correspondingly raises questions about the 'legal quality' of any lack of protest.

The article, third, follows the recommendation of the International Law Commission to investigate the particular circumstances of absences of protest.[10] Non-objections to targeted killing practices might have nothing to do with tacit consent but might be due to political circumstances. Building on Third World Approaches to International Law (TWAIL), the article shows that the political context is particularly important to examine in the case of targeted killing practices because of the power asymmetries underlying practices, such as armed drone attacks. They constitute a use

[3]A. J. Radsan and R. W. Murphy, 'Due Process and Targeted Killing of Terrorists', (2009) 31 *Cardozo Law Review* 406.

[4]UNODA, 'Study on Armed Unmanned Aerial Vehicles: Prepared on the Recommendation of the Advisory Board on Disarmament Matters', 2015, available at unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf.

[5]Dorsey and Paulussen, ICCT Research Paper, *supra* note 1.

[6]M. E. Villiger, *Customary International Law and Treaties* (1985); M. Byers, *Custom, Power, and the Power of Rules* (1999).

[7]ILC, Report by Special Rapporteur Michael Wood, Third Report on Identification of Customary International Law, UN Doc. A/CN.4/682(2015); M. Mendelson, 'The Subjective Element in Customary International Law', (1995) 66 *British Yearbook of International Law* 177.

[8]A. Plaw and J. F. Reis, 'The Contemporary Practice of Self-Defense: Evolving Toward the Use of Preemptive or Preventive Force?', in K. Fisk and J. M. Ramos (eds.), *Preventive Force: Drones, Targeted Killing, and the Transformation of Contemporary Warfare* (2016), 229, 240.

[9]Ibid.

[10]ILC, UN Doc. A/CN.4/682, *supra* note 7; see also O. Corten, 'The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate', (2005) 16 *European Journal of International Law* 803; C. Gray, *International Law and the Use of Force* (2008).

https://doi.org/10.1017/S0922156519000475 Published online by Cambridge University Press

of force by hegemonic actors directed against non-state actors in marginalized border regions in Third World states.

Based on these three lines of analysis (empirical findings, requirements for acquiescence and investigation of the political context), the article concludes that silence cannot be interpreted as acquiescence in the case of recent targeted killing practices. Rather, the invocation of silence as acquiescence in itself risks complicity of legal knowledge production with the legitimization of contentious forms of state violence by hegemonic actors.

2. Acquiescence and the un/lawfulness of 'targeted killing'

Even though there has been a proliferation of treaty law in the twenty-first century, customary international law remains crucial (i) for the interpretation of existing treaties, especially in vague areas such as the use of force; (i) for new aspects of international law, which have not yet been negotiated; and (iii) for the clarification of some longstanding issues for which no explicit treaty has been decided.[11] This last point hints at the importance of acquiescence for international law. A majority of customary international law comes about through the practice of a small number of 'movers and shakers' and the silence, interpreted as acquiescence, of the rest.[12]

Unlike the written 'thereness'[13] of treaty law, which offers more densely linked intertextual meanings, customary international law relies on the interpretation of state actions and omissions. Examining whether or not customary international law has been changing, the silence of governments then appears as a question of evidence, a question of whether 'the absence of international comment or criticism . . . be interpreted as tacit endorsement'.[14] Acquiescence thus 'comes into play when silence or inaction is interpreted in such a way as to manifest a state's acceptance of a factual or legal situation'.[15]

Drawing on the importance of 'the toleration by a state of a practice of another or other states',[16] some scholars have discussed state silence in recent debates on the right to self-defence in counterterrorism use of force.[17] Different cases are cited to have demonstrated 'that the majority of states agree on the need to adapt existing rules to the changes in geopolitical realities'.[18] Murphy, for example, legally justifies US drone attacks by referring to similar state practices which have not prompted any objection by other states.[19] Anderson argues that the practice of targeted attacks has been tacitly endorsed by the international community,[20] and Plaw and Reis refer to the 'muted reaction . . . in regard to the U.S. drone campaign'[21] and argue that 'most other states seem to be willing to acquiesce in this reinterpretation of the customary law of self-defense'.[22]

[11]C. A. Bradley and M. Gulati, 'Withdrawing from International Custom', (2010) 120 *Yale Law Journal* 202, 209.

[12]Mendelson, *supra* note 7, at 185.

[13]J. Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', (2004) 15 *European Journal of International Law* 523, 524.

[14]A. Garwood-Gowers, 'Israel's Airstrike on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-Emptive Self-Defence?', (2011) 16 *Journal of Conflict and Security Law* 263, 265.

[15]S. Kopela, 'The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals', (2010) 29 *Australian Year Book of International Law* 87.

[16]ILC, UN Doc. A/CN.4/682, *supra* note 7.

[17]O. Corten 'The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?', (2016) 29 LJIL 777; Garwood-Gowers, *supra* note 14; T. Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11', (2011) 105 *American Journal of International Law* 244.

[18]Reinold *supra* note 17, at 245.

[19]S. D. Murphy, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan', (2009) 85 *International Law Studies U.S, Naval War College* 109.

[20]Anderson, *supra* note 2.

[21]Plaw and Reis, *supra* note 8, at 243.

[22]Ibid., at 246.

https://doi.org/10.1017/S0922156519000475 Published online by Cambridge University Press

The discussion around a developing lawfulness of targeted killing has been somewhat complicated by the contradictory invocations of the term. The concept targeted killing has on the one hand been employed in order to emphasize the precision of attacks *within* traditional armed conflicts, adhering to enshrined international humanitarian law (IHL) principles.[23] Targeted killing used in this sense would be understood to be lawful by most international lawyers.[24] The concept has, on the other hand, been used to describe a range of *jus ad bellum* claims regarding a wider right to self-defence. It is targeted killing in this second use of the term, advanced mainly by the US and Israeli governments, which will be the focus of this article. Targeted killing in this use entails a conceptual, geographical and temporal widening of the right to self-defence.[25]

Conceptually, targeted killing has raised debates regarding the applicable legal paradigm and has 'blur[red] the line between war in the traditional sense on the one hand and countering the crime of terrorism on the other'.[26] The US government has argued that targeted killing is lawful as an act of self-defence 'outside areas of active hostilities'[27] – yet while applying principles of the laws of war.[28] This ignores the threshold requirements for a violent confrontation to be regarded as an armed conflict in international law.[29] According to these requirements, the intensity of fighting has to reach a certain threshold on both sides of the conflict, and the terrorist group has to show a degree of organization, in order for a violent clash to be regarded as an armed conflict and IHL to take effect.[30] Outside of armed conflicts, international human rights law would have to be observed, particularly the right to life and the right to due process.[31]

The identification of an armed conflict, in turn, is separate from the *jus ad bellum* question of whether the territory of another state can be infringed, a question often ignored in targeted killing debates.[32] For the flight of an aircraft over territorial airspace, or the use of police or military measures on the territory of another state, there has to be 'valid consent'[33] of the territorial state, unless the infringement is authorized by the Security Council, or the measure is taken in lawful

[23]A. S. Wilner, 'Targeted Killings in Afghanistan: Measuring Coercion and Deterrence in Counterterrorism and Counterinsurgency', (2010) 33 *Studies in Conflict & Terrorism* 307; J. M. Beard, 'Law and War in the Virtual Era', (2009) 103 *American Journal of International Law* 409; H. H. Koh, U.S. Department Of State, 'The Obama Administration and International Law', Speech, 25 March 2010, available at 2009-2017.state.gov/s/l/releases/remarks/139119.htm; J. Tinetti, 'Lawful Targeted Killing or Assassination: A Roadmap for Operators in the Global War on Terror', 9 February 2004, *Naval War College Newport, R.I.*, available at apps.dtic.mil/dtic/tr/fulltext/u2/a422785.pdf.

[24]But see the argument that 'targeted killing' contradicts the IHL assumption that combatants are not criminals made by M. L. Gross, 'Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?', (2006) 23 *Journal of Applied Philosophy* 323, 326.

[25]See, for a similar discussion of the issues raised by 'targeted killing', UNGA, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. A/68/389(2013).

[26]House of Lords, House of Commons, Joint Committee on Human Rights, *supra* note 2, at 6; L. R. Blank, 'Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications', (2012) 38 *William Mitchell Law Review* 1655.

[27]The White House, 'Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities', 23 May 2013, available at obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism.

[28]J. O. Brennan, 'The Efficacy and Ethics of U.S. Counterterrorism Strategy', *Wilson Center*, 30 April 2012, available at www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy; J. J. Paust, 'Self-Defense Targetings of Non-State Actors and Permissibility of US Use of Drones in Pakistan', (2009) 19 *Journal of Transnational Law & Policy* 237, 260.

[29]ILA, 'Final Report Meaning of Armed Conflict in International Law', 2010, available at www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf; M. S. Wong, 'Targeted Killings and the International Legal Framework: With Particular Reference to the US Operation against Osama Bin Laden', (2012) 11 *Chinese Journal of International Law* 127.

[30]M. Brookman-Byrne 'Drone Use "Outside Areas of Active Hostilities": An Examination of the Legal Paradigms Governing US Covert Remote Strikes', (2017) 64 *Netherlands International Law Review* 3; M. E. O'Connell, 'When Is a War Not a War? The Myth of the Global War on Terror', (2005) 12 *ILSA Journal of International & Comparative Law* 535.

[31]Heller, *supra* note 2.

[32]A. Henriksen, '*Jus ad Bellum* and American Targeted Use of Force to Fight Terrorism Around the World', (2014) 19 *Journal of Conflict and Security Law* 211, 215.

[33]UNGA, Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83(2002), 5, Art. 20.

self-defence. As the International Court of Justice (ICJ) ruled in the *Nicaragua* case, self-defence in another state can only be invoked if the government of that state had been responsible for an armed attack.[34] Saura put it rather provocatively: 'could anyone imagine the United Kingdom bombing the Republic of Ireland during the IRA years (or bombing the US, by the way, where the IRA used also to obtain funding)?'[35]

Some, including US government representatives, have argued that non-state actors can be directly targeted independent of attribution of the attack to the state or consent of the territorial state in which the individuals are located.[36] Targeted killing attacks have been closely linked to arguments of a so-called global war on terror between the US and 'al-Qaeda, as well as the Taliban and its associated forces'[37] according to which use of force directly against these individuals always constitutes an act of self-defence.[38] This entails a much wider geographical remit of the right to self-defence, often hinging on the requirement that the territorial state is understood to be 'unable or unwilling to take actions against the threat'.[39]

This so-called 'unable or unwilling' approach has itself become the subject of much debate in international law.[40] Some have argued that the doctrine has developed as a new customary interpretation of the right to self-defence which allows states to use military force on foreign territory 'to the extent that the foreign State cannot be relied on to prevent or suppress terrorist activities'.[41] Others have argued that this interpretation has not, or should not, become lawful as it would open the door for powerful states to invoke the right to self-defence in a discriminatory notion against less powerful states.[42]

Temporally, targeted killing claims have relied on a pre-emptive understanding of the right to self-defence against individuals who are seen to present a threat of carrying out *future* terrorist attacks. This relies on an ambiguous notion of threat which 'does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future'[43] and runs counter to other interpretations of the right to self-defence which require a prior (or imminent) armed attack. It has been controversial in scholarship and jurisprudence,[44] not least because of 'all the ways in which pre-emption can disadvantage third-world states, which will be the inevitable object of the exercise of the doctrine'.[45]

[34]*Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States Of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14.

[35]J. Saura, 'On the Implications of the Use of Drones in International Law', (2016) 12 *Journal of International Law and International Relations* 120, 137.

[36]Paust, *supra* note 28.

[37]Koh, U.S. Department of State, *supra* note 23.

[38]It has thus been argued that 'the armed conflict between U.S. military forces and those of the Taliban inside and outside of Afghanistan since October 7, 2001 is an international armed conflict' within the framework of which 'all of the customary laws of war apply', see Paust, *supra* note 28, at 261.

[39]Brennan, *supra* note 28.

[40]D. I. Ahmed, 'Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defense', (2013) 9 *Journal of International Law and International Relations* 1; Corten, *supra* note 17; I. Couzigou, 'The Right to Self-Defence Against Non-State Actors: Criteria of the "Unwilling or Unable" Test', (2017) 77 *Heidelberg Journal of International Law* 53.

[41]K. N. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors', 56 *International & Comparative Law Quarterly* 141, 156.

[42]Ahmed, *supra* note 40; Corten, *supra* note 17.

[43]U.S. Department of Justice, 'Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force', Draft 8 November 2011, available at fas.org/irp/eprint/doj-lethal.pdf, at 7.

[44]C. Greenwood, 'International Law and the Pre-Emptive Use of Force', (2003) 4 *San Diego International Law Journal* 7; W. M. Reisman and A. C. Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense', (2006) 100 *American Journal of International Law* 525; D. Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors', (2012) 106 *American Journal of International Law* 770; Garwood-Gowers, *supra* note 14; A. Anghie, 'The War on Terror and Iraq in Historical Perspective', (2005) 43 *Osgoode Hall Law Journal* 45.

[45]Anghie, Ibid., at 51.

https://doi.org/10.1017/S0922156519000475 Published online by Cambridge University Press

Because of the temporal, conceptual, and geographical challenges of targeted killing in the second use of the term, some international law scholars have warned of the damaging effects of targeted killing and practices, such as US armed drone attacks, for international law.[46] Many commentators have hence expressed concern at how Israel formally adopted a targeted killing policy in 2000[47] and how the US government has used the concept targeted killing in order to justify attacks outside of traditional zones of armed conflict with armed drone attacks in Pakistan, Yemen and Somalia.[48]

These practices are not altogether new. Claims for a wider right to self-defence against non-state actors in counterterrorist operations in Third World countries have been made for decades by different actors. In particular, the US and Israeli governments have justified use of force along these lines since the 1970s, despite opposition by other states to those practices.[49] Yet, the use of the concept targeted killing to describe such practices is an invention of the twenty-first century, closely linked to the use of unmanned aerial vehicles (UAVs) or drones.[50] More importantly for this article, the claim of acquiescence to such practices seems to have been made more frequently in recent decades.

It could of course be argued that targeted killing based on such a wide interpretation of the right to self-defence clearly breaks international law requirements[51] and contradicts the *jus cogens* norm of the prohibition of the use of force.[52] Yet the invocation of silence as acquiescence to such practices has been important in interpretive struggles around the legitimacy of such practices. Rather than directly investigating the un/lawfulness of targeted killing in and of itself, the rest of this article investigates the claim of silence as acquiescence to the *jus ad bellum* aspects of targeted killing.

3. Acts of protest, lacks of protest

For obvious reasons, most scholarship on targeted killing seems to have focused on the practices and justifications by those states directly engaging in the practice. This means mainly a focus on practices by the US and Israel, the two governments which have officially endorsed targeted killing in the way defined above. The UK has also been seen to conduct targeted killing attacks on occasion, though it is very unclear whether or not the UK has indeed endorsed the *jus ad bellum* aspects of targeted killing.[53]

Despite this focus on mainly three states, other states have crucially come into debates on a wider right to self-defence through the silence claim made particularly by those interpreters who argue for a more expansive right to self-defence. As Starski summarized:

[46]R. Brooks, 'Drones and the International Rule of Law', (2014) 28 *Ethics & International Affairs* 83, 98.

[47]Note, however, that the Israeli government relies on a rather particular legal framework in the Occupied Territories; see O. Ben-Naftali and K. Michaeli, '"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* 233.

[48]European Parliament, 2014/2567(RSP), *supra* note 2; HRC, UN Doc. A/HRC/14/24/Add.6(2010), *supra* note 2; Dorsey and Paulussen, ICCT Research Paper, *supra* note 1; O'Connell, *supra* note 2; Ahmad, 'The Legality of Unmanned Aerial Vehicles Outside the Combat Zone', (2014) 30 *Defense & Security Analysis* 245.

[49]These practices were discussed during a number of Security Council debates and resolutions; see, for example, UNSC, Provisional verbatim record of the 2674th meeting, held at Headquarters, New York, on Tuesday, 15 April 1986, UN Doc. S/PV.2674(1986); UNSC, Israel-Lebanon, UN Doc. S/RES/425(1978); UNGA, Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the aerial and naval military attack against the Socialist People's Libyan Arab Jamahiriya by the present United States Administration in April 1986, UN Doc. A/RES/41/38(1986).

[50]See E. Schweiger, 'The Lure of Novelty: "Targeted Killing" and Its Older Terminological Siblings', *OUP*, 3 June 2019, available at doi.org/10.1093/ips/olz006

[51]O'Connell, *supra* note 2.

[52]U. Linderfalk, 'The Post-9/11 Discourse Revisited: The Self-Image of the International Legal Scientific Discipline', (2010) 2 *Goettingen Journal of Intenational Law* 893, 939.

[53]House of Lords, House of Commons, Joint Committee on Human Rights, *supra* note 2.

https://doi.org/10.1017/S0922156519000475 Published online by Cambridge University Press

> All these different expansionist lines of argument arrive at their conclusion by referring to the (contested) practice and explicit contentions of a limited number of states, the verbal support of these actions and claims by a few other states, and the fact that they are *not opposed* by the remaining majority of states.[54]

This section focuses on state reactions to targeted killing practices, such as armed drone attacks, and challenges the assumption that there has been silence on targeted killing. Targeted killing practices are often shrouded in secrecy and attacks *outside* of traditional zones of armed conflict are often part of military campaigns *within* traditional armed conflicts[55] which means that a classic investigation case by case would be very difficult. Instead, this section builds on a comprehensive analysis of 975 Security Council debates from January 2000 to December 2016 as well as other UN reports.

The methodology for selecting the Security Council debates was based on the topic and region under discussion: the article examined all Security Council debates with topics referring to the use of force, such as 'threats to international peace and security' or 'protection of civilians in armed conflicts' as well as all debates referring to the countries and regions within which targeted killing claims have been used to justify the use of force, such as 'the situation in the Middle East', or 'the situation in Somalia'. This returned 975 Security Council debates, each of which were examined for the following key words: 'targeted'; 'drone'; 'unmanned'; 'remote'; 'execution'; 'extrajudicial'; 'assassination'. The last three key words were included after a first review of debates on Israeli targeted killing practices which showed that states often discussed these practices using the terms 'extrajudicial execution' or 'assassination', sometimes interchangeably with the term targeted killing.

The analysis indicates that most states have rejected Israeli targeted killing claims and practices in various Security Council debates. Reacting to the targeted killing of Sheikh Ahmed Yassin in 2004, the representative of China stated that 'the practice of targeted removal by Israel violates international law and is therefore unacceptable',[56] the French representative found, in addition to condemning this particular killing, that 'France has always condemned the principle of any extrajudicial execution as contrary to international law'[57] and numerous other states voiced strong objections to the operation.[58] Similarly, after the killing of Abdel Aziz Al-Rantisi, which was justified by Israel as a 'targeted counter-terrorist operation',[59] the Russian delegation pronounced not only that it objected to this strike but that 'on numerous occasions Russia has declared its rejection of extrajudicial execution and targeted elimination';[60] similar statements were made by Algeria, Benin, Angola, Spain, Brazil, the UK, China, Chile, France, Egypt, and the Permanent Observer of the League of Arab States.[61] While these states do not tend to reveal the legal reasoning for why they believed these killings were unlawful, most of them voice their objections not simply based on the circumstances (such as a lack of proportionality) of that particular case but object more generally to 'Israel's policy of organized assassinations and extrajudicial killings'[62] as being contrary to international law.

[54]P. Starski, 'Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force', 15 October 2016, *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-20*, available at ssrn.com/abstract=2851809, at 15.

[55]Brookman-Byrne, *supra* note 30.

[56]UNSC, United Nations Security Council Debate (4929th Meeting): The situation in the Middle East, including the Palestinian question, UN Doc. S/PV.4929(2004).

[57]Ibid.

[58]Ibid.; see also Algeria, United Kingdom, Pakistan, Chile, Russia, Spain, Germany, France, Libya, Egypt, Quatar, the League of Arab States, Bahrain, Ireland, Jordan, Tunisia, and Indonesia.

[59]UNSC, United Nations Security Council Debate (4945th Meeting): The situation in the Middle East, including the Palestinian question, UN Doc. S/PV.4945(2004).

[60]Ibid.

[61]Ibid.

[62]Representative of Jordan in UNSC, UN Doc. S/PV.4929(2004), *supra* note 56.

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Objections to Israeli targeted killing practices were advanced by 63 individual states in the Security Council debates I analysed between 2000 and 2016. If we additionally take into account those states represented by the supranational institutions of the European Union (EU), the Non-Aligned Movement (which represents 120 states), the League of Arab States, and the Organization of the Islamic Conference, the number rises to a total of 151 states. The EU has, thus, unanimously condemned Israeli targeted killing practices on different occasions,[63] arguing that 'the European Union and the international community at large had consistently rejected the Israeli method of extrajudicial killings'.[64] The Non-Aligned Movement as well as the League of Arab States, and the Organization of the Islamic Conference have similarly positioned themselves against the practice at the Security Council.[65]

Yet, while targeted killing claims and practices by the Israeli government have thus been repeatedly condemned at the Security Council, there seems to be a reluctance to voice objections to US targeted killing practices, such as the practice of armed drone attacks in Pakistan, Yemen or Somalia. In the analysed 975 Security Council debates, only 21 statements by governments refer to armed drone attacks at all. Most of these statements are advanced in the context of Security Council debates on civilians in armed conflict and tend to discuss armed drone attacks in relation to international humanitarian law and international human rights law.[66] States seem to have avoided addressing *jus ad bellum* aspects of armed drone attacks at the Security Council, in particular the way in which the US has justified armed drone attacks through the right to self-defence. While this is not necessarily a new phenomenon and there is a long tradition at the Security Council for states to focus on *jus in bello* questions instead of open, doctrinal disputes of the right to self-defence,[67] it seems nonetheless significant in the context of silence as potential acquiescence.

There seems to be more discussion of armed drone attacks at the UN HRC. In 2014 the HRC held an 'interactive panel discussion on the use of remotely piloted aircraft or armed drones in compliance with international law'.[68] State delegations in the discussion emphasized the importance for armed drones to be deployed in accordance with established principles of international law and express concern 'that armed drones had been used outside the international legal framework'.[69] Some state delegations raise *jus ad bellum* concerns during the debate, recalling 'the obligation to respect the general principles of international law in the use of drones. Respect for State Sovereignty, territorial integrity, including sovereign air space, and the political independence of all States'.[70]

[63]UNSC, UN Doc. S/PV.4945(2004), *supra* note 59; UNSC; United Nations Security Council Debate (4934th Meeting): The situation in the Middle East, including the Palestinian question, UN Doc. S/PV.4934(2004); UNSC, United Nations Security Council Debate (4357th Meeting): The situation in the Middle East, including the Palestinian Question, UN Doc. S/PV.4357(2001).

[64]UNSC, United Nations Security Council Debate (4588th Meeting): The situation in the Middle East, including the Palestinian question, UN Doc. S/PV.4588(2002).

[65]See for example UNSC, UN Doc. S/PV.4929(2004), *supra* note 56; UNSC, United Nations Security Council Debate (5411st Meeting): The situation in the Middle East, incuding the Palestinian question, UN Doc. S/PV.5411(2006); UNSC, UN Doc. S/PV.4945(2004), *supra* note 59.

[66]The representative of Austria for example 'supported the Secretary-General's call to ensure that attacks by armed drones complied fully with international humanitarian law and human rights laws' in UNSC, United Nations Security Council Debate (7109th Meeting): Protection of civilians in armed conflict UN Doc. S/PV.7109(2014), 44; see also UNSC, United Nations Security Council Debate (6980th Meeting): Children and armed conflict - Report of the Secretary-General on children and armed conflict (S/2013/245), UN Doc. S/PV.6980(2013); UNSC, United Nations Security Council Debate (6917th Meeting): Protection of civilians in armed conflict - Letter dated 4 February 2013 from the Permanent Representative of the Republicof Korea to the United Nations addressed to the Secretary-General (S/2013/75), UN Doc S/PV.6917(2013).

[67]Gray, *supra* note 10, at 166.

[68]HRC, UN Doc. A/HRC/28/38(2014), *supra* note 2, para. 38. Amongst the participating states were Brazil, Chile, China, France, Germany, Russia, South Africa, UK, and USA

[69]Ibid., para. 37.

[70]Ibid., para. 33.

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In 2014, the HRC adopted the resolution 'Ensuring the use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law'.[71] The resolution was adopted by a vote of 29 state representatives in favour[72] and six against.[73] The first sentence of the resolution refers to the prohibition of the inter-state use of force with particular reference to Article 2(4) of the UN Charter.[74]

While states have, thus, made explicit references to the *jus ad bellum* aspects of armed drone attacks, it seems noteworthy that these were raised at the forum of the HRC rather than the Security Council. This could be interpreted as another way in which *jus ad bellum* concerns have in effect been displaced by IHL or human rights law concerns (this time through the forum at which attacks are discussed in the first place), thus indicating a silence on the *jus ad bellum* aspects of armed drone attacks. Yet, there is another way in which the choice of the HRC as the forum to discuss armed drone attack could be interpreted.

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has pointed out that the lawfulness of the use of armed drones for targeted killing depended above all on whether there was an armed conflict: 'since under international *human rights* law, the targeting of individuals was rarely lawful'.[75] Some states have hence proposed to discuss armed drones at the forum on arms control and disarmament or IHL.[76] Indeed, explaining their vote against the HRC resolution on armed drones in 2014, the UK argued that the HRC was not the appropriate forum because 'when used in the context of armed conflict, the appropriate law was international humanitarian law and the Human Rights Council did not have a mandate to consider this'.[77] Similarly, the US representative argued that 'it did not believe that the examination of specific weapon systems fell under the mandate of the [Human Rights] Council'.[78] This objection to the HRC as a forum to discuss armed drone attacks has political undertones which link back to the way in which targeted killing has built on the geographically and conceptually expansive right to self-defence discussed in the first part of this article, according to which the targeted killing of a suspected terrorist anywhere in the world is justified to be a lawful exercise of the right to self-defence – hence falling under IHL.

The forum of the HRC for the discussion of US armed drone attacks (another resolution on the use of armed drones was adopted by the HRC in 2015[79]) shows that states were concerned about armed drone attacks taking place outside of traditional zones of armed conflict and that international human rights law was considered to be the applicable framework – not IHL, as has been argued by the US government. This sentiment was summarized in the report on the 2014 panel discussion on armed drone attacks:

> Many [state] delegations expressed concern that armed drones had been used outside the international legal framework. Some expressed specific concerns that drone strikes could amount to extrajudicial or arbitrary executions . . . It was recalled that outside armed

[71]HRC, Resolution Ensuring Use of Remotely Piloted Aircraft or Armed Drones in Counter-Terrorism and Military Operations in Accordance with International Law, Including International Human Rights and Humanitarian Law, UN Doc. A/69/53 (2014), 86–8.

[72]Ibid.; amongst them Argentina, Brazil, Chile, China, Indonesia, Pakistan, Peru, Russia, Saudi Arabia, and South Africa.

[73]Ibid.; USA, UK, Japan, France, Republic of Korea, and the former Yugoslav Republic of Macedonia.

[74]Ibid.

[75]HRC, UN Doc. A/HRC/28/38(2014), *supra* note 2.

[76]Ibid., para. 31.

[77]HRC, 'Human Rights Council extends mandates on Syria, Iran, Democratic People's Republic of Korea and Myanmar', 28 March 2014, available at www.ohchr.org/en/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=14455&LangID=R.

[78]Ibid.

[79]HRC, Resolution Ensuring Use of Remotely Piloted Aircraft or Armed Drones in Counter-Terrorism and Military Operations in Accordance with International Law, Including International Human Rights and Humanitarian Law, UN Doc. A/70/53(2015), 34–5.

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> conflict, the key international framework was international human rights law and some delegations recalled that international law prohibited arbitrary and extrajudicial executions . . . [80]

The US government's argument of a geographically and conceptually expansive right to self-defence for targeted killing operations outside of traditional zones of armed conflict has, thus, not been acquiesced to by those states.

To conclude this section, various Israeli targeted killing practices have been opposed by the vast majority of states at the Security Council. State representatives have also emphasized the *jus ad bellum* problems of armed drone attacks in their compliance with respect for state sovereignty and the prohibition of the use of force at the forum of the HRC. Two HRC resolutions have been adopted regarding compliance of the use of armed drones with existing international law requirements, including explicit references to the prohibition of the use of force and respect for state sovereignty. These have also been incorporated into a General Assembly resolution on counter-terrorism.[81]

Yet, state representatives seem more reluctant to directly object to US armed drone attacks. Particularly at the forum of the Security Council, statements by governments tend to be kept at a general level regarding the compliance of the use of drones with IHL and human rights law, avoiding *jus ad bellum* questions. A similar silence has been noted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. In 2013, he advanced eight disputed legal questions regarding the use of armed drones in counterterrorism measures, almost all of which address *jus ad bellum* aspects of armed drone attacks.[82] He requested clarifications from states in the UN General Assembly. Four years later in his report in 2017 he states that 'no formal answers have been received to date'.[83] If we accept that there has been silence regarding the *jus ad bellum* aspects of US armed drone attacks at the Security Council, the question arises whether this could possibly be interpreted as tacit consent to targeted killing, as has been suggested by some scholars.[84]

4. Requirements for acquiescence

The inherent ambiguity of silence has led the International Law Commission to emphasize that only some instances of state silence can be interpreted as acquiescence and that interpretation should be made in relative terms,[85] relying on particular requirements to establish whether a silence amounts to 'qualified silence'.[86] This caution seems to be all the more warranted if a wider right to self-defence, as proposed with US targeted killing practices, touches on the *jus cogens* norm of the prohibition of the use of force[87] since a *jus cogens* norm is:

> . . . a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[88]

[80]HRC, UN Doc. A/HRC/28/38(2014), *supra* note 2, para. 37.

[81]UNGA, Protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/RES/68/178(2013), para. 6(s).

[82]UNGA, UN Doc. A/68/389(2013), *supra* note 25.

[83]HRC, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. A/HRC/34/61(2017), 61.

[84]Plaw and Reis, *supra* note 8; Anderson, *supra* note 2.

[85]ILC, UN Doc. A/CN.4/682, *supra* note 7, para. 22.

[86]Villiger, *supra* note 6, at 39.

[87]Linderfalk, *supra* note 52, at 941.

[88]1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 53.

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Silence is interpreted as acquiescence through its perceived link to a state practice which prompts no protest:[89] 'Given that silence is a reactive act, its legal effects depend upon the act/claim of another state'.[90] Possible state practice which might be seen to prompt acquiescence can be acts, proposals, or assertions.[91] What the ICJ has established as the most important characteristic of the state practice is that it 'calls' for a reaction.[92] As the ICJ argues in *Malaysia/Singapore*: '[t]he absence of reaction may well amount to acquiescence . . . that is to say, silence may also speak, but only if the conduct of the other State calls for a response'.[93]

Whether or not a state practice is seen to call for a reaction rests on an – ultimately subjective – interpretation of the circumstances.[94] International jurisprudence has linked the interpretation of silence as acquiescence to the question whether the practice (i) is seen to be public and openly known, (ii) is understood to demonstrate legal commitment and advancing a general, legal claim, (iii) is seen as consistent and lasting for a sufficient length of time, and (iv) is perceived to affect the interests of the silent states. This section investigates each of the above requirements in the context of US armed drone attacks.

In order to give rise to acquiescence, a state practice has to (i) be seen to be 'open and public'[95] and made known in a way in which other states would have, or ought to have, knowledge of it.[96] The requirement for the acts to be public links into the importance of actual or constructive knowledge of the practice by the silent states. This means that:

> . . . a State whose inaction is sought to be relied upon in identifying whether a rule of customary international law has emerged must have had actual knowledge of the practice or the circumstances must have been such that the State concerned is deemed to have had such knowledge.[97]

The state acts have to be 'public, formal acts' which 'invite opposition . . . if [the acts] were believed to be unwarranted'.[98]

The US government has officially justified armed drone attacks through the right to self-defence[99] and it can be assumed that all governments have knowledge of this; yet actual targeted killing practices and procedures through the CIA drone program have been shrouded in secrecy.[100] While the US government has claimed that targeted killing outside of traditional armed conflicts is lawful in principle, the way in which killings take place is explicitly not disclosed.[101] Individual drone attacks are usually not publicly admitted and are instead only revealed through contradictory reports by local officials and sporadic newspaper coverage, such as the following:

[89] *Fisheries Case (United Kingdom v. Norway)*, Jurisdiction and Admissibility, Judgment of 18 December 1951, [1951] ICJ Rep. 116, para. 139.

[90] Kopela, *supra* note 15, at 107.

[91] *North Sea Continental Shelf Case (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Merits, Judgment of 20 February 1969, [1969] ICJ Rep. 3 (Judge Lachs, Dissenting Opinion).

[92] ILC, UN Doc. A/CN.4/682, *supra* note 7, para. 21.

[93] See *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Merits, Judgment of 23 May 2008, [2008] ICJ Rep. 12, para. 121.

[94] E. Schweiger, 'Listen closely: what silence can tell us about legal knowledge production', November 2018, *London Review of International Law*, available at academic.oup.com/lril/article-abstract/6/3/391/5382550?redirectedFrom=fulltext.

[95] *Island of Palmas Case (Netherlands v. USA)*, Judgment of 4 April 1928 [1928], UN Reports of International Arbitral Awards, 831, 868.

[96] *Fisheries* case, *supra* note 89.

[97] ILC, UN Doc. A/CN.4/682, *supra* note 7, para. 24.

[98] *Honduras Borders (Guatemala v. Honduras)*, Judgment of 23 January 1933 [1933], UN Reports of International Arbitral Awards 1307, 1327.

[99] See, for example, The White House, Fact Sheet, *supra* note 27.

[100] A. Birdsall, 'Drone Warfare in Counterterrorism and Normative Change: US Policy and the Politics of International Law', (2018) 32 *Global Security* 241.

[101] Koh, U.S. Department of State, *supra* note 23.

https://doi.org/10.1017/S0922156519000475 Published online by Cambridge University Press

'US Central Command . . . denied conducting Thursday's strike while the CIA refused to comment when contacted by the Bureau, a position it has routinely taken'.[102] The secrecy around such practices limits the legal grounds on the basis of which governments around the world could object to the state practice and impacts the interpretation of state silence as acquiescence. The ICCT thus concluded in their report that 'the public silence on the issue of drone use by other states may not necessarily signify acquiescence or consent' but may be read as 'a lack of precise knowledge of a specific attack'.[103]

The regularity of acting cannot in itself form the basis for a new law. As the ICJ argues: 'The frequency, or even habitual character of the acts is not in itself enough.'[104] A practice requires certain legal characteristics because 'acting or agreeing to act in a certain way, does not in itself demonstrate anything of a juridical nature'.[105] The practice needs to (ii) demonstrate legal commitment and enact generalized legal claims in order to be seen as a practice exhibiting a 'juridical nature' as opposed to an irregular practice out of political convenience.[106]

It depends on the view of the interpreter whether US armed drone attacks are seen to demonstrate legal commitment rather than political convenience. On the one hand, the US has justified targeted killing in various public statements by US administrative figures.[107] Yet, not only is it often unclear which definition of targeted killing is used in these justifications but the US government has furthermore given the impression that it does 'not want to set precedents for other states'.[108] The use of force in targeted killing attacks in Pakistan, for example, has not been reported to the Security Council.[109] This undermines an interpretation of legal commitment since 'the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence',[110] as the ICJ argued in the *Nicaragua* case. The US government itself objected to plans of a targeted use of force against terrorists by other states, such as the Russian government infringing Georgian airspace in 2002,[111] or some Israeli targeted killing practices.[112]

In order to be interpreted as acquiescence, state practice and silence (iii) has to be continuous, consistent and lasting over a 'sufficient period of time'.[113] There are no formalized measurements of the time needed for silence to constitute acquiescence since this depends on various factors, such as the nature of the right claimed.[114] While arguments of 'instant custom' have been advanced by some legal scholars,[115] in the *Fisheries* case the ICJ emphasized the length of time

[102]J. Purkiss and J. Serle, 'US Drones Appear to have Returned to Pakistan', 6 March 2017, *The Bureau of Investigative Journalism*, available at www.thebureauinvestigates.com/stories/2017-03-06/us-drones-return-to-pakistan.

[103]ICCT Research Paper, *supra* note 1, at 55.

[104]*North Sea Continental Shelf* case, *supra* note 91, para. 77.

[105]Ibid., para. 76.

[106]I. C. MacGibbon, 'Customary International Law and Acquiescence', (1957) 33 *British Year Book of International Law* 115, 118; see also J. Brunnée and S. J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010), 26.

[107]Brennan, *supra* note 28; U.S. Department of Justice, *supra* note 43; The White House, 'Remarks by the President at the National Defense University', 23 May 2013, available at obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

[108]Reinold, *supra* note 17, at 281.

[109]International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School Of Law), 'Living Under Drones: Death, Injury, And Trauma To Civilians From Us Drone Practices In Pakistan', September 2012, available at chrgj.org/wp-content/uploads/2016/09/Living-Under-Drones.pdf, at 123.

[110]*Nicaragua* case, *supra* note 34, para. 200.

[111]'US Warns Russia over Georgia Strike', 13 September 2002, *BBC News*, available at news.bbc.co.uk/2/hi/europe/2254959.stm.

[112]UNSC, UN Doc. S/PV.4588(2002), *supra* note 64.

[113]ILC, UN Doc. A/CN.4/682, *supra* note 7, para. 25.

[114]I. C. MacGibbon, 'The Scope of Acquiescence in International Law', (1954) 31 *British Year Book of International Law* 143, 165.

[115]B. Langille, 'It's Instant Custom: How the Bush Doctrine Became Law after the Terrorist Attacks of September 11, 2001', (2003) 26 *Boston College International and Comparative Law Review* 145; B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', (1965) 5 *Indian Journal of International Law* 23.

of the silence where 'for a period of more than sixty years the United Kingdom Government itself in no way contested [the Norwegian practice]'.[116] The length of time supports the perceived deliberateness of silence as constituting a legal stance, as opposed to a political reaction.[117]

It is not clear how continuous and consistent targeted killing has been enacted and responded to in the relatively short time frame since its inception (the first time the concept targeted killing was officially used was by the Israeli government in 2000[118]). The majority of armed drone attacks seem to have taken place within traditional, non-international armed conflicts *with* consent of the territorial state[119] – thus not advancing the new *jus ad bellum* aspects of targeted killing as defined in the first part of this article at all. It is even more questionable how consistently targeted killing practices have been responded to with silence. As discussed previously, most states have objected to targeted killing practices in some form in recent years.

For silence to be regarded as acquiescence, it is important (iv) for the act to be seen to affect the interests or rights of the silent states.[120] What exactly that means depends on the interpretation of what the rights and interests of that state are considered to be. It has been suggested that there are 'areas of relations affecting the common interests of all mankind' in which absence of protest always implies acquiescence[121] and it could be argued that the use of force always constitutes such an area of common interest. On the other hand, current counterterrorism practices in places such as the marginalized border regions in Pakistan might not affect the interests of most governments. They might in fact have strong motivation to refrain from protesting against US practices.[122] The interpretation of silence necessitates a reflection on relations between the states and the political context of state acts.[123]

5. The political context

The International Law Commission has argued that it is difficult to evaluate the intentionality of silence and its legal quality since 'there could be various reasons for a refusal to act, including a lack of capacity to do so or a lack of direct interest'.[124] This section engages with the political context and how it might inform any interpretation of silence on US armed drone attacks. Challenging the invocation of silence regarding US armed drone attacks as acquiescence to targeted killing, the section raises alternative interpretations of silence before reflecting on the asymmetrical political context which might prevent states from being able to protest against US armed drone attacks.

As the 2016 Draft Conclusions on the Identification of Customary International Law by the International Law Commission put it: 'Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), *provided that* States were in a position to react and the circumstances called for some reaction.'[125] The above section challenged the idea that the circumstances of US armed drone attacks can be seen to call for a reaction. If this interpretation is shared by states, silence on armed drone attacks and similar practices might express that states see no legal necessity for objection. As Starski has argued, because 'silence is inherently ambiguous, a mere non-protest might also be interpreted as reflecting the general opinion that

[116] *Fisheries* case, *supra* note 89, 116.
[117] MacGibbon, *supra* note 114, at 143.
[118] HRC, UN Doc. A/HRC/14/24/Add.6(2010), *supra* note 2, para. 13.
[119] Brookman-Byrne, *supra* note 30.
[120] ILC, UN Doc. A/CN.4/682, *supra* note 7, para. 23.
[121] Ibid.; G. Danilenko, *Law-Making in the International Community* (1993), 108.
[122] See, for a similar argument, Linderfalk, *supra* note 52, at 932.
[123] ILC, UN Doc. A/CN.4/682, *supra* note 7.
[124] Ibid.
[125] ILC, Identification of Customary International Law. Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee, UN Doc. A/CN.4/L.872(2016), Conclusion 10(3) (emphasis added).

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a certain practice is not calling any established rules into question'.[126] This interpretation gains further relevance, if indeed the majority of armed drone attacks has taken place within traditional armed conflicts with consent of the territorial state[127] and is not actually based on a wider right to self-defence.

While legal committees, policy makers and scholars have called on a new regulation for the use of armed drones for targeted killing,[128] many state representatives have emphasized that they see no necessity to respond to armed drone attacks. The Committee of Ministers of the Council of Europe, which is comprised of the Foreign Affairs Ministers of its 47 member states, thus explicitly explains why 'it does not find that there is a need at the present stage to draft guidelines along the lines suggested by the Assembly' regarding armed drone attacks.[129] The Committee notes that:

> the use of armed drones is relatively recent and has greatly increased in the past years. It also notes that there is a broad agreement that armed drones themselves are not illegal weapons and that relevant rules of international law regulating the use of force and the conduct of hostilities as well as of international human rights law apply to their use.[130]

This seems to be a point coming up frequently when state representatives discuss armed drone attacks. The conclusion of the UN HRC panel discussion on armed drones was to affirm that 'the existing legal framework was sufficient and did not need to be adapted to the use of drones'.[131] Noting a lack of protest to armed drone attacks might then reveal more about the expectations of the interpreters than about the legal will of states.[132]

Depending on the context, silence can work to disregard claims in order for them not to gain legal relevance. D'Amato argues that silence can be a means for governments to actively ignore an exceptional practice.[133] By ignoring the practice of State B, State A can use silence to mark the boundaries of the legal field. Official protest would be less effective than silence which allows that the silent state 'might later be able to claim that B's act was a "political" one that had nothing to do with international law'.[134] According to this logic, silence is a way for states to not contribute to a legalization of proposed practices and claims.

As D'Aspremont put it: 'Indeed, in international law, naming is what produces knowledge.'[135] Because targeted killing is based on a wide interpretation of the right to self-defence – and is an ambiguous concept to begin with (as discussed in the first part of this article) – it is essential whether attacks are framed as legally relevant acts and discussed on the legal stage at all. This is why Krasmann called attention to the co-constitutive relationship between the discourse on targeted killing and its law: 'Legal reasoning, however, couching the practice in legal terms and producing a normative reality of its own, contributes to targeted killing's legalization.'[136]

[126]Starski, *supra* note 54, at 38.

[127]Brookman-Byrne, *supra* note 30.

[128]See, for example, House of Lords, House of Commons, Joint Committee on Human Rights, *supra* note 2; Dorsey and Paulussen, ICCT Research Paper, *supra* note 1; A. Dworkin, 'Policy Brief: Drones and Targeted Killing: Defining a European Position', July 2013, *European Council on Foreign Relations*, available at www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf.

[129]Committee of Ministers of the Council of Europe, 'Doc. 13928, Reply to Recommendation 2069, Drones and Targeted Killings: The Need to Uphold Human Rights and International Law', 8 December 2015, available at assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22301&lang=en.

[130]Ibid., para 2.

[131]HRC, UN Doc. A/HRC/28/38(2014), *supra* note 2, para. 56.

[132]See for further discussion of this E. Schweiger, 'Listen Closely: What Silence Can Tell Us About Legal Knowledge Production', (2018) 6 *London Review of International Law* 391.

[133]A. D'Amato, *The Concept of Custom in International Law* (1971), 101.

[134]Ibid.

[135]J. D'Aspremont, 'Wording in International Law', (2012) 25 LJIL 575, 582.

[136]Krasmann, *supra* note 2, at 668.

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In light of this, it is important to note that states who condemned Israeli targeted killing claims after 2000 have avoided using the term targeted killing.[137] During the 2006 debate of the Israeli targeted killing of 21 Palestinians, for example, most governments tend to use the terms 'extrajudicial execution' and 'assassination', as, for example, the speaker for the EU who 'called on Israel to stop the practice of extrajudicial killings, which was contrary to international law'[138] or a hybrid term such as 'extrajudicial targeted killing'.[139] In general, across the 975 Security Council debates I analysed between 2000 and 2016, the term targeted killing was only used 23 times by state representatives – compared to the terms 'extrajudicial execution' and 'assassination' which were used in 167 statements during the same time frame in order to refer to Israeli targeted killing practices. The avoidance of the term targeted killing, by states, while operating at a more implicit level than the protest itself, could be seen as a quiet contestation of the new category.

Because state representatives can have various reasons for silence which might have nothing to do with the question of legality, international jurisprudence has emphasized the necessity to investigate the particular circumstances of a case in order to ensure that silence can be interpreted as legally 'qualified silence'.[140] States might want to avoid open conflict and to sustain diplomatic relationships in the face of disagreement[141] and silence regarding targeted killing practices and claims by powerful states, such as the US, might ensure diplomatic relationships in complicated political alliance systems.[142] As Dworkin argues in the case of EU states:

> Torn between an evident reluctance to accuse Obama of breaking international law and an unwillingness to endorse his policies, divided in part among themselves and in some cases bound by close intelligence relationships to the US, European countries have remained essentially disengaged as the era of drone warfare has dawned.[143]

This is particularly important because of the asymmetrical political context of targeted killing practices. Third World Approaches to International Law have highlighted the risk of the acquiescence doctrine further marginalizing Third World countries, since the doctrine is to the detriment of those who are expected to speak while not actually being able to do so.[144] Acquiescence is based on the principle '*Qui tacet consentire videtur si loqui debuisset ac potuisset*' [If someone is silent, they will be considered to be consenting, if they should have spoken and would have been able to speak]. It is hence necessary to question whether silences are 'expressed freely, which excludes those that are essentially explained by political or diplomatic pressure'.[145] It could be argued that at the Security Council in particular, it is not surprising if states have been reluctant to object to US practices. Indeed, it seems that states have been reluctant to directly oppose US

[137]See particularly the 2004 Security Council debate UNSC, UN Doc. S/PV.4945(2004), *supra* note 59.

[138]UNSC, UN Doc. S/PV.5411(2006), *supra* note 65.

[139]Ibid.

[140]ILC, UN Doc. A/CN.4/682, para. 22.

[141]H. Burhanudeen, 'Diplomatic Language: An Insight from Speeches Used in International Diplomacy', (2006) 67 *Akademika* 37.

[142]See, for example, N. VanRaemdonck, 'Vested Interest Or Moral Indecisiveness? Explaining the EU's Silence on the US Targeted Killing Policy in Pakistan', March 2012, *Istituto affari internazionali Working Papers 12 | 05*, available at www.files.ethz.ch/isn/141630/iaiwp1205.pdf.

[143]Dworkin, *supra* note 128, at 2.

[144]B. Stern, 'Custom at the Heart of International Law', in P. Reuter, *Mélanges offerts à Paul Reuter: le droit international, unité et diversité* (1981), 89, 93, available at fr.scribd.com/document/137206779/Brigitte-Stern-Custom-at-the-Heart-of-International-Law (translated by M. Byers and A. Denise); A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (1999) 40 *Harvard International Law Journal* 1; B. S. Chimni, 'Customary International Law: A Third World Perspective', (2018) 112 *American Journal of International Law* 1.

[145]Corten, *supra* note 10, at 818.

https://doi.org/10.1017/S0922156519000475 Published online by Cambridge University Press

counterterrorism practices at the Security Council since the end of the Cold War.[146] As Lobel argued regarding the 1998 US counterterrorism attacks, silence on US practices and claims then 'does not reflect the emergence of any new legal principle or expansion of self-defense permitted by Article 51, but rather an acquiescence to the power of the world's sole remaining superpower'.[147]

Targeted killing practices have taken place in marginalized border regions in Third World states. These states would arguably be the states most affected by the proposed change of customary international law. As Heller argued in a recent paper, if we take the 'specially affected states' doctrine seriously, we need to particularly consider not only states that engage in a practice but also 'states that are affected by a practice in a manner that other states are not'.[148] Yet, these smaller states in the Global South most affected by a potentially developing lawfulness of targeted killing are also the ones least able to speak, particularly in opposition to hegemonic actors.[149] Some economically disadvantaged states even lack the bureaucratic resources to monitor practices and publish their legal positions.[150] Acts and statements by non-Western governments are furthermore often not registered in the predominantly Anglophone field of International Law.[151]

Because targeted killing is directed against non-state actors in marginalized border regions, it is also important to note that the protest of actors such as the Peshawar High Court, which condemned armed drone attacks in 2013,[152] or the EU Parliament, which passed a resolution against targeted killing in 2014,[153] are not taken into account by international lawyers who invoke the 'muted reaction . . . in regard to the U.S. drone campaign'.[154] As TWAIL scholars have argued 'it is therefore no accident that what has been common since the nineteenth century is that subaltern actors either do not speak or are not assigned adequate weight'.[155]

As argued elsewhere, silence cannot be referenced, proven in its existence through author name and date – the very existence and the meaning of silence fundamentally depends on what is listened to by those who interpret state acts – and how this listening takes place.[156] The methodological choice of which forums are accessed by scholars and which practices are assumed to be relevant for international law in order to arrive at the conclusion that there has been potential acquiescence, fundamentally impacts not only the interpretation of silence, but whether it is seen to exist at all. This article has challenged the invocation of silence as acquiescence to targeted killing practices. After showing that there have been instances of protest and after questioning the interpretation of silence as tacit consent according to the requirements for acquiescence, the above section engaged with alternative interpretations of silence regarding US armed drone attacks, for example as expressing that there is no necessity to speak, as a way of ignoring exceptional practices, or as an impossibility of speaking. The very fact that silence has been invoked as

[146]The 1986 counterterrorism attack by the US in Libya was met with vehement protest during the ensuing Security Council debates, see UNSC, UN Doc. S/PV.2675(1986); while there were few objections to US counterterrorism attacks in Iraq 1993 or in Afghanistan and Sudan in 1998, see UNSC, UN Doc. S/PV.3245(1998) and UN Doc. S/1998/794.

[147]J. Lobel, 'The Use of Force to Respond to Terrorist Attacks', (1999) 24 *Yale Journal of International Law* 537, 540.

[148]K. J. Heller, 'Specially Affected States and the Formation of Custom', (2018) 112 *American Journal of International Law* 191, 207.

[149]D. Panke, 'Speech Is Silver, Silence Is Golden?', (2017) 12 *Review of International Organizations* 121; Ahmed, *supra* note 40; Brunnée and Toope, *supra* note 106, at 74.

[150]J. P. Kelly, 'The Twilight of Customary International Law', (2000) 40 *Virginia Journal of International Law* 449, 474.

[151]Ibid.; Olivier Corten similarly points to the legal debates on the invasion of Yugoslavia in which practices by NATO states were emphasized while 'the reticence and protest of other [non-NATO] states (such as members of the non-aligned movement), on the other hand, were minimized; ignored, even', in Corten, *supra* note 10, at 811.

[152]Peshawar High Court, Judgment of 11 April 2013, Writ Petition No. 1551-P/2012.

[153]European Parliament, Resolution 2014/2567 (RSP), *supra* note 2.

[154]Plaw and and Reis, *supra* note 8, at 243.

[155]Chimni, *supra* note 144, at 19; see also Stern, *supra* note 144; Bradley and Gulati, *supra* note 11.

[156]Schweiger, *supra* note 132.

https://doi.org/10.1017/S0922156519000475 Published online by Cambridge University Press

tacit consent in scholarship to a concept which governments have avoided using altogether, then raises more fundamental questions about legal knowledge production.

6. Concluding remarks

This article has challenged the invocation of silence as acquiescence to targeted killing. Investigating state reactions to targeted killing practices, particularly in the context of US and Israeli claims and practices, I argued that there has been no acquiescence to targeted killing. The argument proceeded along three lines: First, at an empirical level, the article examined over 900 Security Council debates as well as other UN documents and found that almost all governments have condemned Israeli targeted killing practices at the Security Council. While US armed drone attacks have been discussed at the HRC and it has been underlined by most states that armed drone attacks should be judged according to existing international law requirements, there has been a reluctance by states to protest directly against US armed drone attacks at the Security Council.

The article, second, examined the silence by states on US armed drone attacks at the Security Council according to the requirements for acquiescence and argued that it does not provide convincing grounds for an interpretation of legally qualified silence. The article questioned whether the circumstances can be understood to call for a response, regarding the covert nature and secrecy of the attacks, the lack of generality and legal commitment by the US, and the inconsistency of practices and reactions.

Following the recommendation of the International Law commission to investigate the political context of absence of protest, the article, third, explored other interpretations of silence to US armed drone attacks and argued that the non-objection to contentious targeted killing practices might be an attempt by governments to ignore targeted killing claims or a diplomatic move to maintain relationships with the US. Considering the power asymmetries due to the US as a super-power and the invocation of targeted killing against non-state actors in marginalized border regions, I posited that silence can in this case not be interpreted as acquiescence. Invoking silence as acquiescence in this case would instead risk complicity of legal knowledge production with the legitimization of violence by hegemonic actors.

Cite this article: Schweiger E (2019). 'Targeted killing' and the lack of acquiescence. *Leiden Journal of International Law* **32**, 741–757. https://doi.org/10.1017/S0922156519000475