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Terrorism and Targeted Killings in International Law

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15. Terrorism and targeted killings under international law

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1. INTRODUCTION

The term 'targeted killing' does not have a fixed definition under international law;[1] however, a useful working definition has been proposed by UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, who defines targeted killing as 'the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator'.[2] Targeted killing has become part of the conventional military and security strategy of a number of states in their operations against terrorist suspects, with Israel, the US and Russia among the most notable that have openly or otherwise employed it.[3]

Controversy has arisen regarding whether, as the perpetrator states have asserted,[4] such killings should be considered as part of an ongoing 'war' against terrorist organizations, thus judged according to the law on the use of force (*jus ad bellum*) and the law of armed conflict (*jus in bello* or international humanitarian law (IHL), or whether the struggle against terrorist groups should be considered within a law enforcement framework, thus engaging international human rights law (IHRL). While the killing of individuals 'not in the physical custody' of the targeting state or entity is a foreseen and integral part of the conduct of armed conflicts and permissible under IHL, if the campaign against terrorist organizations does not

[1] Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP, 2010) 538.

[2] Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions – Study on Targeted Killings*, UN Doc A/HRC/14/24/Add.6 (28 May 2010) 3.

[3] Ibid 5–9.

[4] For instance, see comments made by Russian authorities following the killing of Chechen rebel leader, Shamil Basayev, in July 2006: 'Chechen rebel chief Basayev dies', *BBC News* (online, 10 July 2006) <http://news.bbc.co.uk/2/hi/5165456.stm>.

fall under the IHL framework, such targeted killings would seem to violate the IHRL principles on the right to life and fair trial, and amount to an 'extra-judicial execution'.

2. THE RELEVANT LAW ON TARGETED KILLINGS – LAW ON THE USE OF FORCE, INTERNATIONAL HUMANITARIAN LAW, AND INTERNATIONAL HUMAN RIGHTS LAW

A. The Law on the Use of Force

Article 2(4) of the UN Charter prohibits the use of force by a state in the territory of another sovereign state; the prohibition is accepted as customary norm,[5] arguably a *jus cogens* norm.[6] There are limited exceptions to the Article 2(4) prohibition, including authorization for the use of force by the Security Council for the purposes of maintaining international peace and security,[7] and the right of states to use force in self-defence, either individually or collectively.[8] A state may use force in the territory of another state if permission has been granted by the other state for such force to be deployed within their territory.[9] Any use of force in self-defence must be considered necessary and proportionate.[10] Using force in self-defence is only legal if the targeted state is either responsible for the armed attack occasioning the use of force in self-defence, or the targeted state is either unwilling or unable to stop the armed attack launched against the targeting state from being carried out within its territory.[11]

A targeted killing, if undertaken without the permission of the state in which the killing takes place, is prima facie contrary to Article 2(4). However, a number of states engaged in targeted killings have justified

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[5] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1986] ICJ Rep 14, 190 ('*Nicaragua*'); Antonio Cassese, *International Law* (2nd edn, OUP, 2004) 64–5.

[6] Ian Brownlie, *International Law and the Use of Force by States* (OUP, 1963) 267.

[7] *Charter of the United Nations*, arts 42 and 51.

[8] Ibid art 51; see also *Nicaragua*, 176.

[9] *Nicaragua*, 246.

[10] *Oil Platforms (Iran v US)* [2003] ICJ Rep, 43 ('*Oil Platforms*'); *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep, 41 ('*Nuclear Weapons*').

[11] Rein Müllerson, '*Jus ad Bellum* and international terrorism' (2002) 32 *Israel Yearbook on Human Rights* 1.

their actions on the basis of the Article 51 right of self-defence.[12] As outlined by Harold Koh, US State Department Legal Adviser, the US justifies its right to engage in targeted killings because the US is 'in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defence under international law'.[13] This is similar to Russian and Israeli justifications for targeted killings.[14]

However, problems have arisen regarding justifications of self-defence. First, there is debate over what amounts to an armed attack giving rise to a right of self-defence. The International Court of Justice (ICJ) has stated that only the 'most grave forms of the use of force'[15] will constitute an armed attack; this has led some scholars to argue that the sporadic nature of most terrorist attacks falls short of the threshold for armed attack, instead occasioning a law enforcement, rather than military, response under international law.[16] An attempt by the USA to argue, in the *Oil Platforms* case, that an accumulation of small-scale events could amount to an armed attack capable of triggering the right of self-defence, was rejected by the ICJ in that instance.[17] A number of publicists have, however, argued that such a series of 'pin-prick' attacks, when aggregated, *would* amount to a sufficiently grave armed attack – this is especially pertinent in the context of terrorist attacks.[18]

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[12] *Nicaragua*, 194; Oscar Schachter, 'The right of states to use armed force' (1984) 82 *Michigan Law Review* 1620, 1633–4.

[13] Harold Koh, 'The Obama Administration and International Law', delivered at the Annual Meeting of the American Society of International Law (Washington, DC, 25 March 2010) recorded in (2010) 104 ASIL Proceedings 207, 218.

[14] For example, see comments made by Colonel Daniel Reisner, Israeli Defence Force (IDF) Legal Division (15 November 2000) <http://mfa.gov.il/MFA/PressRoom/2000/Pages/Press%20Briefing%20by%20Colonel%20Daniel%20Reisner-%20Head%20of.aspx>.

[15] *Nicaragua*, 191.

[16] Mary Ellen O'Connell, 'Remarks: The resort to drones under international law' (2010–11) 39 *Denver Journal of International Law & Policy* 585, 593; Mary Ellen O'Connell, 'Lawful self-defence to terrorism' (2002) 63 *University of Pittsburgh Law Review* 889, 898.

[17] *Oil Platforms*, 64; Christine Gray, *International Law and the Use of Force* (3rd edn, CUP, 2008) 145–8.

[18] Natalino Ronzitti, 'The expanding law of self-defence' (2006) 11 *Journal of Conflict and Security Law* 343, 351; Yoram Dinstein, *War, Aggression and Self-Defence* (4th edn, CUP, 2005) 202; Enzo Cannizaro, 'Contextualizing proportionality: Jus ad bellum and jus in bello in the Lebanese War' (2006) 88 *International Review of the Red Cross* 782. Both Dinstein and Cannizaro discuss, in the context of Israel and Lebanon respectively, the necessity of the accumulation approach,

Dispute has also emerged over whether an Article 51 act of self-defence can be carried out against non-state actors. The ICJ has affirmed in a number of decisions the requirement of attribution to a state for the armed attack, in order to give rise to a right of self-defence.[19] However, other publicists, including individual judges of the ICJ, have argued that state attribution is unnecessary, and that a right of self-defence exists against non-state armed attacks;[20] and some have argued that something akin to a lower standard of attribution has developed – that a right to self-defence exists against non-state terrorist groups when a state that is harbouring a terrorist group is unwilling or unable to repress the acts of such an organisation.[21] Indeed, Article 51 of the UN Charter does not expressly require state attribution, declaring instead that an inherent right to self-defence arises 'if an armed attack occurs against a Member of the United Nations'. This lack of direct reference to state attribution was highlighted by Judge Kooijmans in his separate opinion in the *Armed Activities* case; in noting the threats posed by non-state groups, Judge Kooijmans stated that 'it would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require'.[22] This has been affirmed by UN Security Council Resolutions that have declared that a state has an inherent right of self-defence in response to 'any act of international terrorism' regardless of possible state attribution.[23] However, such a suggestion by the Security Council would have to be read in line with existing international law as regards attribution, and would not amount to an attempt, by the Security Council, to change international law by implication.

Also problematic in the 'self-defence' justification has been the issue

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with Dinstein noting that 'a series of pin-prick assaults might be weighed in its totality and count as an armed attack' (230–1).

[19] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep, 139 ('*Wall*'); *Oil Platforms*, 72; *Nicaragua*, 195. This is supported by publicists such as Mary Ellen O'Connell: see O'Connell, 'Remarks' above note 16, 593.

[20] See: the separate opinion of Judge Kooijmans in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep, 28 ('*Armed Activities*'); the separate opinion of Judge Higgins in the *Wall*, 33; and the declaration of Judge Buergenthal in the *Wall*, 6.

[21] Christian Tams, 'The use of force against terrorists' (2009) 20 *European Journal of International Law* 359, 385–7; Tom Ruys and Sten Verhoeven, 'Attacks by private actors and the right of self-defence' (2005) 10 *Journal Conflict and Security Law* 289, 315ff. See also comments made by Judge Jennings in his dissenting opinion in *Nicaragua*, 533.

[22] Separate opinion of Judge Kooijmans in *Armed Activities*, 30.

[23] See UN Security Council Res 1368 (12 September 2001) and UN Security Council Res 1373 (28 September 2001).

of how far, in terms of both temporal and geographical scope, the self-defence argument can be applied. Israel allegedly conducted a targeted killing of a suspected terrorist in Dubai;[24] the US has targeted suspected terrorists in Yemen and Somalia.[25] As noted earlier, some publicists have classically argued that using force in the territory of another state where no direct link of attribution to the armed attack can be made out violates Article 2(4) of the UN Charter.[26] Others have asserted that the right to self-defence overrides in some instances a state's right to territorial integrity under Article 2(4).[27] This argument builds on the notion that a state unwilling or unable to prevent its territory being used as a base from which to launch attacks against another state 'cannot expect to insulate its territory against measures of self-defence'.[28] This principle – that every state must not allow its territory 'to be used for acts contrary to the rights of other States'[29] was articulated by the ICJ in the *Corfu Channel* case and has been repeatedly endorsed by numerous General Assembly resolutions on terrorism. Also part of the debate regarding the geographical scope of self-defence is the controversial statement made by the ICJ in the *Wall* case, that a state cannot exercise self-defence against a threat originating from territory it occupies or otherwise controls, as such acts are beyond the contemplation of Security Council Resolutions 1368 (2001) and 1373 (2001) on the threat to international peace and security posed by terrorism[30] – a proposition which would seem to preclude a considerable number of attacks against a state as triggering the right to use force.[31]

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[24] 'Dubai police chief in Mossad arrest call', *BBC News* (online, 19 February 2010) <http://news.bbc.co.uk/2/hi/middle_east/8523588.stm>.

[25] Alston, above n 2, regarding the killing of Qaed Senyan al-Harithi; 'Al Qaeda's Anwar al-Awlaki killed in Yemen', *CBS News* (online, 30 September 2011) <www.cbsnews.com/2100–202_162–20113732.html>.

[26] O'Connell, 'Remarks' above n 16, 592.

[27] JJ Paust, 'Permissible self-defence targeting and the death of bin Laden' (2011) 39 *Denver Journal of International Law and Policy* 569, 572–3.

[28] Ruth Wedgwood, 'Responding to terrorism: The strikes against Bin Laden' (1999) 24 *Yale Journal of International Law* 559, 565; indeed, this was the justification cited by Harold Koh, who argued that the US was permitted to target suspected terrorists in Pakistan and other states' territory due to those states' lack of 'willingness and ability. . . to suppress the threat' posed by those targeted for killing (Koh, above n 13, 219).

[29] *Corfu Channel (UK v Albania)* [1949] ICJ Rep, 22.

[30] *Wall*, 139. For a critique of this comment, see further Sean Murphy, 'Self-defence and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?' (2005) 99 *American Journal of International Law* 62.

[31] Murphy uses the example of the 9/11 attacks against the US as potentially being excluded under such an approach, stating that the September 11 attacks

With regard to issues of the temporal reach of self-defence, questions remain as to how imminent an armed attack must be before a state may invoke the right of self-defence. For some publicists, a strict adherence to the principles laid down in the aftermath of the *Caroline* incident provides the only feasible interpretation: a state may use force in self-defence against an imminent threat where the necessity of self-defence is 'instant, overwhelming, and leaving no choice of means, and no moment of deliberation'.[32]

However, dispute exists regarding just how 'imminent' an attack must be; can the right of self-defence extend to cover so-called 'pre-emptive', 'preventive' and 'anticipatory' acts of self-defence? While Gray notes that these terms are 'not technical terms of art with clear meanings',[33] the common issue underlying these terms is whether a state may use force against a non-imminent threat – for instance, where there is foreknowledge of an attack yet to be launched, or where one attack has already happened but another is believed to be in train.

Some scholars favour a state's right to anticipatory self-defence, arguing that any other approach would result in states '[assuming] the posture of "sitting ducks"'[34] when dealing with an imminent threat.[35] The counter to this position is the belief that such an expansive view of the right to self-defence would allow for recourse to force when not strictly necessary,[36] thus failing the necessity requirement.[37]

'were committed by nineteen men resident in the United States who seized aircraft in the United States and crashed them into buildings in the United States. At least in the immediate sense, the threat "originated' in territory under US control.' (Ibid 68).

[32] 'The *Caroline* Incident, Letters from Webster to Fox' (1840–41) 29 British & Foreign State Papers 1129, 1137–8.

[33] Gray, above n 17, 211–2.

[34] Myres McDougal, 'The Soviet-Cuban quarantine and self-defence' (1963) 57 *American Journal of International Law* 597, 601.

[35] Michael Schmitt, 'Responding to transnational terrorism under the *jus ad bellum*: A normative framework' in Michael Schmitt and Jelena Pejic (eds) *International Law and Armed Conflict: Exploring the Faultlines – Essays in Honour of Yoram Dinstein* (Martinus Nijhoff, 2007) 174; Wedgwood, above n 28, 564–5.

[36] Thomas Franck, 'Who killed Article 2(4) or: Changing norms governing the use of force by States' (1970) 64 *American Journal of International Law* 809, 821.

[37] W Michael Reisman and Andrea Armstrong, 'The past and future of the claim of pre-emptive self-defence' (2006) 100 *American Journal of International Law* 525, 549–50.

B. International Humanitarian Law

Another argument used to justify targeted killing of terrorist suspects has been that such persons are taking direct part in hostilities against the targeting state, and under international humanitarian law they are subject to targeting for such participation.[38] Under the law of armed conflict, targeted killing will indeed be legal if the target can be considered either a combatant (in international armed conflict) or a person who is deemed to be taking direct part in hostilities (in international or non-international conflicts). Determining who is a combatant is relatively uncontroversial – Article 4A of Geneva Convention III outlines the requirements for combatant status in international conflicts:[39]

(1) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

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

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Combatant status is also outlined in Article 43 of Protocol I as 'all organized armed forces, groups and units which are under a command

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[38] Reisner, above n 14.
[39] Geneva Convention (III) Relative to the Treatment of Prisoners of War, adopted 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), art 4A.

responsible to that Party for the conduct of its subordinates. . . [and]. . . subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict'.[40] Article 1(4) of Protocol I relevantly 'internationalizes' conflicts involving national liberation movements fighting against state parties to Protocol I.

More difficult to determine is when persons who do not qualify as Article 4A combatants may be targeted, raising the issue of 'direct participation in hostilities' (DPH). As a general rule, civilians are not to be made the target of attack, unless and for such time as they directly participate in hostilities. Additional Protocol I[41] codifies the principle of DPH in Article 51(3) providing that 'civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'.[42] DPH is codified in Article 13(3) of Protocol II, and is worded similarly to Article 51(3) of Protocol I.[43] Article 51 of Protocol I does not provide a clear definition of what is meant by the phrase 'direct part in hostilities.'[44] The Commentary to the Additional Protocols states that:

> [t]he immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be

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[40] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), art 43 ('Protocol I').

[41] Ibid art 51(3); Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987) xix–xxxi.

[42] The 'protection afforded by this Section' refers to the prohibition contained in art 51(1), (2), (4)–(8) which provides that civilians are not to be made the subject of attack, and that civilians are to be protected from the dangers arising from military operations, imposing prohibitions on parties to the conflict on conducting indiscriminate attacks, and from using civilians to immunize military installations or sites.

[43] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), art 13(3) ('Protocol II').

[44] Additional Protocols Official Records XV, CDDH/III/224, 330; see also Sandoz, Swinarski and Zimmerman, above n 41, 618–9 [1942–1945]; and Michael Bothe, KJ Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, 1982) 301–4, [2.4]–[2.4.2.2].

> understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.[45]

The potential uncertainties in Article 51 led to the authors of the 2006 International Committee of the Red Cross (ICRC) Study on the customary status of international humanitarian law to state that 'a precise definition of the term "direct participation in hostilities" does not exist'.[46]

The Israeli Supreme Court has examined the question of DPH in the 2006 case *The Public Committee Against Torture in Israel v The Government of Israel*.[47] The so-called *Targeted Killings* case was brought by an Israeli human rights organization seeking to challenge the state policy of targeted killings. In order to determine whether targeted killings were legal, the court had to examine when civilians were deemed to be taking direct part in hostilities. Thus, the scope of Article 51(3) of Protocol I regarding DPH comprised a major portion of the decision.

The court identified certain categories of persons who could be considered as taking direct part in hostilities, including persons collecting intelligence on the armed forces; persons transporting unlawful combatants to or from the place where hostilities are occurring, and persons who operate weapons that unlawful combatants use, or who supervise their operations or provide service to them.[48] Civilians involved in transporting ammunition for use in hostilities and persons acting as voluntary human shields should also be considered as taking direct part in hostilities.[49] The court explained:

> [the] direct character of the part taken should not be narrowed merely to the person committing the physical act of attack, those who have sent him, as well, take 'a direct part'. The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in hostilities.[50]

As to the duration of DPH, the court stated that there was no accepted or agreed position regarding when civilian immunity was lost and regained

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[45] Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, above n 41, 618 [1942].

[46] Jean Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (ICRC, 2005) vol I, 22.

[47] *The Public Committee Against Torture in Israel v The Government of Israel*, Supreme Court of Israel, 14 December 2006, HCJ 5100/94 ('*Targeted Killings*').

[48] Ibid, s 35.

[49] Ibid, ss 35–6.

[50] Ibid, s 37.

but acknowledged that a person who has ceased taking a direct part in hostilities regains his or her protection.[51] The court stated that a distinction should be made between a person who takes part in hostilities only once, or sporadically, and those persons who have actively joined a 'terrorist organization' and commit a chain of hostile acts, even if there are short 'rest' periods between such acts.[52] Such rest periods did not constitute a cessation of active participation, but rather a brief interlude preparatory to the commission of, and/or participation in the next hostile act.[53]

The court held that decisions to proceed with a targeted killing needed to be assessed on a case-by-case basis, [54] and would be legal if the following cumulative criteria were met:

(1) targeting forces must verify the identity of the target as well carry out the steps for meeting the 'DPH' standard;
(2) less harmful means should be used if possible, even if the target has been properly identified and meets the DPH test;
(3) following any targeted killing, there must be a retroactive and independent investigation on the identification of the target and the circumstances of the attack;[55]
(4) any collateral damage to civilians must meet the IHL requirements of proportionality.[56]

The *Targeted Killings* case took an essentially restrained approach to how to deal with the targeting of civilians taking direct part in hostilities. The court rejected the attempts by the Israeli Government to introduce a 'third category' of persons under the international law – the 'unlawful combatant',[57] favouring a case-by-case approach, and emphasizing the applicability of law of war norms.[58] While the decision has been criticized by some commentators regarding some of its reasoning and methodology,[59] for the most part, the decision has been received as a

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[51] Ibid, s 39.
[52] Ibid, ss 39–40.
[53] Ibid.
[54] Ibid, ss 34 and 39.
[55] Ibid, ss 54 and 59.
[56] Ibid, ss 60 and 63.
[57] Ibid, ss 26, 28 and 30.
[58] Ibid, ss 16 and 21.
[59] Marko Milanović criticised the court for not providing detailed reasoning on how it conceptualized the interface between international humanitarian law and international human rights law – see 'Lessons for human rights and humanitarian law in the war on terror: Comparing *Hamdan* and the Israeli *Targeted Killings*

'well-reasoned'[60] and 'positive contribution'[61] to IHL; in light of the reaction to the ICRC Interpretive Guidance,[62] the Israeli case would seem to have charted a more acceptable and reasonable 'middle-ground'[63] in dealing with the question of direct participation. The degree to which states other than Israel have taken on board the judgment is less clear, given the opacity of states' reporting on their policies in regards to targeted killing practices.[64]

While the *Targeted Killings* case did not undertake a detailed examination of what constituted membership of a terrorist group or assumption of combat function, the ICRC, who was undertaking a contemporaneous examination of DPH, did. The ICRC Interpretive Guidance examined the questions:

(1) who is a civilian for the purposes of the principle of distinction;
(2) what conduct amounts to direct participation in hostilities; and
(3) what modalities govern the loss of protection against direct attack?[65]

In answer to question (1), the guidance defines civilians as 'all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*'. Such persons are 'entitled to protection against direct attack unless and for such time as they take a direct part in hostilities'.[66] Identifying civilians in international armed conflicts is comparatively straightforward; identifying civilians in a non-international armed conflict is less so. The instruments that deal with non-international

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case' (2007) 89 *International Review of the Red Cross* 373, 391; Nils Melzer also felt that human rights law considerations were given short shrift – see *Targeted Killing in International Law* (OUP, 2008) 34–6.

[60] William Fenrick, '*Targeted Killings* judgment and the scope of direct participation in hostilities' (2007) 5 *Journal of International Criminal Justice* 332, 333.

[61] Amichai Cohen and Yuval Shany, 'A development of modest proportions: The application of the principle of proportionality in the *Targeted Killings* case' (2007) 5 *Journal of International Criminal Justice* 310, 320.

[62] Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009, published in (2008) 90(872) *International Review of the Red Cross* 991 ('ICRC Interpretive Guidance').

[63] Gabriella Blum and Philip Heymann, 'Law and policy of targeted killing' (2010) 1 *Harvard National Security Journal* 145, 159.

[64] See below, n 88, regarding the US and public accountability for the targeted killing programme.

[65] ICRC Interpretive Guidance, above n 62, 994.

[66] Ibid, 997.

armed conflict – common Article 3 and Protocol II – acknowledge, but do not authorize, participation in armed conflict. There is no clear combatant/civilian divide among non-state persons engaged in a non-international armed conflict. The Interpretive Guidance on participation in non-international armed conflict is accordingly more complex than that for international armed conflict:

> [a]ll persons who are not members of State armed forces or organised armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities ('continuous combat function').67

Exactly what constitutes direct participation in hostilities is defined by the Interpretive Guidance as a specific act that meets three cumulative criteria:

(1) the act must be likely to adversely affect the military operations of military capacity of a party to an armed conflict or alternatively to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
(2) there must be a direct causal link between the act and the harm likely to result from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
(3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[68]

The remaining part of the test is that of 'modalities governing loss of protection'. Civilians directly participating will lose their protected status for the duration of each act of DPH but regain protection upon cessation of DPH, whereas higher level members of organized groups do not regain protected civilian status as long as they assume continuous combat function.[69] Travel to, and return from, an act of DPH, is included in the window for loss of protection.[70]

The ICRC Interpretive Guidance is a useful, if controversial, addition to the discussion on direct participation. Towards the end of the

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67 Ibid, 1002.
68 Ibid, 1016.
69 Ibid, 1034–5.
70 Ibid, 1031.

Expert Process, nearly a third of the approximately 40 experts involved in the discussions requested that their names be removed from the final document 'lest inclusion be misinterpreted as support for the Interpretive Guidance's propositions'.[71] Dispute arose over a number of sections in the Interpretive Guidance, including the addition of Section IX in the final document,[72] the temporal dimension to direct participation,[73] and the definition of membership in armed groups.[74] The ICRC, in response, 'took back' the Interpretive Guidance, and issued it under its own auspices;[75] the Interpretive Guidance is thus not an expert guidance but rather the ICRC's own position on what constitutes direct participation in hostilities.[76] The Interpretive Guidance has been criticized for taking too liberal an approach to determining direct participation, presenting a 'normative paradigm that states that actually go to war cannot countenance'.[77] The lack of 'official' state responses to the Interpretive Guidance makes it difficult to assess the degree to which the guidance has been accepted or rejected by states in practice.[78] The wealth of commentary from academics and practitioners suggests a cautious approach to the Interpretive

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[71] Michael Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A critical analysis' (2010) 1 *Harvard National Security Journal* 5.

[72] Section IX related to 'General Restraints on the Use of Force in Attack' – a section added towards the end of the process and apparently to the surprise of the participants, who had neither expected nor debated such an inclusion. In a scathing article, one of the experts involved, W Hays Parks, a law professor and former Senior Associate Deputy General Counsel for the US Department of Defence, dubbed Section IX as having 'no mandate, no expertise and legally incorrect'. See 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No mandate, no expertise, and legally incorrect' (2010) 42 *NYU Journal of International Law and Politics* 769.

[73] Bill Boothby, '"And for Such Time As": The time dimension to direct participation in hostilities' (2010) 42 *NYU Journal of International Law and Politics* 741.

[74] Direct Participation in Hostilities Expert Kenneth Watkin, 'Opportunity lost: Organised armed groups and the ICRC 'Direct Participation in Hostilities Interpretive Guidance' (2010) 42 *NYU Journal International Law and Politics* 641.

[75] Interpretive Guidance, above n 62, 992.

[76] Ibid.

[77] Schmitt, above n 71, 44.

[78] See, e.g., J. Jeremy Marsh and Scott Glabe, 'Time for the United States to directly participate' (2011) 1 *Virginia Journal of International Law Online* 13 at 14 where the authors note that the absence of state responses to the Interpretive Guidance is creating the possibility for the guidance to become the authoritative statement on direct participation, despite the extensive criticism levelled at the guidance.

Guidance, acknowledging the scholarship of the guidance,[79] but emphasising that it remains the opinion of the ICRC alone, and is not necessarily reflective of customary law, or accepted state practice.[80]

For a targeted killing to be legal under IHL, it must also fulfil certain fundamental requirements. The targeted killing must adhere to the principle of distinction. This principle, contained in Article 48 of Protocol I, states that parties to the conflict 'shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'.

Targeted killings must also fulfil the requirement of proportionality, and must be justifiable according to the doctrine of military necessity. The principle of proportionality, codified in Article 51(5)(b) of Protocol I, states that 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated' would be disproportionate, and illegal under international law. If it becomes apparent, prior to an impending attack, that the target is not in fact military in nature, or if the attack will cause incidental loss of human life, injury to civilians, and/or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, the attack must be cancelled or suspended. [81] Connected to the principle of proportionality, the doctrine of military necessity states that 'no more force or greater violence should be used to carry out a military operation than is necessary in the circumstances.'[82] Thus, parties to a conflict may employ armed force against their adversary, so long as such force is the minimum required for the achievement of their military objectives.

Concerns regarding the practice of targeted killings in armed conflict have mainly arisen in relation to the principle of distinction. A report in *The New York Times* revealed some of the details regarding the Obama administration policy on drone strikes and selection of targets, illustrating the remarkably broad scope of targeting criteria as 'all military-age males in a strike zone'. An administration source dismissed concerns that the targeting scope was too wide, suggesting that people in an area of known terrorist activity, or found with a top Al Qaeda operative, are

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[79] Schmitt, above n 71, 6.

[80] Boothby, above n 73; Parks, above n 72; Schmitt, above n 71; Marsh and Glabe, above n 78.

[81] Protocol I, art 57(2).

[82] Solis, above n 1, 258.

probably engaged in activities that would inevitably render them liable for targeting.[83] However, this seems an unacceptably broad approach; indeed, some reports have placed civilian casualties as a result of the US targeted killing campaign[84] at over 1,000.[85] These numbers have been disputed, with claims that local authorities over-report civilian casualties and that targeted killings, as conducted by the US, have resulted in near-zero civilian casualties.[86] Due to the manifold voices of concern about the legality of the US drone strikes policy, the Obama administration has apparently undertaken the task of adopting a handbook setting out the precise contours of the legal rules governing targeted killings. The handbook is, as this chapter goes to press, still at draft stage.[87]

C. International Human Rights Law

Finally, the legality of targeted killings under IHRL should also be considered. If a targeted killing occurs outside the context of an armed conflict, some have argued that IHRL is the applicable, indeed preferable, framework in which to analyse its legality, 'terrorist attacks generally have the hallmarks of crime; not armed attacks that give rise to the right of self-defence . . . terrorist attacks are usually sporadic, and they are rarely the

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[83] Jo Becker and Scott Shane, 'Secret "Kill List" proves a test of Obama's principles and will', *The New York Times* (online, 29 May 2012) <www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>.

[84] From 2004–12, covering reported and recorded strikes in Yemen, Pakistan, and Somalia; see further the ongoing investigation undertaken by the Bureau of Investigative Journalism, *Covert War on Terror: The Data* (2012) <www.thebureauinvestigates.com/category/projects/drone-data/>; see also the Stanford/NYU study, *Living Under Drones* (2012) <http://livingunderdrones.org/report/>.

[85] Ibid.

[86] See reported figures and research undertaken by the New America Foundation, *Year of the Drone* (2012) <http://counterterrorism.newamerica.net/drones>.

[87] Scott Shane, 'Election Spurred a Move to Codify US Drone Policy', *The New York Times* (24 November 2012) <www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?_r=0>. The most recent reports – in January 2013 – had the Obama Administration 'poised to sign off' on the so-called 'counter-terrorism playbook' (Greg Miller, Ellen Nakashima and Karen DeYoung, 'CIA Drone Strikes Will Get Pass in Counterterrorism 'Playbook,' Officials Say', *The Washington Post* (19 January 2013) <http://articles.washingtonpost.com/2013–01–19/world/36474007_1_drone-strikes-cia-director-playbook>). However, there has been no reportage of any new developments on this front as of this writing.

responsibility of the state where the perpetrators are located'.[88] Human rights law will be particularly important given ongoing controversies over the application of international humanitarian law, namely when terrorism can constitute a non-international 'armed conflict' and accompanying uncertainties about the geographical and temporal scope of such conflicts.[89] These issues in turn determine whether killing may be lawfully justified under IHL or left to human rights law. Even if IHL applies, IHRL may still be significant because it applies concurrently to complement IHL in situations of armed conflict.[90]

Under IHRL all persons have an 'inherent', non-derogable right to life.[91] Some of the foundation documents of IHRL modify the right slightly: the ICCPR,[92] the American Convention on Human Rights[93] and the African Charter of Human and People's Rights[94] prohibit the 'arbitrary' deprivation of life. The European Convention for the Protection of Human Rights and Fundamental Freedoms[95] refers to the right not to be 'intentionally'[96] deprived of life, but states that such deprivation of life will

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[88] O'Connell, 'Remarks' above n 16, 593; see also Susan Breau, Marie Aronsson and Rachel Joyce, 'Drone Attacks, International Law and the Recording of Civilian Casualties of Armed Conflict' (Oxford Research Group Discussion Paper 2, 1 June 2011) <www.oxfordresearchgroup.org.uk/publications/briefing_papers_and_reports/discussion_paper_2>: the authors state that 'those attacks that take place outside of the geographical area of armed conflict are extra-judicial killings contrary to international Human Rights Law and domestic criminal law unless the persons involved were killed while trying to evade lawful capture' at 2. It should be noted that the existence of an armed conflict does not preclude the applicability of human rights norms – this was affirmed by the ICJ in advisory opinions on the *Wall*, 102–6 and *Nuclear Weapons*, 25.

[89] See Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, 2012) 164–70; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (CUP, 2010) 140–48.

[90] See *Nuclear Weapons*, 25; *Wall*, 102–6; see also related comments to this effects by the UN Human Rights Committee, General Comment N.o 29: Article 4 – States of Emergency UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [3]; ECOSOC, Concluding Observation: Israel, UN Doc E/C.12/1/Add.69 (31 August 2001).

[91] International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6 ('ICCPR').

[92] Ibid

[93] Adopted 22 November 1969, 1149 UNTS 123 (entered into force 18 July 1978) art 4 ('ACHR').

[94] Adopted 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 4 ('Banjul Charter').

[95] Adopted 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('ECHR').

[96] Ibid, art 2(1).

not be unlawful if it results from the proportional use of force which is no more than absolutely necessary in certain cases, including 'defence of any persons from unlawful violence'.[97]

Under IHRL, the deprivation of life will not be prima facie illegal if it is required to protect life from an imminent threat – thus making the deprivation proportional – and provided that there were no other means, such as capture or non-lethal incapacitation, to prevent the threat to life – thus making the deprivation of life necessary.[98] All law enforcement activities, in the context of anti-terrorism measures, must therefore be carried out with full regard to IHRL. As noted by Kretzmer, the following fundamental principles must be observed:

> (1) every individual benefits from the presumption of innocence; (2) persons suspected of perpetrating or planning serious criminal acts should be arrested, detained and interrogated with due process of law; and (3) if there is credible evidence that such persons were indeed involved in planning, promoting, aiding and abetting or carrying out terrorist acts they should be afforded a fair trial before a competent and independent court and, if convicted, sentenced by the court to a punishment provided by law.[99]

Under such a model, it would seem impossible that a targeted killing – the intentional and premeditated killing of a person not in the custody of the targeting state – could ever be considered lawful under IHRL. This was noted by Philip Alston, who stated that under IHRL, 'unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation'.[100]

However, it may be queried to what extent a state, seeking to prevent the commission of an act of violence, can respect and observe the due process norms of arrest, detention, and trial for suspected terrorists when they are beyond the territorial reach of the targeting state. This raises the issue of the extraterritorial applicability of IHRL. Under the ICCPR, parties to the Covenant are obliged to respect and ensure the rights enshrined in the

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[97] Ibid, art 2(2).

[98] See Phillip Alston, *Interim Report on the Worldwide Situation in Regard to Extrajudicial, Summary or Arbitrary Executions*, UN Doc A/61/311 (5 September 2006) [33]–[45]; UN Human Rights Committee, General Comment No. 6: Article 6 – The Right to Life, UN Doc HRI/GEN/1/Rev.6 (1982) [3]; and the Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc.5, rev. 1, corr, (2002) [86]–[92].

[99] David Kretzmer, 'Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence?' (2005) 16 *European Journal of International Law* 171, 178.

[100] Alston, above n 1, 11 (emphasis in original).

ICCPR 'to all individuals in its territory and subject to its jurisdiction'.[101] However, the very nature of targeted killings is that the targets are not within the territory of the targeting state, nor usually subject to its jurisdiction. As Kreztmer argues:

> The problem with the law enforcement model in the context of transnational terror is that one of its fundamental premises is invalid: that the suspected perpetrator is within the jurisdiction of the law-enforcement authorities in the victim state, so that an arrest can be effected. What is the situation when. . . the terrorist is in the territory of another state? The victim state may not arrest or apprehend that person without the active assistance and support of that other state. But what if that state is either unwilling to arrest the suspected terrorist or incapable of doing so?[102]

The European Court of Human Rights, in its decision in *Banković v Belgium*, took a narrow view regarding the scope of jurisdiction; a party to the European Convention exercises jurisdiction only in its own territory, except where the state exercises some or all of the powers of government in the territory of another state with this consent, invitation or acquiescence, or else where it is an occupying power exercising effective control.[103] More recently, the European Court, in its decisions of *Al-Skeini*[104] and *Al-Jedda*[105] re-examined the question of the extra-territorial scope of the European Convention, and, in *Al-Skeini*, reaffirmed the 'exceptional' nature of instances of extra-territorial application of the European Convention[106] – that, for the purposes of the Convention 'whenever a state through its agents exercises control and authority over an individual, and thus jurisdiction, the state us under an obligation under Article 1 to secure

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[101] ICCPR, art 2(1).

[102] Kretzmer, above n 99, 179.

[103] *Banković v Belgium* App No 52207/99 (2007) 44 EHRR SE5, s 59–61 ('*Banković*'); see also *Loizidou v Turkey* App No 15318/89 (1996) 23 EHRR 513, s 52; *Wall*, 139. The decision in *Banković* has been subject to much criticism, with commentators criticizing the result as the product of;

> the Court's less than transparent weighing of competing policy considerations, and its ultimate desire to come up with a superficial, legalistic rationale that would justify making the extraterritorial application of the ECHR *exceptional*. Deciding the case in late 2001, in the immediate wake of 9/11, the Court was understandably torn between considerations of universality and effectiveness' Marko Milanović, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 *European Journal of International Law* 121, 123.

[104] *Al-Skeini and others v United Kingdom* App No. 55721/07 (2011) 53 EHRR 18.

[105] *Al-Jedda v United Kingdom* App No. 27021/08 (2011) 53 EHRR 23.

[106] *Al-Skeini*, above n 104, 133–42.

to that individual the rights and freedoms under [the Convention]'.[107] This expanded on *Banković*, by adding the idea of state jurisdiction triggered by a state's agent's personal control and authority over an individual; *Banković* admitted only a spatial model of jurisdiction[108] – where a state has effective control over an area.[109] However, the European Court stressed that extra-territorial scope of the European Convention was still exceptional – the personal control of individuals that was grounds for jurisdiction in *Al-Skeini* was dependent on the finding that the UK had spatial jurisdiction and exercised public powers in parts of Iraq. Thus, using the *Al-Skeini* reasoning, if the original spatial jurisdiction does not exist, logically personal jurisdiction cannot be found either. As Milanović puts it:

> while the ability to kill is 'authority and control' over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft. Under this reasoning, drone operations in Yemen or wherever would be just as excluded from the purview of human rights treaties as under *Banković*.[110]

With such a narrow scope of application, it seems questionable whether IHRL norms apply to terrorists targeted beyond the borders of the targeting state.[111] However, such an approach would seem to run counter to the philosophical underpinning of IHRL, the idea that these rights are universal.[112] A more protective or functional interpretation of jurisdiction might suggest that wherever a state is able to affect a particular right, it has a correlative duty to respect it; thus, if a state has the power to take life (by using force abroad), it bears an obligation not to take life arbitrarily.

With respect to the proportionality and necessity elements regarding a 'non-arbitrary' deprivation of life under IHRL, questions also arise regarding how imminent the threat of violence must be before a deprivation of life will be considered 'non-arbitrary'. Put another way, 'where there is strong evidence that a suspected terrorist is preparing or planning a terrorist attack against residents of the victim state, will a pre-emptive attack be regarded as an arbitrary deprivation of his life, if there was no reasonable way of apprehending or arresting him?'[113] Complicating the issue is

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107 Ibid, 137.
108 Milanović, above n 103, 122.
109 *Banković*, 71.
110 Milanović, above n 108, 130.
111 See, e.g., Gerald L Neuman, 'Humanitarian law and counter-terrorist force' (2003) 14 *European Journal of International Law* 283.
112 ICCPR, Preamble; Kretzmer, above n 99, 184.
113 Kretzmer, above n 99, 180.

that if such persons are outside the territorial control of the state acting in self-defence, one must query the degree to which the persons in question present an imminent threat justifying a lethal response under IHRL – in certain rare circumstances, such as remote detonation of an explosive located extra-territorially from the bomber, lethal force could arguably be used. However, the more 'conventional' examples, for instance, the use of light arms or non-remote explosive devices, would perhaps not allow for extra-territorial use of lethal force under human rights law.

The Human Rights Committee has gone some way to addressing this question, in regard to the practice of targeted killing in Israel, stating that the practice of targeted killing for the purposes of deterrence or punishment would be a violation of Article 6 of the ICCPR, but that the use of deadly force against a 'person suspected of being in the process of committing acts of terror'[114] would not necessarily be illegal provided that 'before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted'.[115] However, the ambiguity regarding what amounts to exhausting all measures for arrest prior to the use of lethal force persists and falls to be resolved on a case-by-case basis in concrete cases.[116] There is also a question to what extent human rights bodies and courts should defer to the executive's law enforcement judgements about whether arrest is feasible in a given case or force is the only option.

3. CONCLUSION

The last decade has seen considerable steps being taken by a number of bodies, including the Supreme Court of Israel, the ICRC, and the UN, to address the question of the legality of targeted killings. These bodies

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[114] UN Human Rights Committee, Concluding Observations: Israel, UN Doc CCPR/CO/78/ISR (21 August 2003) [15].

[115] Ibid.

[116] Note the decision of the European Court of Human Rights in *McCann v UK* App No 18984/91 (2008) 47 EHRR 40, which split the Court on the issue of the legality of the use of lethal force against suspects who may be about to detonate a remote explosive device. The Court was in agreement regarding the right to use lethal force if doing so was absolutely necessary in order to defend of persons from unlawful violence (134–5, 148, 200); however the Court was divided on, among other points, the question of the practicality of arresting terrorist suspects (11), with the minority noting that 'it would be wrong to conclude in retrospect that a particular course would, as things later transpired, have been better than one adopted at the time under the pressures of an on-going anti-terrorist operation' (8).

have investigated the question of when someone can be considered to be taking direct part in hostilities, for the purposes of losing their civilian immunity,[117] and whether targeted killings are legal under international law, international humanitarian law, and IHRL. However, schisms remain regarding whether targeted killings of terrorists should be dealt with under the schema of IHL or whether IHRL remains the more appropriate framework – or both. As of 2013, the UN Special Rapporteur on Counter-Terrorism, Ben Emmerson, and Special Rapporteur on Extra-Judicial Killings, Christof Heyns, will lead an investigation unit within the special procedures of the UN Human Rights Council to inquire into US-led drone attacks.[118] It is hoped that this body will continue to clarify the applicable law and address the extant lacunae in this growing area of state practice, even if a fairly small number of states is engaged in such policies.

[117] ICRC Interpretive Guidance, above n 62.

[118] Owen Bowcott, 'UN to Investigate Civilian Deaths in US Drone Strikes', *The Guardian* (Online, 25 October 2012) <www.guardian.co.uk/world/2012/oct/25/un-inquiry-us-drone-strikes>.