

Targeted Killings: An Examination of its Permissibility Under Human Rights Law, the Law on the Use of Inter-State Force, and International Humanitarian Law

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I. INTRODUCTION

Targeted killing is the “use of lethal force attributable to a subject of international law *with* the intent, premeditation, and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.”¹ It takes place in a variety of contexts and may be committed by governments and their agents in times of peace as well as in times of armed conflict.² The means and methods of killing vary, and include sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison.³

In November 2000, Israel was the first state to openly and publicly acknowledge that it operated targeted killings in its confrontation with Palestinian and Hamas militants.⁴ Israel not only assumed responsibility for numerous specific operations, but has also repeatedly declared that such has been a part of a long-term deliberate policy.⁵

After the dramatic events of 11 September 2001, the practice of targeted killing has started to become openly adopted and accepted by other states such as the United States (U.S.), the United Kingdom, and Germany, as part of their counter-terrorism strategy.⁶ Such states justify the use of targeted killings as necessary to protect the lives and integrity of individuals they consider to be under threat from those they target.⁷ Thus, it may be said that the present war on terror ushered in a new method of conducting hostilities or of using force, which is what is known as targeted killing.

However, the current and increased practice by some states of targeted killings has triggered a continuing heated debate on the legal as well as moral permissibility of “targeted killings.” While some instances of “targeted killings” were unanimously condemned, some, however, have been widely

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1. NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 439 (2008 ed.) (emphasis supplied).
 2. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 8, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip G. Alston) [hereinafter *Study on Targeted Killings*].
 3. *Id.*
 4. See generally Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings* (An Unpublished Report to the Israeli Government), available at <http://www.amnesty.org/en/library/asset/MDEI5/005/2001/en/818d1e6d-dc4b-11dd-a4f4-6f07ed3e68c6/mdei50052001en.pdf> (last accessed Sep. 12, 2012).
 5. *Id.*
 6. MELZER, *supra* note 1, at xi.
 7. See The White House, *The National Security Strategy of the United States of America* September 2002, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/print/nss5.html> (last accessed Sep. 12, 2012).

condoned. Amidst all these, it must not be forgotten that the end does not always justify the means.

Given the foregoing, the following questions come to the fore: What is the legal regime that governs targeted killings? Should targeted killings be referred to as a method of law enforcement in peacetime situations or is it a method of conducting hostilities used in the course of an armed conflict? If targeted killings should be regarded as being in the context of an armed conflict, is this practice compatible with the principles of humanitarian law?

II. TARGETED KILLING UNDER INTERNATIONAL LAW

A. *The Notion of Targeted Killing*

“Targeted killing” is not a term defined under international law. Nor does it fit neatly into any particular legal framework. However, it will be useful to use the definition of targeted killing proposed by Dr. Nils Melzer, a legal advisor to the International Committee of the Red Cross (ICRC) with vast experience in his field of work with the ICRC, especially in Iraq and Afghanistan, where targeted killing operations are frequently conducted. In fact, the United Nations Special Rapporteur for Extrajudicial, Summary, and Arbitrary Executions, Philip G. Alston, used Melzer’s definition in his Report⁸ on targeted killings presented to the United Nations Human Rights Council on 28 May 2010.

Any incident of targeted killing has five cumulative elements.

First, targeted killing is a “method of *employing lethal force* against human beings.”⁹ Although targeted killings usually necessitate the use of weapons, this is not the only option in taking human life.¹⁰ Lethal force includes “any forcible measure, regardless of the means employed, which is capable of causing the death of a human being.”¹¹

Second, the elements of a targeted killing are intent, premeditation, and deliberation to kill.¹² The element of *intent* “requires that the operation be carried out with the intent to kill the targeted person, as opposed to the unintentional, accidental, negligent[,] or reckless use of lethal force.”¹³ The element of *premeditation* “requires that the intent be based on a conscious choice, as opposed to voluntary acts driven by impulse or passion.”¹⁴ The

8. *Study on Targeted Killings*, *supra* note 2, ¶ 9 (citing MELZER, *supra* note 1, at 4-5).

9. MELZER, *supra* note 1, at 3 (emphasis supplied).

10. *Id.*

11. *Id.*

12. *Id.* at 4.

13. *Id.*

14. *Id.*

element of *deliberation* “requires that the death of the targeted person be the actual aim of the operation, as opposed to the deprivations of life which, although intentional and premeditated, remain the incidental result of an operation while pursuing other aims.”¹⁵

Third, targeted killing involves those of selected individuals.¹⁶ This differentiates them from those of random persons.¹⁷

Fourth, the “targeted persons are *not in the physical custody of those targeting them at the time of their killing.*”¹⁸ According to Melzer, this distinguishes targeted killings from judicial and extrajudicial ones as both contemplate the situation wherein the state targeting the individual has custody over the latter.¹⁹ It must also be noted that targeted killing is an “*extra-custodial*, but not necessarily an extrajudicial, deprivation of life.”²⁰

Fifth, targeted killings are “*attributable to a subject of international law.*”²¹ This element makes any case of targeted killing relevant under international law.²² Traditionally, only states have been considered as legitimate subjects of international law; however, subjects of international law may now include non-state actors, or entities “whose conduct is not attributable to [s]tates in accordance with the rules of general international law governing the responsibility of [s]tates for the conduct of their agents.”²³ This characteristic of being subject to the rules of general international law leads us to the conclusion that “deprivations of life attributable to non-[s]tate actors qualify as targeted killings *to the extent that international law regulates, prohibits, or penalizes* the use of lethal force by them.”²⁴

The foregoing distinguishes targeted killings from unintentional, accidental, or reckless killings, or those made without conscious choice.²⁵ It also distinguishes them from law enforcement operations, e.g., against a suspected suicide bomber.²⁶

15. MELZER, *supra* note 1, at 4.

16. *Id.*

17. *Id.*

18. *Id.* (emphasis supplied).

19. *Id.*

20. *Id.* (emphasis supplied).

21. MELZER, *supra* note 1, at 4 (emphasis supplied).

22. *Id.*

23. *Id.*

24. *Id.* (emphasis supplied).

25. *See* MELZER, *supra* note 1, at 4.

26. *Id.*

It is important to note that a “targeted killing” is not the same as an “assassination.” An assassination carried out in peacetime is commonly defined as the “murder of a private individual or public figure for political purposes,”²⁷ while an assassination conducted in times of armed conflict is often defined as the “specific targeting of an individual using treacherous means.”²⁸

In the same manner, targeted killing is different from an “extrajudicial execution,” which refers to “the deliberate killing of suspects in lieu of arrest, in circumstances in which they [do] not pose an immediate threat.”²⁹

B. Current Trend Towards Legitimization

1. The Declared State Policy of Israel of Targeted Killings

In November 2000, Israel was the first state to publicly acknowledge and admit the policy and practice of targeted killings in the war against terror.³⁰ The means used for the Israeli targeted killings include drones, snipers, missiles from helicopters, killings at close range, and artillery.³¹ Israel has assumed responsibility for numerous attacks on suspected members of the Fatah, Hamas, and Islamic Jihad organizations, and any other alleged terrorist organization.³² Moreover, it has in fact repeatedly declared that targeted killing is part of a long-term deliberate policy to eliminate threat from the said groups. Notably, in 14 February 2001, then Israel Deputy Minister of Defense Ephraim Sneh made the following statement: “We will continue our policy of liquidating those who plan or carry out attacks, and no one can

27. W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 714 (2007) (citing Matthew C. Wiebe, *Assassination in Domestic and International Law: The Central Intelligence Agency, State-Sponsored Terrorism, and the Right of Self-Defense*, 11 TULSA J. COMP. & INT'L L. 363, 365 (2003)).

28. Fisher, *supra* note 28, at 714 (citing Asa Kasher & Amos Yadlin, *Assassination and Preventive Killing*, 25 SAIS REV. 41, 41 (2005); Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 641-42 (1992); & Wiebe, *supra* note 28, at 366).

29. Fisher, *supra* note 28, at 714 (citing Amnesty International, *Yemen/USA: Government Must Not Sanction Extra-Judicial Executions* (An Unpublished Amnesty International Press Release) 1, available at <http://www.amnesty.org/en/library/asset/AMR51/168/2002/en/ac72c772-fae9-11dd-8917-49d72do853f5/amr511682002en.pdf> (last accessed Sep. 12, 2012)).

30. See generally Amnesty International, *supra* note 30.

31. *Id.*

32. *Id.*

give us lessons in morality because we have unfortunately 100 years of fighting terrorism.”³³

Subsequently, each time a person suspected of being a member of any terrorist organization was “liquidated” or “neutralized,” the Israel Government has made such similar statements, justifying the act of targeted killing.³⁴ Israel justifies the resort to targeted killing by indicating that it is duly exercising its right of self-defense in a situation that amounts to an armed conflict appropriately governed by the Laws of War.³⁵ Speaking before the United Nation Human Rights Committee (UNHRC), the Israeli representative had the following statement to make —

[The] attacks were restricted to persons directly involved in hostile acts. Even persons known to be terrorists were legitimate targets only if there was reliable evidence linking them directly to a hostile act. Senior political figures had not been attacked for their political activities but because they had been directly implicated in hostile acts. It would, of course, be preferable to arrest such persons, but in areas like the Gaza strip, over which Israel had no control, his government did not have that option. Its security forces were instructed by the Attorney General, however, to attack ... combatants only when there was an urgent military necessity and when no less harmful alternative was available to avert the danger posed by the terrorists. Furthermore, under the rule of proportionality, which formed part of the laws of armed conflict and was integral to Israel’s accepted values, they were instructed to carry out such attacks only if they did not cause proportionate harm to civilians. ... For its part, Israel operated only against legitimate targets, using legitimate methods of warfare while abiding by the rule of proportionality in accordance with international law.³⁶

However, the Israel policy of targeted killing was and is to this day subject to intense debate as well as criticism by legal scholars and human rights groups with Amnesty International at the forefront.

Amnesty International has repeatedly called on Israel to abolish its policy of targeted killing and not to use lethal force except against those posing an *imminent* danger to human life.³⁷ The group rejects the Israeli government’s and Israeli Defense Force’s justification that they may direct the killings of those who, in turn, planned or are planning the killings of Israelis.³⁸ It has consistently maintained its position that such is internationally acceptable

33. Amnesty International, *supra* note 4, at 1.

34. See Amnesty International, *supra* note 4, at 2.

35. *Id.* at 7.

36. MELZER, *supra* note 1, at 30-31 (citing U.N. Human Rights Committee, *Summary Record of the 2118th meeting: Israel*, ¶ 40, U.N. Doc. CCPR/C/SR.2118 (July 25, 2003)).

37. Amnesty International, *supra* note 4, at 2-3 (emphasis supplied).

38. *Id.* at 28.

only if lives are in imminent danger.³⁹ Amnesty International also notes that even if Palestinians have died when weapons were used against Israelis, a number of the killings took place when no such danger existed.⁴⁰

Similarly, the UNHRC, in response to the statement made by the Israeli representative as noted above, emphasized that states should not use targeted killing as a deterrent or punishment.⁴¹ It further adds that all efforts to arrest the person must be taken before resort to lethal force may be had.⁴²

Despite the foregoing concerns regarding Israel's targeted killing policy raised by Amnesty International and the UNHRC, Israel to this day continues to enforce its policy of targeted killings. However, Israel has neither clarified the parameters of its policy of targeted killings as requested by the UNHRC nor has it divulged the actual procedure followed preparatory to and during an actual targeted killing operation.⁴³ In connection with this, Col. Daniel Reisner, Head of the Legal Department of the Israeli Defence Force (IDF), when asked by Amnesty International representatives during consultation meetings as to the IDF's rules of engagement, the latter responded by merely saying that "most countries [refuse to] divulge [their] rules of engagement," implying that Israel would similarly refuse to divulge information about such.⁴⁴

2. Public Committee Against Torture in Israel (PCATI) v. Government of Israel⁴⁵

This case is significant because to date, it is the only comprehensive judgment on the legal permissibility of targeted killings. The judgment constitutes a step forward towards clarification about the issues involving the international lawfulness of targeted killing in relation to law enforcement or to the conduct of hostilities by states against non-state actors. However, the Israeli Supreme Court, while clarifying important issues about the international lawfulness of targeted killings, also expanded the meaning of certain standards under International Humanitarian Law (IHL) without however taking into account the relationship of IHL with international human rights law.

39. *Id.*

40. *Id.* at 25.

41. MELZER, *supra* note 1, at 31 (citing U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee on Israel*, ¶ 15, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003)).

42. *Id.*

43. MELZER, *supra* note 1, at 31.

44. Amnesty International, *supra* note 4, at 24.

45. See Public Committee Against Torture in Israel (PCATI) v. Government of Israel, 46 I.L.M. 375 (2006) & MELZER, *supra* note 1, at 32.

Preliminarily, it must be noted that before the Israeli Supreme Court took cognizance of this case, it had previously dismissed, suspended, or otherwise delayed cases questioning the Israeli government's policy of targeted killings.⁴⁶ The court on such occasions brushed aside petitions for it to exercise the power of judicial review by the mere expedient statement that "the choice of means of war employed by respondents in order to prevent murderous terrorist attacks before they happen, is not among the subjects in which this Court will see fit to intervene."⁴⁷

The present judgment under consideration was filed jointly in a petition by the PCATI and the Palestinian Society for the Protection of Human Rights and the Environment, both human rights groups, arguing against the legality of Israel's targeted killing policy.⁴⁸ The Government of Israel was the principal respondent in the petition.⁴⁹ While the court in previous occasions shied away from entertaining petitions questioning the legality of targeted killings, this time it took note of its duty to judicially review the use of the discretion of the commanders of the army forces in order to preserve the legality of the use of discretion on the part of the military commander. According to the court, "fulfillment of the conditions determined in customary international law for performing military operations is a legal question," undisputedly within its competence to rule upon.⁵⁰

The Petitioners' main position was that the "targeted killings policy is totally illegal, and contradictory to international law, Israeli law, and basic principles of human morality."⁵¹ Accordingly, it was claimed to be violative "of the human rights recognized in Israeli and international law, both the rights of those targeted, and the rights of innocent passersby caught in the targeted killing zone."⁵²

In response to the Israeli Government's invocation of Article 51 of the United Nations Charter⁵³ as a justification for the targeted killings, the

46. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 378.

47. *Id.*

48. *See generally Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. 375.

49. *Id.*

50. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 400.

51. *Id.* at 376.

52. *Id.*

53. Article 51 of the U.N. Charter states —

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in

Petitioners averred that the right to self-defense is granted to a state only in response to an armed attack by another state.⁵⁴ “The territories where targeted killing operations were carried out were under belligerent occupation by the State of Israel, and thus Article 51 does not apply to the issue.”⁵⁵ Moreover, a state cannot claim self-defense against its own population as well as against persons under the occupation of its army.⁵⁶ Therefore, Petitioners maintained that “against a civilian population under occupation[,] there is no right to self-defense; there is only the right to enforce the law in accordance with the laws of belligerent occupation.”⁵⁷ In fine, the laws applicable “are the laws of policing and law enforcement within the framework of the law of belligerent occupation, and not the laws of war.”⁵⁸

Furthermore, according to Petitioners, assuming *arguendo* the law applicable is the law of war, the targeted killings policy still violates the rules of international law applicable to armed conflicts.⁵⁹ Petitioners claimed that the laws of war recognize only two statuses of people: combatants and civilians.⁶⁰ Combatants are legitimate targets for attack with rights under international law, such as immunity from trial and the right to the status of prisoner of war.⁶¹ Meanwhile, civilians are protected persons during war; “they are not a legitimate target for attack.”⁶² According to Petitioners, “there is no intermediate status, and there is no third category of ‘unlawful combatants.’”⁶³ Petitioners thus implied that “any person who is not a combatant, and any person about whom there is doubt, automatically has the status of civilian, and is entitled to the rights and protections granted to civilians at the time of war.”⁶⁴ Therefore, terrorist organization members

any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art 51.

54. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 376.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 376.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

should be seen as civilians and not “unlawful combatants” as the state claims them to be.

In support of their position that there is no third category of “unlawful combatants,” Petitioners attached a copy of the opinion of Professor Antonio Cassese, an eminent expert in international law. In the said opinion, Professor Cassese opines that “those who do not fall into the category of combatants are, by definition, civilians. ... Thus, those who participate in various combat activities without fitting the definition of combatant, are of civilian status, [not that of unlawful combatant status,] and are entitled to the protections granted them under the laws of war.”⁶⁵

“A civilian who participates in combat activities loses those protections, and might be a legitimate target for attack ... [o]nly if he is taking a direct part in the hostilities, and only if the attack against him is carried out during such time of said participation.”⁶⁶ In addition, Professor Cassese adds that under Article 51 (3) of Additional Protocol I to the Geneva Convention,⁶⁷ “a civilian participating in hostilities loses the protections granted to civilians only for such time when he actually takes a direct part in the combat activities, such as when he shoots or positions a bomb.”⁶⁸ However, “[w]hen he lays down his weapon, or when he is not committing hostilities, he ceases to be a legitimate target for attack. Thus, a person who merely aids the planning of hostilities, or who sends others to commit hostilities, is not a legitimate target for attack.”⁶⁹ Such indirect aid cannot turn them into a legitimate target for attack.⁷⁰ They do not become military objectives.

With respect to the principle of proportionality entrenched in Article 51 (5) (b)⁷¹ of Additional Protocol I, Petitioners claimed that the targeted killing policy violated such customary rule of international law.⁷² According to

65. *Id.* at 377.

66. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 377.

67. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51 (3), *opened for signature* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

68. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 377 & Additional Protocol I, *supra* note 68, art. 51, ¶ 3.

69. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 377.

70. *Id.*

71. Additional Protocol I, *supra* note 68, art. 51 (5) (b). This Article 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” is considered indiscriminate and thus prohibited. *Id.*

72. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 377.

them, the “implementers are aware that it may, at times nearly certainly, lead to the death and injury of innocent persons.”⁷³ Moreover, they said that the Israeli Government’s targeted killing policy failed to satisfy the principle of proportionality because through “the methods used in implementing that policy, many of the targeted killing attempts end up killing and wounding innocent civilians.”⁷⁴

In its defense, Respondent Government of Israel justified its claimed legality of the policy of targeted killings by pointing to the security background which gave rise to the emergence of said policy. Using as a basis the numerous terrorist attacks upon Israel and its citizens, the Respondent maintained that it had the right to resort to the use of force to a terrorist attack against it. It claimed that pursuant to Article 51 of the United Nations Charter, which permits a state to defend itself against an “armed attack,”⁷⁵ the targeted killings carried out were justified. According to the Respondent, an “assault of terrorism against Israel fits the definition of an armed attack. Thus, Israel is permitted to use military force against the terrorist organizations.”⁷⁶

The Respondent also maintains the status of the targeted persons to belong to the class of what it called “unlawful combatants;” hence, they are considered as legitimate targets for attack. Furthermore, it posits that “they are not entitled to all the rights granted to legal combatants, as they themselves do not fulfill the requirements of the laws of war.”⁷⁷ Thus consistently, “the status of terrorists actively participating in the armed conflict is not that of civilians.”⁷⁸ Being parties to the armed conflict, it is indisputable that they can be attacked. They have become legitimate military objectives.

With regard to the issue of proportionality of targeted killings, the Respondent maintains that “targeted killings are performed only as an exceptional step, when there is no alternative to them.”⁷⁹ In addition, Respondent averred that in every targeted killing operation, collateral damage to civilian life and property is as much as possible minimized, or avoided entirely.⁸⁰

73. *Id.*

74. *Id.*

75. U.N. Charter art. 51.

76. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 378.

77. *Id.* at 379.

78. *Id.*

79. *Id.* at 380.

80. *Id.*

In ruling on the points raised by Petitioners and Respondent, the Israeli Supreme Court rendered a comprehensive judgment reaffirming customary IHL. According to the court, targeted killing is governed by IHL because Israel and the Palestinian Organizations as well as other terrorist organizations claimed to be involved in the conflict were in a state of war.⁸¹ The nature of such conflict, according to the court, was of *international character*.⁸²

The court rejected the Respondent's proposition of the existence of a third category — “unlawful combatants” — under which the Palestinian fighters would be classified.⁸³ The court reasoned that based on Article 1 of Chapter 1 of the Hague Convention (IV) Annex,⁸⁴ the Palestinian fighters are civilians and not combatants. While the court took note of numerous articles⁸⁵ by legal scholars arguing for the recognition of the third category of “unlawful combatants,” the court went on to say that the data before it was not sufficient to recognize this third category.⁸⁶ In short, the court agreed with Professor Cassese's opinion regarding the non-existence of the third category of “unlawful combatants.” As civilians, the Palestinians are entitled to protection against direct attack unless they *directly* participate in hostilities, in accordance with Article 51 (3)⁸⁷ of Additional Protocol I.⁸⁸

81. *Id.* at 383.

82. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 383.

83. *Id.* at 388.

84. The Hague Convention (IV) Annex provides —

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- (1) To be commanded by a person responsible for his subordinates;
- (2) To have a fixed distinctive emblem recognizable at a distance;
- (3) To carry arms openly; and
- (4) To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army.’

Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land art. 1 (Annex), *opened for signature* Oct. 18, 1907, 187 C.T.S. 227.

85. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 388.

86. *Id.*

87. Additional Protocol I, *supra* note 68, art. 51 (3). This Article provides that “civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” *Id.*

88. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 389.

Notable about the ruling of the Israeli Supreme Court is its interpretation of the elements “taking ... part in hostilities,” “takes a direct part,” and “for such time” under Article 51 (3) of Additional Protocol I.

Regarding the first element, the court said that a civilian is taking part in hostilities when:

- (1) Using weapons in an armed conflict;
- (2) While gathering intelligence; or
- (3) While preparing himself for the hostilities.⁸⁹

The court also opined that “there is no condition that the civilian use his weapon, nor is there a condition that he bear arms (openly or concealed).”⁹⁰ Hence, for the court, “it is possible for a civilian to take part in hostilities without using weapons at all.”⁹¹

Regarding the second element “takes a direct part,” the court while noting the absence of an agreed and accepted definition under international law of the word “direct,” held that “a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it, is a civilian taking ‘*an active part*’ in the hostilities.”⁹² Meanwhile, “a civilian who generally supports the hostilities against the army [and] who sells food or medicine to unlawful combatants is also taking an indirect part in the hostilities.”⁹³ In addition, the court held that all the terrorists belonging to the entire chain of command are deemed to be taking a “direct part” in the hostilities.⁹⁴

Regarding the third element “for such time,” the court went on to say that “a civilian taking a part in hostilities loses the protection from attack ‘for such time’ as he is taking part in those hostilities.”⁹⁵ Hence once “‘such time’ has passed[,] the protection granted to the civilian returns.”⁹⁶

Ultimately interpreting the elements of Article 51 (3) of Additional Protocol I together, the court held that a civilian participating directly in hostilities on a sporadic basis and who detaches himself from such after, may not be subject to attack “for such time” as such civilian detached oneself

89. *Id.* at 390.

90. *Id.*

91. *Id.*

92. *Id.* at 391 (emphasis supplied).

93. *Id.*

94. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 393.

95. *Id.*

96. *Id.*

from the hostilities.⁹⁷ Meanwhile, a civilian whose role is to commit a chain of acts for the terrorist organization in its conduct of hostilities is, while still a civilian, subject to attack during the intervals of the acts constituting the chain of hostilities.⁹⁸ According to the court, the rest period in between hostilities is nothing but a preparation for the next hostility; hence, the said civilian may be directly attacked.⁹⁹

The court then set out a four-fold test as a safeguard that a state may use before implementing a targeted killing operation. This test requires the state to:

- (1) Ensure the existence of strong evidence as to the identity and activity of the civilian who is allegedly taking part in the hostilities;
- (2) Take less harmful alternative measures such as arrest, interrogation, and trial as much as possible;
- (3) Conduct a thorough independent investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed after the targeted killing operation has been performed; and
- (4) If the harm is not only to a civilian directly participating in the hostilities, but also to innocent civilians nearby, the harm to them is collateral damage, which damage must withstand the proportionality test.¹⁰⁰

On the issue of whether targeted killing is in accord with the proportionality principle entrenched in Article 51 (5) (b) of Additional Protocol I, the court only used a simple cost-benefit analysis. The court only had to say that “the state’s duty to protect the lives of its soldiers and civilians must be balanced against its duty to protect the lives of innocent civilians harmed during attacks on terrorists.”¹⁰¹

In the end, it will be seen that the court permitted the targeted killings conducted by the Israeli Government provided that the above-mentioned tests have been complied with. According to the court, targeted killings must be examined on a case-to-case basis in accordance with the standards of international law, applying the four-fold test provided by the court in its ruling.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. at 394.

101. *Id.* at 396.

3. The United States' Practice of "Lethal Covert Operations"

The events of 11 September 2001 (9/11) when the United States was attacked by al-Qaeda militants ushered in a new era for United States warfare. Characterized as a horrendous atrocity by numerous groups and countries, it marked not only the day when the free world and the United States would declare war against terror but also signified the shift in counterterrorism effort and policy by the U.S. On 17 September 2001, US President George W. Bush reportedly signed an order authorizing the Central Intelligence Agency (CIA) to undertake "lethal covert operations" against the al-Qaeda network.¹⁰² The said order meant that lethal operations which were unthinkable before 9/11 were now going to be undertaken in order to target al-Qaeda and other international terrorists. Thus, the Bush Doctrine of Pre-emptive Self-defense emerged. As can be gleaned from the National Security Strategy of 2002,¹⁰³ the U.S. put forward a new interpretation of the right of a state to self-defense under Article 51 of the United Nations Charter. The Strategy reads —

We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends.

...

The United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker ... [does] not permit that option. We cannot let our enemies strike first.¹⁰⁴

This position was further emphasized by no less than then President Bush in his 2003 State of the Union Address, where he said —

Some have said that we must not act until the threat is imminent. Since when have terrorists and tyrants announce their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late. Trusting in the sanity and restraint of Saddam Hussein is not a strategy and not an option.¹⁰⁵

102. MELZER, *supra* note 1, at 40 (citing Bob Woodward, *CIA Told to Do 'Whatever Necessary' to Kill Bin Laden*, WASH. POST, Oct. 21, 2001, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/18/AR2007111800655.html> (last accessed Sep. 12, 2012)).

103. The White House, *supra* note 7.

104. *Id.*

105. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 211 (3d ed.) (citing eMediaMillWorks, *Text of President Bush's 2003 State of the Union Address*, WASH. POST, Jan. 28, 2003, available at http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/bushtext_012803.html (last accessed Sep. 12, 2012)).

Again, in the National Security Strategy of 2006,¹⁰⁶ the contents of its predecessor as to the United States' stance on pre-emptive self-defense were repeated.

This policy of the U.S. Government continues with the Obama Administration now in place. Shortly after his assumption into office, incumbent U.S. President Barack D. Obama has ordered the CIA to continue the policy of the Bush Administration of "lethal covert operations."¹⁰⁷ Only recently, Harold H. Koh, the Legal Adviser to the U.S. Department of State outlined the US Government's legal justifications for targeted killings.¹⁰⁸ They were said to be based on its asserted right to self-defense, and on IHL, on the basis that the US is "in an armed conflict with al-Qaeda, as well as the Taliban and associated forces."¹⁰⁹

In order to implement the Bush Doctrine and its accompanying policies, the U.S. developed unmanned aerial vehicles (UAVs) or drones specifically made for lethal covert operations aimed at striking not only against al-Qaeda but also against other terrorist organizations. The most notable among these UAVs or drones is the so-called "Predator" and the "Reaper." "The CIA reportedly controls its fleet of drones from its headquarters in Langley, Virginia, in coordination with pilots near hidden airfields in Afghanistan and Pakistan who handle take-offs and landings[,] ... [and] reportedly flown by civilians, including both intelligence officers and private contractors[.]"¹¹⁰

Specific instances where the US carried out the policy include the targeted killings of Ali Qaed Senyan al-Harithi, the suspect in the bombing of the USS Cole (Yemen, 3 November 2002);¹¹¹ Haitahm al-Yemeni,

106. See generally The White House, The National Security Strategy of the United States of America March 2006, available at <http://georgewebush-whitehouse.archives.gov/nsc/nss/2006/> (last accessed Sep. 12, 2012).

107. Mary Ellen O'Connell, Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009 (An Unpublished Legal Studies Research Paper) 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144 (last accessed Sep. 12, 2012) (citing Jane Mayer, *The Predator War, What are the Risks of the C.I.A.'s Covert Drone Program?*, THE NEW YORKER, Oct. 26, 2009, available at http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer (last accessed Sep. 12, 2012)).

108. See *Study on Targeted Killings*, *supra* note 2, ¶ 22.

109. *Study on Targeted Killings*, *supra* note 2, ¶ 22 (citing Harold Hongju Koh, Legal Adviser, U.S. Department of State, Keynote Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (last accessed Sep. 12, 2012)).

110. *Study on Targeted Killings*, *supra* note 2, ¶ 20 (citing Mayer, *supra* note 108).

111. See BBC News, CIA 'killed al-Qaeda suspects' in Yemen, available at <http://news.bbc.co.uk/2/hi/2402479.stm> (last accessed Sep. 12, 2012).

suspected senior figure in the terrorist organization al-Qaeda (Pakistani-Afghan border, around May 2005);¹¹² and Musab al-Zarqawi, the leader of the terrorist group al-Qaeda in Iraq (Iraq, 7 June 2006).¹¹³ Several failed attempts of targeted killings also highlight the US's policy of "lethal covert operations" such as that of Ayman al-Zawahri, the alleged second in command of al-Qaeda (Pakistan, 13 January 2006),¹¹⁴ and Sheik Ahmed Madobe, senior leader of the Islamic Court in Somalia (Somalia, 23 January 2007).¹¹⁵

It is notable, however, that the United States has not acknowledged and assumed responsibility for the numerous cases of targeted killings that were enumerated above.¹¹⁶ Even when virtually incontestable, the United States has maintained an evasive attitude with respect to the assumption of responsibility for the targeted killings.¹¹⁷ Specifically, when asked by Alston, the United Nations Special Rapporteur for Extrajudicial, Summary, and Arbitrary Executions, about the killing of al-Harithri, the US merely responded by saying that "'allegations stemming from any military operations conducted during the course' of such ... 'armed conflict' 'do not fall within the special mandate of the Special Rapporteur' or of the Human Rights Commission;" the "armed conflict" it was engaged in being governed by IHL.¹¹⁸

Thus, the US's failure to provide transparency as to the standards and procedures which govern its targeted killing operations has led to condemnation by human rights groups such as Amnesty International, which

112. See Defense Industry Daily, Predator Kills Important al-Qaeda Leader in Pakistan, *available at* <http://www.defenseindustrydaily.com/predator-kills-important-alqaeda-leader-in-pakistan-0547/> (last accessed Sep. 12, 2012).

113. See Mary Anne Weaver, The Short, Violent Life of Abu Musab al-Zarqawi, *available at* <http://www.theatlantic.com/magazine/archive/2006/07/the-short-violent-life-of-abu-musab-al-zarqawi/304983/> (last accessed Sep. 12, 2012).

114. See NBC News, Al-Zawahri in first video since failed U.S. strike, *available at* http://www.msnbc.msn.com/id/11101405/ns/world_news-terrorism/t/al-zawahri-first-video-failed-us-strike/#.UEMkT6T9E5Q (last accessed Sep. 12, 2012).

115. See Kismaayo News, Up close with Ras Kamboni leader Sheikh Ahmed Madobe, *available at* <http://kismaayonews.com/2012/07/04/up-close-with-ras-kamboni-leader-sheikh-madobe/> (last accessed Sep. 12, 2012).

116. See generally MELZER, *supra* note 1, at 42.

117. *Id.*

118. MELZER, *supra* note 1, at 42 (citing Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report on the Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶ 43, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004) (by Philip G. Alston)) [hereinafter *Dec. 22, 2004 Report*].

stated that “if this was the deliberate killing of suspects in lieu of arrest, in circumstances in which they did not pose an immediate threat, the killings would be extra-judicial executions in violation of international human rights law.”¹¹⁹ Furthermore, Alston criticized the attack against al-Harithri and said that it constituted a clear case of extrajudicial killing. Moreover, the US’s refusal to acknowledge responsibility for the targeted killings has raised doubts as to the legal permissibility of such under international law.

In fact, only recently in May 2009, Leon E. Panetta, Director of the CIA defended the United States’ position from the growing criticism against the targeted killing operations.¹²⁰ Very frankly, he said, “it’s the only game in town in terms of confronting and trying to disrupt the al-Qa[e]da leadership.”¹²¹

III. TARGETED KILLING AND HUMAN RIGHTS LAW

Alston says that “[t]he legality of [targeted killings] outside the context of armed conflict is governed by human rights standards, especially those concerning the use of lethal force.”¹²² Frequently referred to as the law enforcement model —

[these standards] do not in fact apply only to police forces or in times of peace. The ‘law enforcement officials’ who may use lethal force include all government officials who exercise police powers, including a State’s military and security forces, operating in contexts where violence exists, but falls short of the threshold for armed conflict.¹²³

While related to IHL and the law of war, human rights law is a distinct branch of international law. It cannot be denied that at the core of every case of targeted killing is the applicability of human rights law. Hence, a discussion of human rights law and its relationship with targeted killings is appropriate.

119. Matthew J. Machon, Targeted Killing as an Element of U.S. Foreign Policy in the War on Terror (An Unpublished Monograph) 2, available at <http://www.fas.org/irp/eprint/machon.pdf> (last accessed Sep. 12, 2012) (citing Anthony Dworkin, The Yemen Strike: The War on Terrorism Goes Global, available at <http://www.mafhoum.com/press4/122P7.htm> (last accessed Sep. 12, 2012)).

120. O’Connell, *supra* note 108, at 1 (citing Mary Louise Kelly, Officials: Bin Laden Running Out of Space to Hide, available at <http://www.npr.org/templates/story/story.php?storyId=104938490> (last accessed Sep. 12, 2012)).

121. *Id.*

122. *Study on Targeted Killings*, *supra* note 2, ¶ 31.

123. *Id.*

The Universal Declaration of Human Rights (UDHR)¹²⁴ constitutes the agreement among the states of the world that every person is entitled to fundamental human rights, which rights, apply in all places and at all times. “Although the UDHR does not have the force of a treaty, and is therefore not legally binding ... , it has become so widely recogni[z]ed and accepted” since it already became a moral responsibility for all state parties to the Declaration to abide by it.¹²⁵ The rights contained in the UDHR were formally fixed as treaty obligations in the International Covenant on Civil and Political Rights (ICCPR).¹²⁶ The ICCPR in Article 2 (1) thus provides —

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹²⁷

Human rights law provides protection to all persons at all times even during times of armed conflict. Commenting on the all-encompassing scope and application of the ICCPR, the International Court of Justice said —

The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in time of emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹²⁸

It must, however, be stated that “the ICCPR recognizes the need to resort to extreme measures in extraordinary circumstances in Article 4 (1),

124. Universal Declaration on Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

125. Jackson Nyamuya Maogoto, Silencing Human Rights in the Clash of Arms? Israel’s Official Policy of “Targeted Killings” — A Dark Side in Fighting Terrorism (An Unpublished Article) 7, *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1020&context=jackson_maogoto (last accessed Sep. 12, 2012).

126. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

127. *Id.* art. 2 (1).

128. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

stating that, in times of public emergency, States may take measures derogating from their obligations under the Covenant.”¹²⁹

This rule is not absolute, however, as there are some lines that must not be crossed. “Some rights, however, are of such a fundamental character that States cannot derogate from them.”¹³⁰ The right to life, specifically guaranteed in Article 6 (1)¹³¹ of the ICCPR, excluded from the ambit of Article 4 (1) by Article 4 (2),¹³² is one such right.

While numerous human rights are affected with every case of targeted killing, it is undeniable that the most important human right affected is the right to life. Hence, this discussion of targeted killings vis-à-vis human rights law will focus on the right to life.

The right to life is *inherent* in human nature.¹³³ It is the most fundamental human right from which all other rights depend. As expressed in the ICCPR, the protection of the right to life is either from “arbitrary” or “intentional” deprivation of life.¹³⁴ Discussed hereunder are the elements of what constitute an “arbitrary” deprivation of life or an (unlawful) “intentional” deprivation of life.

A. “Arbitrary” Deprivation of Life

The provisions of the ICCPR expressing the protection accorded against an “arbitrary” deprivation of life are expressed in Article 6 (1) and (2) of the document. It reads:

- (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be *arbitrarily* deprived of his life.¹³⁵
- (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the

129. Maogoto, *supra* note 126, at 8.

130. *Id.*

131. ICCPR, *supra* note 127, art. 6 (1). “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” *Id.*

132. *Id.* art. 4 (2). “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” *Id.*

133. *Id.* art. 6 (1).

134. ICCPR, *supra* note 127, art. 6 (1).

135. *Id.* (emphasis supplied).

commission of the crime and can only be carried out pursuant to a final judgment rendered by a competent court.¹³⁶

The deprivation of life is “arbitrary” when:

- (1) It lacks a sufficient legal basis as when lethal force is used without legal basis or based on “a law which does not strictly control and limit the circumstances in which a person may be deprived of his or her life by the authorities of a State;”¹³⁷
- (2) Unnecessary or excessive force is used to maintain, restore, or otherwise impose law and order according to the circumstances of the case;¹³⁸
- (3) The force used is disproportionate to the actual danger sought to be prevented as when no actual threat exists;¹³⁹ and
- (4) The deprivation of life could actually be avoided by taking precautionary measures as when the persons sought to be killed are deprived of the protection of due process of law.¹⁴⁰

It is noteworthy how the United Nations Human Rights Committee commented on the import of the provision of Article 6 (1) of the ICCPR. It said on one occasion —

The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6(1) is of paramount importance. The Committee considers that State parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity.¹⁴¹

B. (Unlawful) “Intentional” Deprivation of Life

For a discussion on what constitutes an “intentional” deprivation of life, resort must be had to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁴² While echoing the import of the provisions of the ICCPR with respect to the protection against

136. *Id.* art. 6 (2).

137. MELZER, *supra* note 1, at 100.

138. *Id.* at 101.

139. *Id.*

140. *Id.*

141. United Nations Human Rights Committee, *General Comment No. 6*, ¶ 3, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

142. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221.

the “arbitrary” deprivation of life, it instead uses the word “intentional” to express such. Article 2 of the ECHR provides:

- (1) Everyone’s right to life shall be protected by law. No one shall be deprived of his life *intentionally* save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) In defen[s]e of any person from unlawful violence;
 - (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and
 - (c) In action lawfully taken for the purpose of quelling a riot or insurrection.¹⁴³

It must be noted that the elements of “arbitrary” deprivation of life under the ICCPR as discussed above are also the elements of what constitute an (unlawful) “intentional” deprivation of life under ECHR.¹⁴⁴

C. *The ICCPR and the ECHR*

In view of the foregoing, it becomes apparent that there is no discrepancy between the ICCPR and the ECHR in terms of the protection of the right to life whether such is an “arbitrary” deprivation or an (unlawful) “intentional” deprivation. Both documents, in express and categorical terms, give paramount importance to the protection of the right to life. Accordingly, every deprivation of life requires a sufficient basis under international law and must fulfill the requirements of necessity as well as proportionality.¹⁴⁵ Thus, if deprivation of life is permissible under the ICCPR, it cannot be viewed as non-permissible under the ECHR and vice versa.

D. *Targeted Killing is Against Human Rights Law*

According to the United Nations Human Rights Council (UNHRC), targeted killings and/or a targeted killing policy by a state is a “grave human rights violation.”¹⁴⁶ Not only are targeted killings both “arbitrary” and

¹⁴³ *Id.* art. 2 (emphasis supplied).

¹⁴⁴ See MELZER, *supra* note 1, at 116-18.

¹⁴⁵ *Id.*

¹⁴⁶ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report on the Civil and Political Rights, Including Questions of: Disappearances and Summary Executions*, ¶ 77, U.N. Doc. E/CN.4/2002/74 (Jan. 9, 2002) (by Asma Jahangir).

(unlawful), but they strike at the core of every human right to which every person is entitled to.

First, most, if not all, targeted killings lack sufficient legal basis for their exercise. More often than not, these targeted killing operations are carried out with the oft-repeated justification of protecting the integrity of the state and its citizenry without factual and legal grounds to substantiate such claim.¹⁴⁷ In the case of Israel and the United States, these states justify a targeted killing operation by the expedient resort to their efforts towards the “war on terror.”¹⁴⁸ True, terrorists pose a substantial threat to peace and security not only to the U.S. and Israel. However, these states do not take into account that terrorists also have rights.

It may be said that with Israel’s publicly acknowledged policy of targeted killings, there is transparency and existence of factual and legal bases to support such actions. However, aside from the Israeli Defense Force’s bare statement that the State of Israel does carry out targeted killing operations against terrorists, they offer no specific provision under domestic, much less international, law justifying the resort to such measures. Assuming, without conceding, that there exists a specific provision of domestic or international law in support of such actions, such must control and limit the use of lethal force by the state so as to comply with the standards required by human rights law as enunciated above.

In the case of the United States, the broad statement authorizing the CIA to undertake “lethal covert operations” also lacks basis in domestic and international laws. It must be noted that such statement authorizes the CIA to undertake *all* necessary actions to eliminate the terrorist threat. It is imperative that the actions undertaken and to be undertaken by the CIA whenever carrying out a targeted killing operation must be in accord with established law, domestic or international. However, given the all-encompassing and broad authority which they are allowed, it is likely that most of their actions are not justified by any law at all.

Therefore, failure to provide legal basis for any case of targeted killing in accord with international law amounts to a violation of human rights, in this case, the right to life.

Second, unnecessary or excessive force is used whenever a targeted killing operation is carried out. A case study¹⁴⁹ on targeted killings carried out in Pakistan alone reveals that by October 2009, the ratio has been about 20 terrorist leaders killed for 750–1,000 *unintended* victims.¹⁵⁰ Such numbers

147. See O’Connell, *supra* note 108 (citing Kelly, *supra* note 121).

148. See The White House, *supra* note 7.

149. See generally O’Connell, *supra* note 108.

150. O’Connell, *supra* note 108, at 9 (emphasis supplied).

clearly show that the lethal force used exceeds what is only absolutely or strictly necessary to achieve the aim of the targeted killing operation. Human rights law cannot sustain actions that result in so high a death toll.

In addition, the targeted killing operations carried out to date do not meet the aspects of necessity offered by Melzer in his book. Melzer offers three aspects of necessity: qualitative necessity, quantitative necessity, and temporal necessity.¹⁵¹

Qualitative necessity means that “the use of ... lethal force must be ‘strictly unavoidable’ in the sense that other means remain ineffective or without any promise of achieving the purpose of the operation.”¹⁵²

Thus, the qualitative aspect is not met when the desired purpose of the targeted killing operation could also be achieved by other non-lethal means. As applied to targeted killings, the targeting of a person is not the only means of achieving the purpose of the operation. Other means such as arrest and, consequently, prosecution in accordance with law are available in order to exact liability from the targeted person or to prevent him from committing acts of terrorism.

Quantitative necessity means that “whenever the use of ... lethal force is strictly unavoidable,” those carrying out a targeted killing operation must seek to cause the least damage possible to human life.¹⁵³ This means that lethal force must not be used in a manner that is more hazardous to human life than is called for by the circumstances so as to make lethal force be strictly proportionate to what is necessary to achieve the purpose of the targeted killing operation.¹⁵⁴ Again, as revealed by the numbers and the cases of targeted killings to date, excessive and unnecessary force is used against those targeted. While the aim must be to incapacitate the targeted person, more often than not, that person is killed instantly by the amount and kind of force used.¹⁵⁵ Also, as previously illustrated, the collateral damage in terms of unintended loss of life is also significant.

Temporal necessity means that “if the circumstances evolve so as to permit the achievement of the purpose of the operation without necessarily killing the targeted person, that killing may no longer be lawfully intended.”¹⁵⁶ Those carrying out targeted killing operations do not constantly reassess the absolute necessity of the killing in order to achieve the larger objective.¹⁵⁷

151. See MELZER, *supra* note 1, at 228.

152. MELZER, *supra* note 1, at 228.

153. *Id.*

154. *Id.*

155. See MELZER, *supra* note 1, at 228.

156. MELZER, *supra* note 1, at 228.

157. *Id.*

Once carried out, the operatives are bent on killing the individual. They do not resort to less lethal means whenever the circumstances reveal that such is permissible and available.

Third, the force used in targeted killings is disproportionate to the danger aimed to be prevented. A look at the cases of targeted killings reveal that the threat sought to be prevented was not concrete and specific. It is not sufficient for the permissibility of these targeted killings that the targeted persons had been *previously* involved in the planning and organizing of terrorist attacks. Absent a concrete, specific, and actual threat, targeted killing cannot be employed. However, even in the absence of such a threat, targeted killing still is the course of action taken.

Given the foregoing, it can thus be said that targeted killings violate human rights, primarily the human right to life. While it is true that terrorism poses a continuing danger to peace and order and that all measures must be taken to prevent the danger it brings, it must not be forgotten that human rights apply to all persons without distinction, at all places and at all times. Hence, all steps must be taken to ensure the non-abrogation of human rights.

Therefore, any targeted killing operation —

is legal only if it is required to protect life (making lethal force proportionate) and there is no other means, such as [arrest], capture, [prosecution,] or non-lethal incapacitation, of preventing that threat to life (making lethal force necessary).¹⁵⁸

We also note that —

[t]he proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others[,] [while] the necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate, through, for example, the use of warnings, restraint[,] and capture.¹⁵⁹

At this point, it is worthy to quote Alston, in his report on targeted killings —

This means that under human rights law, a targeted killing in the sense of an intentional, premeditated[,] and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation. Thus, for example, a ‘shoot-to-kill’ policy violates human rights law. This is not to

158. *Study on Targeted Killings*, *supra* note 2, ¶ 32 (citing U.N. Secretary-General, *Note on the Interim Report submitted by Philip G. Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶¶ 41-44, General Assembly, U.N. Doc. A/61/311 (Sep. 5, 2006)).

159. *Id.*

imply, as some erroneously do, that law enforcement is incapable of meeting the threats posed by terrorists and, in particular, suicide bombers. Such an argument is predicated on a misconception of human rights law, which does not require States to choose between letting people be killed and letting their law enforcement officials use lethal force to prevent such killings. In fact, under human rights law, States' duty to respect and to ensure the right to life entails an obligation to exercise 'due diligence' to protect the lives of individuals from attacks by criminals, including terrorists. Lethal force under human rights law is legal if it is strictly and directly necessary to save life.¹⁶⁰

IV. TARGETED KILLINGS AND THE USE OF INTER-STATE FORCE

As earlier stated, any case of targeted killing involves the use of lethal force attributable to a subject of international law *with* the intent, premeditation, and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.¹⁶¹ In addition, as illustrated by the specific instances of targeted killings in Chapters I and II of this Note, such are conducted by states on the territory of other states, either with or without the consent of the state where the target is located.

This current practice of conducting such operations in the territory of another state raises concerns regarding violation of a state's sovereignty by another state. Thus, "when a State conducts a targeted killing in the territory of another State with which it is not in armed conflict, whether the first State violates the sovereignty of the second is determined by the law applicable to the use of inter-state force, while the question of whether the specific killing of the particular individual(s) is legal is governed by IHL and/or human rights law."¹⁶²

This Chapter addresses the question of whether the sovereignty of a second state is violated by the conduct of targeted killing in its territory by a first state. Hence, a discussion of targeted killings under this context will be governed by the law on the use of force or the *jus ad bellum*.

The starting point for any inquiry as to the use of inter-state force especially in relation to targeted killings is Article 2 (4) of the United Nations Charter. The aforesaid provision reads —

160. *Study on Targeted Killings*, *supra* note 2, ¶ 33 (citing Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report on the Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶ 44-54, U.N. Doc. E/CN.4/2006/53 (Mar. 8, 2006) (by Philip G. Alston); ICCPR, *supra* note 127, art. 2 (1); & *Dec. 22, 2004 Report*, *supra* note 119, ¶ 73).

161. MELZER, *supra* note 1, at 5 (emphasis supplied).

162. *Study on Targeted Killings*, *supra* note 2, ¶ 34.

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.¹⁶³

According to the International Court of Justice in its opinion in *Armed Activities on the Territory of Congo*,¹⁶⁴ the said provision is the “cornerstone of the UN Charter.”¹⁶⁵ Also, there exists a general agreement between states and commentators on international law that “the prohibition [against the use of force] is not only a treaty obligation but also customary law and even [*ius cogens*].”¹⁶⁶ Thus, the general rule under the UN Charter is that, unless justified by requirements of inter-state self-defense,¹⁶⁷ or an authorization on the part of the territorial state,¹⁶⁸ or by the UN Security Council, any state action employing the use of force is prohibited.¹⁶⁹

As stated in the foregoing paragraph, while the UN Charter generally prohibits the use of force, such, however, is allowed in cases of self-defense, or in cases where the state where the target is located or found consents to the targeted killing operation. Discussed hereunder are the issues of targeted killings with respect to inter-state self-defense and targeted killings when the state where the targeted killing operation to be carried out consents to such operation.

A. Article 51 of the United Nations Charter

A state’s inherent right to self-defense is established by Article 51 of the United Nations Charter, which reads —

Nothing in the present Charter shall impair the inherent right of individual or collective self-defen[s]e if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defen[s]e shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present

163. U.N. Charter art. 2 (4).

164. *Armed Activities on the Territory of Congo (DRC v. UG)*, 2005 I.C.J. 168, 223 (Dec. 19).

165. GRAY, *supra* note 106, at 30.

166. *Id.*

167. MELZER, *supra* note 1, at 51 (citing Schmitt, *supra* note 29, at 645).

168. MELZER, *supra* note 1, at 51 (citing Chris Downes, *Targeted Killings in an Age of Terror: The Legality of the Yemen Strike*, 9 J. CONFLICT & SEC. L. 277, 280 (2004)).

169. MELZER, *supra* note 1, at 51 (citing Downes, *supra* note 169, at 286).

Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁷⁰

It is this Provision which has sparked numerous debates and discussions as to the scope and permissibility of the right of a state to self-defense.¹⁷¹ There are two views on the matter: those supporting a wide right of self-defense, and those who view it otherwise.

Proponents of the wide right of self-defense under Article 51 argue, first, that “Article 51 of the UN Charter, through its reference to [the] ‘inherent’ right of self-defen[s]e, preserves the earlier customary international law right to self-defen[s]e.”¹⁷² According to them, “the Charter does not take away pre-existing rights of states without express provision.”¹⁷³ Second, they argue that “at the time of the conclusion of the Charter[,] there was a wide customary international law right [to] self-defen[s]e, allowing the protection of nationals and anticipatory self-defen[s]e.”¹⁷⁴

This view is based upon the necessity and proportionality test established in customary international law by the Caroline Doctrine in 1837 which provides that “the use of self-defense should be confined to situations in which a government can show the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”¹⁷⁵ Accordingly, by virtue of a state’s right of anticipatory self-defense, no armed attack needs to occur before a state may resort to force to counter a threat.¹⁷⁶

The opposing side, meanwhile, argues that Article 51 needs no further interpretation — “the right of self-defen[s]e *arises only if an armed attack ... occurs.*”¹⁷⁷ As the right to self-defense provided under Article 51 constitutes an exception to the general rule on the prohibition of force in Article 2 (4) of the UN Charter,¹⁷⁸ the former must be narrowly and strictly construed.¹⁷⁹

170. U.N. Charter art. 51.

171. See James Mulcahy & Charles O. Mahony, *Anticipatory Self-Defence: A Discussion of the International Law*, 2 HANSE L. REV. 231 (2006).

172. GRAY, *supra* note 106, at 117.

173. *Id.*

174. *Id.* at 117-18.

175. Machon, *supra* note 120, at 44 (citing Emmanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights vs. the State's Duty to Protect its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 211 (2001)).

176. Machon, *supra* note 120, at 44-45.

177. GRAY, *supra* note 106, at 118 (emphasis supplied).

178. U.N. Charter art. 2 (4).

179. GRAY, *supra* note 113, at 118.

They further add that “the limits imposed on self-defen[s]e in Article 51 would be meaningless if a wider customary law right to self-defense survives unfettered by these restrictions.”¹⁸⁰ In addition, they claim that “by the time of the Charter[’s] [adoption], customary law allowed only a narrow right of self-defen[s]e.”¹⁸¹ They insist that the article’s requirement of an “armed attack” should be interpreted to mean that a state could only respond to a threat in the case of an actual physical invasion by one state into the territory of another.

Commenting on this issue, the International Criminal Court (ICC) opined that “only an attack by a State can constitute the type of armed attack contemplated by Article 51 of the United Nations Charter.”¹⁸² Significantly, a state may be required to “absorb a severe attack before that state will be permitted, under Article 51, to rise and defend itself.”¹⁸³

Hence, the occurrence of an armed attack is imperative before a state may invoke the right to self-defense under Article 51 of the UN Charter. This was the view earlier pronounced by the International Court of Justice (ICJ) in *Military and Paramilitary Activities in and Against Nicaragua*.¹⁸⁴ In rejecting the United States’ position that it was justified in acting in collective self-defense based on Article 51, the Court held that since there was no armed attack by Nicaragua, resort to Article 51 could not be had.¹⁸⁵

However, the events of 9/11 gave rise to difficult questions regarding the scope and permissibility of Article 51. One such question is whether the right of self-defense can now be exercised against non-state actors.¹⁸⁶ Prior to the events of 9/11, the permissibility of attack on non-state actors by the invocation of the right to self-defense was unacceptable. But after 9/11, states such as the US have adopted the policy of targeting specific individuals suspected of being members of terrorist organizations. Such gave rise to the Bush Doctrine of Pre-emptive Self-defense.

In the case of the United States, it pursued a “pro-active” policy of self-defense in view of the events of 9/11. George P. Schultz, Secretary of State

180. *Id.*

181. *Id.*

182. David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 186 (2005) (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 43 I.L.M. 1009, 1050 (July 9, 2004)).

183. Machon, *supra* note 120, at 45 (citing Gross, *supra* note 176, at 214).

184. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 25 I.L.M. 1023 (June 27, 1986).

185. GRAY, *supra* note 106, at 130.

186. *See* GRAY, *supra* note 106, at 199.

during the Reagan Administration, proposed a policy of “active [self-] defense” —

We must reach a consensus in this country that our responses should go beyond passive defense to consider means of active prevention, pre-emption, and retaliation. Our goal must be to prevent and deter future terrorist acts, and experience has taught us over the years that one of the best deterrents of terrorism is the certainty that swift and sure measures will be taken against those who engage in it. We should take steps towards carrying out those measures. There should be no moral confusion on the issue. Our aim is not to seek revenge but to put an end to violent attacks against innocent people, to make the world a safer place to live for all of us. Clearly the democracies have a moral right, indeed a duty, to defend themselves.¹⁸⁷

President Bush in his 2003 State of the Union Address emphasized the key US policy which was to take measures of self-defense even in the absence of an imminent threat.¹⁸⁸

This position of the United States, however, provoked much controversy and was widely criticized. The U.N., in its High Level Report and in the Report of the Secretary-General, rejected this doctrine of pre-emptive self-defense which the US was asserting.¹⁸⁹ In addition, it said that taking unilateral pre-emptive action posed too great a threat to global order.¹⁹⁰ The Security Council debates would also show that various states were not willing to accept pre-emptive self-defense; thus very little international support exists favoring such doctrine.¹⁹¹ Implicit, too, in the ICJ’s ruling in *Armed Activities on the Territory of Congo*¹⁹² is that it would not accept pre-emptive action as a valid form of self-defense.¹⁹³

187. Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 B.C. INT’L & COMP. L. REV. 1, 26 (2003) (citing Abraham D. Sofaer, *The Sixth Annual Waldemar A. Self Lecture in International Law: Terrorism, the Law and the National Defense*, 126 MIL. L. REV. 89, 95 (1989)).

188. Text of President Bush’s 2003 State of the Union Address, *supra* note 106.

189. GRAY, *supra* note 106, at 212 (citing U.N. Secretary-General, *High-Level Panel Report of the Secretary-General*, ¶ 191, U.N. Doc. A/59/565 (Dec. 2, 2004) & U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 122-26, U.N. Doc. A/59/2005 (Mar. 21, 2005)).

190. *Id.*

191. GRAY, *supra* note 106, at 213 (citing U.N. Security Council, *4726th mtg. Resumption 1 Security Council Debates*, at 8, 13, 32, 33 & 35, U.N. Doc. S/PV.4726 (Mar. 27, 2003)).

192. *Armed Activities*, 2005 I.C.J. at 168.

193. GRAY, *supra* note 106, at 216.

The Proponent of this Note adheres to the view advanced by those opposing the existence of a wide right to self-defense and of the existence of anticipatory self-defense as such is not justified under Article 51 and not in accordance with the rulings of the ICJ and the ICC as discussed above. In the case of the United States' targeted killings operations, the Proponent of this Note does not adhere to the view proposed by one writer who said —

Nevertheless, despite the unpopularity of its interpretation of self-defense under Article 51, the United States is able to act as it deems appropriate without U.N. censure since the United States is a permanent member of the Security Council and any resolution requires its approval. Although the United States is still subject to measures by the General Assembly, cooperation is on a voluntary basis.¹⁹⁴

Deeply related to the aforesaid issue is the question of whether the right to self-defense may validly be exercised even in the absence of an actual and imminent threat of an armed attack by non-state actors such as terrorists.

The proponents of the existence of the right of self-defense against non-state actors “argue that Article 51 of the UN Charter does not displace the customary international law right to act in self-defen[s]e, including against non-state actors, and that State practice supports that position.”¹⁹⁵ Their arguments are hinged on the United Nations Security Council Resolutions 1368 and 1373¹⁹⁶ issued after the 11 September 2001 attacks, as well as North Atlantic Treaty Organization's (NATO) invocation of the North Atlantic Treaty's Article 5 collective self-defense provision.¹⁹⁷ On the other hand, the opposing view argues that this “does not find support in judgments of the [ICJ] holding that States cannot invoke Article 51 against armed attacks by non-state actors that are not imputable to another State.”¹⁹⁸

Another issue concerns what amount of force used by non-state actors would be sufficient to constitute an “armed attack” so as to justify the right of self-defense of a state against such non-state actors.

194. Jami Melissa Jackson, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications*, 24 N.C. J. INT'L L. & COM. REG. 669, 684 (1999).

195. *Study on Targeted Killings*, *supra* note 14, ¶ 40 (citing Sofaer, *supra* note 188, at 170).

196. The preambles of these resolutions provide that the Security Council is determined to combat all threats to international peace and security caused by terrorist acts and that it recognizes the inherent right of individual or collective self-defense in accordance with the Charter. S.C. Res. 1368, 4370th mtg. pmbL, U.N. Doc. S/RES/1368 (Sep. 12, 2001) & S.C. Res. 1373, 4385th mtg. pmbL, U.N. Doc. S/RES/1373 (Sep. 28, 2001).

197. *Study on Targeted Killings*, *supra* note 2, ¶ 40.

198. *Id.*

The ICJ in *Military and Paramilitary Activities in and Against Nicaragua*,¹⁹⁹ *Oil Platforms*,²⁰⁰ *Armed Activities on the Territory of Congo*,²⁰¹ and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,²⁰² “has established a high threshold for the kinds of attacks that would justify the extraterritorial use of force in self-defense.”²⁰³

According to the ICJ —

sporadic, low intensity attacks do not rise to the level of armed attack that would permit the right to use extraterritorial force in self-defen[s]e, and the legality of a defensive response must be judged in light of each armed attack, rather than by considering occasional, although perhaps successive, armed attacks in the aggregate.²⁰⁴

1. Targeted Killings and Article 51 of the United Nations Charter

Melzer discusses the two scenarios present in the interplay between targeted killings and the right to self-defense. First, targeted killings are supposed to be pre-emptive measures against leaders of “rogue” states who aim to acquire weapons of mass destruction.²⁰⁵ Second, targeted killings are defensive measures against members of transnational terrorist groups.²⁰⁶

In both, the prerequisite of the existence of an “armed attack” is an important consideration so as to be able to invoke the right of self-defense under Article 51 of the UN Charter. It has thus been argued that events like the 9/11 attacks can qualify as an “armed attack” thereby justifying an invocation of the right to self-defense under Article 51 of the UN Charter.²⁰⁷

This, however, is not so when targeted killings are undertaken in order to prevent an armed attack which is *not actual, imminent, nor occurring*.

Again, as discussed earlier, there are proponents for the use of targeted killing not only when the threat of an armed attack has become actual and imminent but even when none exist as a preventive measure against future terrorist attacks.²⁰⁸ Arguing for the permissibility of pre-emptive self-defense,

199. *Military and Paramilitary Activities*, 25 I.L.M. at 1023.

200. *Oil Platforms (Iran v. U.S.)*, 42 I.L.M. 1334 (Nov. 6, 2003).

201. *Armed Activities*, 2005 I.C.J. at 168.

202. *Occupied Palestinian Territory*, 43 I.L.M. at 1009.

203. *Study on Targeted Killings*, *supra* note 2, ¶ 41.

204. *Id.*

205. MELZER, *supra* note 1, at 52.

206. *Id.*

207. *Id.*

208. Sofaer, *supra* note 188.

they claim that once the suspected terrorists or persons involved are visible, targeting them is a valid act.

Contrarily, those rejecting this proposition claim that the clear import of Article 51 of the UN Charter is that any use of force, at any time, before a concrete armed attack begins or is obviously about to begin, is unlawful.²⁰⁹ Hence, the recognition and consequent permission of anticipatory or pre-emptive self-defense would result in the use of force predicated on uncertain grounds, or at best, unverifiable information provided by intelligence agencies.”²¹⁰

A persuasive example of the use of arbitrary force borne about by the invocation of the right to pre-emptive self-defense is the US invasion of Iraq in 2003. At the end of the invasion, the United States’ claims proved bereft of any factual basis.²¹¹

At this point, it may be well to discuss the relationship of self-defense, IHL, and human rights law. In the context of the targeted killings conducted by the United States in Iraq, Afghanistan, and Pakistan, scholars and commentators, as well as defense officials in the United States, advocate a “robust form” of self-defense wherein once self-defense is invoked, such precludes the application of IHL and human rights law.²¹² Proponents of a robust right to self-defense find support in the ICJ Nuclear Weapons Opinion,²¹³ “in which the court found that although the threat or use of nuclear weapons would generally violate IHL, it could not conclude that such threat or use would be lawful or unlawful in an extreme circumstance of self-defen[s]e[.]”²¹⁴ This approach “reflects an unlawful and disturbing tendency to permit violations of IHL based on whether the broader cause in which the right to use force is invoked is ‘just.’”²¹⁵ Hence, “invoking such an extreme exception in order to permit violations of IHL on self-defen[s]e grounds would be tantamount to abandoning IHL.”²¹⁶

In addition, the aforesaid approach confuses the proper areas of application of the law on the use of inter-state force (*jus ad bellum*) and the

209. MELZER, *supra* note 1, at 53.

210. *Id.*

211. See CNN US, Iraq war wasn’t justified, U.N. weapons experts say, *available at* http://articles.cnn.com/2004-03-21/us/iraq.weapons_1_nuclear-weapons-hans-blix-iaea?_s=PM:US (last accessed Sep. 12, 2012).

212. *Study on Targeted Killings*, *supra* note 2, ¶ 42.

213. *Nuclear Weapons*, 1996 I.C.J. at 226.

214. *Study on Targeted Killings*, *supra* note 2, ¶ 42.

215. *Id.*

216. *Id.*

law applicable to the conduct of armed conflict (*jus in bello*).²¹⁷ The question of the legality of the use of force arises at the start of an armed conflict properly determined by the law on the use of force (*jus ad bellum*), while the question of the legality of the armed conflict that ensues thereafter is properly determined by the law on armed conflict (*jus in bello*).²¹⁸

Under the law on the use of force (*jus ad bellum*) “proportionality under self-defen[s]e requires States to use force only defensively and to the extent necessary to meet defensive objectives.”²¹⁹ Hence, any case of targeted killing must be defensively necessary and must be conducted only to this extent.²²⁰

The requirement of necessity, meanwhile, imposes an obligation upon a state to make an assessment as to the availability of means to defend itself other than through the use of armed force.²²¹ As applied to targeted killings, an assessment and evaluation must be conducted by the targeting state whether there are available non-lethal means to achieve the desired objective of the operation, such as arrest, prosecution, and detention.²²²

Under the law on armed conflict (*jus in bello*), proportionality under IHL “requires States to balance the incidental harm or death of civilians caused by an operation to the military advantage that would result.”²²³ Thus, the use of lethal force in a targeted killing operation must not be excessively disproportionate to achieve the end sought. The requirement of necessity in IHL imposes an obligation upon a state to conduct targeted killings in a manner that is consistent with the rules of IHL and which will, at the same time, enable it to achieve the goals of the targeted killing operation.²²⁴ Again, less lethal means, if available, must be resorted to first.

It must also be noted that the robust form of self-defense does not take into account two levels of responsibility in the event that a targeted killing for which self-defense is invoked is found to be unlawful: state responsibility and individual responsibility.²²⁵ The Articles on State Responsibility for Internationally Wrongful Acts²²⁶ express in clear and categorical terms that

217. *Id.* ¶ 43.

218. *Id.*

219. *Id.*

220. See *Study on Targeted Killings*, *supra* note 2, ¶ 43.

221. *Id.*

222. See *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. 375.

223. *Study on Targeted Killings*, *supra* note 2, ¶ 43.

224. *Id.*

225. *Id.*

226. Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 53 U.N. GAOR Supp. (No. 10) at 74, U.N. Doc. A/56/10 (2001).

violations of IHL may not be justified on the mere expedient invocation of the right to self-defense or claiming that a state of necessity exists;²²⁷ thus, the unlawful killing itself may be a war crime.²²⁸

Therefore, a targeted killing operation justified under the law on the use of force is not necessarily determinative of the legality of whether the killing of the particular targeted individual or individuals is lawful.²²⁹ “The legality of a specific killing depends on whether it meets the requirements of IHL and human rights law (in the context of armed conflict) or human rights law alone (in all other contexts).”²³⁰

2. Is Targeted Killing Violative of Article 51 of the UN Charter?

As previously noted, a proper invocation of the right to self-defense under Article 51 of the UN Charter requires an *actual and imminent* armed attack directed against a state or its citizens by “rogue” states or non-state actors such as transnational terrorists, whether the latter are cooperating with each other or not.²³¹ Absent a clear and concrete situation of an armed attack, the use of force or, specifically, the resort to targeted killing under the guise of self-defense is not justified and has no basis at all.

In the specific cases of targeted killings noted in the beginning of this Note, neither was an armed attack nor any threat of such present posed by the persons targeted.²³² The presence of intelligence reports regarding a planned or impending attack, if any, does not serve as basis for carrying out a targeted killing operation because most of the time, these intelligence reports are unsubstantiated, purely speculative, and used merely as flimsy excuses to carry out a targeted killing operation.

Assuming the existence of an impending actual and imminent attack directed against a state, that state may therefore resort to the use of targeted killings in order to deter the said actual and imminent attack. In such a case, the targeting state must be able to show the necessity of that act of self-defense which must be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”²³³ Lethal force must only be used *defensively* and only to the extent necessary to meet legitimate defensive

227. See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *supra* note 227, arts. 21 & 25.

228. See *Study on Targeted Killings*, *supra* note 2, ¶ 43.

229. *Id.*

230. *Study on Targeted Killings*, *supra* note 2, ¶ 43.

231. U.N. Charter art. 51.

232. See MELZER, *supra* note 1, at 436-42.

233. Machon, *supra* note 120, at 44 (Gross, *supra* note 176, at 211).

objectives.²³⁴ In addition, an assessment must be made whether the state has means to defend itself other than through the use of armed force. If such other less lethal means are available, then resort to targeted killings as a measure of self-defense cannot be had.

With respect to the right to self-defense against non-state actors, “it will only be in very rare circumstances that a non-state actor whose activities do not engage the responsibility of any State will be able to conduct the kind of armed attack that would give rise to the right to use extraterritorial force.”²³⁵ And even when such arises, the UN Charter requires that Security Council approval should be first secured.²³⁶

The foregoing would therefore mean that in any case of targeted killing justified by the right to self-defense, whether against states or non-state actors, the requirements of necessity and proportionality must be met. The purpose should always be to halt or repel an actual and imminent attack, even if it should be necessary to kill the subject of the attack. In other words, the resort to targeted killings must always be preventive, rather than punitive or retaliatory, in nature.

Be that as it may, the justification of any case of targeted killing by the right of self-defense in the context of inter-state force only pertains to the issue of whether the use of such force violates the sovereignty of the other state. It does not address the issue of whether the specific killing is legal. The issue of the lawfulness of such killing under human rights law (in all contexts other than in an armed conflict) is discussed in Chapter III of this Note while lawfulness under IHL (in an armed conflict situation) is discussed in Chapter V.

B. State-consented Targeted Killing

According to Alston, “[a] targeted killing conducted by a State on the territory of a second State does not violate the sovereignty of the second State when the latter consents to the said targeted killing within its territory.”²³⁷

It must, however, be taken into consideration that consent only permits the use of force, in this case lethal force to conduct targeted killings — to the extent that the sovereignty of the consenting state is not violated by the state conducting the targeted killing operation. Whether the specific targeted killings are lawful or not are left to be determined by IHL and/or by human

234. *Study on Targeted Killings*, *supra* note 2, ¶ 43.

235. *Id.* ¶ 40.

236. *Id.*

237. *Id.* ¶ 37.

rights law.²³⁸ Consent, therefore, “does not absolve either of the concerned States from their obligations to abide by human rights law and IHL with respect to the use of lethal force against a specific person.”²³⁹

Thus, “the consenting State [has] the responsibility to protect those in its territory from arbitrary deprivation of the right to life at all times,” such that it “may only lawfully authorize a killing by the targeting State to the extent that the killing is carried out in accordance with applicable IHL or human rights law.”²⁴⁰

Therefore, there is a two-pronged duty imposed upon the consenting state — responsibilities both before and after the conduct of the targeted killing operation.²⁴¹ Prior to the conduct of the targeted killing operation, the consenting state should “require the targeting State to demonstrate verifiably that the person against whom lethal force is to be used can be lawfully targeted and that the targeting State will comply with the applicable law.”²⁴² After the targeted killing is conducted, “the consenting State should ensure that it was legal.”²⁴³ Whenever there exists evidence of any act of wrongdoing, as when the targeting state exceeded the bounds allowed by the consenting state with respect to the targeted killing operation, an investigation must be conducted by the consenting state so as to determine accountability and responsibility for such act.²⁴⁴

V. TARGETED KILLING AND INTERNATIONAL HUMANITARIAN LAW

IHL is the body of rules and principles specially designed to regulate the conduct of States and individuals actively involved in situations of international or non-international armed conflict.²⁴⁵ With respect to targeted killings committed during the course of an armed conflict, it is IHL, therefore, which is the governing law. Hence, the lawfulness of targeted killings committed during the course of an armed conflict must be determined by the *lex specialis* of IHL. Since *lex specialis* particularly supplies a

238. *Id.*

239. *Id.*

240. *Study on Targeted Killings, supra* note 2, ¶ 37.

241. *Id.* ¶ 38.

242. *Id.* (citing *Dec. 22, 2004 Report, supra* note 121, ¶ 41).

243. *Study on Targeted Killings, supra* note 2, ¶ 2.

244. *See Study on Targeted Killings, supra* note 2, ¶ 38.

245. *See* International Committee of the Red Cross, What is International Humanitarian Law? (An Unpublished Advisory Service on International Humanitarian Law), *available at* http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (last accessed Sep. 12, 2012).

standard in cases of armed conflicts, it must be applied instead of *lex generalis*.²⁴⁶

Nonetheless, it must be noted that the application of *lex specialis* does not rule out the applicability of human rights law — it only provides for its interpretation.²⁴⁷ The applicability of *lex generalis* of human rights law may be justified when there exists a void in *lex specialis* of IHL.²⁴⁸ Thus, when IHL is not sufficient to determine the lawfulness of targeted killing, resort must be had to treaty interpretation and reference to the general principles underlying the framework of IHL.²⁴⁹

A. Armed Conflict, International and Non-international

The applicability of IHL presupposes the existence of an armed conflict, whether international or non-international in character.²⁵⁰

Before discussing the differences between the two types of armed conflict, the question “whether an armed conflict exists is a question that must be answered with reference to objective criteria which depend on the facts on the ground, and not only on the subjective declarations either of States ... or, if applicable, of non-state actors[.]”²⁵¹ It must be noted that most states refuse to acknowledge the existence of an armed conflict with non-state actors, denying them recognition as belligerents or warriors, and instead classifying them as mere criminals subject to domestic law.²⁵²

However, the United States and Israel, the two states spearheading the so called “war on terror,” claim to be engaged in an armed conflict against non-state actors.²⁵³ These states do so in the belief that IHL “has more permissive rules for killing than does human rights law or a State’s domestic law, and generally provides immunity to State armed forces.”²⁵⁴ Hence, compliance with the due process requirements of capture, arrest, detention,

246. MELZER, *supra* note 1, at 81.

247. *Id.*

248. *Id.*

249. *Id.*

250. THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45 (Dieter Fleck ed., 2008) [hereinafter THE HANDBOOK].

251. *Study on Targeted Killings*, *supra* note 2 ¶ 46.

252. *Id.*

253. *Id.* ¶ 47 (citing Koh, *supra* note 110 & *Public Committee Against Torture in Israel (PCATI)*, 46 I.L.M. 375).

254. *Study on Targeted Killings*, *supra* note 2, ¶ 47.

or extradition of an alleged terrorist is dispensed with.²⁵⁵ However, Alston opines otherwise. Accordingly, he states —

IHL is not, in fact, more permissive than human rights law because of the strict IHL requirement that lethal force be necessary. Although the appeal of an armed conflict paradigm to address terrorism is obvious, so too is the significant potential for abuse. Internal unrest as a result of insurgency or other violence by non-state armed groups, and even terrorism, are common in many parts of the world. If States unilaterally extend the law of armed conflict to situations that are essentially matters of law enforcement that must, under international law, be dealt with under the framework of human rights, they are not only effectively declaring war against a particular group, but eviscerating key and necessary distinctions between international law frameworks that restricts States' ability to kill arbitrarily.²⁵⁶

An international armed conflict is one waged between two or more states.²⁵⁷ It exists when “one state uses force of arms against another state.”²⁵⁸ Hence, regardless of whether the parties to the conflict consider themselves to be at war with each other and regardless of how they describe the conflict, an international armed conflict exists once one state uses armed force against another state.²⁵⁹ A situation of international armed conflict also exists regardless of the intensity, duration, or scale of the use of armed force between the states involved. “It makes no difference how long the conflict lasts, or how much slaughter takes place.”²⁶⁰ Therefore, once an international armed conflict exists, the IHL on international armed conflicts applies.

255. *Id.*

256. *Id.* ¶ 47-48.

257. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, *adopted* Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, *adopted* Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, *adopted* Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, *adopted* Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

258. THE HANDBOOK, *supra* note 251 at 46.

259. *Id.*

260. Ornar Ben-Naftali and Keren R. Michaeli, *We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 257, (2003) (citing JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: A COMMENTARY ON THE I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (1952 ed.)).

Note that for IHL to apply to an international armed conflict, there need not be a formal declaration of war, as declarations of war occur rarely, and in fact, none may be made at all.²⁶¹ IHL for international armed conflict also applies even if the states involved in the armed conflict do not recognize each other as states, as “the question of whether the parties to an armed conflict are states is objective and is not a matter to be determined by the subjective recognition policies of each party.”²⁶²

It should also be underscored that the application of IHL does not depend on what gave rise to the armed conflict.²⁶³ Hence, irrespective of the legality or illegality of the parties’ resort to force, IHL applies to such international armed conflict.²⁶⁴

However, with the adoption of Additional Protocol I, the traditional definition of international conflict was broadened to incorporate “conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”²⁶⁵

Non-international armed conflicts, meanwhile, are all other conflicts not of an international nature.²⁶⁶ It is any “confrontation between the existing governmental authority and groups of persons subordinate to this authority or between different groups none of which acts on behalf of the government, which is carried out by force of arms within the national territory and reaches the magnitude of an armed confrontation or a civil war.”²⁶⁷ Thus, Article 3 common to the 1949 Geneva Conventions mandates that “in a non-international armed conflict, each party is bound to apply, as a minimum, the fundamental provisions of international law.”²⁶⁸ Compliance with the rules of IHL must therefore be made in the conduct of operations by a state’s armed forces even if the armed conflict is non-international in character.²⁶⁹

261. THE HANDBOOK, *supra* note 251, at 49.

262. *Id.* at 51.

263. *Id.*

264. *Id.*

265. Additional Protocol I, *supra* note 68, art. 1 (4).

266. First Geneva Convention, *supra* note 258, art. 3; Second Geneva Convention, *supra* note 258, art. 3; Third Geneva Convention, *supra* note 258, art. 3; & Fourth Geneva Convention, *supra* note 258, art. 3.

267. THE HANDBOOK, *supra* note 251, at 54.

268. *Id.* (citing First Geneva Convention, *supra* note 258, art. 3; Second Geneva Convention, *supra* note 258, art. 3; Third Geneva Convention, *supra* note 258, art. 3; & Fourth Geneva Convention, *supra* note 258, art. 3.).

269. *Id.*

The elements necessary to constitute a non-international armed conflict are:

- (1) “The non-State armed group must be identifiable as such based on criteria that are objective and verifiable.”²⁷⁰ Hence, the non-state armed group must have:
 - (a) A minimum level of organization allowing the forces to focus their operations against their adversaries;
 - (b) The capability of the group to apply the Geneva Conventions; such as adequate command structure, and separation of military and political command;
 - (c) The group must engage in collective, armed, anti-government action;
 - (d) The state uses its regular military forces against the group; or,
 - (e) Admission of the conflict against the group to the agenda of the UN Security Council or the General Assembly.²⁷¹
- (2) “There must be a minimal threshold of intensity and duration” of the armed conflict.²⁷² Thus, an armed conflict of a non-international character must be more than the level of intensity of mere internal disturbances and tensions²⁷³ or be of such a nature of a “protracted armed violence.”²⁷⁴
- (3) The non-international conflict must be restricted to the territory of a state and between the state’s own armed forces and the non-state group or it involves transnational conflict, i.e., one that crosses state borders.²⁷⁵

Therefore, taking the aforementioned elements together, the resulting concept of a non-international armed conflict is such “sufficiently intense or protracted violence between identifiable and organized armed groups, regardless of where they occur, as long as they are not of an inter-state character.”²⁷⁶

270. *Study on Targeted Killings*, *supra* note 2, ¶ 52 & MELZER, *supra* note 1, at 254.

271. *Study on Targeted Killings*, *supra* note 2, ¶ 52.

272. *Id.*

273. *Study on Targeted Killings*, *supra* note 2, ¶ 52 & MELZER, *supra* note 1, at 256.

274. *Study on Targeted Killings*, *supra* note 2, ¶ 52.

275. *Study on Targeted Killings*, *supra* note 2, ¶ 52 & MELZER, *supra* note 1, at 257.

276. MELZER, *supra* note 1, at 261.

B. The Principle of Distinction under IHL

Under the context of international armed conflict, the basic rule of distinction is expressed in Article 48, Additional Protocol I, which states —

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operation only against military objectives.²⁷⁷

Hence, Article 48 of Additional Protocol I mandates that at all times during the course of an armed conflict, civilian persons as well as civilian objects must be spared from any direct attack carried out in pursuance of a military objective. The protection accorded civilian persons and civilian objects is so broad and encompassing that such may not be compromised regardless of any potential military advantage that may be achieved by a military operation sought to be carried out. It is important to note that aside from civilians being protected against a direct attack, medical, religious, and civil defense personnel of the armed forces as well as persons *hors de combat* are also accorded the same protection.²⁷⁸ In fact, the ICJ Nuclear Weapons Opinion stresses that “[s]tates must never make civilians the object of attack.”²⁷⁹

On the other hand, combatants may be targeted at any time and any place during the course of an armed conflict, subject of course to the other requirements of IHL.²⁸⁰ In addition to combatants who may be lawful targets of direct attacks during the course of an armed conflict, those entitled to immunity from direct attack as enumerated in the preceding paragraph may lose their protection from the prohibition against direct attack due to their personal conduct. Thus, if they perform acts harmful to the adversary or when the persons *hors de combat* commit hostile acts or try to escape, they may lawfully be the subject of direct attack.²⁸¹ In the case of civilians, they lose immunity from the prohibition against direct attacks upon them “for such time as they take a direct part” in the hostilities.²⁸²

1. Armed Forces, Combatants, and Civilians

At this point, it is well to discuss the differences between armed forces, combatants, and civilians.

277. Additional Protocol I, *supra* note 68, art. 48.

278. MELZER, *supra* note 1, at 301-02.

279. *Nuclear Weapons*, 1996 I.C.J. at 257.

280. Additional Protocol I, *supra* note 68, arts. 48 & 51 (2).

281. *Id.* art. 41 (2).

282. *Id.* art. 51 (3).

The term “armed forces” is defined in Additional Protocol I, Article 43 (1), which provides —

The armed forces of a Party to a conflict consist of all organized armed forces, groups[,] and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party[.]²⁸³

This definition means that the armed forces of a party are composed of all armed personnel, the regular and irregular armed forces, as long as they are under a command responsible to that party.²⁸⁴

The term “combatants,” meanwhile, is defined under Article 43 (2) of Additional Protocol I, which provides —

Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.²⁸⁵

Thus, combatants are those members of the armed forces who have a right to directly participate in hostilities. Note, however, that “this ... is not an individual right [granted] to the combatant ... , but results from the affiliation of the combatant to an organ (i.e., the armed forces) of a party to the conflict, which is itself a subject of international law.”²⁸⁶

It must also be noted that while the right to directly participate in hostilities provides combatants with immunity from prosecution for the commission of lawful acts of war, the same does not hold true when the combatant commits acts contrary to IHL.²⁸⁷

“Civilians,” on the other hand, are defined in Article 50 (1) of Additional Protocol I, which provides —

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.²⁸⁸

Thus, the term “civilian” under Article 50 (1) of Additional Protocol I includes all persons who are not members of the armed forces within the meaning of IHL. It is therefore apparent that under the context of an international armed conflict, individuals belong to either one of two

283. *Id.* art. 43 (1).

284. See generally MELZER, *supra* note 1, at 306–07.

285. Additional Protocol I, *supra* note 68, art. 43 (2).

286. THE HANDBOOK, *supra* note 251, at 81.

287. MELZER, *supra* note 1, at 309.

288. Additional Protocol I, *supra* note 68, art. 50 (1).

mutually exclusive categories: the “members of the armed forces” or “civilians.” In case of doubt, the Article 50 (1) of Additional Protocol I provides that the individual shall be presumed to be a civilian. In contrast to combatants, civilians are not allowed to participate actively in the fighting. If they do, they lose their status as civilians, and consequently their protection from direct attacks.²⁸⁹ Therefore, at such time a civilian is “directly participating” in hostilities, the civilian may lawfully be subject of a direct attack because during that period, the civilian is not protected under the rules of IHL. However, once the civilian ceases to “directly participate” in the hostilities, the civilian once again is clothed with the immunity from direct attack provided by IHL.

With respect to the concept of what constitutes “direct participation” in the hostilities by civilians as to entail their loss from protection against a direct attack, there is no express definition of the concept in treaty law, case law, or state practice. In fact, in *Prosecutor v. Tadic*,²⁹⁰ the International Criminal Tribunal for the Former Yugoslavia (ICTY) came to the following conclusion —

It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are so not involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time.²⁹¹

In order to arrive at a definition or at the least a concept of what constitutes “direct participation” in hostilities, recognition must be made of the fact that direct participation may only include conduct close to that of a

289. Article 51 of Additional Protocol I on the protection of the civilian population provides in part:

- (a) The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
- (b) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
- (c) Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

Additional Protocol I, *supra* note 68, art. 51.

290. International Criminal Tribunal for the Former Yugoslavia (ICTY): *Prosecutor v. Tadic*, 41 I.L.M. 1328 (July 30, 2002).

291. MELZER, *supra* note 1, at 333.

fighter or conduct that directly supports combat.²⁹² Acts of “direct participation” would include civilians’ shooting at the other state’s armed forces or the commission of acts of violence in the context of hostilities that would cause death or injury to civilians.²⁹³

However, “more attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does not constitute direct participation.”²⁹⁴ Thus, conduct aimed at supporting the general war effort would not be considered as direct participation.²⁹⁵

Therefore, the concept of direct participation in the hostilities includes acts specifically committed to support a party to the armed conflict by causing direct harm to the other party’s military capacity.²⁹⁶ On the other hand, activities which merely reinforce the capacity of a party’s military without directly harming another do not amount to direct participation in hostilities.²⁹⁷

C. *The Principle of Proportionality under IHL*

The principle of proportionality under IHL is codified in Article 51 (5) (b) of Additional Protocol I. The said provision reads —

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.²⁹⁸

The import of Article 51 (5) (b) of Additional Protocol I is reiterated in Article 57 (2) (a) (iii) of the same Protocol when it obliges armed forces to refrain from conducting attacks expected to cause “excessive” damage to civilians.²⁹⁹ In fact, Article 8 (2) (a) (iv) of the Rome Statute of the International Criminal Court (ICC)³⁰⁰ considers such an attack as a war crime.³⁰¹ Moreover, the principle of proportionality under IHL has attained

292. *Study on Targeted Killings*, *supra* note 2, ¶ 60.

293. *Id.* ¶ 61.

294. *Id.* ¶ 60.

295. *Id.* ¶ 61.

296. MELZER, *supra* note 1, at 343.

297. *Id.* at 343-44.

298. Additional Protocol I, *supra* note 68, art. 51 (5) (b).

299. *Id.* art. 57 (2) (a) (iii).

300. Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90.

301. Article 8 (2) (a) (iv) of the Rome Statute provides: “For purposes of this Statute, ‘war crimes’ means: ... (iv) Extensive destruction and appropriation of property,

customary international law status. In the ICJ Nuclear Weapons Opinion, the ICJ stated —

The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus[,] even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.³⁰²

Thus, the principle of proportionality takes into consideration the importance of the anticipated military advantage in relation to the gravity of the expected collateral damage.³⁰³ It involves a determination whether the harm likely to be caused by the force used is justified in view of the expected military advantage.³⁰⁴ It is worthy to note that the standard used is “excessive” collateral damage, and not “extensive” collateral damage. This is proper because even extensive collateral damage may be justified if it is not excessive according to the circumstances.³⁰⁵ Thus, the resulting collateral damage is not the only measure of its excessiveness; rather, the necessity of the “concrete and direct military advantage anticipated” is always the controlling factor.³⁰⁶

Whether the collateral damage is excessive or not remains to be determined by various factors. Such factors include “incomplete or incorrect knowledge about the target, failure to anticipate how civilians will be affected, inaccuracy, and inability to precisely measure the force applied to ensure no more than necessary is used, and re[-]striking a target because it cannot be reliably determined whether it has been sufficiently neutralized.”³⁰⁷

Therefore, the decisive criterion in assessing the proportionality of an attack is the relative military importance of a target, and not the achievement

not justified by military necessity and carried out unlawfully and wantonly.” *Id.* art. 8 (2) (a) (iv).

302. *Nuclear Weapons*, 1996 I.C.J. at 587 (J. Higgins, dissenting opinion) & YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 120 (2004 ed.).

303. MELZER, *supra* note 1, at 357.

304. *Id.*

305. *See* DINSTEIN, *supra* note 303, at 121.

306. MELZER, *supra* note 1, at 360.

307. Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT’L REV. OF THE RED CROSS 445, 457 (2005).

of a strict numerical balance.³⁰⁸ Hence, it follows that high value targets justify greater collateral damage than lower ones.³⁰⁹

Closely related to the proportionality principle under IHL is the principle of IHL prohibiting indiscriminate attacks.³¹⁰ This, however, need not be discussed here in relation to targeted killings since targeted killings are by definition directed against a specific person.

D. The Principle of Necessity under IHL

As earlier stated, the principle of necessity forbids a state to employ force in an armed conflict beyond what is necessary for the achievement of the goals of that state.³¹¹ Under this principle, armed force must be employed “to achieve the submission of the enemy with a minimum expenditure of time, life, and physical resources both on the part of the attacker and that of the attacked.”³¹² Armed conflict must, therefore, be conducted not solely to kill the enemy but rather to defeat the enemy even if it should be necessary to kill the enemy for that purpose.³¹³ Thus, under the context of an armed conflict, IHL requires that the use of armed force or the targeted killing operations be towards the attainment of direct military advantage in the absence of any other non-lethal alternative.³¹⁴

E. The Principle of Precaution under IHL

The principle of precaution complements the principle of proportionality under IHL. The basic rule of precaution is enunciated in Article 57 of Additional Protocol I, which provides:

- (1) In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians[,] and civilian objects.
- (2) With respect to attacks, the following precautions shall be taken:
 - (a) Those who plan or decide upon an attack shall:
 - (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

308. MELZER, *supra* note 1, at 362.

309. *Id.*

310. Additional Protocol I, *supra* note 68, arts. 48 & 51 (4).

311. See THE HANDBOOK, *supra* note 251, at 35-38.

312. MELZER, *supra* note 1, at 297.

313. *Id.*

314. *Id.* at 397.

- (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - (iii) Refrain from deciding to launch any 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;
- (b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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;
 - (c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
- (3) When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
 - (4) In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
 - (5) No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.³¹⁵

Thus, the principle of precaution aims to prevent erroneous targeting and to avoid or minimize the incidental harm done to civilians.³¹⁶ Therefore, those planning, deciding upon, and executing an attack must do everything feasible to ensure that the objectives to be attacked are legitimate military objectives, and that such attacks are in conformity with the rules of IHL.³¹⁷ Hence, the means and methods to be used in the attack must be carefully selected in order to minimize, or at best totally avoid, incidental loss of civilian life, injury to civilians, and damage to civilian objects.³¹⁸ If the attack may be expected to cause excessive collateral damage vis-à-vis the concrete

315. Additional Protocol I, *supra* note 68, art. 57.

316. MELZER, *supra* note 1, at 363-64.

317. *Id.* at 364.

318. *Id.*

and direct military advantage sought to be achieved, those planning, deciding upon, and executing the attack must refrain from launching the attack.³¹⁹

What constitutes a “feasible precaution” is that kind of precaution which is “practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”³²⁰

F. Are Targeted Killings Justified under IHL?

As noted in the beginning of this Chapter, the legality of any case of targeted killing conducted through the course of an armed conflict is determined by the principles of IHL, such law governing armed conflict.

Taking into account the foregoing principles discussed in the preceding sections of this Chapter, targeted killings may be justified and thus permissible during armed conflict.

For a case of targeted killing to be legal and permissible, it must be, first, necessary or militarily necessary. That is, the targeted killing must be committed for the purpose of direct military advantage in the absence of any other non-lethal alternative.³²¹ In addition thereto, the targeted killing must not otherwise be prohibited under IHL. Thus, in the absence of less harmful means such as arrest, interrogation, and trial, targeted killing meets the requirement of the principle of necessity under IHL.

In conjunction with the principle of necessity, the targeted killing operation, in order to be lawful, must meet the principle of distinction under IHL. Thus, only combatants may be the lawful objective of targeted killing conducted under a situation of armed conflict, in accordance with Articles 43 (2) and 50 (1) of Additional Protocol I. The only time civilians may be the lawful subject of targeted killing is when they directly participate in the hostilities. This requirement is further tempered by the concept of what constitutes “direct participation” by civilians as discussed above.³²² Hence, if a civilian commits a hostile act that is specifically designed to support one party to an armed conflict,³²³ then that civilian may be the lawful subject of targeted killing. If, however, the civilian commits acts which merely reinforce the military capacity of a party to the conflict without directly causing harm to another or takes part in activities which are not designed to

319. *Id.*

320. *Id.* at 365.

321. *Id.* at 397.

322. *See Study on Targeted Killings, supra* note 2, ¶¶ 60-61.

323. MELZER, *supra* note 1, at 343.

support a party to an armed conflict by harming another, then no targeted killing may be directed against that civilian.³²⁴

In case the requirements of the principles of necessity and distinction are complied with, as when the targeted killings are militarily necessary and at the same time directed against an individual representing a legitimate military objective, such targeted killing must additionally comply with the principle of proportionality. Hence, the collateral damage which results from the targeted killing must not be excessive in relation to the concrete and direct military advantage anticipated from the death of the targeted individual.³²⁵ This of course also implies that all the necessary precautionary steps must have been taken (requirement of precaution).

It will therefore be seen that once a specific case of targeted killing complies with the foregoing principles of IHL applicable during an armed conflict, such will be considered lawful or justified. Otherwise, a specific targeted killing case may amount to a violation of IHL.

To the extent however that IHL (*lex specialis*) is not sufficient to address the problems of a particular case of targeted killing, the standards of human rights law (*lex generalis*) will be used.

VI. CONCLUSIONS AND RECOMMENDATIONS

Targeted killing is the “use of lethal force attributable to a subject of international law *with* the intent, premeditation, and deliberation to kill individually selected persons who are *not* in the physical custody of those targeting them.”³²⁶ A targeted killing is conducted through various means such as snipers, missiles from helicopters and aircraft, killings at close range, and artillery,³²⁷ and most recently through the use of UAVs or drones.³²⁸ Although the practice of targeted killings is not at present acceptable for some states and some scholars in international law, it is likely to continue and increase with other states following the United States’ and Israel’s lead, the two superpower states being the foremost advocates of targeted killings.

The analysis conducted in this Note in the preceding Chapters shows that targeted killings cannot properly be called as unlawful as some states and some scholars in international law would claim. The foregoing analysis has shown that while the term “targeted killing” as well as its practice is relatively new under international law, it can fit into an applicable legal framework and be governed by the rules of that framework depending on

324. *Id.* at 343-44.

325. *Id.* at 358.

326. *Id.* at 5 (emphasis supplied).

327. *Study on Targeted Killings*, *supra* note 2, ¶ 8.

328. *Id.* ¶ 18 (citing Mayer, *supra* note 108).

the context it is undertaken. Thus, “international law protecting individuals against intentional deprivation of life does not categorically prohibit State-sponsored targeted killings, but subjects their lawfulness or unlawfulness to a series of strict conditions.”³²⁹ More specifically, as shown by the analysis conducted in this Note, the current legal standards in place in human rights law, the law on inter-state force, and the law on armed conflict are sufficient to address the issues and problems targeted killings present.

Outside the context of an armed conflict, whether of an international or non-international character, the applicable legal standard or legal framework is human rights law. Under human rights law and standards, a targeted killing being an “intentional, premeditated[,] and deliberate killing by law enforcement officials is not legal because, unlike in situations of armed conflict, it is never permissible for killing to be the *sole objective* of an operation.”³³⁰ Hence, the right to life, i.e., the right of an individual to be protected from an arbitrary and/or unlawful deprivation of life, must be respected at all times. The right to life is a paramount right of every individual from which the enjoyment of all other rights spring from and from which no derogation may be made.

Under the context of a state’s right to self-defense, the applicable legal framework is the law on the use of inter-state force. A proper invocation of the right to self-defense under Article 51 of the United Nations Charter requires an *actual and imminent* armed attack directed against a state or its citizens by “rogue” states or non-state actors such as transnational terrorists, whether the latter are cooperating with each other or not. Absent a clear and concrete situation of an armed attack, the use of force or, specifically, the resort to targeted killing under the guise of self-defense is not justified and has no basis at all.

Hence, the existence of an impending actual and imminent attack directed against a state justifies that state’s resort to the use of targeted killings in order to deter the said actual and imminent attack. In such a case, the targeting state must be able to show the necessity of that act of self-defense which must be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”³³¹ Lethal force must only be used *defensively* and only to the extent necessary to meet legitimate defensive objectives.³³² In addition, an assessment must be made whether it has means to defend itself other than through the use of armed force. If such other less lethal means are available, then resort to targeted killings as a measure of self-defense cannot be had.

329. MELZER, *supra* note 1, at 423.

330. *Study on Targeted Killings*, *supra* note 2, ¶ 33.

331. Machon, *supra* note 120, at 44 (citing Gross, *supra* note 176, at 211).

332. *Study on Targeted Killings*, *supra* note 2, ¶ 43.

In situations where a state conducts a targeted killing operation on the territory of another state, such does not violate the sovereignty of the latter state when the latter consents to the said targeted killing within its territory.³³³ Prior to the conduct of the targeted killing operation, the consenting state should, at a minimum, require the targeting state to demonstrate verifiably that the person against whom lethal force is to be used can be lawfully targeted and that the targeting state will comply with the applicable law.³³⁴ After the targeted killing is conducted, the consenting state should ensure that it was legal.³³⁵

Therefore, under the law of inter-state force, a case of targeted killings is justified, either when: “(a) [t]he targeted killing operation conducted within the territory of a State, is consented to by that state, or (b) [w]hen the targeting State has right of self-defense under international law.”³³⁶

It must be noted, however, that the justification of any case of targeted killing by the right to self-defense in the context of inter-state force only pertains to the issue of whether the use of such force violates the sovereignty of the other state. It does not address the issue of whether the specific killing is legal. The question of the lawfulness of such killing is addressed by human rights law and IHL.

With respect to targeted killings committed during the course of an armed conflict, it is IHL which is the governing law. Hence, the lawfulness of targeted killings committed during the course of an armed conflict must be determined by the *lex specialis* of IHL. To the extent that the *lex specialis* provides a specific rule for the particular situation at hand, regardless whether that rule is more or less precise than the general rule, it takes precedence over the continuously generally applicable *lex generalis*.

First, a targeted killing to be legal and permissible must be necessary or militarily necessary.³³⁷ The targeted killing must contribute effectively or likely to contribute effectively to the achievement of a concrete and direct military advantage without the existence of a non-lethal alternative.³³⁸

Second, only combatants may be the lawful objective of targeted killing conducted under a situation of armed conflict. In case, however, civilians *directly participate* in the hostilities, they may be the lawful subject of targeted killing. Hence, if a civilian commits a hostile act that is specifically designed to support one party to an armed conflict by directly causing harm to the

333. *Id.*

334. *Id.* ¶ 38 (citing *Dec. 22, 2004 Report*, *supra* note 119, ¶ 41).

335. *Study on Targeted Killings*, *supra* note 2, ¶ 38.

336. *Id.*

337. MELZER, *supra* note 1, at 397.

338. *Id.*

military operations or military capacity of the other, or death, injury, or destruction to persons or objects protected against direct attack, that civilian may be the lawful subject of targeted killing.³³⁹

Third, the collateral damage which results from the targeted killing must not be excessive in relation to the concrete and direct military advantage anticipated from the death of the targeted individual.³⁴⁰

Therefore, under IHL, targeted killings are justified when the principles of: (a) military necessity, (b) distinction, and (c) proportionality of attack as well as precaution in attack, are complied with.

Based on the foregoing conclusions, the following recommendations are given.

First, the ICRC, being the guardian of international humanitarian law,³⁴¹ should pursue an active role in enforcing humanitarian measures whenever a targeted killing operation is planned to be conducted and when it is actually conducted. In case there are claimed violations of IHL when a targeted killing operation has been conducted, the ICRC should notify the state alleged to have committed the violation and initiate dialogue between the conflicting states involved. The ICRC should ensure strict compliance and observance of the rules set forth in the 1949 Geneva Conventions as well as Additional Protocols I and II.³⁴² Furthermore, the ICRC should extend protection and aid to military and civilian victims of targeted killings and serve as mediator between the parties involved in the conflict.³⁴³ While the ICRC's actions are aimed at influencing state action through persuasion, when the violations of humanitarian law brought about by targeted killings result in so high a death toll, the ICRC can resort to public denunciation³⁴⁴ of the specific violation of international humanitarian law involved.

Second, the United Nations Human Rights Council must assert itself in calling for the protection of human rights in case targeted killings are conducted, whether such be in the context of an armed conflict or not. It must be noted that, while the *lex specialis* of IHL applies in the context of an armed conflict, human rights, especially the human right to life continues to be a protected right during the course of an armed conflict as opined in the ICJ Nuclear Weapons Opinion.³⁴⁵ Therefore, human rights bodies have a

339. *Id.* at 343.

340. *Id.* at 358.

341. THE HANDBOOK, *supra* note 251, at 714.

342. *Id.*

343. *Id.*

344. *Id.* at 714-15.

345. *See Nuclear Weapons*, 1996 I.C.J. at 240.

responsibility to investigate those limitations of human rights in armed conflicts which may apply under the *lex specialis* role of IHL. This duty indeed includes the right to investigate violations of human rights, especially the human right to life, whenever targeted killings are conducted.

While the competence of human rights bodies established under the human rights conventions is generally limited to the determination whether a given act was in violation of relevant human rights norm, this does not preclude taking into consideration provisions of IHL in order to interpret such norm.³⁴⁶ Therefore, IHL may be dealt with even by human rights bodies, which can provide support to ensure respect for IHL.

In connection with the foregoing recommendations, the United Nations High Commissioner for Human Rights should convene a meeting of states, including representatives of key military powers, the ICRC, and human rights and IHL experts. The objective of such meeting is to arrive at a set of rules governing targeted killings (or the law of targeting) as well as the means and methods employed, a monitoring mechanism to check for abuses in order to prevent unjustified resort to targeted killings, in accordance with the pertinent rules of IHL or human rights law standards depending on the context under which a specific case of targeted killing is conducted. These institutions should work together to ensure that targeted killings are kept well within the parameters permitting it under human rights law and standards, the law on the use of inter-state force, and the law of armed conflict.

Third, in response to the United States' statement that the targeted killings conducted by it during the course of an armed conflict are not within the mandate of the United Nations Special Rapporteur for Extrajudicial, Summary, and Arbitrary Killings, this Note maintains that the Special Rapporteur is well within his mandate to investigate and expose the legal ramifications of targeted killings in international law. The mandate of the Special Rapporteur covers executions (extrajudicial, summary, and arbitrary) which violate the fundamental human right to life.³⁴⁷ In connection with this, it must not be forgotten that at the core of every targeted killing operation is the fundamental human right to life; thus, it is undeniable that human rights are affected whenever targeted killings are conducted. Therefore, the mandate of the Special Rapporteur is deemed to cover within its ambit the targeted killing operations conducted in the context of an armed conflict or under peacetime conditions. No provision of international law precludes the Special Rapporteur from investigating the legality or illegality of targeted killings and recommend measures based on

³⁴⁶ *Id.* at 715.

³⁴⁷ U.N. Human Rights Council, *Mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Res. No. A/HRC/8/3 (June 18, 2008).

his observations. The human rights obligation to investigate alleged violations of the right to life does not cease to apply during armed conflict.

Fourth, the United Nations Security Council must actively engage itself in investigating targeted killings and its effects on international peace and security as a whole. Subsumed under its mandate to maintain international peace and security in accordance with the principles and purposes of the United Nations³⁴⁸ is the duty to take effective measures against serious violations of human rights where such poses a threat to international peace and security. It is undeniable that targeted killings can constitute a serious violation of human rights when committed under circumstances under which it is not permissible, hence posing a serious threat to peace and order. Not only can targeted killings be violative of human rights, it can further be violative of applicable rules of IHL. Therefore, the Security Council should initiate fact-finding missions with a view to identifying violations of human rights or IHL in conflict areas in order to come up with measures to ensure the protection of the rights affected. In addition, the Security Council should take effective measures to bring to justice perpetrators of targeted killings who commit grave violation of human rights and IHL. At this point, this Note deems it important that the Security Council come up with a resolution regarding targeted killings. The novelty of the concept and practice of targeted killings in international law makes it imperative that it be clarified in order to address the legal issues surrounding such concept and practice, especially when it constitutes a threat to international peace and security.

On the part of states, the following are recommended.

First, states must be able to “publicly identify the rules of international law they consider to provide a basis for any targeted killings they undertake.”³⁴⁹ This is important in order to assure transparency and accountability whenever a targeted killing operation is conducted. It also prevents abuses and unjustified claims whenever states resort to targeted killings. Thus, the bases for decisions to kill rather than capture; the procedural safeguards in place to ensure in advance of targeted killings that states comply with international law; and the measures taken after any such killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures they would take, must be made publicly available and must, with accuracy, be spelled out by states conducting targeted killings.³⁵⁰ Furthermore, “if a State commits a targeted killing in the territory of another

348. See generally United Nations Security Council, Functions and Powers, available at http://www.un.org/Docs/sc/unsc_functions.html (last accessed Sep. 12, 2012).

349. *Study on Targeted Killings*, *supra* note 2, ¶ 93.

350. *Id.*

State, the [latter] should publicly indicate whether it gave consent, and on what basis.”³⁵¹ Hence, coordination between the two states is necessary to ensure that a targeted killing operation is conducted in accordance with established rules of international law, depending on the context under which the targeted killing operation was conducted. In addition, the states involved must actively cooperate with the United Nations Human Rights Council, the International Committee of the Red Cross, or with any human rights body investigating the lawfulness of a specific case of targeted killing conducted.

Second, particularly in targeted killings conducted outside the context of armed conflict, human rights law and standards require states to make publicly available “the measures taken to control and limit the circumstances in which its law enforcement officers may resort to lethal force.”³⁵² This is in consonance with the rule earlier stated in Chapter III that outside the context of an armed conflict or during peacetime situations, resort to lethal force is never permissible if the sole objective of a targeted killing operation is to kill a person.

Therefore, non-lethal force must always be resorted to. This requirement includes permissible objectives, non-lethal tactics for capture or incapacitation, efforts taken to minimize the use of lethal force, and a “legal framework [that] should take into account the possibility that a threat may be so imminent that a warning and the graduated use of force are too risky or futile.”³⁵³ Monitoring mechanisms and independent investigative bodies must also be established in order to provide prompt and effective disclosure of measures taken during targeted killings and in order to prevent violations.

Third, under the context of armed conflict, IHL requires a state to disclose institutional mechanisms established to investigate alleged unlawful targeted killings to be able to identify perpetrators in order to exact responsibility from them, or to “extradite them to another State that has made a [*prima facie*] case for the unlawfulness of a killing.”³⁵⁴ Furthermore, targeted killings should never be conducted on the basis of unsubstantiated, unreliable, and unverified information. Hence, states must use all means reasonably necessary to ensure that the targeted person is a lawful target to ensure that minimum collateral damage is inflicted, and to ensure that the killings are militarily necessary and in accordance with the principles of distinction, proportionality, and precaution in attack in IHL.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

In case of targeted killings conducted through drone attacks and airstrikes —

it is incumbent on pilots, whether remote or not, to ensure that a commander's assessment of the legality of a proposed strike is borne out by visual confirmation that the target is in fact lawful, [such that] if the facts on the ground change in substantive respects, those responsible must do everything feasible to abort or suspend the attack.³⁵⁵

In targeted killings conducted in heavily populated urban areas, state forces must provide effective advance warning to the population.³⁵⁶ The use of “human shields” by the legitimate targets for the targeted killing operation does not, however, dispense with the “obligation to ensure that attacks do not kill civilians in excess of the military advantage of killing the targeted [individual].”³⁵⁷

VII. EPILOGUE: TARGETED KILLINGS AND THE PHILIPPINE GOVERNMENT IN ITS COUNTER-INSURGENCY MEASURES

For many years now, the Philippine Government has been involved in numerous counter-insurgency operations against the Communist Party of the Philippines–New People's Army–National Democratic Front (CPP–NPA–NDF), as well as other leftist groups which the government claims to be involved in measures, armed or unarmed, directed towards the government, threatening peace and order in the Philippines.³⁵⁸ In the areas of Mindanao, the government has also been continuously exerting efforts to curb lawlessness claimed to be perpetrated by the Moro Islamic Liberation Front (MILF) and the bandit group Abu-Sayyaf, which according to intelligence reports, have close links to international terrorist groups such as al-Qaeda and Jemaah-Islamiyah.³⁵⁹

More recently, the number of leftist activists neutralized and silenced forever has consistently been growing. The persons included in these killings compose mainly of human rights defenders, trade unionists, and land reform

355. *Study on Targeted Killings*, *supra* note 2, ¶ 93.

356. *Id.*

357. *Id.*

358. See Jim Michaels, Philippines a model for counterinsurgency, USA TODAY, Mar. 31, 2011, available at http://www.usatoday.com/news/world/2011-03-30-secretwar30_ST_N.htm (last accessed Sep. 12, 2012).

359. See generally Dona Z. Pazzibugan, *Jemaah Islamiyah, Abu Sayyaf now merged, says antiterror expert*, PHIL. DAILY INQ., Sep. 29, 2011, available at <http://newsinfo.inquirer.net/67043/jemaah-islamiyah-abu-sayyaf-now-merged-says-antiterror-expert> (last accessed Sep. 12, 2012) & abc News, *The Abu Sayyaf-Al Qaeda Connection*, available at <http://abcnews.go.com/International/story?id=79205&page=1#.UETj06T9E5Q> (last accessed Sep. 12, 2012).

advocates.³⁶⁰ More particularly, the victims belong to organizations such as the Bagong Alyansang Makabayan, or the “New Patriotic Alliance” or adherents of the “national democratic” ideology espoused by the CPP-NPA-NDF.³⁶¹ In effect, these killings constitute a chilling effect on civil society leaders, limiting their courses of action as well as their avenues for political discourse.³⁶²

Two things are noticeable with respect to the measures taken by the Philippine Government with respect to these persons targeted. First, “the military’s counter[-]insurgency strategy against the CPP-NPA-NDF increasingly focuses on dismantling civil society organizations that are *purported* to be ‘CPP-NPA-NDF front groups.’”³⁶³ Second, even when non-lethal or less lethal means such as arrest, prosecution, and trial are available to address the claimed threats to peace and order by the persons targeted, the government forces more often than not, if not most of the time, resort to killing these persons.

The foregoing circumstances pose a great threat to the protection of human rights, especially in situations falling outside the context of armed conflict. In the situation obtaining in the Philippines, the killings are committed even when there exists no armed conflict or hostilities between the government and the aforementioned groups.

Before discussing the relation of targeted killings and the counter-insurgency measures of the Philippines against the such groups, it will be well to provide a brief background of the nature and history of the conflict with each of the groups respectively.

A. The CPF-NPA-NDF and the MILF

1. The CPP-NPA-NDF

The CPP-NPA-NDF traces back its beginnings to the time of the United States occupation of the Philippines in the mid-1930s when “the Communist Party of the Philippines (CPP) was established to engage in a legal struggle against the government.”³⁶⁴ In 1942, with the Japanese occupation of the

360. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Mission to the Philippines*, ¶ 11, U.N. Doc. A/HRC/8/3/Add.2 (Apr. 16, 2008) (by Philip G. Alston) [hereinafter *Mission to the Philippines*].

361. *Id.*

362. *Id.*

363. *Id.* ¶ 12.

364. Mailyn V. Matamis, *Asserting Belligerent Status under International Law: The Case of the CPP-NPA-NDF and the Moro Islamic Liberation Front (MILF) A Legal Analysis*, at 72-73 (2000) (unpublished J.D. thesis, Ateneo de Manila

Philippines, the CPP merged with the *Hukbo ng Bayan Laban sa Hapon* (HUKBALAHAP).³⁶⁵ In 1950, when the HUKBALAHAP was converted into the *Hukbong Mapagpalaya ng Bayan* (HMB), it declared an all-out war against the then administration of President Elpidio Quirino, which it claimed was backed by the United States government.³⁶⁶ In 1969, the CPP formed the New People's Army (NPA), which had its basis on the Marxist and Leninist principles, as it sought to address the fundamental problems of the country.³⁶⁷ In 1973, the CPP formally founded the National Democratic Front (NDF), the latter being the vehicle by which the CPP was able to carry out its programs.³⁶⁸

The CPP-NPA-NDF exists on the belief that the predominance of US imperialism, feudalism, and bureaucrat capitalism are the roots of oppression, exploitation, and injustice in Philippine society.³⁶⁹ It believes that genuine political, economic, and social reforms are not possible unless the present structure of the Philippine government is completely changed and the state is overthrown by means of a violent revolution of armed struggle.³⁷⁰ Thus, the CPP-NPA-NDF seeks to undertake this task by waging against the Philippine Government what is called the "people's war." In fact, it is stated in the NDF Program that the strategy of the CPP-NPA-NDF entails a total mobilization of the entire people for armed struggle, open mass struggles, rural and urban uprisings, and other forms of unarmed and armed conflict to destroy the military and political capability of the Philippine government.³⁷¹ Furthermore, the NDF is of the stand that the armed struggle is the main form of revolutionary struggle because it smashes the bureaucratic and military machinery of the reactionary state and makes possible the emergence and development of the revolutionary organs of democratic power because it believes that without the seizure of political power, the national and social liberation of the people is impossible.³⁷²

University) (on file with the Professional Schools Library, Ateneo de Manila University).

365. *Id.* at 73.

366. *Id.*

367. *Id.*

368. *Id.* at 74.

369. *Id.* at 76.

370. Matamis, *supra* note 365, at 76.

371. National Democratic Front of the Philippines, The Twelve Points of the NDF Program, available at <http://www.ndfp.net/joomla5/index.php/about-the-ndfp-mainmenu-27/12-point-program-mainmenu-29/twelve-points-of-the-ndf-program-mainmenu-60.html?start=1> (last accessed Sep. 12, 2012).

372. *Id.*

2. The Moro Islamic Liberation Front (MILF)

The MILF is a faction of the Moro National Liberation Front (MNLF) which split from the latter when the MNLF recognized the Philippine Constitution and thus started to work in coordination with the Philippine Government towards efforts to restore peace in Mindanao.³⁷³

The MILF's demand consists of an independent and sovereign Moro Islamic State, with its own government implementing Shari'ah Law.³⁷⁴ The MILF ideology centers on the role of Islam in its struggle for autonomy and self-determination.³⁷⁵ In order to achieve this objective, the MILF engages in armed conflict against the forces of the government. The MILF also has established bases and camps in the hinterlands of Mindanao.

To date, numerous peace talks with the MILF has been initiated by the government.³⁷⁶ However, these peace talks are unable to put an end to the fighting in Mindanao. The MILF remains firm in its struggle for the separation of the Muslim areas from the government of the Philippines. The MILF, to this day, continues to launch attacks against the armed forces of the Philippine Government.

B. Targeted Killings and the Philippine Insurgency Problem

At this point, it must be noted that the chances of the Philippines, a close ally of the United States, which is a state at the forefront in the method of targeted killing, employing the same in its efforts to curb lawlessness and threat from domestically-organized groups are very likely.

As earlier stated, targeted killing is the "use of lethal force attributable to a subject of international law *with* the intent, premeditation, and deliberation to kill individually selected persons who are *not in the physical custody* of those targeting them."³⁷⁷

The legality or illegality of any case of targeted killing depends on the context under which it is undertaken. Therefore, if committed in the context of an armed conflict, targeted killing is governed by IHL, IHL being the *lex specialis* that applies during the situation of an armed conflict —

373. Matamis, *supra* note 365, at 87-88.

374. *Id.*

375. *Id.*

376. See generally John Unson, MILF sees success of current round of peace talks, PHIL. STAR, Aug. 14, 2012, available at <http://www.philstar.com/nation/article.aspx?publicationsubcategoryid=200&articleid=838005> (last accessed Sep. 12, 2012) & Karlos Manlupig, MILF hits 'slow' pace of peace talks, available at <http://www.rappler.com/nation/8229-milf-hits-slow-pace-of-peace-talks> (last accessed Sep. 12, 2012).

377. MELZER, *supra* note 1, at 5 (emphasis supplied).

whether of an international or non-international character. If committed in exercise of a state's right to self-defense, such is governed by the law of inter-state force. However, the legality or illegality of the targeted killing will be determined by IHL, if an armed conflict ensues or human rights law, if committed under situations outside of armed conflict because the law on the use of inter-state force applies only to determine the legality of a state's resort to use of force, which is targeted killing.

As noted above, for IHL to apply to targeted killings, there must exist an armed conflict. Hence, in order to determine whether IHL applies to determine the targeted killings which can be employed by the Philippine government in its counter-insurgency measures, it must first be determined whether the conflict between the Philippine government and the CPP-NPA-NDF and the MILF is an armed conflict within the meaning of the Geneva Conventions and its Additional Protocols.

The insurgency problem of the Philippine Government cannot be classified as an international armed conflict under the 1949 Geneva Conventions. Under the 1949 Geneva Conventions, an international armed conflict is "any case of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by of them."³⁷⁸ Neither does the insurgency problem in the Philippines fit into the modern concept of international armed conflict according to Jean S. Pictet, a noted expert in international law. Pictet, in his commentary, provides —

Any difference arising between two States and leading to the intervention of the armed forces is an armed conflict within the meaning of Article 2 [of the Geneva Conventions], even if one of the [p]arties denies the existence of a state of war.³⁷⁹

Clearly, in the case of the Philippines, the conflict with the CPP-NPA-NDF or with the MILF does not fall under the foregoing concept of an international armed conflict there being no other High Contracting Party to the Geneva Conventions involved in the conflict.

It could be argued that the conflict with the MILF would be covered by Article 1 (4) of Additional Protocol I, which extends the notion of international armed conflict to —

378. First Geneva Convention, *supra* note 258, art. 2 (1); Second Geneva Convention, *supra* note 258, art. 2 (1); Third Geneva Convention, *supra* note 258, art. 2 (1); & Fourth Geneva Convention, *supra* note 258, art. 2 (1).

379. JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: A COMMENTARY ON THE III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (1960 ed.).

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations.³⁸⁰

However, this provision is not applicable to the Philippine Government because although the Philippines signed Additional Protocol I, it has not ratified it. Hence, there is no need to discuss the resulting legal implications of Additional Protocol I.

Regarding non-international armed conflicts, it is defined under Article 3 (1) of Geneva Convention III as “any conflict which is not of an international character.”³⁸¹ Under Article 1 of Additional Protocol II,³⁸² to which the Philippines is a state party, the scope of a non-international armed conflict includes:

- (1) Armed conflicts which are not of an international character and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.³⁸³
- (2) The Protocol does not apply to situations of internal disturbances and tension, such as riots, isolated and sporadic attacks of violence and other acts of a similar nature, as not being armed conflicts.³⁸⁴

The concept of non-international armed conflict therefore, is “all situations of sufficiently intense or protracted armed violence between identifiable and organized armed groups regardless of where they occur, as long as they are not of inter-state character.”³⁸⁵ Thus, “outside the context of inter-state relations, the ability of identifiable parties to sustain a structured campaign of armed violence against each other, and to fulfill their basic obligations under IHL, is sufficient to create a situation of armed conflict.”³⁸⁶

380. Additional Protocol I, *supra* note 68, art. 1 (4).

381. Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III), art. 3 (1), *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

382. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), *opened for signature* June 8, 1977, 1125 U.N.T.S. 609.

383. *Id.* art. 1 (1).

384. *Id.* art. 1 (2).

385. MELZER, *supra* note 1, at 261.

386. *Id.*

In the view of the Proponent of this Note, the conflict between the Philippine Government and the CPP-NPA-NDF and the MILF qualifies as a non-international armed conflict under Article 3 (1) of Geneva Convention III.³⁸⁷

First, the CPP-NPA-NDF and the MILF are groups which are identifiable based on objectively verifiable data. It is no secret that the CPP-NPA-NDF exists in Philippine society. The CPP-NPA-NDF is an organization which calls for the overthrowing of the Philippine Government with a well-structured and organized chain of command, as earlier discussed in the beginning of this Chapter. On the other hand, the MILF also has an organized chain of command whose leaders are properly identified.

Second, the CPP-NPA-NDF and the MILF are capable of carrying out sustained and concerted military operations against the forces of the Philippine Government. To date, an all-out offensive policy against the CPP-NPA-NDF and the MILF and their respective operatives is being implemented by the Philippine Government, an indication that both groups continue to be a threat to the national security and political integrity of the Philippine Government. The use of military means and methods to combat the operatives of the CPP-NPA-NDF and the MILF is an indication that the conflict between the Philippine Government and the former goes beyond the level of intensity of internal disturbances and tensions, such as riots, isolated, and sporadic acts of violence and other acts of a similar nature.

It is therefore inescapable to characterize the armed conflict between the Philippine Government and the CPP-NPA-NDF and the MILF as a non-international armed conflict. Therefore, any targeted killing conducted under this context must be governed by the rules of IHL applicable under non-international armed conflict. Thus, the Philippine Government, if and when it launches a targeted killing operation, must clearly distinguish between persons protected from attack and those who may legally be targeted, as well as comply with the minimum requirements of IHL applicable to non-international armed conflict.

Outside the context of an armed conflict, which in the case of the Philippines is a non-international armed conflict, targeted killings must continue to be governed by human rights standards and human rights law.³⁸⁸ Human rights are rights inherent to all human beings, whatever a person's nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status is. Accordingly, all persons are equally entitled to human rights without discrimination.

387. Geneva Convention III, *supra* note 382, art. 3 (1).

388. *Study on Targeted Killings*, *supra* note 2, ¶ 31.

The Philippines, being a party to the ICCPR, is therefore bound to comply with all the standards and principles affecting human rights, the most paramount of which is the human right to life. True, the ICCPR recognizes the need to resort to extreme measures in extraordinary circumstances in Article 4 (1), stating that, in times of public emergency, states may take measures derogating from their obligations under the Covenant.³⁸⁹ *Some rights, however, are of such a fundamental character that States cannot derogate from them.* The right to life, specifically guaranteed in Article 6 (1)³⁹⁰ of the ICCPR, excluded from the ambit of Article 4 (1) by Article 4 (2),³⁹¹ is one such right.

Despite the fact however, that the Philippines is a state party to the ICCPR, its government has failed to protect human rights, especially the human right to life. Worse, it is claimed by numerous human rights groups in the Philippines that the Philippine Government, which should be the guardian of human rights, is its foremost violator. Alston stated in the Report filed before the United Nations Human Rights Council that as of 30 June 2007, the number of victims of alleged political killings accounted for is 390.³⁹² Extrajudicial killings cannot reach such a high death toll. It must also be noted that such number covers only the cases accounted for; the actual number could be higher when those unaccounted for are factored in. Moreover, journalists themselves also have had more than a fair share of the victims of alleged political killings. The National Union of Journalists of the Philippines has reported that since 1987, the number of journalists killed is now 137.³⁹³ One hundred of these have been committed during the administration of President Gloria M. Macapagal-Arroyo alone.³⁹⁴

The foregoing would therefore lead to the following positions regarding the permissibility of targeted killings in the Philippines.

Under the context of a non-international armed conflict between the Philippine government and the CPP-NPA-NDF and the MILF, targeted killing is permissible as long as it complies with the minimum requirements

389. ICCPR, *supra* note 127, art. 4 (1).

390. *Id.* art. 6 (1). “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” *Id.*

391. *Id.* art. 4 (2). “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” *Id.*

392. *Mission to the Philippines*, *supra* note 361, ¶ 12.

393. National Union of Journalists of the Philippines, Freedom and Accountability: NUJP on World Press Freedom Day, *available at* <http://micmed5.blogspot.com/2010/05/freedom-and-accountability-nujp-on.html> (last accessed Sep. 12, 2012).

394. *Id.*

of IHL particularly the principles of distinction, proportionality, precaution in attack, and military necessity.

Outside the conduct of hostilities, however, to allow the government, through the military, to target specific individuals, would open the floodgates of abuse and arbitrariness in the conduct of targeted killings. Furthermore, such would only lead to more human rights violations which cannot in any way be countenanced on the bare assertion that a leftist group, or any other group for that matter, is suspected of being a threat to national peace and security. In fact, “the rhetoric of many officials in the Philippine government moves too quickly from the premise that there are some front organizations to the assertion, *usually unsubstantiated*, that particular organizations are indeed fronts.”³⁹⁵ Unsubstantiated and unverified information *cannot* be the basis of a targeted killing operation against an individual suspected of being a threat to peace and security. As much as possible, if not at all times, the non-lethal means of arrest, prosecution, and trial must be resorted to if indeed an individual is suspected of having committed acts detrimental to peace and security which is likely to be repeated again in the future. It is paramount that the individual be given a day in court to defend oneself if the charges against him or her are not true. In this way, his or her human rights are protected and recognized, the most important of which is the human right to life. And on a larger scale, the overall protection accorded to human rights, especially in the field of counter-insurgency measures and law enforcement, is amplified and institutionalized.

395. *Mission to the Philippines*, *supra* note 361, ¶ 14 (emphasis supplied).