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**UNLEASHING THE ROBOTIC DOGS OF WAR: WHAT
IMPLICATIONS DOES THE USE OF UNMANNED
PREDATOR DRONES FOR TARGETED KILLING HAVE ON
THE INTERPRETATION, APPLICATION AND FORMATION
OF INTERNATIONAL LAW?**

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Supervised by
Professor Thomas Bennett



Thesis presented for the approval of Senate in fulfillment of the requirements for the degree of Master of Laws in International Law in the Department of Public Law.

February 2011

**UNLEASHING THE ROBOTIC DOGS OF WAR: WHAT IMPLICATIONS
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FORMATION OF INTERNATIONAL LAW?**

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I do hereby declare that I have read and understood the regulations governing submission of a Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Brian Sang Yegon Kibet

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights (1981)
ACHR	American Convention on Human Rights (1969)
ACiHPR	African Commission on Human and Peoples' Rights
ADRDM	American Declaration of the Rights and Duties of Man (1948)
AP I	First Additional Protocol to the 1949 Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts (1977)
AP II	Second Additional Protocol to the 1949 Geneva Conventions, relating to the Protection of Victims of Non- International Armed Conflicts (1977)
ASIL	American Society of International Law
CCW	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (1980)
CCW	Amended Prot. II Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (1996)
CCW	Protocol I Protocol on Non-Detectable Fragments (1980)
CCW	Protocol II Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (1980)
CCW	Protocol III Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (1980)
CIA	Central Intelligence Agency (US foreign intelligence service)
CRC	Convention on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
ECiHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECR	European Court Reports
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EWCA Civ.	England and Wales, Court of Appeal, Civil
EWHC Admin.	England and Wales, High Court
F.Supp.	Federal Supplement (US), 1932–
FRY	Federal Republic of Yugoslavia
GAOR	General Assembly Official Records
GC	Geneva Conventions (1949)
GC I	First Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949)

GC II	Second Geneva Convention, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949)
GC III	Third Geneva Convention, relative to the Treatment of Prisoners of War (1949)
GC IV	Fourth Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)
H III	Third Hague Convention, relative to the Opening of Hostilities (1907)
H IV	Fourth Hague Convention, respecting the Laws and Customs of War on Land (1907)
H IV R	Regulations concerning the Laws and Customs of War on Land, annexed to H IV (1907)
IAC	International Armed Conflict
IACiHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICC	Statute Rome Statute of the International Criminal Court (1998)
ICCPR	International Covenant on Civil and Political Rights (1966)
ICECSR	International Covenant on Economic, Social and Cultural Rights (1966)
ICJ	International Court of Justice
ICJ Reports	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDF	Israel Defence Forces
IFHV	Institute for International Law of Peace and Humanitarian Law of the Ruhr-University Bochum
IFRC	International Federation of Red Cross and Red Crescent Societies
IIHL	International Institute for Humanitarian Law
IHL	International Humanitarian Law
ILC	International Law Commission of the United Nations
ILM	International Legal Materials
ILR	International Law Reports
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
INLA	Irish National Liberation Army
Iran-US CTR	Iran-US Claims Tribunal Reports

IRRC	International Review of the Red Cross
LAW	Palestinian Society for the Protection of Human Rights and the Environment
Lieber Code	Instructions for the Government of Armies of the United States in the Field (1863)
LOAC	Law of Armed Conflict
LRTWC	Law Reports of Trials of War Criminals
MFA	Ministry of Foreign Affairs
NATO	North Atlantic Treaty Organization
NIAC	Non-International Armed Conflicts
OAS	Organization of American States
OAU (AU)	Organization of African Unity (now African Union)
PCATI	Public Committee Against Torture in Israel
PCIJ	Permanent Court of International Justice
PCIJ Reports	Reports of the Permanent Court of International Justice
PHRIC	Palestine Human Rights Information Center
PKK	Kurdish Workers' Party (Partiya Karkeren Kurdistan)
PLO	Palestine Liberation Organization
POW	Prisoner of War
RIAA	Reports of International Arbitral Awards
SAS	Special Air Service (of the UK Special Forces)
SCOR	Security Council Official Records
UAV	Unmanned Aerial Vehicle
UCIHL	University Centre for International Humanitarian Law, Geneva, Switzerland
UDHR	Universal Declaration of Human Rights (1948)
UK	United Kingdom
UN	United Nations Organization
UN Charter	Charter of the United Nations (1945)
UN Doc.	United Nations Document
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
UNHRComm	United Nations Commission on Human Rights (in 2006 replaced by UN Human Rights Council)
UNSC	United Nations Security Council
UNTS	United Nation Treaty Series
UNWCC	United Nations War Crimes Commission
US	United States of America
Vienna Convention	Vienna Convention on the Law of Treaties (1969)

Over the past decade, the number and type of unmanned or robotic systems developed for, and deployed in, armed conflict and law-enforcement contexts has grown at an astonishing pace [...] Unmanned technologies already in use [can be] equipped with weapons to be used against targets or in self-defence. Some of these technologies are semi-automated, and can, for example, land, take off, fly, or patrol without human control [...] In the foreseeable future, the technology will exist to create robots capable of targeting and killing with minimal [...] need for direct human control or authorization [...] Although robotic or unmanned weapons technology has developed at astonishing rates, the public debate over the legal, ethical and moral issues arising from its use is at a very early stage, and very little consideration has been given to the international legal framework necessary for dealing with the resulting issues. [Report of the Special Rapporteur (Executions), 23 August 2010, A/65/321, paragraphs 17 and 29]

The Predator [drones] that engaged targets in Iraq, Afghanistan, and Yemen were remotely piloted. [...] On the other end of the technological spectrum is the autonomous command and control system, which uses the unmanned aircraft's onboard computer to locate, identify, track, and expeditiously attack targets. [...] Once technology advances to enable reliable autonomous operations, maintaining accountability proves problematic. [John J Klein 'The Problematic Nexus: Where Unmanned Combat Aerial Vehicles and the Law of Armed Conflict Meet' (2003) *Air & Space Power Journal* ff 19, 21]

The moral rule is not "when one is about to kill you, preempt him and kill him first," but rather "when one is about to kill you, do everything necessary in order to thwart his intention." Accordingly, if there is no alternative to killing him, strike first. If there is an alternative other than killing him, thwart his intention without striking first, without killing him. [Assa Casher *Military Ethics* (1996) 56]

Empowering governments to identify and kill 'known terrorists' places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted. While it is portrayed as a 'limited exception' to international norms, it actually creates the potential for an endless expansion of the relevant category to include any enemies of the State, social misfits, political opponents, or others. And it makes a mockery of whatever accountability mechanisms may have otherwise constrained or exposed such illegal action under either humanitarian or human rights law. [Report of the Special Rapporteur (Executions), 22 December 2004, E/CN.4/2005/7, paragraph 41]

The Special Rapporteur acknowledges that Governments have a responsibility to protect their citizens against the excesses of non-State actors or other authorities, but these actions must be taken in accordance with international human rights and humanitarian law. In the opinion of the Special Rapporteur, the attack in Yemen (using an unmanned Predator drone) constitutes a clear case of extrajudicial killing. [Report of the Special Rapporteur (Executions), 13 January 2003, E/CN.4/2003/3, paragraph 39]

ABSTRACT

With its increasing appeal as a means of countering terrorist attacks, targeted killing is emerging one of the most controversial issues in international law today.¹ The use of drones by States to conduct such killings by means of aerial strikes has also emerged as a novel method of modern aerial warfare, and has provoked both criticism and calls for accountability.²

This research will seek to identify the specific elements and requirements that must be present in order for an incident of targeted killing to be permissible under international law. The ensuing analysis rests on three bases: the *jus ad bellum* (which is primarily self-defence), the *jus in bello* (which is primarily humanitarian law) and law enforcement (which involves human rights).

With a view to addressing these three issues, this thesis surveys recent information concerning States' use of drones to conduct targeted killings. The analysis includes concrete case studies of incidents where suspected terrorists have, intentionally, been targeted and killed. In this respect, the research seeks to identify areas in which the extant international law has either been violated or has been extended unnecessarily, and without well grounded legal cause, beyond the permissible limits.

The thesis aims to establishing the highest possible standards under international law to regulate the use of drones. It therefore seeks to suggest ways by which greater certainty and clarity can be brought to the law by determining which specific normative regime – self-defence, humanitarian law or human rights – is most appropriate for the circumstance in which targeted killing is contemplated.

¹ Conway W Henderson *Understanding International Law* (2010) 273 Wiley-Blackwell: West Sussex; Peter M Cullen 'The Role of Targeted Killing in the War against Terror' (2008) 48 *JF Quarterly* 28.

² Jonathan Hafetz 'The (Still) Unaddressed Threshold Question: What is the "War on Terror" Anyway?' (2010) available at <http://balkin.blogspot.com/2010/09/still-unaddressed-threshold-question.html> (accessed 2 November 2010); Peter M Cullen, *ibid* at 22.

I. PREDATOR WARFARE: AN INTRODUCTION TO THE USE OF UNMANNED DRONES FOR TARGETED KILLING IN INTERNATIONAL LAW

In the early morning of November 3, 2002, a vehicle reported to have been carrying six men drove across the crusty, windswept desert of Qana in the Marib province of Yemen.³ Deploying its optical capability, a CIA-operated unmanned aerial vehicle (UAV), the RQ-1 'Predator Drone' flying overhead focused on the target and took aim.⁴ It then swooped down and with the swift movement of its controller's joystick, it launched a 'Hellfire' missile deliberately intended to hit the vehicle so as to specifically kill one of its occupants, one Ali Qaed Senyan Al-Harethi.⁵

But for the fragments of mangled metal and other charred matter swirling about in the desert wind, little else remained after the drone attack.⁶ Having been literally reduced to dust, the erstwhile occupants of the vehicle were not easily identifiable.⁷ Absent the benefit of forensic evidence to substantiate their claim, the Yemeni authorities 'positively' identified some of the carbonized remains as being those of Ali Qaed Senyan al-Harithi, also known as 'Abu Ali'.⁸ The deceased was alleged, during his lifetime, to have been a senior al Qaeda operative who was behind the bomb attacks on the US War Ship the *USS Cole* in 2000.⁹

³ Nils Melzer *Targeted Killing in International Law* (2008) 3 Oxford University Press: Oxford; Jan Römer *Killing in a Gray Area Humanitarian Law and Human Rights: How Can the National Police of Colombia Overcome the Uncertainty of Which Branch of International Law to Apply?* (2010) 2 Springer: Heidelberg.

⁴ Laurie Calhoun 'The Strange Case of Summary Execution by Predator Drone' (2003) 15(2) *Peace Review* 209; Nils Melzer, *ibid* at 3 and 439; Peter M Cullen, *supra* note 1 at 28.

⁵ Michael N Schmitt 'Precision Attack and International Humanitarian Law' (2005) 87 *International Review of the Red Cross* 445, 448; Laurie Calhoun, *ibid* at 209; Nils Melzer, *ibid* at 3; Peter M Cullen, *ibid* at 28.

⁶ UNHRC, Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Philip Alston, Study on Targeted Killings, A/HRC/14/24/Add.6, 28 May 2010, paragraph 7 (hereinafter UNHRC, Alston Targeted Killings Report); Laurie Calhoun, *ibid* at 209; Jane Mayer, The Predator War, *The New Yorker*, 26 October 2009; Greg Miller, C.I.A. Said to Use Outsiders to Put Bombs on Drones, *LA Times*, 13 February 2009; James Risen, CIA Said to Use Outsiders to Put Bombs on Drones, *NY Times*, 21 Aug. 2009.

⁷ UNHRC, Alston Targeted Killings Report, paragraph 7; Laurie Calhoun, *ibid* at 209; Michael N Schmitt, *ibid* at 448-450; Peter M Cullen, *ibid* at 28; Nils Melzer, *ibid* at 3 and 439; Jane Mayer, *ibid*; Greg Miller, *ibid*.

⁸ Norman Printer 'The Use of Force against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen' (2003) 8 *UCLA Journal of International Law and Foreign Affairs* 331, 335.

⁹ Nils Melzer, *ibid* at 3 and 439; Jack Kelly, U.S. Kills Al-Qaeda Suspects in Yemen; One Planned Attack on USS Cole, Officials Say, *USA Today*, November 5, 2002, at A1; Walter Pincus, Missile Strike Carried Out with Yemeni Cooperation: Official Says Operation Authorized Under Bush Finding, *Washington Post*, November 6, 2002, at A10; Brian Whitaker & Duncan Campbell, CIA Missile Kills Al-Qaeda Suspects, *The*

Hardly a year passed before a similar unmanned drone attack was launched by the CIA on Damadola village in Pakistan resulting in 18 civilian deaths.¹⁰ Comments by US officials are indicative of the fact that the attack was a covert operation targeting Aiyman al-Zawahiri, a suspected senior Al Qaeda member.¹¹

These two examples are illustrative of the currency of the resort to lethal robotic technology and targeted killing amongst States struggling with threats of terror.¹² The purpose of these illustrations is to provide a graphic snapshot of emergent State practice which elicits important, if daunting, legal questions.¹³

Presently, one of the foremost concerns of States is the prevention of terrorist attacks and the maintenance of their national security.¹⁴ A question, however, arises as to whether, and if so in what circumstances, a State may lawfully target (with the intention of killing) a selected individual who is suspected of complicity in the planning of terrorist attacks.¹⁵ Other questions arise regarding what criterion is used in determining the qualification of a

Guardian, 5 November 2002 available at <http://www.guardian.co.uk> (accessed 15 September 2010); Dana Priest, Surveillance Operation in Pakistan Located and Killed Al-Qaeda Official; David Jonston & David E Sanger, Yemen Killing Based on Rules Set Out by Bush, New York Times, 6 November 2002; CNN 'US Kills Cole Suspect' 5 November 2002 available at <http://www.cnn.com> (accessed 15 September 2010); Seymour Hersh, Manhunt: The Bush Administration's New Strategy in the War against Terrorism, The New Yorker, 23 and 30 December 2002 available at <http://www.newyorker.com> (accessed 15 September 2010).

¹⁰ UNHRC, Report of the Special Rapporteur (Executions), of 26 March 2006 (E/CN.4/2006/53/Add.1) 183; Nils Melzer, *ibid* at 3; Jackie Northam, Airstrikes in Pakistan's Tribal Areas Legally Murky, NPR, June 10, 2009, available at <http://www.npr.org/templates/story/story.php?storyID=101953944> (accessed 12 November 2010); Jane Mayer, The Predator War, The New Yorker, 26 October 2009.

¹¹ Nils Melzer, *ibid* at 444; Dana Priest, Covert CIA Program Withstands New Furor, Washington Post, 30 December 2005, A01, available at <http://www.washingtonpost.com> (accessed at 15 September 2010).

¹² Christian M De Vos 'Judging Justice: Laws of War, Human Rights, and the Military Commissions Act of 2006' in Roberta Arnold & Noëlle Quéniwet *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (2008) 499-523, 499: On November 13, 2001, two months after the terrorist attacks of September 11th, President George W. Bush issued a Presidential Military Order (PMO)...based largely on a similar order issued by President Franklin D Roosevelt in July 1942, the PMO cited the "danger to the safety of the United States and the nature of international terrorism" as justification for the commissions, permitting a swifter justice reflective of the fact that it would not be "practicable" to apply the principles of law and rules of evidence otherwise available under domestic criminal law during a time of war.'

¹³ Dustin A Lewis 'Hearing in "Targeted Killing" Case' Program on Humanitarian Policy and Conflict Research available at <http://www.hpcresearch.org/blog/dustinlewis/2010-10-14/hearing-targeted-killing-case> (accessed 22 November 2010); UNHRC, Alston Targeted Killings Report, paragraphs 2-4.

¹⁴ Nils Melzer, *ibid* at 9; Dustin A Lewis, *ibid*; Jan Römer, *supra* note 3 at 12; Dana Priest, *supra* note 9.

¹⁵ UNHRC, Alston Targeted Killings Report, paragraphs 2-4; Nils Melzer, *supra* note 3 at 51.

particular individual as a legitimate target (whether as a participant, an unprivileged combatant or a 'continuing threat').¹⁶

Additionally, issues regarding whether individuals may be targeted while not visibly engaged in combat and of the possibility of their being erroneously targeted when they have disengaged from hostilities also arise.¹⁷

The above scenario is well illustrated in the targeted killing of Al-Harethi and six others, where all were declared members of Al Qaeda and therefore legitimate military targets.¹⁸ This drone strike received an equal measure of approval¹⁹ and condemnations (as

¹⁶ Jonathan Ulrich 'The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism' (2005) 45 *Virginia Journal of International Law* 1029, 1050; Tyler J Harder 'Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law' (2002) 172 *Military Law Review* 19, 34; Louis R Beres 'The Newly Expanded American Doctrine of Preemption: Can It Include Assassination?' (2002) 31(2) *Denver Journal of International Law and Policy* 157, 160, 164; Nils Melzer, *ibid* at 53; Joshua Raines 'Osama, Augustine and Assassination: The Just War Doctrine and Targeted Killings' (2002) 12 *Transnational Law and Contemporary Problems* 217, 238; Louis R Beres 'Assassinating Saddam Hussein: The View From International Law' (2003) 13(3) *Indiana International and Comparative Law Review* 847.

¹⁷ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraphs 31-40; UNHRC, Alston Targeted Killings Report, paragraph 15; Antonio Cassese, Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law, 5 submitted on 18 July 2003 to the Israeli Supreme Court at the request of the petitioners in *Public Committee Against Torture in Israel v the Government of Israel* (hereinafter Antonio Cassese, Expert Opinion on Israel's Targeted Killings Case); William Hays Parks, Executive Order 12333 and Assassination, Memorandum of Law, 2 November 1989, at 6; PCATI/LAW *The Assassination Policy of the State of Israel, November 2000–January 2002* (2002) at 86 (hereinafter PCATI/LAW, *The Assassination Policy of the State of Israel*); Nils Melzer, *supra* note 3 at 56; Kenneth Watkin 'Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict' in David Wippman & Mathew Evangelista (eds.) *New Wars, New Laws? Applying the Laws of War to 21st Century Conflicts* (2005) 137-79, 153; Joseph B Kelly 'Assassination in War Time' (1965) 30 *Military Law Review* 101, 110; Tom Ruys 'License to Kill?: State-Sponsored Assassination under International Law' (2005) 44(1-2) *Military Law and Law of War Review* 13, 28.

¹⁸ US Department of Defence, 'Fact Sheet Guantanamo Detainees': 'The United States and its coalition partners remain at war against Al Qaeda and its affiliates, both in Afghanistan and in its operations around the world. Since Usama bin Laden declared war on the U.S. in 1996, Al Qaida and its affiliates have launched repeated attacks that killed and wounded thousands of Americans [...]'; US Government *National Security Strategy* 5: 'The United States of America is fighting a war against terrorists of global reach.[...] The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time'; UNHRC, Alston Targeted Killings Report, paragraph 22; Nils Melzer, *supra* note 3 at 262; Chris Downes 'Targeted Killing in the Age of Terror: The Legality of the Yemen Strike' (2004) 9(2) *Journal of Conflict and Security Law* 277, 278; Orna Ben-Naftali & Keren Michaeli "'We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings' (2003) 36 *Cornell International Law Journal* 233, 270; Nils Melzer, *ibid* at 439.

extrajudicial killings).²⁰ This represents the importance of the subject of targeted killings of suspected terrorists in international law.

With the development of modern technology, the conduct of military operations is bound, invariably, to change.²¹ Examples of these ever-advancing developments are apt to be found in aerial warfare. In recent years, aerial warfare has emerged as a significant factor in modern warfare that is determinative of the military strength of a given State.²² This is particularly evident in the conduct of aerial warfare where the more advanced the technology deployed the better the military advantage one has over the enemy.²³

One such development in aerial warfare is the use of drones for the purposes of killing selected individuals.²⁴ Drones can 'launch, attack, recover and return to base without any onboard aircrew.'²⁵ Drones have been termed 'uninhabited' rather than 'unmanned' since there is still a significant human element in the actual control of the drone, despite the controller's remoteness from the drone.²⁶

Drones were used in the Gulf and Balkan Wars²⁷ and have since then become 'important nodes in military information networks'.²⁸ More recently they have been used for surveillance, reconnaissance, and the provision of real-time information concerning the

¹⁹ Michael J Dennis 'Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economics and Social Council' (2003) 97 *American Journal of International Law* 364, 367.

²⁰ UNHRC, Special Rapporteur on Extrajudicial, Summary, or Arbitrary Killing, Report on the Yemen Strike, UN Doc. E/CN.4/003/3, paragraphs 37 – 39; UNHRC, Alston Targeted Killings Report, paragraph 19.

²¹ UNHRC, Alston Targeted Killings Report, paragraph 18 and 79; UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary and Arbitrary Executions, A/65/321, 23 August 2010, paragraph 17; Keith L Shimko *The Iraq Wars and America's Military Revolution* (2010) 42.

²² David R Mets *Aerial Power and Technology: Smart and Unmanned Weapons* (2009) 209; Michael R Rip & James M Hasik *Precision Revolution: GPS and the Future of Aerial Warfare* (2002) 152.

²³ Alan Colins *Contemporary Security Studies* (2007) 327; Peter M Cullen, *supra* note 1 at 28.

²⁴ Elinor Camille Sloan *The Revolution in Military Affairs: Implications for Canada and NATO* (2002) 149.

²⁵ RE Chapman 'Unmanned Combat Aerial Vehicle: Dawn of a New Age' (2002) 16 *Aerospace Power Journal* 60 cited in Hyder Gulam & Simon Lee 'Uninhabited Aerial Combat Vehicles and the Law of Armed Conflict' (2005) 3(2) *Australian Army Journal* 124.

²⁶ Hyder Gulam & Simon Lee, *ibid* at 124-25; Chris Jenks 'Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict' (2009) 85 *University of North Dakota Law Review* 649-671.

²⁷ Thomas G Mahnken *Technology and the American Way of War* (2008) 186 Columbia University Press: New York.

²⁸ Armin Krishnan *Killer Robots: Legality and Ethicality of Autonomous Weapons* (2009) 3 Ashgate Publishing Limited: Surrey.

terrain and terrorist activities.²⁹ The proliferation of drones as a relatively new means in contemporary warfare is a fact as their capacity and utility for reconnaissance, surveillance, lethal targeting and even weapons deployment has been ‘effectively’ proven.³⁰

1. Statement of the Legal Problem

While the use of unmanned drones for targeted killing is a relatively novel phenomenon, aerial means of warfare have been used for more than two centuries.³¹ Aerial warfare has developed greatly since its earliest instance when an Italian commander tossed a grenade from his biplane when attacking the Libyan tribesmen.³² Since then, aerial power has been amongst the most decisive elements in armed conflicts.³³ The use of drones has preoccupied the minds of army commanders, military theorists and air force engineers since the World War I.³⁴ Gulam and Lee note that the pre-eminent military engineer Clarence Johnson³⁵ was said to have remarked that the future of military aviation belonged to the drones.³⁶

However, the deployment of technology-intensive methods in modern armed conflict is a matter of significant importance not only to international humanitarian law (IHL), which governs the law of armed conflict, but also to international human rights law and the law of inter-State use of force.³⁷ Drones are one such means of modern warfare the legality of whose use has raised a considerable debate.³⁸ There are those who justify their use on

²⁹ Hyder Gulam & Simon Lee, *supra* note 25 at 124.

³⁰ Craig H Allen *Maritime Counterproliferation Operations and the Rule of Law* (2007) 41.

³¹ CH Gibbs-Smith *Aviation: An Historical Survey from its Origins to the End of World War II* (1970) London: Her Majesty’s Stationery Office.

³² M Cerasini *The Future of War: The Face of 21st Century Warfare* (2003) 123 Alpha: Indianapolis cited in Hyder Gulam & Simon Lee, *ibid* at 125.

³³ David R Mets, *supra* note 22 at 209.

³⁴ K Munson, Jane’s Unmanned Aerial Vehicles and Targets, 23 October 2002 Jane’s Information Group, Surrey, UK; Lax & Sutherland ‘An Extended Role for Unmanned Aerial Vehicles in the Royal Australian Air Force’ (1996) 2 Paper 46 Air Power Studies Centre cited in Hyder Gulam & Simon Lee, *ibid* at 125.

³⁵ Clarence Johnson was the founder of ‘Skunk Works’, the classified Lockheed military aviation testing facility which designed and produced the SR-71 and U-2 which are the earliest stealth military aircrafts.

³⁶ AJ Lazarski ‘Legal Implications of the Uninhabited Combat Aerial Vehicle’ (2002) 16 *Aerospace Power Journal* 74, 75 cited in Hyder Gulam & Simon Lee, *ibid* at 125.

³⁷ UNHRC, Alston Targeted Killings Report, paragraphs 29-35; Nils Melzer, *supra* note 3 at 42.

³⁸ Peter W Singer ‘Attack of the Military Drones’ (2009) available at http://www.brookings.edu/opinions/2009/0627_drones_singer.aspx (accessed 5 May 2010).

grounds of efficiency³⁹ and others who steadfastly reject their use on grounds of law and humanity.⁴⁰

Subsequent to the 11 September 2001 attacks, the Bush Administration inaugurated the ‘global war on terror’.⁴¹ This was the first terrorist attack to be accorded the status of armed conflict,⁴² the fact of which was upheld in the *Hamdan Case*.⁴³ With the literal⁴⁴ construction of Common Articles 2 and 3 to the four Geneva Conventions of 1949 so as to fit the interests of the United States, the law of armed conflict became applicable.⁴⁵ In addition to the controversial nature of the conflict,⁴⁶ the US military's use of drones which can ‘watch, hunt and kill insurgents’ continues to rise steeply.⁴⁷ This has been attributed, in

³⁹ Harold Koh, Legal Adviser, Department of State, The Obama Administration and International Law, Keynote Address at the Annual Meeting of the American Society of International Law (25 Mar. 2010).

⁴⁰ Philip Alston & Hina Shimsi, A Killer Above the Law?, *The Guardian*, 8 February 2010; Daya Gamage ‘U.S. Engaged in ‘Extra-judicial Killings’ of Civilians in Af-Pak-Iraq Using ‘Unmanned Drones’ available at <http://www.asiantribune.com/news/2010/03/21/us-engaged-%E2%80%98extra-judicial-killings%E2%80%99-civilians-af-pak-iraq-using-%E2%80%98unmanned-drones%E2%80%99> (accessed 30th March 2010); Report of the UN Special Rapporteur (Executions), 13 January 2003, E/CN.4/2003/3, para 39.

⁴¹ Marko Milanovic ‘Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings Case*’ (2007) 89 *International Review of the Red Cross* 373, 374; George Bush ‘Address to a Joint Session of Congress and the American People’, Sept. 20, 2001; available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (accessed 16 August 2010) cited in Steven Ratner ‘Predator and Prey: Seizing and Killing Suspected Terrorists Abroad’ (2007) 15(3) *The Journal of Political Philosophy* 251; UN Special Rapporteur (Executions), 8 March 2006, E/CN.4/2006/53, para 45.

⁴² Marko Milanovic, *ibid* at 374; Roy Schondorf ‘The Targeted Killings Judgment: A Preliminary Assessment’ (2007) 5 *Journal of International Criminal Justice* 301, 304; Agnieszka Jachec-Neale ‘End Justifies the Means?: Post 9/11 Contempt for Humane Treatment’ in Roberta Arnold & Noëlle Quénivet *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (2008) 58 Martinus Nijhoff: Leiden, Netherlands: ‘The court recognized this conflict as non-international in character...’

⁴³ *Hamdan v. Rumsfeld* 548, U.S. 196 (2006) at 67-69; Nils Melzer, *supra* note 3 at 266; Roy Schondorf, *ibid*.

⁴⁴ *Hamdan v. Rumsfeld* 548, U.S. 196 (2006) Opinion of the Court at 68: ‘In context, then, the phrase “not of an international character” bears its literal meaning. Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of “conflict not of an international character,” i.e., a civil war, the commentaries also make clear “that the scope of the Article must be as wide as possible.”’; Agnieszka Jachec-Neale, *ibid* at 58.

⁴⁵ Agnieszka Jachec-Neale, *ibid* at 58; Marko Milanovic, *ibid* at 375; Nils Melzer, *ibid* at 266.

⁴⁶ Agnieszka Jachec-Neale *ibid* at 59; Marko Milanovic, *ibid* at 375; Nils Melzer, *ibid* at 266.

⁴⁷ UNHRC, Alston Targeted Killings Report, paragraph 2; Nils Melzer, *supra* note 3; Agnieszka Jachec-Neale, *ibid* at 59; Murray Wardrop, Unmanned Drones Could be Banned, Says Senior Judge, *The Telegraph*, 6 July 2009; New America Foundation, Analysis of US Drone Strikes in Pakistan (2004-2010) available at <http://counterterrorism.newamerica.net/drones#2010chart>. (accessed 12 June 2010); Phil Stewart & Robert Birsell, Under Obama, Drone Attacks on the Rise in Pakistan, *Reuters* (October 12, 2009), available at <http://www.reuters.com/articlePrint?articleId=USN11520882> (accessed 12 June 2010): ‘There have been 39 drone strikes in Pakistan since Obama took office not quite nine months ago, according to a Reuters tally of

large part, to the demands placed on the troops to capture and kill ‘high-value targets’.⁴⁸ The deployment of drones has mostly been in Iraq,⁴⁹ Afghanistan,⁵⁰ and Pakistan.⁵¹

The use of drones for targeted killing is controversial. Proponents advocate for them on the grounds of greater surveillance capability and precision, thus better ‘precaution in attack’ and minimal incidental civilian loss.⁵² Critics consider them prohibited weapons as they result in the disproportionate and erroneous killing of civilians.⁵³ Ironically, whilst targeted killings are supposedly precision strikes, there is evidence of extensive incidental harm caused by drone attacks.⁵⁴ This does not, however, suggest that missiles fired from drones are less humane than other weapons. The critical legal question to be addressed is the extent to which the specific use of drones conforms to the constraints of international law.

The issue that arises from the use of drones is not so much a question of whether or not drones may be used as it is whether the use of drones for targeted killing conforms to the constraints of international law.⁵⁵ This problem is compounded by the doubtful legality of targeted killing policies (through which States identify and kill ‘known terrorists’ using drones) and their increasing proliferation in contemporary State practice.

reports from Pakistani security officials, local government officials and residents. That compares with 33 strikes in the 12 months before Obama was sworn in on Jan. 20.’

⁴⁸ *Al-Aulaqi v Obama* (2010) 10-CV-01469, paragraph 1: ‘the [US] maintains... kill-lists [of suspects] against whom lethal force can be used’; Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 13 January 2003, E/CN.4/2003/3, paragraph 39; Gary D Solis *The Law of Armed Conflict in International Humanitarian Law in War* (2010) 539; UNHRC, Alston Targeted Killings Report, paragraph 92.

⁴⁹ Michael Byers ‘The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq’ (2002) 13 *European Journal of International Law* 21, 34; Gary D Solis, *ibid* at 539.

⁵⁰ *Al-Aulaqi v Obama* (2010) 10-CV-01469; Andrew M Exum et al *Triage: The Next Twelve Months in Afghanistan and Pakistan* (2009) Center for New American Security: Washington DC; Jane Mayer, The Predator War, What are the Risks of the C.I.A.’s Covert Drone Program?, *The New Yorker*, October 26, 2009.

⁵¹ Bill Roggio & Alexander Mayer, US Predator Strikes in Pakistan: Observations, *Long War Journal* 21 July 2009; David Bingham, Air Force Completes Killer Micro-Drone Project, *Wired*, 5 January 2010.

⁵² Article 57, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Adopted 8 June 1977, entry into force 7 December 1978 (hereinafter AP I); UNHRC, Alston Targeted Killings Report, 24, paragraph 78-80.

⁵³ UNHRC, Alston Targeted Killings Report, 24; Murray Wardrop, Unmanned Drones Could be Banned, Says Senior Judge, *The Telegraph*, 6 July 2009; David Bingham, *ibid*; Jane Mayer, *ibid*.

⁵⁴ UNHRC, Alston Targeted Killings Report, 3, paragraph 2-4; Murray Wardrop, *ibid*.

⁵⁵ UNHRC, Alston Targeted Killings Report, 24, paragraph 79.

The exponential increase in the use of drones for targeted killing policies in order to fight terrorism is a 'worrying precedent and an issue of serious concern'. Both the 2003 and 2004 annual reports of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions identified States' justification of targeted killings on the basis that the targeting and elimination of 'known terrorists' is more efficient and costs fewer lives than waging conventional war.

The UN Special Rapporteur finds the above contention problematic in four ways: i) there is no verifiable obligation upon States to demonstrate that targeted individuals are terrorists; ii) there is no obligation to demonstrate that every other alternative had been exhausted; iii) it creates potential for the expansion of the category of persons who may be targeted (e.g. enemies of the State, political opponents etc.); and iv) it undermines the accountability mechanisms which are supposed to constrain illegal action under humanitarian or human rights law.

The use of drones for covert targeted killing operations (which preclude international public scrutiny) in fighting terrorism is a disturbing precedent which raises grave legal concerns. The UN Special Rapporteur has noted that the absence of public scrutiny increases the risk of abuse thereby leading to arbitrariness and a lack of accountability. Additionally, it makes it difficult for human rights monitors to verify whether the individuals killed were legitimate targets, and also the number of civilian casualties.

Targeted killing operations by drone attacks are remotely controlled from distant locations, far removed from the immediate conduct of hostilities.⁵⁶ These operations are largely reliant on ground intelligence.⁵⁷ Concern arises over the reliability of information being used to make decisions of who, when and where to attack. This becomes especially clear considering that in many instances ground forces (in the immediate context of hostilities) make mistakes due to unreliable intelligence.⁵⁸

⁵⁶ UNHRC, Alston Targeted Killings Report, 25, paragraph 84.

⁵⁷ UNHRC, Alston Targeted Killings Report, 25, paragraph 82.

⁵⁸ UNHRC, A/HRC/11/2/Add.4, paragraphs 14-18, 70; UNHRC, Alston Targeted Killings Report, *ibid* at 25, paragraph 83: 'International forces all too often based manned airstrikes and raids that resulted in killings

In the case of drones, the remoteness from the actual context of hostilities poses a considerable in complying with international law. With regard to intelligence collection, the possibility of mistakes being made and errors arising is increased.⁵⁹ An illustration of the lethal effects of mistakes in such operations is the unfortunate ‘Tall Man Incident’ of 2002 where an innocent Afghani peasant was killed using an unmanned drone by CIA operatives who were convinced that he was Osama Bin Laden (whose height is 6 feet, 5 inches). A related concern is that, by the controllers’ distance from the area of combat, there are few procedural safeguards to verify the accuracy of such intelligence information.⁶⁰

Drone attacks raise some difficulty as they are usually deployed as a means of first rather than last resort, especially when carried out as (anticipatory) self-defence.⁶¹ This is in contravention of the requirement in international law that, when lethal force is used, less-than-lethal measures must have been attempted first.⁶²

The use of lethal force is only permissible if (at the time used) such force is used for legitimate and lawful defensive purposes.⁶³ Thus, for drone attacks in cases where the threat

on faulty intelligence. Multiple other examples show that the legality of a targeted killing operation is heavily dependent upon the reliability of the intelligence on which it is based’; UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, A/65/321, paragraph 24; Israel HJC, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 40.

⁵⁹ Israel Ministry of Foreign Affairs, ‘Findings of the inquiry into the death of Salah Shehadeh’ available at <http://www.mfa.gov.il/MFA/Government/Communiques/2002/Findings%20of%20the%20inquiry%20into%20the%20death%20of%20Salah%20Sh> cited in UNHRC, Alston Targeted Killings Report, 25.

⁶⁰ Peter W Singer ‘Ethical Implications of Military Robotics’ (2009): ‘We have new questions of law and ethics. For example, what do you do about unmanned slaughter? That is, what do you do when you kill someone that you didn’t intend to kill, such as the three times we thought we got Osama Bin Laden with a Predator drone strike, and we got someone else instead? In one case, it was an Afghan civilian who was just unlucky enough to look like Osama Bin Laden when viewed through the soda straw of a Predator drone.’; UNHRC, Alston Targeted Killings Report, paragraph 83; David Hambling, Air Force Completes Killer Micro-Drone Project, *Wired*, 5 January 2010; *Public Committee Against Torture in Israel v Israel*, paragraph 40.

⁶¹ UNHRC, Alston Targeted Killings Report, 25, paragraph 86; Roy Schondorf, *supra* note 42 at 303.

⁶² Article 35(1), AP I; ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 78; A/61/311, paragraphs 33-45; E/CN.4/2006/53, paragraphs 44-54; UNHRC, Alston Targeted Killings Report, 25, paragraph 74 and 86.

⁶³ *Al-Aulaqi v Obama* (Complaint for Injunctive Relief) paragraph 2; UNHRC, Alston Targeted Killings Report, 22, paragraph 74; University Centre for International Humanitarian Law, Report on the Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, 1-2 (2005) 36 (hereinafter UCIHL, Right to Life in Armed Conflict); Marco Sassoli & Laura M Olson ‘The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts’ (2008) 90 *International Review of the Red Cross* 599, 611.

to life is imminent, questions arise as to whether, in fact, there are effective safeguards to ensure the reliability of imminence assessments.⁶⁴

The use of drones makes it easier to kill the targeted persons with minimal risk to a State's forces.⁶⁵ This raises some concern over the criteria used to determine who may be targeted and killed, and under what circumstances.⁶⁶ The ease of killing may lead the decision-makers to interpret the legal limitations on killing unnecessarily broadly.⁶⁷ An example is the inclusion of ordinary criminals (for instance alleged Taliban-supporting drug traffickers) in 'kill lists' for targeted killing operations.⁶⁸

To compound the unilaterally broad interpretation of legal killing, is the fact that conducting a drone attack operation on a computer screen (remote from the battlefield) may lead to reduced respect for the right to life under human rights and IHL thus encouraging 'a "PlayStation" mentality to killing.'⁶⁹

The use of drones for targeted killing poses a challenge as it is governed by the rules of IHL pertaining to air warfare. Little progress has been made in the development of a

⁶⁴ UN Doc. A/61/311, paragraphs 49-51 cited in UNHRC, Alston Targeted Killings Report, 22, paragraph 74.

⁶⁵ UNHRC, Alston Targeted Killings Report, 24, paragraph 80.

⁶⁶ UNHRC, Alston Targeted Killings Report, 24, paragraphs 76-78.

⁶⁷ UNHRC, Alston Targeted Killings Report, 24, paragraph 79.

⁶⁸ *Nasser Al-Aulaqi v Obama* (2010) 10-CV-01469; Patrick Gallahue 'The Targeted Killing of Drug Lords: Traffickers as Members of Armed Opposition Groups and/or Direct Participants in Hostilities' (2010) 1 *International Yearbook on Human Rights and Drug Policy* 1: 'In the summer of 2009, the US Pentagon announced that it had placed fifty Afghan drug traffickers on a list of people "to be killed or captured", essentially wedding the mission to defeat the Taliban with the counter-narcotics effort in Afghanistan. One implication of this decision is that by placing "no restrictions on the use of force with these selected targets", it appears to have given those drug traffickers an equal legal status as insurgents in the eyes of the US military'; *Afghanistan's Narco War: Breaking the Link between Drug Traffickers and Insurgents*, A Report to the Committee on Foreign Relations United States Senate, 10 August 2009, 1; James Risen, U.S. to Hunt Down Afghan Drug Lords Tied to Taliban, *The New York Times*, 9 August 2009; Dapo Akande 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?', EJIL: Talk, <http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-anillegal-and-dangerous-precedent>, 13 Sep 2009 (accessed 22 April 2010).

⁶⁹ UNHRC, Alston Targeted Killings Report, 25, paragraph 84: 'because operators are based thousands of miles away from the battlefield, and undertake operations entirely through computer screens and remote audio-feed, there is a risk of developing a "Playstation" mentality to killing'; Philip Alston & Hina Shamsi, A Killer above the Law, *The Guardian*, 8 February 2010: 'Equally discomfiting is the "PlayStation mentality" that surrounds drone killings. Young military personnel raised on a diet of video games now kill real people remotely using joysticks. Far removed from the human consequences of their actions, how will this generation of fighters value the right to life?'

comprehensive codification of the laws of aerial warfare for reasons which Marco Sassoli and Antoine Bouvier state as follows:⁷⁰

- a) the methods and means of air warfare develop so rapidly that any rules quickly become obsolete;
- b) the means of air warfare are so powerful and militarily important that States are reluctant to agree to any limitations on their use;
- c) reconnaissance and targeting are much more difficult, although the latest weaponry has made targeting substantially more precise than in land warfare. Nonetheless, air warfare is intrinsically blind by nature and less capable of drawing a distinction between armed forces and civilians.

Analogous to States' need to suppress terrorism is the concern for their obligations to comply with their international and domestic human rights and IHL obligations.⁷¹ This research will focus on the legality of the use of drones within three systems of regulation: i) the self-defence rules which proceed from a law of inter-State use of force perspective (*jus ad bellum*); ii) the conduct of hostilities rules which proceed from a IHL perspective (*jus in bello*); and iii) the law enforcement rules which proceed from a human rights law perspective.⁷²

Proponents of targeted killings under the regulatory rules of self-defence must justify its use as a defensive (as opposed to retributive) measure against members of transnational organized armed groups operating within the territory of another State.⁷³

⁷⁰ Salah El-Din Amer 'The Protection of Civilian Population' in Natalino Ronzitti & Gabriella Venturini (eds.) *The Law of Air Warfare: Contemporary Issues* (2006) 17-33, 18 Eleven International Publishing: Utrecht.

⁷¹ See U. N. Security Council Resolution 1456 (2003) cited in Agnieszka Jachec-Neale, *supra* note 42 at 63.

⁷² Nils Melzer, *supra* note 3 at 43; UNHRC, Alston Targeted Killings Report, paragraphs 29-36.

⁷³ ICJ, *Legal Consequences of a Wall Advisory Opinion*, paragraph 139; Mordechai Kremnitzer 'Preventive Killings' in Dieter Fleck (ed.) *Legal Issues of Military Counter-Terrorist Operations* (2004) 12 Baden-Baden: Nomos; Nils Melzer, *ibid* at 69; Philip B Heymann & Juliette N Kayyem 'Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism' (2004) 67, joint project of John F Kennedy School of Government and Harvard Law School April 2003-November 2004, available at www.ksg.harvard.edu/bscia/longtermlegalstrategy and www.mipt.org/Long-Term-Legal-Strategy (accessed 26 July 2010); Nicholas J Kendall 'Israeli Counter-Terrorism: "Targeted Killings" Under International Law' (2002) 80 *North Carolina Law Review* 1069, 1078; William Hays Parks, *supra* note 17 at 7; Gary Solis 'Assassination and American Armed Forces', *Military Law News* (Autumn 2001) 7; PCATI/LAW, *supra* note 17 at 91; Emanuel Gross 'Democracy in the War Against Terrorism—the Israeli Experience' (2002) 35 *Loyola of Los Angeles Law Review* 1161, 1194; Michael N Schmitt 'State-Sponsored Assassination in International and

Proponents of targeted killings under the regime of the conduct of hostilities contend that when attacks from terrorists and resulting counter-terrorist responses by States surpass the threshold of an armed conflict, it can be justified under the rules of IHL.⁷⁴

Proponents of the law enforcement system of regulation take the view that terrorist acts are criminal offences which should be dealt with in the interest of respecting and protecting the right to life, especially against violence.⁷⁵ They further contend that when lethal force is resorted to by State agents, use of drones would comply with the strict human rights standards of law enforcement.⁷⁶

This research seeks to find out the legal basis, in international law, for the use of drones to conduct targeted killings of suspected terrorists.⁷⁷ It examines the legal status of private actors and other entities that may be involved in drone strike operations,⁷⁸ places

Domestic Law' (1992) 17 *Yale Journal of International Law* 609, 646; Jefferey F Addicott 'Proposal for a New Executive Order on Assassination' (2003) 37(3) *Richmond Law Review* 751, 772; Nils Melzer, *ibid* at 52.

⁷⁴ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 16: '[t]he general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip (hereinafter "the area") a continuous situation of armed conflict has existed since the first *intifada* (emphasis in the original)'; Harold Koh, *supra* note 39 at 8; Philip B Heymann & Juliette N Kayyem, *ibid* at 64; Tom Ruys, *supra* note 17 at 30; David Kretzmer 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defence' (2005) 16 *European Journal of International Law* 201; Chris Downes, *supra* note 18 at 281, 294; Mordechai Kremnitzer, *ibid* at 4; Nils Melzer, *ibid* at 55.

⁷⁵ David Kretzmer, *ibid* at 184; Mordechai Kremnitzer, *ibid* at 14; Nils Melzer, *ibid* at 58.

⁷⁶ Amnesty International *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations* (2003) 2, 4 July 2003, AI Index: MDE 15/056/2003 (hereinafter Amnesty International, *Israel Must End its Policy of Assassinations*); Tom Ruys, *supra* note 17 at 35; PCATI/LAW, *Assassination Policy of the State of Israel*, *supra* note 17 at 86; David Kretzmer, *ibid* at 183, 203; Mordechai Kremnitzer, *ibid* at 6; Nils Melzer, *ibid* at 58.

⁷⁷ Jane Mayer, *The Predator War*, *The New Yorker*, October 26 2009 states that targeted killings using drones 'represents a radically new and geographically unbounded use of state-sanctioned lethal force.'; Two key terms that are used in this research necessitate clarification because they owing to their being subject to diverse and sometimes contradictory interpretations. The definitions provided are context-specific as they are given within the restrictive context of this research. The term 'legality' as used in this research is the objective standard by which an action or omission is consistent with both conventional and non-conventional international law. In order to discuss the notion of 'targeted killing' in international law with a heightened sense of objectivity, this research shall retain a strictly legal definition of targeted killing shorn of any moral or policy overtones. This is beneficial to the research in two ways: i) it upholds the neutrality of perspective and ii) it maintains an unprejudiced approach to the determination of the legality of targeted killing in international law.

⁷⁸ UNHRC, Statement of the Special Rapporteur to the Human Rights Council, 3 June 2010, available at <http://www.extrajudicialexecutions.org/application/media/Statement-Alston1.pdf>; UNSG, of the Special Rapporteur to the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, A/65/321,

where drone strikes can occur, the nature of the incidental civilian casualties,⁷⁹ how the results of individual drone strikes are assessed before and after the fact, and the organization and control mechanisms for supervision, oversight and discipline.⁸⁰

The research, importantly, seeks to determine to whether, and if so the extent to which, the targeted killing of specific individuals is permissible under international law. The research also addresses the implications likely to be had by the use of drones for targeted killing on the interpretation, application and formation of international law.

The use of drones (some of which are semi-autonomous) for the specific purpose of targeted killing raises three key concerns: i) the doubtful permissibility of the method of targeted killing; ii) the setting of precedent for other States to adopt and endorse similar practice; iii) the arbitrary expansion of the permissible limits of killing by States; and iv) the discomfiting secrecy with which States carry out these operations in violation of the requirement of accountability under international law.

It is noteworthy that a Hell-fire missile fired by an unmanned drone (with the intention of killing a selected individual) is no different from one fired from a F-16 fighter-jet or an Apache helicopter. However, the critical legal question addressed in this research (which would be the same for every weapon) is the extent to which the specific use of drones conforms to the requirements of international law.

2. Scope of the Study

It is notable that most of the incidences of targeted killing have been aimed primarily at members of non-State organized armed groups.⁸¹ In this regard, the study will confine itself

paragraph 12 and 13; UNHRC, Alston Targeted Killings Report, paragraphs 79-84; Leon Panetta, Central Intelligence Agency Director 'Remarks at the Pacific Council on International Policy' May 18 2009.

⁷⁹ Hearing of the House Armed Services Committee, Effective Counterinsurgency: the future of the U.S. Pakistan Military Partnership, April 23, 2009 (Testimony of David Kilcullen).

⁸⁰ 'ACLU asks For Data on "Targeted Killings" of Suspected Terrorists and Civilian Casualties' available at <http://www.aclu.org/national-security/aclu-requests-information-predator-drone-program> (accessed 3 May 2010); Israel Supreme Court, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 40.

⁸¹ Noam Lubell *Extraterritorial Use of Force against Non- State Actors* (2010) 72-3; Mary Ellen O'Connell 'Enhancing the Status of Non-State Actors Through a Global War on Terror' (2005) 43 *Columbia Journal of*

to the permissibility of State-sponsored targeted killings of non-State actors under international law.

3. Defining the Contemporary Notion of ‘Targeted Killing’

The notion of ‘targeted killing’, despite the frequency with which the phrase is used, is neither defined under international law nor does it fit neatly into any legal framework.⁸² It manifests itself when lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator.⁸³

The lack of a uniform definition provides States with an avenue to formulate their policies more permissively so that the practice of targeted killing may be allowed by their domestic laws and regulations.⁸⁴ This raises serious concerns from an international law perspective, especially from the perspective of human rights and humanitarian law. Some definitions of targeted killing are broad as they introduce ambiguous categories of

Transnational Law 435; Derek Jinks ‘September 11 and the Laws of War’ (2003) 28 *Yale Journal of International Law* 1, 9; Nils Melzer, *supra* note 3 at 56.

⁸² UNHRC, Alston Targeted Killings Report, 4, paragraph 7.

⁸³ Nils Melzer, *supra* note 3 at 4-5 cited in UNHRC, Alston Targeted Killings Report, 5, paragraph 9.

⁸⁴ Gary Solis ‘Targeted Killing and the Law of Armed Conflict’ (2007) 60(2) *Naval War College Review* 127, 146 where targeted killing is defined as that which encompasses the intentional killing of a specific civilian who cannot reasonably be apprehended, and who is taking a direct part in hostilities, and that the targeting is done at the direction and authorization of the State in the context of an international or internal armed conflict; Chris Downes, *supra* note 18 at 280 who defines ‘targeted killings’ as ‘attacks on individual terrorists’ with ‘a quality of premeditation’ regardless of their ‘legality or non-legality’; Steven R David ‘Fatal Choices: Israel’s Policy of Targeted Killing’ (2002) 51 *Mideast Security and Policy Studies* 2 who defines ‘targeted killing’ as ‘the intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval’; Tom Ruys, *supra* note 17 at 15 who uses the term ‘State-sponsored assassination’ to define targeted killing as ‘the wilful killing of a specific individual that is attributable to a State in the sense of the International Law Commission’s Draft Articles on State Responsibility’; David Kretzmer, *supra* note 74 at 176 defines targeted killings as the ‘targeting of a suspected terrorist who is not in the territory of the State which carries out the attack’; Mordechai Kremnitzer, *supra* note 73 at 1 who defines targeted killing as ‘deliberate use of lethal weapons against the body of a person’; UCIHL, *The Right to Life in Armed Conflicts and Occupation*, *supra* note 63 at 29-31 where it was suggested that targeted killing could be described as a use of force in order ‘to prevent the perpetration of a particularly serious crime’ and also as occurring where the ‘State considers a particular individual to pose a serious threat as a result of his or her activities and decides to kill that individual, even at a time when this individual is not in fact engaging in hostile activities’.

individuals such as a ‘specific civilian who cannot reasonably be apprehended’⁸⁵ or an ‘individual terrorist’.⁸⁶

The resulting interpretation of these definitions would be broad and permissive and thus their application would encompass all individuals who are deemed to fall within this wide and insufficiently defined category of persons.⁸⁷

The specific goal of a targeted killing operation should be to use lethal force against a specifically known individual. Targeted killing may be defined as 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.’⁸⁸

From this definition, five (cumulative) elements which must be simultaneously present are discernable. First, is the element of lethal force which requires a method that is capable of causing the death of a human being.⁸⁹ The second element is the intent, premeditation and deliberation to kill. Intent requires the target’s death to be the object of the operation while premeditation qualifies the intent by requiring that it be based on a conscious choice.⁹⁰ The deliberation requirement demands that the killing of the targeted individual be the principal objective of the operation.⁹¹

The third element requires the targeting of individually selected persons.⁹² The fourth element necessitates an extra-custodial⁹³ deprivation of life where the targeted individual is

⁸⁵ Gary Solis, *supra* note 84 at 127-28; Steven R Ratner, *supra* note 41 at 252.

⁸⁶ Chris Downes, *supra* note 18 at 280.

⁸⁷ Steven R Ratner, *ibid* at 252; Nils Melzer, *supra* note 3 at 3-5.

⁸⁸ Nils Melzer, *ibid* at 3; UNHRC, Alston Targeted Killings Report, 5, paragraph 9.

⁸⁹ Nils Melzer, *ibid* at 3; UNHRC, Alston Targeted Killings Report, 5, paragraph 9; UCIHL, *The Right to Life in Armed Conflict and Occupation*, *supra* note 63 at 31.

⁹⁰ Nils Melzer, *ibid* at 3; UNHRC, Alston Targeted Killings Report, paragraph 9; Mordechai Kremnitzer, *supra* note 73 at 1; Israel H CJ, *Public Committee Against Torture in Israel v Israel*, H CJ 769/02, paragraph 2.

⁹¹ Nils Melzer, *ibid* at 4; UNHRC, Alston Targeted Killings Report, *ibid* at 5; Chris Downes, *supra* note 18 at 280; Steven R David, *supra* note 84 at 2; Tom Ruys, *supra* note 84 at 15.

⁹² Nils Melzer, *ibid*; UNHRC, Alston Targeted Killings Report, 5, paragraph 9.

not in the physical custody of the targeting party.⁹⁴ The fifth element requires the attribution of the targeting to a subject of international law.⁹⁵ It is noteworthy that despite the State-centric nature of international law, in certain situations and for limited circumstances, targeted killings may be attributable to non-State actors.⁹⁶

The 2010 Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Alston Targeted Killings Report) defines the notion of targeted killing in the following words:

A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.

Targeted killing, as noted in the above report, is carried out by various methods and takes place in a variety of contexts.⁹⁷ It may be committed by governments and their agents in times of peace as well as in armed conflicts, or by organized armed groups in armed conflict.⁹⁸ Most cases of targeted killings by drone strikes have been against suspected terrorists who are known to be part of an identifiable terrorist organization, and whose conduct presents a specific threat to the security of the State.⁹⁹

⁹³ From Melzer's analysis, it is worth noting that the absence of the targeted party from the custody of the targeting party distinguishes targeted killing from extrajudicial killing and thus a judicially sanctioned extrajudicial killing of a selected individual may not necessarily be an extrajudicial killing.

⁹⁴ Nils Melzer, *ibid* at 3.

⁹⁵ Nils Melzer, *ibid* at 3.

⁹⁶ Nils Melzer, *ibid* at 4: 'Non-State actors considered to have their own duties under international law include, for example, belligerent and insurgent parties to a non-international armed conflict, international organizations, non-self governing peoples, and private individuals whose conduct may constitute an offence under international criminal law (ie a war crime, the crime of genocide or a crime against humanity). While it is generally recognized that the conduct of non-State actors involved in armed conflicts must be in conformity with international humanitarian law, the question as to whether non-State actors can have obligations under human rights law remains controversial.'; Ian Brownlie *Principles of International Law* (2008) 57, 62 and 68.

⁹⁷ UNHRC, Alston Targeted Killings Report, paragraph 14. The methods of killing vary, and include sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison.

⁹⁸ UNHRC, Alston Targeted Killings Report, 4; UCIHL, *Right to Life in Armed Conflict and Occupation*, *supra* note 63 at 31: targeted killing is 'a killing which takes place during the combat phase of an international armed conflict, where one combatant targets and kills an enemy combatant on sight on the basis of the other's status as an enemy combatant.'

⁹⁹ Nils Melzer, *supra* note 3 at 9.

Thus, the definition of ‘targeted killing’ which appears to be the most appropriate is that which is concise yet broad enough to encompass domestic as well as transnational situations of targeted killing. This would enable the definition to escape the shadowy realm of half-legality and non-accountability.¹⁰⁰ Therefore, when defining ‘targeted killing’, States should ensure that it is analytically formulated in a way that covers broad applications of targeted killing operations, and also provides a comprehensive and sufficiently precise description of the method (and the individuals involved).¹⁰¹

This research will thus adopt Melzer’s definition of targeted killing: ‘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.’

¹⁰⁰ Nils Melzer, *ibid* at 9.

¹⁰¹ Nils Melzer, *ibid* at 5.

II. THE NOTION OF TARGETED KILLING IN CONTEXT: APPLICABLE LAW AND EMERGING LEGAL DOCTRINE.

1. Advancement in Technology and Emergent Targeted Killing Policies

a. The Use of Robotics for Targeting: Enter the Unmanned Drone

Drones are amongst the cutting-edge military technology in aerial combat presently being deployed.¹⁰² They are aerial vehicles that can launch, attack, recover and return to base without onboard aircrew.¹⁰³ The United States Department of Defense defines drones as ‘[a] powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and [which] carr[ies] a lethal or nonlethal payload.’¹⁰⁴

¹⁰² UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, 23 August 2010, A/65/321, paragraph 17; Noel Sharkey ‘Death Strikes from the Sky: The Calculus of Proportionality’ (2009) 28 *IEEE Technology and Society* 16-19; Hyder Gulam & Simon W Lee, *supra* note 25 at 123; Robert Sparrow ‘Predators or Plowshares?: Arms Control of Robotic Weapons’ (2009) 28 *IEEE Technology and Society* 25; UNHCR, Targeted Killings Report, paragraph 27 and 81.

¹⁰³ UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, 23 August 2010, A/65/321, paragraph 24: ‘The level of automation that generally exists in currently deployed systems is limited to the ability of, for example, an unmanned combat aerial vehicle or a laserguided bomb to be programmed to take off, navigate or de-ice by itself, or with only human monitoring (as opposed to control)’; R E Chapman, *supra* note 25 at 60.

¹⁰⁴ UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, 23 August 2010, A/65/321, paragraph 24; Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms* (2001) 577 cited in Chris Jenks ‘Law from Above: Unmanned Aerial Systems, Use of Force and the Law of Armed Conflict’ 85 *North Dakota Law Review* 649, 653.

Vast numbers of drones and other aircraft have been employed in the recent past in situations related to armed conflict.¹⁰⁵ Their functions have included armed attack, surveillance, intelligence gathering, reconnaissance and, search and rescue operations.¹⁰⁶

Drones were initially designed as stealth mediums of information-gathering for reconnaissance.¹⁰⁷ This was illustrated during the 1973 Yom Kipur War where Israel used drones to observe real-time video imagery of enemy forces' positions.¹⁰⁸ However, technological advancement saw the weaponization of drones which presently have the capability to shoot laser-guided missiles.¹⁰⁹ Thus, drones represent the air power element of the 'revolution in military affairs'¹¹⁰ as they embody technological advancement, conceptual innovation and organisational adaptation.¹¹¹

Gulam and Lee distinguish two types of drones based on the command and control characteristics: i) the 'dumb' drone which is entirely controlled by a human operator through a data link; and ii) the 'terminator' drone which is wholly autonomous with the ability to function independently of human action once assigned a target to kill.¹¹² Although the idea of roboticized weapons comes across as being deceptively trivial, drones are a

¹⁰⁵ R E Chapman, *ibid* at 60; UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, 23 August 2010, A/65/321, paragraph 21 and 24: 'In June 2010, trials were held in which helicopters had carried out fully autonomous flights'; Olivia Koski, In a First, Full-Sized Robo-Copter Flies With No Human Help, *Wired*, 14 July 2010.

¹⁰⁶ R E Chapman, *ibid* at 60; Brian M Carney 'Air Combat by Remote Control' May 12, 2008, available at <http://online.wsj.com/article/SB121055519404984109.html#printMode> (accessed 10 November 2010).

¹⁰⁷ UNHRC, Alston Targeted Killings Report, paragraph 27; C Hoyle 'Iraqis Capture Phoenix Drone' *Jane's Defence Weekly*, 2 April 2003 cited in Hyder Gulam & Simon W Lee, *ibid* at 124; R E Chapman, *ibid* at 60, 62, 63 and 67; Keith Somerville, US Drones Take Combat Role, *BBC News*, November 5, 2002, available at http://news.bbc.co.uk/2/hi/in_depth/2404425.stm (accessed 12 September 2010).

¹⁰⁸ Lax & Sutherland *An Extended Role for Unmanned Aerial Vehicles in the Royal Australian Air Force* (2008) 10 cited in Hyder Gulam & Simon Lee, *ibid* at 126.

¹⁰⁹ UNHRC, Alston Targeted Killings Report, *supra* note 45 at 9; United States Air Force, *United States Air Force Unmanned Aircraft Systems Flight Plan 2009-2047* (2009) 26.

¹¹⁰ Alan Colins, *supra* note 23 at 327; S Metz 'Strategists and the Revolution in Military Affairs' in H Smith (ed.) *The Strategists* (2002) 100 Australian Defence Studies Centre: Canberra cited in Hyder Gulam & Simon W Lee, *supra* note 23 at 124.

¹¹¹ S Metz, *ibid* cited in Hyder Gulam & Simon W Lee, *ibid* at 124.

¹¹² C Kopp *The UCAV Ascendancy* (2009) 9 cited in Hyder Gulam & Simon Lee, *supra* note 3 at 126.

serious reality.¹¹³ While addressing an audience at the US Naval Academy, Peter Singer stated that [n]othing that you see (from a Power Point presentation) is science fiction... [t]his is the real deal.¹¹⁴

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, seconds the above contention and further cautions against the adoption of a 'Playstation' mentality to killing human beings.¹¹⁵ For military commanders, drones offer greater advantages as compared to manned aerial vehicles, for instance fighter jets, and thus will most likely continue to be used by the military for quite a long time.¹¹⁶

b. Emergent Targeted Killing Policies

While various forms of targeted killing have been present throughout history,¹¹⁷ in contemporary times this phenomenon has been increasingly prevalent. Troublingly, most

¹¹³ Peter W Singer 'Ethical Implications of Roboticized Warfare', The 2009 William C Stunt Ethics Lecture 25 March 2009 presented at the Vice Admiral James B Stockdale Centre for Ethical Leadership, United States Naval Academy.

¹¹⁴ Peter W Singer *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (2009) 7.

¹¹⁵ UNHRC, Alston Targeted Killings Report, paragraph 84; Paul W Singer, *supra* note 113 at 15: "It's like a video-game" is how one young (drone) pilot described what it was like to take out enemy troops.'

¹¹⁶ See Hyder Gulam & Simon W Lee, *ibid* at 124-25: 'Regardless of the command and control methodology of theUCAV, these weapons have become highly desirable given their reusability and the significant cost saving per target destroyed or neutralised. Other advantages lie in the design of the [drone]. By removing the operator from the weapons delivery system, employment of the vehicle ceases to involve risk to human life. Without the need to build a cockpit capable of enclosing a pilot, the vehicle can be smaller and possess fewer radar emitting edges, lower signature and less reflectivity. A smaller vehicle can yield greater range and endurance and has better survivability. The lack of aircrew can facilitate the political decision to use armed force, without the electoral repercussions when service personnel are wounded, killed or go missing in action. [Drones] can significantly minimise risk, especially in an air campaign against the enemy's integrated air defence systems and are capable of deep penetration strikes against enemy centres of gravity. Finally, the long loitering ability of [drones] over a battlespace can mean a persistent presence to rapidly strike targets of opportunity.'

¹¹⁷ Nils Melzer, *supra* note 3 at 1 and 9; Kenneth Watkin, *supra* note 17 at 169; Patricia Zengel 'Assassination and the Law of Armed Conflict' (1991) 134 *Military Law Review* 123, 125; Louis Beres, *supra* note 16 at 847; Franklin F Ford *Political Murder: From Tyrannicide to Terrorism* (1985).

States which conduct targeted killings have not been transparent about the practice,¹¹⁸ usually choosing to hold it as unofficial or to deny altogether any such policies.¹¹⁹

There are few States, however, which have either openly adopted policies permitting targeted killings, or have formally adopted such policies while refusing to acknowledge their existence.¹²⁰ Examples of these include the United States, Israel and Russia which have asserted the legality of targeted killings in excessively broad circumstances, outside the limited permissible circumstances.¹²¹

Subsequent to the 11 September 2001 attacks, the US reportedly adopted a secret policy of targeted killing.¹²² This involved operations of targeted killings in the territory of other States.¹²³ The secret program is reportedly conducted by the Central Intelligence

¹¹⁸ UNHRC, Alston Targeted Killings Report, paragraph 11; UNHRC, Concluding Observations of the Human Rights Committee of 25 July 2003 (CCPR/CO/78/ISR), paragraph 15.

¹¹⁹ UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, 23 August 2010, A/65/321, paragraph 12: ‘expressed particular concern in relation to the United States Central Intelligence Agency’s targeted killing programme because of its complete lack of public accountability and transparency’; According to Amnesty International, between 1976 and 1992, an elite unit of the British army killed 37 reported members of the Irish Republican Army in Northern Ireland; the United Kingdom has consistently denied conducting targeted killings. Amnesty International *Political Killings in Northern Ireland* (1994) 4 cited in UNHRC, Alston Targeted Killings Report, paragraph 11; Nils Melzer, *ibid* at 42; Brian Whitaker & Duncan Campbell, CIA Missile Kills al-Qaeda Suspects, *The Guardian*, 5 November 2002 available at <http://www.guardian.co.uk> (accessed 15 May 2010); BBC News, US Defends Pakistan Terror Drive, available at <http://news.bbc.co.uk> (accessed 15 May 2010); Multinational Force Iraq, Coalition Forces Kill Abu Musab Al-Zarqawi, Press Release of 8 June, 2006 available at <http://www.mnf-iraq.com> (accessed 15 May 2010).

¹²⁰ UNHRC, Alston Targeted Killings Report, paragraphs 3 and 11; Report of the Special Rapporteur (Executions), Addendum of 26 March 2006, E/CN.4/2006/53/Add.1, 264; Nils Melzer, *ibid* at 42.

¹²¹ UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, 23 August 2010, A/65/321, paragraph 11.

¹²² Nils Melzer, *ibid* at 40; Council of Europe *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States*, (2007) report submitted by Mr. Dick Marty, Doc. 11302 Rev., paragraphs 58-64 cited in UNHRC, Alston Targeted Killings Report, paragraph 18; Bob Woodward, CIA told to Do ‘Whatever Necessary’ to Kill Bin Laden, *Washington Post*, 30 December 2005, A01.

¹²³ UNHRC, Alston Targeted Killings Report, paragraph 18: ‘The first credibly reported CIA drone killing occurred on 3 November 2002, when a Predator drone fired a missile at a car in Yemen, killing Qaed Senyan al-Harithi, an al-Qaeda leader allegedly responsible for the *USS Cole* bombing’; UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, A/65/321, paragraph 14: ‘United States drone strikes have been reported in the border region of Pakistan and Afghanistan’; Greg Miller, Feinstein Comment on US Drones Likely to Embarrass Pakistan, *Los Angeles Times*, 13 February 2009; Peter Finn, U.N. Official Urges U.S. to Stop CIA Drone Attacks on al-Qaeda and Taliban, *Washington Post*, 3 June 2010; Jane Mayer, The Predator War, *The New Yorker*, 26 October 2009.

Agency (CIA) using unmanned drones.¹²⁴ However, the involvement of special operations forces and of the assistance offered by civilian contractors in the targeted killing operations has also been reported.¹²⁵ The use of drone airstrikes for targeted killings has featured prominently in the armed conflicts in Pakistan, Afghanistan and Iraq.¹²⁶

The United States Legal Adviser to the Department of State has since outlined legal justifications for targeted killings based on the right to self-defence.¹²⁷ Also, the practice was defended on grounds of IHL, with the assertion that the US is in an armed conflict with transnational organized armed groups.¹²⁸ This official statement, however, failed to advert to some critical legal issues including: i) the scope of the armed conflict in which the State

¹²⁴ UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, 23 August 2010, A/65/321, paragraph 12: ‘This is best illustrated by statements provided by Central Intelligence Agency spokespersons indicating that they can neither confirm nor deny that targeted killing programmes are conducted by the Agency’; UNHRC, Report of the Special Rapporteur (Executions), of 26 March 2006 (E/CN.4/2006/53/Add.1) 264; Frank Jordans, UN Expert: ‘Targeted Killings’ by U.S., Israel, Russia May Be War Crimes, Associated Press, 2 June 2010; Charlie Savage, U.N. Report Highly Critical of U.S. Drone Attacks, The New York Times, 2 June 2010; Frank Jordans, UN Expert: ‘Targeted Killings’ by U.S., Israel, Russia May Be War Crimes, Associated Press, 2 June 2010; Dana Priest, Covert CIA Program Withstands New Furor, Washington Post, 30 December 2005, A01, available at <http://www.washingtonpost.com> (accessed 19 June 2010); Bob Woodward, CIA Told to Do ‘Whatever Necessary’ to Kill Bin Laden, Washington Post, 21 October 2001, A01 available at <http://www.washingtonpost.com> (accessed 19 June 2010); Alston Targeted Killings Report, paragraph 18.

¹²⁵ UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, 23 August 2010, A/65/321, paragraph 15: ‘In addition to concerns about Central Intelligence Agency activities, new and disturbing information has come to light concerning targeted killing operations in Afghanistan led by United States Special Forces, belonging to the United States military. In the Special Rapporteur’s report on his May 2008 mission to Afghanistan, concern was expressed about the lack of transparency and accountability with respect to covert United States-led missions to capture or kill alleged suspects in Afghanistan Newly available United States Government documents covering the 2004-2009 period show the extent to which such concerns were justified. These documents indicate that a United States Special Forces unit, Task Force 373 (TF-373), was used to deal with the capture or killing of Taliban and al-Qaida leaders, who were included on a joint prioritized effects list of some 2,000 names’; Alston Targeted Killings Report, paragraph 18; Nick Davies, Afghanistan War Logs: Task Force 373, The Guardian, 25 July 2010; CNN, Wikileaks Shines Spotlight on Mysterious Task Force 373, 26 July 2010; Jane Perlez, Pakistan Rehearses Its Two-Step on Airstrikes, New York Times, 15 April 15 2009; James Risen & Mark Mazzetti, CIA Said to Use Outsiders to Put Bombs on Drones, New York Times, 21 August 2009.

¹²⁶ UNHRC, Alston Targeted Killings Report, paragraph 18; New America Foundation, Analysis of US Drone Strikes in Pakistan 2004-2010, available at <http://counterterrorism.newamerica.net/drones#2010chart>; US Drone Attacks in Pakistan ‘Backfiring, Congress Told, Los Angeles Times, 3 May 2009.

¹²⁷ Harold Koh, Legal Adviser, Department of State ‘The Obama Administration and International Law’, Keynote Address at the Annual Meeting of the American Society of International Law (25 March 2010).

¹²⁸ UNHRC, Alston Targeted Killings Report, paragraph 22; UNHRC, Report of the Special Rapporteur (Executions) of 22 December 2004 (E/CN.4/2005/7), paragraph 43 referring to E/CN.4/2003/G/80, Annex.

asserts it is engaged; ii) the criteria for individuals who may be targeted and killed; iii) the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings; and iv) the existence of accountability mechanisms.¹²⁹

In November 2000, subsequent to the outbreak of the Al-Aqsa *intifada*,¹³⁰ the Israeli Government confirmed the existence of a State policy of targeted killings.¹³¹ This was premised on self-defence and IHL, primarily due to the failure by the Palestinian Authority to prevent, investigate and prosecute acts of terrorism directed at Israel.¹³² The Israeli claim

¹²⁹ UNHRC, Alston Targeted Killings Report, paragraph 22; Nils Melzer, *supra* note 3 at 42.

¹³⁰ Nils Melzer, *supra* note 3 at 28. These riots were provoked by the controversial official visit by Ariel Sharon, the then *de facto* leader of the Likud opposition party, to the Temple Mount in Jerusalem on 28 September 2000 a few weeks prior to national elections to assert the Jewish right of access to the area.

¹³¹ Subsequent to the outbreak of the Al-aqsa *intifada* that was attended by violent Palestinian riots in Jerusalem and the Occupied Palestinian Territories, Israel's campaigns of targeted killing began in earnest. The first incident, in what was to become an officially declared State policy, was the targeted killing of Fatah activist Hussein Abayat in November 2000. This attack was publicly acknowledged by Israel. In the wake of this incident, Israel repeatedly declared that targeted killings constituted a fundamental part of their long-term policy. A good example is the statement of Israel's Deputy Minister of Defence who stated that Israel will relentlessly continue the 'policy of liquidating those who plan or carry out attacks' and that 'no one can give us lessons in morality because we have unfortunately one hundred years of fighting terrorism'. See Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 2; UNHRC, Alston Targeted Killings Report, paragraph 13; Israel MFA, Press Briefing by Colonel Daniel Reisner, Head of International Law Branch of the IDF Legal Division, 15 November 2000 available at <http://www.mfa.gov.il> (accessed 5 May 2010); Amnesty International *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings* (2001) 9, 21 February 2001, AI Index: MDE 15/005/2001 (hereinafter Amnesty International, *State Assassinations and Other Unlawful Killings*); Nils Melzer, *ibid* at 28 and 29; PCATI/LAW, *Assassination Policy of the State of Israel*, *supra* note 17 at 5; Israel MFA, Cabinet Communique, Jerusalem, 1 September 2003 available at <http://www.mfa.gov.il> (accessible 21 April 2010); Keith B Richburg, Israelis Confirm Wider Policy of Assassinations, Washington Post, 8 January 2001, available at <http://www.washingtonpost.com> (accessed 11 March 2010); B'Tselem *Israel's Assassination Policy: Extra-judicial Executions* (2001) 1, Position Paper Jan. 2001.

¹³² Israel HCJ, *State of Israel v Marwan Bharghouti* (2002) Cr. C (T.A) 092134/02; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel* (2006) HCJ 769/02, 1 at paragraph 60; Amos N Guiora 'Targeted Killing as Active Self-Defence' (2005) 37 *Case Western Reserve Journal of International Law* 319, 328; Orna Ben-Naftali & Keren Michaeli 'Public Committee Against Torture in Israel v. Government of Israel' (2007) 101 *American Journal of International Law* 459, 463-464; Robert J Beck & Anthony Clark Arend 'Don't Tread on Us': International Law and Forcible Trends on Terrorism' (1994) 12 *Wisconsin International Law Journal* 153, 213; Press Briefing by Colonel Daniel Reisner, IDF Legal Division, 15 Nov. 2000, available at http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/11/Press%20Briefing%20by%20Colonel%20Daniel%20Reisner-%20Head%20of cited in UNHRC, Alston Targeted Killings Report, paragraph 13.

was reinforced by the Israeli Defence Force Judge Advocate General's legal opinion on the conditions under which Israel considered targeted killings to be legal.¹³³

Israel is yet to substantively disclose the basis for its legal conclusions, and also details of the guidelines it uses to make its targeted killings decisions, the evidentiary or other intelligence requirements that would justify any killing, or the results of any *post-facto* review of the conformity of the operation with the legal requirements.¹³⁴

The main concern is that these targeted killing policies involve 'overly expansive' interpretations of the law which leads to applications that do not comport with human rights and humanitarian law.¹³⁵ This is further compounded by the prospect that other States would inevitably adopt these policies, which (if accompanied by feelings of legal permission, justification or obligation) may have the effect of forming new customary international law.¹³⁶

2. Who Conducts Targeted Killing and Who May be Targeted Lawfully

¹³³ Gideon Alon & Amos Harel, IDF Lawyers Set 'Conditions' for Assassination Policy, Haaretz, 2 February 2002 cited in UNHRC, Alston Targeted Killings Report, paragraph 13; Roy Schondorf, *supra* note 42 at 308.

¹³⁴ UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Extrajudicial or Arbitrary Executions, A/65/321 at paragraph 11; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraphs 40 and 60; UNHRC, Alston Targeted Killings Report, paragraph 17; Nils Melzer, *supra* note 3 at 32-34; Marko Milanovic, *supra* note 41 at 389; Roy Schondorf, *ibid*.

¹³⁵ UNSG, Interim Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, A/65/321, paragraph 11; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel* (2006) HCJ 769/02, 1 at paragraph 60 where the Court contended that in response to the 'massive assault of terrorism' directed at Israel subsequent to the outbreak of Al-Aqsa *intifada*, Israel adopted the policy of 'targeted frustration' of terrorism by ordering the killing of 'members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel'; Kristen E Eichensehr 'On Target? The Israeli Supreme Court and the Expansion of Targeted Killings' (2007) 116 *Yale Law Journal* 1873; UNHRC, Alston Targeted Killings Report, paragraph 15; Nils Melzer, *supra* note 3 at 9.

¹³⁶ Article 38, Statute of the International Court of Justice; ICJ, *Continental Shelf Case (Libya Arab Jamahiriya v Malta)* I.C.J. Reports, 1985, 29-30 paragraph 27: 'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States'; ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226, paragraph 70; ICJ, *Nicaragua Case* I.C.J Reports, 1996, 14; ICJ, *Asylum Case (Columbia v Peru)* I.C.J Reports, 1950, 266; ICJ, *Rights of Passage over Indian Territory Case (Portugal v India)*, I.C.J. Reports, 1960, 6 ; Ian Brownlie, *supra* note 96 at 7; Malcolm N Shaw *International Law* (2003) 69, 84; David J Harris *Cases and Materials on International Law* (2010) 19; Rebecca MM Wallace *International Law* (2008) 9; R Müllerson 'The Interplay of Objective and Subjective Elements in Customary Law' in K Wellens (ed.) *International Law: Theory and Practice* (1998) 161; UNSG, Interim Report of the Special Rapporteur on Extrajudicial, Summary or Extrajudicial or Arbitrary Executions, A/65/321, paragraph 11.

a. Who May be Targeted Lawfully

A source of considerable uncertainty regarding targeted killing operations in the context of armed conflicts concerns who may be lawfully targeted, and where and when such persons may be targeted. Drawing from customary IHL,¹³⁷ ideally, persons who may be subjected to targeted killing must be legitimate military targets.¹³⁸ This is analogous with the principle of distinction which requires the differentiation between civilian objects and military objectives and additionally accords civilians and civilian objects immunity from attack.¹³⁹ Legitimate military targets must be objectively singled out for their role in activities related to the ongoing armed conflict.¹⁴⁰

¹³⁷ ICTY, *Tadic Case* (Judgment of 7 May 1997), paragraph 639; IACiHR, *Abella (La Tablada) Case*, paragraph 178; ECtHR, *Özkan Case*, paragraph 170; ECtHR, *Ergi Case*, paragraph 81; ECtHR, *Isayeva et al. Case*, paragraph 140, 157 and 163; ECtHR, *Isayeva v Russia*, paragraph 19, 175, 180 and 191; IACiHR, *Columbia Country Report*, paragraph 78; Nils Melzer, *ibid* at 32; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 30, 61; Israel HCJ, *Beit Sourik v the Government of Israel*, paragraph 37.

¹³⁸ Article 48, AP I; Article 51, AP I; Nils Melzer, *ibid* at 33; Robert Kolb & Richard Hyde *An Introduction to the International Law of Armed Conflicts* (2008) 127; Hilly Even-Khen Moodrick 'Can We Now Tell What "Direct Participation in Hostilities" Is?' (2007) 40 *Israel Law Review* 213, 243; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 40; William J Fenrick 'The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities' (2007) 5(2) *Journal of International Criminal Justice* 332, 338.

¹³⁹ Article 48, AP I; Article 50, AP I; Article 52(1), AP I; Article 25(g), Hague Regulations IV; Nils Melzer, *ibid*; Robert Kolb & Richard Hyde, *supra* note 138 at 127; ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226, paragraph 78; Croatia, *Prosecutor v Rajko Radulovic and Others* (1997) May 26, 1997, K-15/95; ICTY, *Prosecutor v Galic* (Appeals Judgment) IT-98-29-A (30 November 2006), paragraph 135-138; ICTY, *Prosecutor v Ivica Rajic* (1996) Case No. IT-95-12-R61, paragraph 33; ICTY, *Prosecutor v Tadic* (Appeal Decision on Jurisdiction) at 119, 127; ICTY, *Prosecutor v Martić (Rule 61 Decision)* at 8, 10, 19 and 20; ECtHR, *Ergi Case*, paragraph 79 and 81; ECtHR, *Özkan Case*, paragraph 170; ECtHR, *Isayeva Case*, paragraph 175, 183; United Nations *Report of the Secretary General Mission to Inspect Civilian Areas in Iran and Iraq which Have been Subject to Military Attack*, UN Doc. S/15834 (June 20, 1983); Marco Sassoli & Antoine Bouvier *How Does Law Protect in War?: Cases, Documents and Teaching Materials on Contemporary International Humanitarian Law* (1999) 161.

¹⁴⁰ Article 51(3), AP I; Article 52(2), AP I; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraphs 33, 37 and 39; Jean-Marie Henckaerts & Louise Doswald-Beck *Customary International Humanitarian Law, Volume I: Rules* (2005), Rule 8; Michael N Schmitt 'The Law of Targeting' in Elizabeth Wilmshurst & Susan Breau (eds.) *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 138; Orna Ben-Naftali & Keren R Michaeli, *supra* note 18 at 278; Kenneth Watkin, *supra* note 17 at 139; Kenneth Watkin 'Canada/United States Military Interoperability and Humanitarian Issues: Landmines, Terrorism, Military Objectives and Targeted Killing' (2005) 15 *Duke Journal of Comparative and International Law* 281, 309; Nils Melzer, *ibid* at 56; Jeffery F Addicott 'Proposal for a New Executive Order on Assassination' (2003) 37(3) *Richmond Law Review* 751, 782; Mordechai Kremnitzer, *supra* note 73 at 4; Tom Ruys, *supra* note 17 at 20; Hilly Even-Khen Moodrick, *supra* note 138 at 34; *PCATI v Israel*, paragraph 30.

In international armed conflicts, subject to other requirements,¹⁴¹ combatants may be targeted at any time and any place. The absence of ‘combatant’ status in the IHL applicable to internal armed conflict creates some uncertainty thus making the rules of targeting less clear.¹⁴² The IHL applicable to internal armed conflict (as in international armed conflict) permits the targeting of civilians who ‘directly participate in hostilities’.¹⁴³ This does not, however, introduce clarity as to who may be lawfully targeted since there isn’t a commonly accepted definition of the notion of ‘direct participation in hostilities’. This leaves the way (perilously) open of individual State interpretation.¹⁴⁴

The principal areas of contention regarding direct participation in hostilities may be summed up as follows: i) what kind of conduct constitutes ‘direct participation’ making an individual subject to attack?; ii) to what extent may ‘membership’ in an organized armed group be used as a factor in determining whether a person is directly participating in hostilities?; and iii) the temporal nature of direct participation (how long does direct

¹⁴¹ ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 66 at paragraph 78; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraphs 33; UNHRC, Alston Targeted Killing Reports, paragraph 58; Article 4, GC III; Common Article 3, GCs; Article 1, Hague Convention V; Article 48, AP I; Article 57, AP I; Article 51(2), AP I; International Humanitarian Law Research Initiative, HPCR Manual and Commentary on International Law Applicable to Air and Missile Warfare, Harvard University Program on Humanitarian Policy and Conflict Research (2009), available at <http://www.ihlresearch.org/amw/manual> (accessed 10 May 2010) (hereinafter HPCR Manual and Commentary) Section A.1.(y)(1). The term ‘combatant’ is not defined in IHL, but may be extrapolated from Article 4(A) G C III; Ryan Goodman ‘The Detention of Civilians in Armed Conflict’ (2009) 103 *American Journal of International Law* 48; Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* note 140 at Rule 1; Marco Sassoli & Antoine A Bouvier *supra* note 139 at 807, 810; Michael N Schmitt, *supra* note 140 at 136; Nils Melzer, *ibid* at 407.

¹⁴² UNHRC, Alston Targeted Killing Reports, paragraph 58; Israel Military Court, *Military Prosecutor v Omar Mahmud Kasseem and Others* (1969) ILR vol. 42, 1971, 470-483; Jean-Marie Henckaerts & Louise Doswald-Beck, *ibid* at Rule 6; Marco Sassoli & Laura M Olson ‘The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts’ (2008) 90 *International Review of the Red Cross* 599, 611; Marco Sassoli ‘Transnational Armed Groups and International Humanitarian Law’ (2006) HPCR Paper Series.

¹⁴³ UNHRC, Alston Targeted Killings Report, paragraph 58; Article 51(3), AP I; Article 50(1), AP I; Article 13(3) and 51(3); Common Article 3, GC III and IV; Articles 4 and 13(3), AP II. The notion of direct participation in hostilities will be explored in greater detail in subsequent chapters.

¹⁴⁴ Antonio Cassese, *supra* note 17 at 5; UNHRC, Alston Targeted Killings Report, paragraphs 58-61; Tom Ruys, *supra* note 17 at 28; Kenneth Watkin, *supra* note 17 at 153; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 86; Orna Ben-Naftali & Keren Michaeli, *supra* note 18 at 278; Joseph B Kelly ‘Assassination in War Time’ (1965) 30 *Military Law Review* 101, 110; William Hays Parks, *supra* note 17 at 6; Nils Melzer, *supra* note 3 at 56; Marco Sassoli & Laura M Olson, *supra* note 142 at 611.

participation last?).¹⁴⁵ The notion of direct participation in hostilities will be explored in greater detail in subsequent chapters.

It is a cause for concern that most States engaging in targeted killing policies have opted not to disclose their interpretation of direct participation in hostilities.¹⁴⁶ Lack of transparency on these criteria obscures any clarity about what conduct could subject a civilian to targeting.¹⁴⁷ It also provides an avenue for States to unilaterally broaden their interpretation of direct participation beyond permissible boundaries.¹⁴⁸

The predicament of these States dealing with terrorist threats must also be borne in mind.¹⁴⁹ It may be difficult to define direct participation in hostilities narrowly when faced with an enemy who disregards the distinction between civilians and legitimate military

¹⁴⁵ UNHRC, Alston Targeted Killings Report, paragraph 59; Nils Melzer, *ibid* at 56.

¹⁴⁶ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 34: ‘And what is the law in the space between these two extremes? On the one hand, the desire to protect innocent civilians leads, in the hard cases, to a narrow interpretation of the term “direct” part in hostilities. On the other hand, it can be said that the desire to protect innocent civilians leads, in the hard cases, to a wide interpretation of the “direct” character of the hostilities, as thus civilians are encouraged to stay away from the hostilities to the extent possible’; Nils Melzer, *ibid* at 68; Alston Targeted Killings Report, paragraph 58; ICTY, *Tadic Case (Judgment of 7 May 1997)*, paragraph 616; UNWCC, *Trial of Wilhelm List Case*, 58; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 30: ‘As mentioned, our position is that all of the parts of art 51(3) of The First Protocol express customary international law’; ICTY, *Kunarac Case (Judgment of 12 June 2002)*, paragraph 57; ICTR, *Rutaganda Case (Judgment of 26 May 2003)*, paragraph 569; ICTY, *Vasiljevic Case (Judgment of 29 November 2002)*, paragraph 24; Philip B Heymann & Juliette N Kayyem, *supra* note 73 at 65, 67.

¹⁴⁷ UNHRC, Alston Targeted Killings Report, paragraph 68; ICTY, *Akayesu Case (Judgment of 2 September 1998)*, paragraph 629; Michael Bothe, Karl Partsch & Waldemar Solf *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) 302.

¹⁴⁸ UNHRC, Alston Targeted Killings Report, paragraph 68: ‘although the US has not made public its definition of (direct participation in hostilities), it is clear that it is more expansive than that set out by the ICRC; in Afghanistan, the US has said that drug traffickers on the “battlefield” who have links to the insurgency may be targeted and killed. This is not consistent with the traditionally understood concepts under IHL – drug trafficking is understood as criminal conduct, not an activity that would subject someone to a targeted killing. And generating profits that might be used to fund hostile actions does not constitute (direct participation in hostilities)’; US Senate Foreign Relations Committee, *Afghanistan’s Narco War: Breaking the Link between Drug Traffickers and Insurgents: Report to the Senate Committee on Foreign Relations* (2009) S. Rep. No. 111-29, 16; Steven Eke, *Russia Law on Killing Extremists Abroad*, BBC, 27 Nov. 2006.

¹⁴⁹ ECtHR, *McCann Case*, paragraph 200, 212; David Kretzmer, *supra* note 74 at 9, 19; Nils Melzer, *ibid* at 62.

targets, and who additionally seeks refuge among the civilian population or uses civilians as human shields.¹⁵⁰

In spite of the unlawful tactics of non-State armed groups, States must always strive to ensure the greatest protection to the civilian population.¹⁵¹ Thus, direct participation should be objectively construed to include only such conduct that directly supports the combat.¹⁵²

The ICRC's *Interpretive Guidelines on the Notion of Direct Participation in Hostilities* stipulates three preconditions which must be met cumulatively for each specific act by a civilian to qualify as direct participation in hostilities. These include:¹⁵³

- (i) There must be a “threshold of harm” that is objectively likely to result from the act, either by adversely impacting the military operations or capacity of the opposing party, or by causing the loss of life or property of protected civilian persons or objects; and
- (ii) The act must cause the expected harm directly, in one step, for example, as an integral part of a specific and coordinated combat operation (as opposed to harm caused in unspecified future operations); and
- (iii) The act must have a “belligerent nexus” – i.e., it must be specifically designed to support the military operations of one party to the detriment of another.

The above criteria are primarily focused on direct conduct to the exclusion of indirect conduct, such as preparatory or capacity building conduct, that is generally supportive of

¹⁵⁰ Article 28, GC IV; Article 51(7), AP I; *Osman Bin Haji Mohamed Ali and Another v the Public Prosecutor* (1969) Law Reports, vol. 1, Appeal Cases, 430-455; Nigeria Supreme Court, *Pius Nwaoga v the State* (1972) ILR 494-497; A/HRC/11/2/Add.4, paragraphs 23-4 cited in UNHRC, Alston Targeted Killings Report, paragraph 60.

¹⁵¹ Article 50(2), AP I; Articles 52-56 and 85(3), AP I; ICTY, *Prosecutor v Ivica Rajic* (1996) Case No. IT-95-12-R61; US District Court New York, *Mahmoud El-Abed Ahmad v George Wigen* (1989) No. 89-CV-715, 726 F. Supp. 389; United States Department of Defense *Report to Congress on the Conduct of the Persian Gulf War* (1992) reprinted in (1992) 31(3) *ILM* 612-644; ICRC ‘Appeal to Belligerents’ (1973) 152 *International Review of the Red Cross* 583-585; Brussels Consil de Guerre, *Public Prosecutor v G.W.* (1966) 18 May; Orna Ben-Naftali & Keren Michaeli, *supra* note 18 at 287; UNHRC, Alston Targeted Killings Report, paragraph 60.

¹⁵² UNHRC, Alston Targeted Killings Report, paragraph 60: ‘More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does not constitute direct participation.’

¹⁵³ Nils Melzer *Interpretive Guidelines on the Notion of Direct Participation in Hostilities* (2009) 66 (hereinafter ICRC, *Guidelines on Direct Participation*); UNHRC, Alston Targeted Killings Report, paragraph 63.

the war effort.¹⁵⁴ Other conduct, for instance political support to a belligerent party, for example an organized armed group which is protected by other human rights standards also do not qualify as direct participation.¹⁵⁵

Thus, it is apparent that the criteria of the ICRC *Guidelines on Direct Participation* focuses on the extent to which specific conduct ‘constitute[s] an integral part of armed confrontations occurring between belligerents’¹⁵⁶ rather than the lawfulness of such conduct under municipal or international law.¹⁵⁷

The import of this is that, when responding to unlawful activities (under municipal or international law) which do not meet the criteria of direct participation in hostilities,¹⁵⁸ States must adhere to the ‘lethal force standards applicable to self-defence and law enforcement.’¹⁵⁹

A shortcoming of the ICRC Guidelines is the creation of a category called the ‘continuous combat function’ (CCF). This category comprises of members of organized

¹⁵⁴ ICTR, *Prosecutor v Akayesu* (Judgment of 2 September 1998), paragraph 629: ‘Common Article 3 is for the protection of “persons taking no *active part* in the hostilities”, and Article 4 of Additional Protocol II is for the protection of, “all persons who do not take a *direct part* or who have ceased to take part in hostilities”. These phrases are so similar that, for the Chamber’s purposes, they may be treated as synonymous’[emphasis added]; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 34; Nils Melzer ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ (2010) 42 *New York University Journal of International Law and Politics* 829, 858; UNHRC, Alston Targeted Killings Report, paragraph 64; Antonio Cassese, *supra* note 17 at 7; HPCR Manual and Commentary, *supra* note 141 at Section C. 28(2), 278.

¹⁵⁵ UNHRC, Alston Targeted Killings Report, paragraph 64; Nils Melzer, *supra* note 3 at 338.

¹⁵⁶ ICRC, *Guidelines on Direct Participation*, *supra* note 153 at 66-68; Nils Melzer, *ibid* at 859.

¹⁵⁷ UNHRC, Alston Targeted Killings Report, paragraph 64. For a different viewpoint, see George P Fletcher ‘The Indefinable Concept of Terrorism’ (2006) 4 *Journal of International Criminal Justice* 898: ‘This phrase ‘direct part’ conjures up a picture of someone picking up a gun and aiming it at the enemy. But ... ordinary principles of self-defence apply against people pointing guns, whether they are civilians or not. Targeted assassinations are usually aimed at the organizers of terrorist attacks--not those who are aiming weapons.... The targets are the key figures behind the scenes who organize the suicide bombings, the hijacking and other terrorist activities. Are they “taking direct part in hostilities”? I think the phrase lends itself to this construction.’

¹⁵⁸ ICTY, *Prosecutor v Akayesu* (1998) Case No. ICTR-96-4-T, paragraph 629; Article 22, Hague Regulations IV; Article 35(1), AP I; Article 51, AP I; UNHRC, Alston Targeted Killings Report, paragraph 64.

¹⁵⁹ ECtHR, *Avsar Case*, paragraph 285; ECtHR, *Ergi Case*, paragraph 79; Jean-François Quéguiner *Direct Participation in Hostilities under International Humanitarian Law* (2003) 3; Mordechai Kremnitzer, *supra* note 73 at 2; Nils Melzer, *ibid* at 861; UNHRC, Alston Targeted Killings Report, paragraph 64; Nils Melzer, *ibid* at 58.

armed groups who may be targeted ‘anywhere, at any time.’¹⁶⁰ This contravenes the human rights standards which protect against the arbitrary deprivation of life.¹⁶¹ Additionally, it is an internal contradiction of the principle of targeting participants in hostilities only ‘for such time’ as they participate, since it introduces the possibility of targeting selected individuals ‘all the time.’¹⁶²

A better approach would be to pay attention to specific acts rather than the status of the person being targeted (whether an unprivileged combatant or a continuous combat function).¹⁶³ Alston notes the increased risk of erroneous targeting which may arise from the creation a category of continuous combatants as some of them may have disengaged from hostilities.¹⁶⁴ He additionally notes that if States accept the continuous combatant category, the onus lies with the State to give strong evidentiary proof of an individual’s belonging to that category.¹⁶⁵ In this regard, less-lethal methods should be attempted first before resorting

¹⁶⁰ ICRC, *Guidelines on Direct Participation*, *supra* note 153 at 66; Nils Melzer, *ibid* at 56; UNHRC, Alston Targeted Killings Report, paragraph 65; *Mahmoud El-Abed Ahmad v George Wigen* (1989) No. 89-CV-715 (membership in the Abu Nidal Organization); *The State v Sagarius and Others* (1982) South African Law Reports, vol. 1, 1983, 833-838 (membership in SWAPO); Israel HCJ, *Sakhwil et al. v Commander of Judea* (1980) Israel Yearbook on Human Rights, vol. 10, 1980, 345 (membership in the Al-Fatah organization); Israel MC, *Military Prosecutor v Omar Mahmoud Kassem and Others* (1961) I.L.R., vol. 42, 470-483 (membership in the Organization of the Popular Front for the Liberation of Palestine); Italy Court of Cassation, *Sansolini and Others v Bentivegna and Others* (1957) I.L.R., vol. 24, 986-990 (membership in the Italian Resistance Movement).

¹⁶¹ UNHRC, *de Guerero Case*, paragraph 13.1; UNHRC, *Suriname Case*, paragraph 14.3; UNHRC, *General Comment No. 6* (1982), paragraph 3; US Military Commission, *Trial of Lieutenant General Harukei Isayama and Seven Others* (1946) 5 LRTWC 60 reprinted in HS Levie (ed.) *International Law Studies: Documents on Prisoners of War* (1979) vol. 60, 345-348; Mordechai Kremnitzer, *ibid* at 8; Nils Melzer, *ibid* at 94.

¹⁶² ICTY, *Tadic Case (Judgment of 7 May 1997)*, paragraph 639; Michael N Schmitt ‘The Interpretive Guidelines on the Notion of Direct Participation in Hostilities: A Critical Analysis’ (2010) 1 *Harvard National Security Journal* 5, 12; UNHRC, Alston Targeted Killings Report, paragraph 65; Nils Melzer, *ibid* at 56.

¹⁶³ UNHRC, Alston Targeted Killings Report, paragraph 65; Nils Melzer, *supra* note 3 at 330-31.

¹⁶⁴ Philip B Heymann & Juliette N Kayyem, *supra* note 73 at 63: ‘[It would generally be lawful] to target and kill any non-surrendering enemy combatant, in any place and at any time, regardless of what that combatant had done or was doing and regardless of whether that combatant posed an imminent threat or any individual threat at all’; Nils Melzer, *supra* note 3 at 68; UNHRC, Alston Targeted Killings Reports, paragraph 66: ‘States must adhere to the careful distinction the ICRC draws between continuous combatants who may always be subject to direct attack and civilians who (i) engage in sporadic or episodic direct participation (and may only be attacked during their participation), or (ii) have a general war support function (“recruiters, trainers, financiers and propagandists”) or form the political wing of an organized armed group (neither of which is a basis for attack)’; ICRC, *Guidelines on Direct Participation*, *supra* note 153 at 31-36.

¹⁶⁵ UNHRC, Alston Targeted Killings Reports, paragraph 66; Nils Melzer, *supra* note 3 at 64.

to targeted killing. This will lessen deaths resulting from erroneous information.¹⁶⁶ Also, precautionary measures must be taken to limit incidental civilian casualties and loss.¹⁶⁷

b. Who May Lawfully Conduct Targeted Killings

Targeted killings are usually State-sponsored and carried out by State agents within the context of an impending attack, in the conduct of armed hostilities or in situations of law enforcement.¹⁶⁸ States undertaking targeted killing in the anticipation of an imminent attack or in response to an attack are acting in self-defence; therefore their actions are defensible under the international law of the use of force.¹⁶⁹ Those carried out within the context of the conduct of hostilities are also defensible under IHL and human rights law, while those conducted as measures of 'law enforcement'¹⁷⁰ are defensible within the complementary overlaps between IHL and human rights law.¹⁷¹

¹⁶⁶ UNHRC, *de Guerero Case*, paragraph 13; Tom Ruys, *supra* note 17 at 21; Mordechai Kremnitzer, *supra* note 73 at 14; Israel H CJ, *Muhammad Abd al-Aziz Hamdan v The General Security Service* (1996) H CJ 8049/96, paragraph 6 (less lethal measures must conform to the law); Israel H CJ, *Wa'al Al Kaaqua, et al. v the State of Israel* (1999); Israel H CJ, *Abd-al Halim Bilbeisi v The General Security Service* (1996) H CJ-VR 336/96 (discussing the permissibility of torture in 'ticking bomb' scenarios); Israel H CJ, *Khader Mubarak and The Public Committee Against Torture in Israel v The General Security Service* (1996) H CJ 3124/96 (on the prohibition of the use of torture during interrogation); UNHRC, Alston Targeted Killings Report, paragraph 78.

¹⁶⁷ Articles, 26 and 27, Hague Regulations IV; Article 57(2), AP I; Article 19, GC IV; Jean-Marie Henckaerts & Loius Doswald-Beck, *supra* note 140 at Rules 15-21 ; UNHRC, Alston Targeted Killings Report, 10, paragraph; Marco Sassoli & Antoine A Bouvier, *supra* note 139 at 165 and 170.

¹⁶⁸ Nils Melzer, *supra* note 3 at 5. This has given rise to the term 'State-sponsored targeted killing' which relates the notion of targeted killing with the principal group that employs it.

¹⁶⁹ Michael N Schmitt 'State-Sponsored Assassination in International and Domestic Law' (1992) 17 *Yale Journal of International Law* 621, 645; Mordechai Kremnitzer, *ibid* at 3; Nils Melzer, *ibid* at 51; Chris Downes, *supra* note 18 at 286; Louis Beres, *supra* note 16 at 160; Emanuel Gross, *supra* note 73 at 1194.

¹⁷⁰ Nils Melzer, *ibid* at 88-89: 'the generic concept of "law enforcement" can be said to comprise all territorial and extraterritorial measures taken by a State to vertically impose public security, law and order or to otherwise exercise its authority or power over individuals in any place or manner whatsoever. As there is room for overlap between the factual concepts of law enforcement and of hostilities in the case of military confrontations between States and non-State actors, it will be important to clarify which normative paradigm must be applied in such situations'; For examples of extraterritorial applications of law enforcement, see Article 12, GC I; Article 12, GC II; Article 13, GC III; Article 27, GC IV.

¹⁷¹ IACiHR, *Abella (La Tablada) Case*, paragraphs 158 and 159; Declaration of Minimum Humanitarian Standards (Turku Declaration), UN Doc. E/CN.4/Sub.2/1991/55 (December 2, 1990), paragraphs 50-57; Marco Sassoli & Antoine A Bouvier, *supra* note 139 at 264 ; Nils Melzer, *ibid* at 89: 'In situations of armed conflict, the law enforcement paradigm continues to govern all exercise by States of their authority or power, which does not amount to the conduct of hostilities'; Nils Melzer, *ibid* at 55-60; Tom Ruys, *ibid* at 35;

Various State agents participate in different circumstances of targeted killing. Most killings are conducted by military or civilian intelligence agents. A significant amount of controversy has been generated by the carrying out of targeted killings by State agents (such as the CIA and Mossad) who are not members of regular armed forces.¹⁷²

Alston's Targeted Killings Report notes the argument that as non-members of the armed forces, the intelligence agents who conduct drone attacks are 'unlawful combatants' who are committing war crimes.¹⁷³ He, however, finds this unsupported by IHL and further to be presumptive of the fact that the operation is pursued in the conduct of hostilities.¹⁷⁴

Targeted killings by State agents who are not members of the armed forces are therefore of dubious legality. They need to be carried out in conformity with the law applicable to the specific purpose of that particular operation.¹⁷⁵ Otherwise, they would engage State responsibility.¹⁷⁶ Under human rights law, killings conducted by State agents outside an armed conflict would constitute extrajudicial executions if they do not conform to human rights standards.¹⁷⁷ It is thus incumbent on States (both the targeting State and the territorial State) to investigate and prosecute incidences such as the above.¹⁷⁸

Mordechai Kremnitzer, *ibid* at 10; Christian Tomuschat *Gezielte Tötungen (Targeted Killings): Zugleich ein Kommentar zum Gutachten des Internationalen Gerichtshofs vom 9 Juli 2004* (2004) 140; Amnesty International, *Israel Must End its Policy of Assassinations*, *supra* note 76 at 2; Appeal Court of Santiago, *Prosecution of Osvaldo Romo Meno* (1994) Case Lumi Videla, Role No. 13.597-94, paragraph 12; India Supreme Court, *Peoples Union for Civil Rights v Union of India and Another* (1997), S.C. 1203-1208, 1997, paragraphs 4, 5, 7 and 9.

¹⁷² UNHRC, Alston Targeted Killings Report, paragraph 70.

¹⁷³ UNHRC, Alston Targeted Killings Report, paragraph 70; Appeal Court of Santiago, *Prosecution of Osvaldo Romo Meno* (1994) Case Lumi Videla, Role No. 13.597-94, paragraph 8(h).

¹⁷⁴ UNHRC, Alston Targeted Killings Reports, paragraph 70; Kenneth Watkin, *supra* note 17 at 164.

¹⁷⁵ UNHRC, *Suriname Case*, paragraph 14.3; UNHRC, *de Guerero Case*, paragraph 13.1; UNHRC, *General Comment No. 6* (1982) paragraph 3; IACtHR, *Myrna Mack Case*, paragraph 153; Nils Melzer, *supra* note 3 at 94.

¹⁷⁶ IACtHR, *Velásquez Rodríguez Case*, paragraph 170; Article 8, ILC Draft Articles on State Responsibility; ILC 'Commentary to Draft Article 8' (2001) 103-104 at paragraphs 1 and 2; Article 158, AP II; ICTY, *Tadic Case* (Judgment of 15 July 1999), paragraph 141; Appeal Court of Santiago, *Prosecution of Osvaldo Romo Meno* (1994) Case Lumi Videla, Role No. 13.597-94, paragraph 12; Nils Melzer, *ibid* at 72; *Re Gill* 5 RIAA 157 (1939).

¹⁷⁷ UNHRC, *General Comment No. 6* (1982) paragraph 3; IACtHR, *Bamaca Velasquez Case*, paragraph 172; IACtHR, *Juan Humberto Sanchez Case*, paragraph 110; UNHRC, *de Guerero Case*, paragraph 13.1 to 13.3; UNHRC, Alston Targeted Killings Report, paragraph 70; IACtHR, *Myrna Mack Case*, paragraph 153; UNHRC, *Suriname Case*, paragraph 14.3; IACtHR, *Villagran Morales Case*, paragraph 144.

¹⁷⁸ Article 146, GC IV; UNHRC, Alston Targeted Killings Report, paragraph 70; IACHPR, *Ouédraogo Case*, paragraph 3; UNHRC, *General Comment No. 6* (1982) paragraph 3; IACtHR, *Myrna Mack Case*, paragraph 153; Appeal Court of Santiago, *Prosecution of Osvaldo Romo Meno* (1994), paragraph 8(h).

Under IHL, while civilians (including intelligence agents) are not entirely prohibited from participating in hostilities, such participation has consequences.¹⁷⁹ First, this participation makes intelligence agents legitimate targets as they are ‘directly participating in hostilities’.¹⁸⁰ Secondly, unlike State armed forces they may be susceptible to prosecution, under municipal law, for their unlawful conduct.¹⁸¹ Therefore, any targeted killing in violation of IHL (regardless of its being conducted by State armed forces or by intelligence agents) may subject the perpetrator to prosecution for war crimes.¹⁸²

Targeted killing operations carried out by intelligence agents in the conduct of hostilities are different from those carried out by armed forces since the former are usually (subjectively) indifferent to IHL.¹⁸³ This increases the possibility of violations of IHL, and thus there is a greater likelihood of prosecution both for war crimes and for violations of the laws of the State in which such killing occurs.¹⁸⁴ Moreover, when intelligence agents are used by States in targeted killing operations to avoid the scrutiny of IHL and human rights law requirements, it could also incur State responsibility for violating those requirements.¹⁸⁵

¹⁷⁹ IACiHR, *La Tablada Case*, paragraph 178; UNHRC, Alston Targeted Killings Report, paragraph 71.

¹⁸⁰ Article 51(3), AP I; Article 13(3), AP II; Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* note 140 at Rule 6; Israel HCJ, *Public Committee Against Torture in Israel v The Government of Israel*, HCJ 769/02, paragraph 30: ‘As mentioned, our position is that all of the parts of Article 51(3) of The First Protocol express customary international law’; ICRC, *Guidelines on Direct Participation*, *supra* note 153 at 20; UNHRC, Alston Targeted Killings Report, paragraph 71; Robert Kolb & Richard Hyde, *supra* note 138 at 127.

¹⁸¹ ECtHR, *Nachova Case*, paragraph 96 and 99; US Court of Military Appeals, *United States v William L Calley Jr* (1973) 22 USCMA 534; US Supreme Court, *Ex Parte Quirin et al.* 317 US 1 (1942); Italy, Court of Cassation, *Sansolini and Others v Bentivegna and Others* (1957) I.L.R., vol. 24, 986-990; *S v Petane* (1988) South African Law Reports vol. 3, 51-67; Nigeria Supreme Court, *Pius Nwaoga v the State* (1972) ILR 494-497; UNHRC, Alston Targeted Killings Report, paragraph 71. The contrast with State armed forces is made with the presumption that the conduct of State forces complies with the requirements of IHL.

¹⁸² Articles 146 and 147, GC IV; Article 158, AP II; ICTR, *Prosecutor v Rutaganda* (Judgment of 26 May 2003), paragraph 569; ICTY, *Prosecutor v Vasiljevic* (Judgment of 29 November 2002), paragraph 24; ICTY, *Prosecutor v Kunarac* (Judgment of 12 June 2002), paragraph 57; UNHRC, Alston Targeted Killings Report, paragraph 72; Appeal Court of Santiago, *Prosecution of Osvaldo Romo Meno* (1994) Case Lumi Videla, Role No. 13.597-94, paragraph 12; Jean Marie-Henckaerts & Louise Doswald-Beck, *supra* note 140, Rule 6 at 23.

¹⁸³ UNHRC, Alston Targeted Killings Reports, paragraph 73.

¹⁸⁴ UNHRC, Alston Targeted Killings Report, paragraph 73; Jean Marie-Henckaerts & Louise Doswald-Beck, *supra* note 140, Rule 6 at 23: ‘international law does not prohibit States from adopting [ie domestic] legislation that makes it a punishable offence for anyone to participate in hostilities, whether directly or indirectly’.

¹⁸⁵ Article 4 and 5, ILC Draft Articles on State Responsibility; Article 3, Hague Convention IV; Article 91, AP I; ICJ, *Armed Activities in the Congo Case*, I.C.J Reports, 2005, 168 at 242, paragraph 213-214; ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory

It is important to note that regardless of justification for the use of force, the lawfulness of each targeted killing operation must (additionally) be objectively assessed on the basis of its compliance with the rules protecting individuals from arbitrary deprivation of life.¹⁸⁶ These include the rules of human rights and IHL (in situations of armed conflict).¹⁸⁷ This is supported by the ILC Draft Articles on State Responsibility which precludes the invocation of self-defence as a defence for violations of IHL.¹⁸⁸

3. International Law Applicable to the Notion of Targeted Killing

In analyzing the permissibility of targeted killing in international law, it is appropriate to advert to the relevant provisions. As mentioned above, three branches of international law are pertinent: i) international law of the use force; ii) IHL; and iii) human rights law. This section only identifies relevant provisions without going into the details of the specific legal requirements for the use of lethal force with the intent to kill a selected individual. This will be dealt with substantively in subsequent sections.

International law on the use of force applies to situations where drone attacks may be resorted to by a victim State in self-defence (including anticipatory self-defence).¹⁸⁹ IHL is

Opinion, I.C.J Reports, 1999, 87 at paragraph 62; ICJ, *Naulilaa Case* (1928); ECtHR, *Caire Case* (1929); ICJ, *Spanish Zone of Morocco Case* (1925); *Kling Case* (1930) R.I.A.A vol. Iv, 575 at 579; Ian Brownlie, *supra* note 96 at 450; Marco Sassoli 'State Responsibility for Violations of International Humanitarian Law' (2002) 846 *International Review of the Red Cross* 401, 405; Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* (1987) 64; Yves Sandoz, Christophe Swinarski & Bruno Zimmerman (eds.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), paragraph 3360; UNHRC, Alston Targeted Killings Reports, paragraph 73; See Letter from CIA Information and Privacy Coordinator, 9 March 2010, available at <http://www.aclu.org/national-security/predator-drone-foia-cia-letter-refusing-confirm-or-deny-existence-records> (accessed 12 May 2010); Nils Melzer, *supra* note 3 at 72.

¹⁸⁶ Chris Downes, *supra* note 18 at 280; Nils Melzer, *supra* note 3 at 52.

¹⁸⁷ Mary Ellen O'Connell 'To Kill or Capture Suspects in the Global War on Terror' (2003) 35 *Case Western Reserve Journal of International Law* 325, 328; UNHRC, Alston Targeted Killings Report, paragraph 44; ICJ, *Nuclear Weapons Advisory Opinion*, I.C.J Reports, 1996, 226, 242; Nils Melzer, *ibid* at 52; Jeffrey F Addicott, *supra* note 140 at 782; Christian Tomuschat, *supra* note 171 at 138; Michael N Schmitt, *supra* note 169 at 645.

¹⁸⁸ Article 21, ILC Draft Articles on State Responsibility; ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226 at 242; Malcolm N Shaw, *supra* note 136 at 708; David J Harris, *supra* note 136 at 436-37; Ian Brownlie, *supra* note 96 at 746; UNHRC, Alston Targeted Killings Report, paragraph 43.

¹⁸⁹ Article 51, UN Charter; IMTFE, *The Tokyo Trial* (1950) Int. Conc. No. 465, at 560; Malcolm N Shaw, *supra* note 136 at 1028-30; Ian Brownlie, *supra* note 96 at 733-34; David J Harris, *supra* note 136 at 747; UNHRC, Alston Targeted Killings Report, paragraph 45; Chris Downes, *supra* note 18 at 286; Philip B Heymann &

applicable in situations amounting to an armed conflict.¹⁹⁰ Human rights law applies both in peace time as well as in situations falling short of an armed conflict. It also applies alongside IHL in situations of armed conflict.¹⁹¹ The law of armed conflict has been an intrinsic part of human civilization for several centuries and, in fact, it was the first part of international law to be codified.¹⁹² The Lieber Code inaugurated, in international law, a semblance of codified regulations pertinent to the laws of armed conflict.¹⁹³

The international law on the use of force significantly constrains the right of states to embark on an armed conflict.¹⁹⁴ It is noteworthy that initially war was considered a right implicit in the sovereignty of States.¹⁹⁵ Parties to the Kellogg-Briand Pact of 1928, however, undertook to ‘condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy.’¹⁹⁶

Juliette N Kayyem, *supra* note 73 at 68; Nils Melzer, *supra* note 3 at 51; JT Gathii ‘Assessing Claims of a New Doctrine of Pre-emption under the Doctrine of Sources’ (2005) 43 *Osgoode Hall Law Journal* 1, 7.

¹⁹⁰ Articles 2 and 3, of the GCs; Robert Kolb & Richard Hyde, *supra* note 138 at 16; Nils Melzer, *ibid*.

¹⁹¹ ICJ, *Nuclear Weapons* I.C.J Reports, 1996, 226 at paragraph 25; ICJ, *Wall Advisory Opinion* I.C.J Reports, 2003, paragraph 106; ICJ, *Armed Activities in the Congo Case* I.C.J Reports, 2005, 168, paragraphs 216-217; ECtHR, *Özkan Case*, paragraph 180 and 181; Nils Melzer, *ibid* at 54; Robert Kolb & Richard Hyde, *ibid* at 270. The Martens Clause is cited as a provision for the complementary application of IHL and human rights law. The provision reads thus: ‘[I]n cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates public conscience.’; Human Rights in Armed Conflicts, Resolution XXIII adopted by the International Conference on Human Rights, Proclamation of Tehran, UN Doc. A/CONF. 32/41 1968, Tehran (12 May 1968); Robert Kolb & Richard Hyde, *ibid* at 272.

¹⁹² Robert Kolb & Richard Hyde, *supra* note 138 at 3; Frits Kalshoven (ed.) *the Centennial of the First International Peace Conference* (2000) cited in Malcolm N Shaw, *supra* note 136 at 1054; Nils Melzer, *ibid*.

¹⁹³ ICJ, *Nicaragua Case (Merits)* I.C.J Reports, 1986, 14, at 100-01; Myres McDougal & Florentino Feliciano *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961) 232-41.

¹⁹⁴ ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14, paragraphs 188-201: ‘The Court finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law.... They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations...’

¹⁹⁵ Judith Gardam *Necessity, Proportionality and the Use of Force by States* (2004) 38-39 Cambridge University Press: Cambridge; Nguyen Quoc, P Daillier & A Pellet *Droit International Public* (2003) 933 Paris.

¹⁹⁶ Article 1, Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57: ‘condemn recourse to war [...] and renounce it as an instrument of national policy’; Myers S McDougal & Florentino P Feliciano, *supra* note 193 at 139-141; Quincy Wright ‘The Meaning of the Pact of Paris’ (1933) 27 *American Journal of International Law* 39.

The Nuremberg Judgment, which was reiterated by a subsequent United Nations General Assembly ratification,¹⁹⁷ also renounced war, thereby rendering it ‘illegal in international law’. It additionally proscribed acts committed by those persons initiating an aggressive war.¹⁹⁸ Presently, Articles 2(4)¹⁹⁹ and 51 of the United Nations Charter explicitly restrict the use of force only to cases of legitimate self-defence.²⁰⁰

a. International Humanitarian Law

IHL is applicable only where there is an armed conflict in existence.²⁰¹ Therefore, when targeted killing is employed as means or tactic of killing individually selected terrorists, it must be proven that there is an ‘armed conflict’ in which the State and the terrorists are engaged.²⁰² In this regard, the US has stated that it is engaged in an armed conflict with Al Qaeda.²⁰³ Additionally, within the operation of IHL distinction needs to be made between combatants,²⁰⁴ civilians²⁰⁵ and other non-combatants.²⁰⁶

¹⁹⁷ UNGA Res. 95 (I), U.N. Doc. A/64/Add. 1 (Dec. 11, 1946).

¹⁹⁸ Malcolm N Shaw, *supra* note 136 at 1017; FB Schick ‘The Nuremberg Trial and the International Law of the Future’ 41(4) *American Journal of International Law* 770.

¹⁹⁹ It is noteworthy that the language of the Kellogg-Briand Pact requiring Member states to refrain from using force against other states is adopted in Article 2(4), UN Charter. See Leo van den Hole ‘Anticipatory Self-Defence International Law’ (2003) 19 *American University International Law Review* 69, 71.

²⁰⁰ ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14, 109-10; Myres McDougal & Florentino Feliciano, *ibid*.

²⁰¹ Common Article 2, Geneva Conventions of 1949; Israel H CJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 2; US Supreme Court, *Hamdan v Rumsfeld* 126 S. Ct. 2749 (2006); Israel H CJ, *Almanti v The Minister of Defense* H CJ 3451/02, 56(3) PD 30; Israel H CJ, *Barake v The Minister of Defense* H CJ 9293/01, 56(2) PD 509; Israel H CJ, *Barake v The Minister of Defense* H CJ 3114/02, 56(3) PD 11; *Ajuri v The Military Commander of the Judea and Samaria Area*, 56(6) PD 352; Malcolm N Shaw, *supra* note 136 at 1020-21.

²⁰² UNHRC, Alston Targeted Killings Report, paragraph 46. The existence of an armed conflict has been suggested to be indicated when the legal government is obliged to have recourse to regular military forces. See Jan Römer, *supra* note 3 at 9; Jean Pictet (ed.) *Commentary GC I*, Article 3 at 49; ICTY, *Prosecutor v Tadic* IT-94-1, Decision 02.10.1995, paragraph 70; ICTR, *Prosecutor v Akayesu* (Judgment of 2 September 1998), paragraph 619; ICTY, *Delalic Case*, (Judgment of 16 November 1998), paragraph 184; ICJ, *Nicaragua Case*, paragraphs 195 and 199; ECtHR, *McCann Case*, paragraph 192; ECtHR, *Makaratzis Case*, paragraph 65; ECtHR, *Gül Case*, paragraph 82; ECiHR, *Ayetkin Case*, paragraph 96; Appeal Court of Santiago, *Prosecution of Osvaldo Romo Meno* (1994) Case Lumi Videla, Role No. 13.597-94, paragraph 7; Nils Melzer, *supra* note 3 at 426.

²⁰³ Harold Koh, *supra* note 37; Michael N Schmitt ‘Targeted Killing in International Law: Law Enforcement, Self-defense and Armed Conflict’ in Roberta Arnold & Noëlle Quéniwet (eds.) *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (2008) 525, 526.

²⁰⁴ Article 4, GC III; Articles 43 and 44, AP I; House of Lords, *Osman Bin Haji Mohamed Ali and Another v The Public Prosecutor* (1969) Law Reports, vol. 1 Appeal Cases, 430-455; US Supreme Court, *Ex parte Quirin* (1942) 317 U.S. 1, 31; Nigeria Supreme Court, *Pius Nwaoga v The State* (1972) ILR, 494-497; Nils Melzer, *ibid* at 415.

Thus, the combatant status of members of armed groups must be ascertained so that they can be targeted lawfully.²⁰⁷ Should the individuals against whom targeted killing operations are aimed be lawful targets, other IHL principles of precaution, proportionality, necessity and humanity must be complied with.²⁰⁸

A violation of the requirements of IHL engages both State and individual responsibility.²⁰⁹ State responsibility is governed under the ILC Draft Articles on State Responsibility while individual responsibility is governed under customary IHL and Article 8 of the ICC Statute which criminalizes grave breaches of IHL.²¹⁰

²⁰⁵ Article 50, AP I; Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* note 140 at Rule 1 and 6; Michael N Schmitt, *supra* note 169 at 609; William Hays Parks, *supra* note 17 at 4; Michael N Schmitt, *ibid* at 142.

²⁰⁶ Article 8(2)(b)(xxiv), ICC Statute; Article 24, GC I; Article 36, GC II; Article 36, GC III; Article 8, AP I; Article 12(1), AP I; Article 67, AP I; UNHRC, Alston Targeted Killings Report, paragraph 61; Jean-Marie Henckaerts & Louise Doswald-Beck, Rules 25 and 27; George Aldrich 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants' (2002) 96 *American Journal of International Law*, 892.

²⁰⁷ Jean-Marie Henckaerts & Louise Doswald-Beck, *ibid*, at Rule 1; Article 48, AP I; Articles 43 and 44, AP I; Antonio Cassese *International Law* (2005) 400; William Gallahue, *supra* note 68 at 3.

²⁰⁸ ICTY, *Prosecutor v. Struger* (Judgment of 31 January 2005) IT-01-42-T, Trial Chamber II, paragraph 220; US Supreme Court, *US v Yamashita* 327 US 1 (1946); Robert Kogod Goldman 'America Watch's Experience in Monitoring Internal Armed Conflicts' (1993) 9 *American Journal of International Law* 78; Nils Melzer, *supra* note 3 at 357; Robert Kolb & Richard Hyde, *supra* note 164 at 269; Patrick Gallahue, *supra* note 68 at 3.

²⁰⁹ Article 146, GC IV; Article 158, AP II; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, PTC I, (Decision of 29 January 2007 on the confirmation of charges), paragraphs 343-348; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, PTC I, (Decision of 30 September 2008 on the confirmation of charges), paragraphs 480-486; ICTY, *Prosecutor v. Stakić*, (IT-97-24), Appeal Judgment 22 March 2006, paragraph 62; Albin Eser 'Individual Criminal Responsibility' in Antonio Cassese, Paola Gaeta & John R.W.D (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 771; Kai Ambos 'Article 25 - Individual Criminal Responsibility' in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2008) 743-770; Jean Marie-Henckaerts & Louise Doswald-Beck, *ibid* at Rules 151-55 at 380-84.

²¹⁰ Jean-Marie Henckaerts & Louise Doswald Beck, *ibid*, at Rule 156; David J Harris, *supra* note 136 at 423-24: 'Conduct attributable to the State can consist of actions or omissions.'; Malcolm N Shaw, *supra* note 136 at 694; Article 2, ILC Draft Articles; ICJ, *Corfu Chanel Case* (Merits) (1949) I.C.J Reports 4, 22-23; ICJ, *Diplomatic and Consular Staff Case* (1980) I.C.J Reports 31-32, paragraph 63 and 67; PCIJ, *Chorzow Factory Case* (1928) P.C.I.J Series A No. 9 at 21; IACtHR, *Velásquez Rodríguez*, paragraph 170: 'under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions...'; ICTY, *Prosecutor v. Zejnib Delalić et al. (Čelebići)* (Appeals Chamber Judgment of 20 February 2001), paragraph 195 ; ICTY, *Prosecutor v Tadić* (Judgment of 15 July 1999), paragraph 188; ICTY, *Prosecutor v Milan Martić*; ICTY, *Prosecutor v Blaškić* (Judgment of 3 March 2000), paragraph 281; ICTR, *Prosecutor v Akayesu* (Judgment of 2 September 1998), paragraph 483; ICTY, *Prosecutor v Ivica Rajić; Kadić et al. v Karadžić*; Leslie Greene 'Command Responsibility in International Humanitarian Law' (1995) 5 *Transnational Law & Contemporary Problems* 319, 320; US Military Tribunal Nuremberg, *The Trial of Alfred Felix Alwyn Krupp von Bohlen Und Halbach and Eleven Others (The Krupp Trial)* (1949), The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, vol. X, 130-159; Marco Sassoli & Antoine A Bouvier, *supra* note 139 at 671.

b. Human Rights Law

Human rights law largely developed from existing custom but it received a great boost in the wake of World War II.²¹¹ This has been attributed to the atrocities that befell multitudes of people prior to and during the war.²¹² Human rights initially developed in order to grant positive rights to individuals, and to ensure that the State respected the rights of its citizens.²¹³

Human rights law acknowledges certain benefits which individuals should enjoy and confers rights upon them.²¹⁴ The body of human rights is made up of conventional law (both universal and regional) and customary law.²¹⁵ The 'most fundamental' of human rights such as the right to life make up the core of the customary law.²¹⁶

²¹¹ Malcolm N Shaw, *supra* note 136 at 253; David J Harris, *ibid* at 535: 'the guarantee of human rights became one of the purposes for which Allied powers fought'; Noëlle Quénivet 'The History of the Relationship between International Humanitarian Law and Human Rights Law' in Roberta Arnold & Noëlle Quénivet (eds.) *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (2008) 1, 2; Henry J Steiner & Philip Alston *International Human Rights in Context: Law, Politics, Morals* (2008) 938.

²¹² David J Harris, *ibid* at 535; Sonjar Starr 'Extraordinary Crimes at Extraordinary Times: International Justice Beyond Crisis Situations' (2007) *North Western University Law Review* 1257, 1259.

²¹³ Malcolm N Shaw, *ibid* at 252-53; Robert Kolb & Richard Hyde, *supra* note 138 at 269; See Rene Provost *International Human Rights and Humanitarian Law* (2002) 6 Cambridge University Press: Cambridge.

²¹⁴ Rebecca MM Wallace, *supra* note 136 at 230; Malcolm N Shaw, *ibid* at 252-53; Rene Provost, *ibid* at 6.

²¹⁵ *Filartiga v Pena-Irala* 630 F.2d 876; Jordan J Paust 'The Complex Nature, Sources and Evidences of Customary Human Rights' (1996) 25 *Georgia Journal of International and Comparative Law* 147, 155; Henry J Steiner & Philip Alston, *supra* note 211 at 4-5; David J Harris, *ibid* at 537; Malcolm N Shaw, *ibid* at 252.

²¹⁶ ECtHR, *Isayeva, Yusupova and Bazayeva v The Russian Federation*, Applications No.s 57947/00, 57948/00 and 57949/00, Judgment (24 February 2004); ECtHR, *Isayeva v The Russian Federation*, Application No. 57950/00, Judgment (24 February, 2005), paragraph 172; Malcolm N Shaw, *ibid* at 257; David J Harris, *ibid* at 626-27; Noëlle Quénivet 'The Right to Life in International Humanitarian Law and Human Rights Law' in Roberta Arnold & Noëlle Quénivet *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (2008) 332; Theodore Meron *Human Rights and Humanitarian Norms as Customary Law* (1989); Richard B Lillich 'The Growing Importance of Customary International Human Rights Law' (1996) 25 *Georgia Journal of International and Comparative Law* 1, 8; Michelle A Hansen 'Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict' (2007) 194 *Military Law Review* 8.

Human rights law is founded on the protection of the life and dignity of the person. Targeted killing involves the ‘use of deadly force’²¹⁷ which impinges on the right to life. This ‘stands as the first right that is to be protected by the State’.²¹⁸ It is also a norm of *jus cogens* thus making any violation presumptively unlawful.²¹⁹ The practice of the ICJ,²²⁰ the UN human rights supervisory system,²²¹ and other regional courts is indicative of a strong argument not only for the *erga omnes* character, but also the customary nature of obligations arising from the *jus cogens* right to life.²²²

²¹⁷ UN Doc.A/HRC/14/24/Add.6, paragraph 1; Kenneth Watkin ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’ (2004) 98 *American Journal of International Law* 17.

²¹⁸ Noëlle Quénivet, *supra* note 216 at 331; Nils Melzer, *supra* note 3 at 91; UNHCR, General Comment No. 6 (1982), paragraph 1; UNHCR, General Comment No. 14 (1984), paragraph 1; Yoram Dinstein ‘The Right to Life, Physical Integrity and Liberty’ in Louise D Henkin (ed.) *International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 114; Manfred Nowak *UN Covenant on Civil and Political Rights – CCPR Commentary* (2005) 104; BG Ramcharan ‘The Concept and Dimensions of the Right to Life’ in BG Ramcharan (ed.) *The Right to Life in International Law* (1985) 6; UNHCR, *Suarez de Guerero v Columbia*, paragraph 13.1; UNHCR, *Baboeram et al. v Suriname*, paragraph 14.6; IACtHR, *Myrna Mack Chang v Guatemala*, paragraph 152; IACiHR, *Country Report Haiti* (1988), page 1; IACtHR, *Villagran Morales Case*, paragraph 144.

²¹⁹ ICTY, *Furundzija Case* (Judgment of 10 December 1998), paragraph 155; UNHCR, *Suarez de Guerero v Columbia*, paragraph 13.1; UNHRC, *Suriname Case*, paragraph 105; IACiHR, *Alejandro Case*, paragraph 39; David J Harris, *supra* note 136 at 566; Ian Brownlie, *supra* note 96 at 510-11; Lauri Hannikainen *Peremptory Norms in International Law (Jus Cogens), Historical Development, Criteria, Present Status* (1988) 6; Third Restatement of the Law: The Foreign Relations Law of the United States (1987) paragraph 702 cited in Noëlle Quénivet, *ibid* at 332; Manfred Nowak, *ibid* at 104; BG Ramcharan, *ibid* at 6, 11 and 15 cited in Nils Melzer, *ibid* at 91.

²²⁰ ICJ, *Barcelona Traction Case*, paragraph 34: ‘basic rights of the human person’ [which include the right to life] ‘give rise to obligations *erga omnes*’; ICJ, *US Consular Staff in Tehran Case*, paragraph 91; ICJ, *Nicaragua Case (Merits)*, paragraph 218; ICJ, *Armed Activities in the Congo Case*, paragraph 219 and 219; ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 25; ICJ, *Corfu Channel Case*, paragraph 22; Nils Melzer, *ibid* at 91.

²²¹ UNSC, Resolution 237 of 14 June 1967: ‘essential and inalienable human rights should be respected even during the vicissitudes of war’; UNSC Resolution 392 of 19 June 1976; UNSC Resolution 417 of 31 October 1977; UNSC Resolution 473 of 13 June 1980; UNGA Resolution 45/162 of 18 December 1990; UNGA Resolution 47/136 of 18 December 1992; UNGA Resolution 51/92 of 12 December 1996; UNGA Resolution 53/147 of 9 December 1998; UNGA Resolution 55/111 of 4 December 2000; UNGA Resolution 57/214 of 18 December 2002; UNGA Resolution 59/197 of 20 December 2004; ECOSOC Resolution 1982/35 of 7 May 1982; ECOSOC Resolution 1983/24 of 26 May 1983; ECOSOC Resolution 1986/110 of 21 May 1986; UNHRC, General Comment No. 24 (1994), paragraph 10; UNHRC, General Comment No. 29 (2001), paragraph 11; UNHRC Comm Resolution 1982/29 of 11 March 1982; UNHRC Comm Resolution 1998/68 of 21 April 1998; UNHRC Comm Resolution 2001/45 of 23 April 2001; UNHRC Comm Resolution 2004/37 of 27 April 2004; Special Rapporteur of the UN Commission on Human Rights, Report on the Situation of Human Rights in the Territory of the former Yugoslavia, 17 November 1992, A/47/666; S/24809, paragraph 129.

²²² IACiHR, *Alejandro et al. v Cuba* (1999) Case No. 11.589, Report No. 86/99, paragraph 39; IACtHR, *Villagran Morales Case*, paragraphs 139 and 144; IACtHR, *Juan Humberto Sanchez Case* (2003), Ser. C, No. 99, 2003, paragraph 110; IACtHR, *Bamaca Velasquez v Guatemala* (2000), paragraph 172; IACtHR, *Myrna Mack Chang v Guatemala* (2003), paragraph 154; IACtHR, *Niera Alegria et al. v Peru* (1995), paragraph 61.

Human rights, as expressed in international conventions, are premised on the protection of every human being's 'inherent' right to life.²²³ All the conventions consider the right to life to be non-derogable,²²⁴ thus (even in targeted killing operations) this right cannot be curtailed during times of public emergency. This means that any act or omission which contravenes the right to life is unlawful, and further that, only under very limited circumstances (strictly controlled by the law) can the wrongfulness of such conduct be precluded.²²⁵

In spite of the non-derogable nature of the right to life, the Universal Declaration of Human Rights,²²⁶ the International Covenant on Civil and Political Rights (ICCPR), the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR),²²⁷ the American Convention on Human Rights (ACHR)²²⁸ and the African Charter on Human and People's Rights (AFCHPR)²²⁹ do not formulate this right in absolute

²²³ Article 6, International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 999 U.N.T.S. 171, entered into force 23 March 1976 (hereinafter ICCPR).

²²⁴ IACiHR, *Villagran Morales Case*, paragraph 139; Section 31, Report of the Expert Meeting on Non-Derogable Rights, 19 May 1995, Geneva annexed to: Annual Report of the Special Rapporteur on Human Rights and States of Emergency, 26 June 1995, E/CN.4/Sub.2/1995/20; UNHRC, General Comment No. 29 (2001), paragraph 11; ECOSOC, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4, paragraph 69; UNHRC, *Alston Targeted Killings Report*, paragraph 33; Nils Melzer, *ibid* at 212; ICJ, *Nuclear Weapons Opinion*, paragraph 25.

²²⁵ ICTR, *Prosecutor v Rutaganda* (Judgment of 6 December 1999), paragraph 106; ICTY, *Prosecutor v Furundzija* (Judgment of 10 December 1998), paragraph 155; ICTY, *Prosecutor v Delalic* (Judgment of 16 November 1998), paragraph 303; ICTY, *Prosecutor v Tadic* (Jurisdiction, 2 October 1995), paragraph 102; UNHCR, General Comment No. 6 (1982), paragraph 3; ACHPR, *Ouédraogo v Burkina Faso*, Communication No. 204/97, Decision of 1 May 2001, 29th Ordinary Session, April/May 2001, paragraph 3; IACtHR, *Myrna Mack Chang v Guatemala*, paragraph 153; UNHRC, General Comment No. 24 (1994), paragraph 10; UNHRC, General Comment No. 29 (2001), paragraph 11; Special Rapporteur of the UNCHR, Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, 17 November 1992, A/47/666/S/24809, paragraph 129; Principle 8, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

²²⁶ Article 3, Universal Declaration of Human Rights, General Assembly Resolution 217A (III), U.N. Document A/810 (1948) (hereinafter UDHR).

²²⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 2 (ETS No. 44), enacted on 6 May 1963 (hereinafter ECHR).

²²⁸ Article 4(1), American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force 18 July 1978 (ACHR).

²²⁹ Article 4, African Charter on Human and People's Rights, adopted 27 June 1981, 21 I.L.M. 58 (1982), entered into force 21 October 1986 (ACHPR).

terms.²³⁰ Rather, each of these conventions prohibits only the ‘arbitrary’ deprivation of life.²³¹

General Comment No. 6 of the UN Human Rights Committee (UNHRC) when read in light of the *de Guerero Case* sheds light on the provision that no one shall be ‘arbitrarily deprived of his life’.²³² The UNHRC held that the law’s failure to strictly control and limit circumstances in which a person may be deprived of his or her life is indicative of the arbitrariness of the resulting loss of life.²³³ This is expressive of a broad interpretation of Article 6 ICCPR which suggests that States need to adopt positive measures in protecting the right to life.²³⁴

These may include, for instance, establishing mechanisms to verify intelligence information thereby reducing erroneous targeting decisions.²³⁵ This may also require an independent oversight body to scrutinize the planning, organization and control of targeted killing operations and to investigate any unlawful killings that may result.²³⁶

Thus, for a targeted killing operation to be lawful, States must take all possible measures to restrict as much as possible the use of lethal force in accordance with the international law rules prohibiting resort to armed force and loss of innocent life.²³⁷ The

²³⁰ Tom Ruys, *supra* note 17 at 3; Nils Melzer, *ibid* at 91 and 92; BG Ramamchran, *supra* note 218 at 6, 11 and 15; David J Harris, *supra* note 136 at 567.

²³¹ Tom Ruys, *ibid* at 3; UNHCR, General Comment No. 6 (1982), paragraph 1 and 4; Nils Melzer, *ibid* at 91.

²³² UNHCR, *Suarez de Guerero v Columbia*, paragraph 13.1; David J Harris, *supra* note 136 at 566.

²³³ UNHCR, *Suarez de Guerero v Columbia*, paragraph 13.1, 13.2, 13.3 and 15; David J Harris, *ibid* at 566.

²³⁴ UNHCR, General Comment No. 6 (1982), paragraph 5: ‘The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures’; UNHCR, *Suarez de Guerero v Columbia*, paragraph 13.3; David J Harris, *ibid* at 570.

²³⁵ ECtHR, *McCann Case*, paragraphs 193 and 211; ECtHR, *Jordan Case*, paragraph 110; B’ Tselem, *Israel’s Assassination Policy*, *supra* note 131 at 8 and 12; Georg Nolte ‘Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order’ (2004) 5 *Theoretical Inquiries* 111, 118; Nils Melzer, *supra* note 3 at 60.

²³⁶ UNHCR, General Comment No. 6, paragraph 2; ECtHR, *Gül Case*, paragraph 84; ECtHR, *Güleç Case*, paragraph 83; David J Harris, *ibid* at 568-69; Vincent-Joel Proulx ‘If the Hat Fits, Wear it, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists’ (2005) 56 *Hastings Law Journal* 801, 888; Nils Melzer, *ibid* at 60; Christian Tomuschat, *supra* note 171 at 140.

²³⁷ UNHCR, General Comment No. 6 (1982), paragraph 3; ACHPR, *Ouédraogo v Burkina Faso*, Communication No. 204/97, Decision of 1 May 2001, 29th Ordinary Session, April/May 2001, paragraph 3; IACtHR, *Myrna Mack Chang v Guatemala*, paragraph 153; David J Harris, *ibid* at 569; *Bordes and Temeharo v*

determination of whether or not a particular incident of targeted killing is arbitrary is a question of fact and has to be determined on a case by case basis.²³⁸

Under human rights law, the permissibility of using lethal force is restrictively regulated by standards of absolute necessity and strict proportionality. Absolute necessity requires that lethal force should be indispensable to prevent a grave and concrete threat whose immediacy allows for no delay.²³⁹ Absolute necessity also requires lethal force to be used only when all less-lethal means (capture or non-lethal incapacitation) are incapable of preventing the expected threat.²⁴⁰

Strict proportionality requires the use of lethal force to be justified by the gravity of the concrete threat being sought to be averted.²⁴¹ It also requires lethal force to be used

France (1997) 4 I.H.R.R. 284; UNHRC, Second General Comment No. 14 on Article 6 (1997), paragraph 6; ICJ, *Nuclear Weapons Advisory Opinion*, I.C.J Reports, 1996, 226 at 240 paragraph 25; Nils Melzer, *ibid* at 119.

²³⁸ ECtHR, *Andronicou and Constantinou Case*, paragraph 171 where the court applied a standard of ‘reasonableness in the circumstances’; UNHRC, *Herrera Rubio v Colombia* (1985) 2 Selected Decisions H.R.C, 195 at paragraph 11: ‘The Human Rights Committee, ... is of the view that the facts as found by the Committee disclose violations of the Covenant with respect to Article 6, because the State party failed to take appropriate measures to prevent the disappearance and subsequent killings of José Herrera and Emma Rubio de Herrera and to investigate effectively the responsibility for their murders’; ECtHR, *McCann Case*, paragraph 195; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 60; David J Harris, *supra* note 136 at 568-69; Tom Ruys, *supra* note 17 at 20; Nils Melzer, *ibid* at 59.

²³⁹ IACiHR, *Alejandro Case*, paragraph 37, 42; ECtHR, *McCann Case*, paragraph 154; US Supreme Court, *Raed Mohamad Ibrahim Matar v Avram Ditcher* (2007) 500 F. Supp. 2d 284; Sharon Weill ‘The Targeted Killing of Salah Shehadeh: From Gaza to Madrid’ (2009) 7 *Journal of International Criminal Justice* 617; Gabriella Blum & Philip Heymann ‘Law and Policy of Targeted Killing’ (2010) 1 *Harvard National Security Journal* 145, 153: ‘They asserted that, according to intelligence reports, at the time of his killing, Shehadeh was effectively a “ticking bomb,” in the midst of planning at least six different attacks on Israelis, including one designed as a “megaattack,” involving a truck loaded with a ton of explosives’; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 59; Tom Ruys, *ibid* at 20; Nils Melzer, *ibid* at 59; See *People v. McLeod* 1 Hill 377 (1841).

²⁴⁰ UNHRC, Concluding Observations on Israel, CCPR/CO/78/ISR, 21 August 2003: ‘Before resorting to the use of deadly force, all measures to arrest a person a person suspected of being in the process of committing acts of terror must be exhausted’; UNHRC, *Baboeram et al. v Suriname* (1985) 2 Selected Decisions H.R.C 172; UNHRC, General Comment No. 6, paragraph 3; ECiHR, *Kelly Case*, paragraph 93; A/61/311, paragraphs 33-45; ACiHPR, *Ouédraogo Case*, paragraph 4; Israel HCJ, *Sakhwil et al. v Commander of the Judea and Samaria Region* (1979) H.C. 434/79 reprinted in (1980) 10 *Israel Yearbook on Human Rights* 345; David J Harris, *ibid* at 567; UNHRC, Alston Targeted Killings Report, paragraph 32; David Kretzmer, *supra* note 74 at 171.

²⁴¹ ECtHR, *Nachova Case*, paragraph 95; ECtHR, *Gül Case*, paragraph 82; ECtHR, *McCann Case*, paragraph 192; ECtHR, *Streletz Case*, paragraph 87, 96 and 102; ECtHR, *Makaratziz Case*, paragraph 64-66; ECiHR, Ayetkin Case, paragraph 95; Tom Ruys, *ibid* at 20; UNHRC, Concluding Observations on Israel, CCPR/CO/78/ISR, 21 August 2003, paragraph 15: ‘The State party should ensure that the utmost

prospectively as a defensive means rather than retrospectively as a retributive means.²⁴² Proportionality in this case should be measured not by the suspect's past offence but by the gravity of the threat which the individual continues to pose.²⁴³ Thus, (like in *jus ad bellum*) the objective of using lethal force must strictly be the prevention of an impending concrete threat rather than the killing of a suspect being the 'sole objective'.²⁴⁴

The lawfulness of extra-territorial targeted killing operations by States raises concerns over the temporal and territorial scope of applicability of human rights law.²⁴⁵ It is possible to consider this concern from two perspectives: i) that of territorial control; and ii) that of States' obligations to respect the right to life.

The use of lethal force under the territorial control perspective must be regulated to the extent that a State exercises effective or partial control over a particular territory.²⁴⁶ The

consideration is given to the policy of proportionality in all its responses to terrorist threats and activities'; A/61/311, paragraphs 42-44; Nils Melzer, *ibid* at 59; PCATI/LAW, *Assassination Policy of Israel*, *ibid* at 59.

²⁴² UNHRC, Concluding Observations on Israel, CCPR/CO/78/ISR, 21 August 2003: 'The State party should not use "targeted killings" as a deterrent or punishment'; IACtHR, *Suriname Case*, paragraphs 14.3 and 15; Christian Tomuschat, *supra* note 171 at 140; Amnesty International, *State Assassinations and Other Unlawful Killings*, *supra* note 131 at 3; Mordechai Kremnitzer, *ibid* at 1 and 2; Nils Melzer, *ibid* at 59.

²⁴³ UNHRC, Concluding Observations on Israel, CCPR/CO/78/ISR, 21 August 2003, paragraph 15: 'This practice [targeted killing] would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6 ... [T]he Committee remains concerned about the nature and extent of the response by the Israeli Defence Force (IDF) to terrorist attacks'; UNHRC, *Suriname Case*, paragraph 15; ECtHR, *Nachova Case*, paragraph 95; ECtHR, *Streletz Case*, paragraph 87, 96 and 97; ECtHR, *McCann Case*, paragraphs 146-50; ECtHR, *Makaratzis Case*, paragraphs 64-66; ECtHR, *Gül Case*, paragraph 12; ECtHR, *Andronicou and Constantinou Case*, paragraph 192; Mordechai Kremnitzer, *ibid* at 2; Nils Melzer, *ibid* at 59.

²⁴⁴ UNHRC, *de Guerero Case*, paragraphs 13.1 to 13.3; ACiHPR, *Ouédraogo Case*, paragraph 4; UNHRC, Concluding Observations on Israel, CCPR/CO/78/ISR, 21 August 2003, paragraph 15; UNHRC, Alston Targeted Killings Report, paragraph 33; Amnesty International, *State Assassinations and Other Unlawful Killings*, *ibid* at 2; Orna Ben-Naftali & Keren Michaeli, *supra* note 18 at 286; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 18 at 78; Mordechai Kremnitzer, *ibid* at 2; Tom Ruys, *supra* note 17 at 20.

²⁴⁵ UNHRC, *Bourgos Case*, paragraph 12.3: 'it would be unconscionable to interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'; UNHRC, *Celiberti Case*, paragraph 10.3; ECtHR, *Öcalan Case (Chamber)*, paragraph 93; ECtHR, *Öcalan Case (Grand Chamber)*, paragraph 91; IACiHR, *Alejandro Case*, paragraph 23; *Salas et al. v United States* (1993), paragraph 6: '[w]here it is asserted that a use of military force has resulted in noncombatant deaths, personal injury and property loss, the human rights of the noncombatants are implicated'; Manfred Nowak, *supra* note 218 at 41; Nils Melzer, *ibid* at 127.

²⁴⁶ ICJ, *Wall Advisory Opinion* I.C.J Reports, 2004, 134 at paragraph 137; IACiHR, *Victor Saldano v Argentina*, paragraphs 17 and 22; ECtHR, *Bankovic Case*, paragraph 75; ECtHR, *G v UK and Ireland*, paragraph 25; ECtHR, *Illascu Case*, paragraph 312; ECtHR, *Issa Case*, paragraph 69; ECtHR, *Loizidou Case (Preliminary*

second perspective adverts to the negative obligation of a State to ‘respect’ the right to life and suggests that this obligation is binding upon States wherever its agents operate.²⁴⁷

Both of these perspectives suggest that States are bound to observe human rights obligations in cases where they exercise jurisdiction as well as cases where their agents engage in law enforcement activities. This is well supported by international jurisprudence.²⁴⁸

Human rights law (especially the right to life) is applicable both in times of peace and in war.²⁴⁹ With the exception of specifically permitted derogations, human rights law

Objections), paragraph 62; Orna Ben-Naftali & Keren Michaeli, *ibid* at 263; Orna Ben-Naftali & Yuval Shany ‘Living in Denial: The Application of Human Rights in the Occupied Territories’ (2003-2004) 37 *Israel Law Review* 17, 63; Nils Melzer, *supra* note 3 at 79, 135; UNHRC, General Comment No. 31 (2004) paragraph 10; UNGA Resolution 46/135 (17 December 1991); UNHRC, General Comment No. 27 (1998); Nils Melzer, *ibid* at 58; UNHRC, Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, Second Periodic Report Israel, 20 November 2001, CCPR/C/ISR/2001/2, 4 December 2001.

²⁴⁷ Article (2)(1), ICCPR; UNHRC, *Bourgos Case*, paragraph 12.2; UNHRC, *Celiberti Case*, paragraph 10.3; UNHRC, Alston Targeted Killings Report, paragraph 33; UNHRC, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 22 December 2004, E/CN.4/2005/7), paragraph 42; UNHRC, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 13 January 2003, E/CN.4/2003/3), paragraph 37; IACiHR, *Alejandro Case*, paragraph 23; Nils Melzer, *ibid* at 58.

²⁴⁸ IACiHR, *Alejandro v Cuba* (1999), paragraph 23: ‘In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographical area, but to whether, in those specific circumstances, the State observed the rights of a person subject to its authority and control ’; IACiHR, *Victor Soldano v Argentina* (1999) paragraph 17: ‘a state party to the American convention may be responsible under certain circumstances for the acts and omissions of its agents which may produce effects or are undertaken outside the states own territory’; UNHRC, General Comment No. 31 (2004) paragraph 10; UNHRC, General Comment No. 23 (1994) paragraph 4; ECiHR, *G v UK and Ireland* (1985) paragraph 25: ‘the authorized agents of the State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property “within the jurisdiction” of that State, to the extent that they exercise jurisdiction over such persons or property’; UNHRC, *Bourgos Case*, paragraph 12.3; UNHRC, *Celiberti Case*, paragraph 10.3; ECtHR, *Loizidou v Turkey (Preliminary Objections)* (1995), paragraph 62; ECiHR, *Ayetkin Case*, paragraph 96; ECtHR, *Gül Case*, paragraph 82; ECtHR, *Makaratzis Case*, paragraph 65; Manfred Nowak, *supra* note 218 at 41; IACiHR, *Coard Case*, paragraph 37: ‘While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain’; IACtHR, *Interpretation of the American Declaration*, paragraph 45 and 47; IACiHR, *Salas v United States* (1993), paragraph 6; Thomas Burgenthal ‘To Respect and to Ensure: State Obligations and Permissible Derogations’ in Louis Henkin (ed.) *International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 73; Theodore Meron ‘The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties’ (1995) 89 *American Journal of International Law* 79.

²⁴⁹ ICJ, *Nuclear Weapons Advisory Opinion*, I.C.J Reports, 1996, 226 at 240 paragraph 25; ICJ, *Armed Activities in the Territory of the Congo* I.C.J Reports, 2005, 168 at paragraph 216 and 219; David J Harris, *supra* note 136 at

protects all human beings at all times.²⁵⁰ This was illustrated by the report of the Committee on Economic, Social and Cultural Rights which relied on the *Nuclear Weapons Advisory Opinion*²⁵¹ to rebuff Israel's position on the non-applicability of human rights in situations of armed conflict and occupation.²⁵² International courts have maintained the applicability of States' obligations in situations of armed conflict, occupation and even in the extraterritorial exercise of jurisdiction.²⁵³

This is consistent with the approach adopted by the Inter-American Commission on Human Rights in the *La Tablada Case* where it held those provisions of human rights which provide higher standards of protection than AP I of the Geneva Conventions to be regarded as applicable.²⁵⁴ International jurisprudence has also upheld the concurrent application of IHL and human rights.²⁵⁵

570; Turku Declaration of Minimum Humanitarian Standards, UN Doc. E/CN.4/Sub.2/1991/55 (2 December 1990), paragraphs 50-57; Respect for Human Rights in Armed Conflict, UNGA Res 2444 (XXIII) (19 December 1968); Basic Principles for the Protection of Civilian Populations in Armed Conflicts UNGA Res 2675 (XXV) (9 December 1970); and Declaration on the Protection of Women and Children in Emergency and Armed Conflict UNGA Res 3318 (XXIX) (14 December 1974); Robert Kolb & Richard Hyde, *supra* note 138 at 272; India Supreme Court, *Peoples Union for Civil Liberties v Union of India*, paragraph 7 and 9.

²⁵⁰ Nils Melzer, *supra* note 3 at 58; Marco Sassoli & Antoine A Bouvier, *supra* note 139 at 264.

²⁵¹ ICJ, *Nuclear Weapons Advisory Opinion*, I.C.J Reports, 1996, 226 at 240, paragraph 25.

²⁵² UN ECOSOC, Implementation of the International Covenant on Economic, Social and Cultural Rights, Second Periodic Report, Israel, E/199606.Add.32, 16 October 2001, paragraph 5; Orna Ben-Naftali & Keren Michaeli, *supra* note 18 at 263; Orna Ben-Naftali & Yuval Shany, *supra* note 256 at 63; ECtHR, *Illascu Case*, paragraph 312; Nils Melzer, *supra* note 3 at 79, 135; David Kretzmer, *supra* note 74 at 206.

²⁵³ ICJ, *Armed Activities in the Congo Case* I.C.J Reports, 2005, paragraph 216: 'international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories'; ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, paragraph 25: 'in principle the right not arbitrarily to be deprived of one's life applies also in hostilities'; ICJ, *Wall Opinion* I.C.J Reports, 2004, paragraphs 111 and 113; ECtHR, *Issa Case*, paragraph 69; ECtHR, *Bankovic Case*, paragraph 71; ECtHR, *Loizidou Case (Preliminary Objections)*, paragraph 62; IACiHR, *Alejandre Case*, paragraph 37; IACiHR, *Salas Case*, para 6; Françoise Hampson & Ibrahim Salama, *The Relationship between Human Rights Law and International Humanitarian Law*, 21 June 2005, UN Doc. E/CN.4/Sub.2/2005/14, paragraph 83; UNHRC, General Comment No. 31 (2004), paragraph 10; UNHRC, Concluding Observations of the Human Rights Committee: United States of America, CCPR/C/USA/CO/3, 15 September 2006, paragraph 10; Orna Ben-Naftali & Yuval Shany, *ibid* at 63 and 100; Theodore Meron, *supra* note 248 at 80.

²⁵⁴ IACiHR, *Abella v Argentina (La Tablada)*, Case No. 11.137, Report No. 55/97, 18 November 1997; IACiHR, *Jesuits in El Salvador Case*, paragraph 158 and 161; Orna Ben-Naftali & Keren Michaeli, *ibid* at 264.

²⁵⁵ ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 25; ICJ, *Wall Advisory Opinion*, paragraph 106; ICJ, *Armed Activities Case*, paragraphs 216-217; ECtHR, *Isayeva v Russia* (App No. 57947-49/00) (2005) 41 EHRR 39; ECtHR, *Bankovic v Belgium* (App No. 52207/99) ECHR 12 December 2001 (2007) 44 EHRR SE5; ACHPR, *Commission Internationale des Droits de l'homme et des Libertés v Chad*, Comm. No. 74/92 (1995) reprinted in

When internal violence reaches the threshold of an internal armed conflict, the law enforcement standards of human rights law may be inadequate. However, the impracticability of arrest and other less-than-lethal measures does not (necessarily) justify the killing of suspects.²⁵⁶ The present author argues that, in all situations where lethal force is resorted to (including in armed conflicts against non-legitimate military targets) human rights standards must be complied with.²⁵⁷

Conduct which contravenes the regulatory regimes of human rights law and IHL engage the responsibility of the concerned State (and in some cases individuals).²⁵⁸ In the event that unlawful killings result from targeted killing operations carried out under law enforcement, responsibility attaches. This includes responsibility for both commission and omission.²⁵⁹ States are obliged to ensure that no one is arbitrarily deprived of life and also to protect and preserve the right to life.²⁶⁰

(1997) 18 *Human Rights Law Journal* 34; *Coard v US Case* 10.951, Report No 109/99 (29 September 1999) cited in Robert Kolb & Richard Hyde, *supra* note 138 at 272; IACiHR, *Abella v Argentina (La Tablada)*, Report No 55/97 (18 November 1997), OEA/Ser.L/V/II.95; IACtHR, *Velásquez v Guatemala* (Merits) Series C No. 70 (25 November 2000), paragraph 208; See also Cordula Droege ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 40(2) *Israel Law Review* 310 cited in Noam Lubell ‘Parallel Applications of International Humanitarian Law and International Human Rights Law: An Examination of the Debate’ (2007) 40(2) *Israel Law Review* 648, 650.

²⁵⁶ UNHRC, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 13 January 2003, E/CN.4/2003/3, paragraph 39 and 84; ECtHR, *McCann Case*, paragraph 200 and 205; ECtHR, *Ayetkin v Tukey*, paragraphs 96 and 97; IACiHR, *Alejandro Case*, paragraph 37 and 42; David Kretzmer, *supra* note 74 at 182; Mordechai Kremnitzer, *supra* note 73 at 14; Nils Melzer, *ibid* at 58; MN Schmitt, *supra* note 203 at 529.

²⁵⁷ IACiHR, *Abella (La Tablada) Case*, paragraph 156; UNHRC, E/CN.1994/7, paragraph 610; Mordechai Kremnitzer, *ibid* at 10; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 86; Nils Melzer, *ibid* at 58; Christian Tomuschat, *supra* note 171 at 140; Georg Nolte, *supra* note 235 at 8; Amnesty International, *State Assassinations and Other Unlawful Killings*, *supra* note 131 at 2; Tom Ruys, *supra* note 17 at 35.

²⁵⁸ UNHRC, *Miango v Zaire* (1985) 2 Selected Decisions H.R.C, 219; UNHRC, *Barbato v Uruguay* (1985) 2 Selected Decisions H.R.C, 112; UNHRC, *Burrell v Jamaica* (1997) 4 I.H.R.R, 350; IACiHR, *Jesuites in El Salvador Case*, paragraph 61; ICTY, *Prosecutor v. Drazen Erdemovic*, IT-96-22-T, paragraph 10; US Military Tribunal Nuremberg, *The Trial of Wilhelm List and Others (The Hostages Trial)* (1948), United Nations War Crimes Commission, Law Reports of Trials of War Criminals, vol. VIII, 34-76; ICTY, *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001; ICTY, *Prosecutor v. Kayeshima*, ICTR-95-1-T, 21 May 1999; ICTY, *Prosecutor v. Bagilishema*, ICTR-95-1A-A, 3 July 2002; ECiHR, *G v UK and Ireland* (1985) paragraph 25: ‘In so far as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged’; UNHRC, Alston Targeted Killings Report, paragraph 43; David J Harris, *supra* note 136 at 537.

²⁵⁹ US Supreme Court, *In re Yamashita* (1946) SC 327 US 1: ‘[t]he charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by “permitting them to commit” the extensive and widespread atrocities specified. [...] It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his

Therefore, States must not only prevent but also actively try and punish deprivation of life resulting from criminal acts and the arbitrary conduct of the State's agents.²⁶¹ Failure to do so would be 'incompatible with effective protection of the right to life'.²⁶²

It is noteworthy that certain provisions of IHL and human rights law are *jus cogens*, and give rise to obligations *erga omnes*.²⁶³ Therefore, any violations of these norms also

command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt'; US Military Tribunal Nuremberg, *The Trial of Wilhelm List and Others (The Hostages Trial)* (1948), United Nations War Crimes Commission, Law Reports of Trials of War Criminals, vol. VIII, 34-76: [A commanding general] is charged with notices of occurrences taking place within the territory. [...] If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is no position to plead his own dereliction as a defence'; US Military Tribunal Nuremberg, *The Trial of Wilhelm List and Others (The Hostages Trial)* (1948), United Nations War Crimes Commission, Law Reports of Trials of War Criminals, vol. VIII, 34-76: 'The reports made to the defendant List as Wehrmacht Commander Southeast charge him with notice of the unlawful killing of thousands of innocent people in reprisal for acts of unknown members of the population who were not lawfully subject to such punishment. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility'; *Zafiro Case* 6 RIAA 160 (1925).

²⁶⁰ Article 1(1), American Convention on Human Rights; IACtHR, *Myrna Mack Chang v Guatemala* (2003), paragraph 153; ACiHPR, *Ouédraogo v Burkina Faso* (2001), paragraph 3: '[The State], even if its agents were not the direct authors of the murders, attempted murders, abductions and other methods of intimidation alleged in this communication, was still responsible for ensuring that measures are taken to ensure the protection of the rights under the [ACHPR]'; UNHRC, General Comment No. 6 (1982), paragraph 3.

²⁶¹ UNHRC, *Guerero v Colombia*, paragraph 13.1; UNHRC, *Barbato v Uruguay* (1985) 2 Selected Decisions H.R.C., 112; UNHRC, *Miango v Zaire* (1985) 2 Selected Decisions H.R.C., 219; IACtHR, *Villagran Morales Case*, paragraph 144; IACtHR, *Juan Humberto Sanchez Case*, paragraph 110; IACtHR, *Myrna Mack Chang v Guatemala* (2003), paragraph 153; IACtHR, *Bamaca Velasquez Case*, paragraph 172; David J Harris, *supra* note 136 at 566.

²⁶² IACtHR, *Myrna Mack Chang v Guatemala* (2003), paragraph 152; IACtHR, *Juan Humberto Sanchez Case*, paragraph 110; UNHRC, Concluding Observations on Israel, CCPR/CO/78/ISR, 21 August 2003, paragraph 15: 'State policy ... should be spelled out in clear guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly and by an independent body'.

²⁶³ Article 26, ILC Draft Articles on State Responsibility; ILC, Report on State Responsibility (2001), Commentary on Draft Article 26, at 209, paragraph 5; ICJ, *East Timor Case* I.C.J Reports, 1995, 90 at 102; ICJ, *Barcelona Traction Case* I.C.J Reports, 1970, 3 at paragraph 34; ICJ, *Application of the Genocide Convention Case* I.C.J Reports, 1993, 325, 439-440; ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226 at paragraph 79; ICJ, *Armed Activities in the Congo Case* I.C.J Reports, 2005, 168, paragraph 216 and 219; ICJ, *US Consular Staff in Tehran Case*, paragraph 91; *Assessment of Aliens Case* I.L.R 43, 3 at 8; *In re Koch* I.L.R 30, 496 at 503; ICTY, *Furundzija Case* (Judgment of 10 December 1998), paragraph 158; *Tokyo Suikosha Case* (1969) 13 Japanese Ann. Of International Law 113 at 115; UNHRC, General Comment No. 24 (1994), paragraph 8; Ian Brownlie, *supra* note 96 at 510-11; Lauri Hannikainen *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988) 4; Gordon A Christenson 'The World Court and Jus Cogens' (1987) *American Journal of International Law* 93, 95; Alexander Orakhelashvili 'The Impact of

engage both individual and State responsibility. Individual criminal liability also attaches specifically for 'grave breaches' of IHL which may amount to war crimes.²⁶⁴

c. The Law of Inter-State Use of Force

The UN Charter is the principal international legal convention that governs the 'use of force'.²⁶⁵ The targeted killing of a selected individual on the territory of another State is an example of inter-State use of force. Targeted killing operations carried out on the territory of another State in the absence of the territorial States' consent falls under the customary international law prohibition on the use of force in Article 2(4) of the UN Charter.²⁶⁶ The UN Charter explicitly establishes a general prohibition on the use of force in Article 2(4) which states:²⁶⁷

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 matter inconsistent with the Purposes of the United Nations.

Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 *European Journal of International Law* 59, 63; ICJ, *Nuclear Weapons Opinion* I.C.J Reports, 2004, 134.

²⁶⁴ Articles 8 and 25, ICC Statute; Article 87, AP I; US Military Tribunal Nuremburg, *The Trial of Alfred Felix Alwyn Krupp von Bohlen Und Halbach and Eleven Others (The Krupp Trial)* (1949), The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, vol. X, 130-159; US Military Tribunal (Nuremburg), *In re Altstötter and Others (The Justice Trial)* (1948) War Crimes Reports, vol. 6, 1; US Military Commission Shanghai, *Trial of Lieutenant General Harukei Isayama and Seven Others* (1946) 5 LRTWC 60; ICTY, *Furundzija v. The Prosecutor*, Appeal Judgment, paragraph 120; Israel HCJ, *Public Committee Against Torture in Israel v. The Government of Israel* at paragraph 46; Holland District Court of The Hague (Special Criminal Chamber), *In re PILZ* (1950) AD, vol. 17, 391-392; US Court of Military Appeals, *US v William Calley Jr.* (1973) 22 USCMA 534; Brussels Conseil de Guerre, *In re Public Prosecutor v G.W.* (1966) *Revue Juridique du Congo*, 236; UNHRC, Alston Targeted Killings Report, paragraph 43; Marco Sassoli & Antoine A Bouvier, *supra* note 139 at 665-66; Antonio Cassese *International Criminal Law* (2003) 125-31.

²⁶⁵ Article 103(2) UN Charter: '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'; Robert F Turner, *supra* note 283 at 799; Chris Downes, *supra* note 18 at 286; Louis R Beres, *supra* note 16 at 160; Louis R Beres, *supra* note 16 at 847; Tyler J Harder, *supra* note 16 at 10, 19; Nicholas J Kendall, *supra* note 73 at 1078; Christain Tomuschat, *supra* note 171 at 138; Michael N Schmitt, *supra* note 169 at 621; Mordechai Kremnitzer, *supra* note 139 at 3.

²⁶⁶ ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14 at 100-01; Nils Melzer, *supra* note 3 at 75.

²⁶⁷ Daniel B Pickard 'Legalizing Assassination?: Terrorism, the CIA, and International Law' (2001) 30 *Georgia Journal of International and Comparative Law* 3, 11; Nicholas J Kendall, *ibid* at 1078; Nils Melzer, *ibid* at 51.

The use of force in targeted killing operations may, however, be vindicated on grounds of self-defence and consent.²⁶⁸ Using force is also legitimized by the UN Security Council authorization.²⁶⁹ Therefore, in the absence of the above exculpatory circumstance, any targeted killing operation constitutes aggression which is prohibited in international law.²⁷⁰

States usually engage in targeted killing operations as a defensive measure against transnational organized armed groups.²⁷¹ The main precondition for self-defence is an 'armed attack'.²⁷² This requirement raises some difficulty regarding the threshold at which minor but persistent attacks by organized armed groups amount to an 'armed attack' under Article 51 of the UN Charter.²⁷³

²⁶⁸ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 10; Harold Koh, *supra* note 39 at 3; UNHRC, Alston Targeted Killings Report, paragraph 39; Malcolm N Shaw, *supra* note 136 at 1026; David J Harris, *supra* note 136 at 725; Chris Downes, *ibid* at 280; Tom Ruys, *supra* note 17 at 22; Derek Bowett *Self Defence in International Law* (1958) 152; Abraham D Sofer 'Terrorism, The Law and the National Defense' (1989) 126 *Military Law Review* 89, 103; ILC Report on State Responsibility (2001); Nils Melzer, *ibid* at 75; Derek Bowett 'Reprisals Involving Recourse to Armed Force' (1972) *American Journal of International Law* 3; Myres McDougal & Florentino Feliciano, *supra* note 193 at 232-41 cited in Nigel D White 'Self-Defence, Security Council Authority and Iraq' in Richard Burchill, Nigel D White & Justin Morris (eds.) *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (2005) 380.

²⁶⁹ Daniel B Pickard, *supra* note 266 at 11: 'Under Article 39, the Security Council is empowered to determine the existence of any threat to the peace, breach of the peace or act of aggression. If the Security Council determines that there has been such a threat to, or breach of, the peace, it may under Article 42 authorize members of the United Nations to use force.'; See Hans Kelsen 'Collective Security and Collective Self-Defence under the Charter of the United Nations' (1948) 42 *American Journal of International Law* 783, 793 cited in Leo van Den Hole 'Anticipatory Self-Defence under International Law' (2003) 19 *American University International Law Review* 67, 72; Daniel B Pickard, *supra* note 266 at 10; Chris Downes, *supra* note 18 at 286.

²⁷⁰ See the Abu Jihad incident in Tunis; UNSC, Resolution 611 of 25 April 1988; Nils Melzer, *ibid* at 75.

²⁷¹ Israel HCJ, *Public Committee Against Torture in Israel v The Government of Israel*, paragraph 39; UNHRC, Alston Targeted Killings Report, paragraph 40; Myres McDougal & Florentino Feliciano, *supra* note 193 at 232-41 cited in Nigel D White 'Self-Defence, Security Council Authority and Iraq' in Richard Burchill, Nigel D White & Justin Morris (eds.) *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (2005) 380; Derek Bowett, *supra* note 268 at 187; Michael N Schmitt, *supra* note 203 at 526.

²⁷² Israel HCJ, *Public Committee Against Torture in Israel v. The Government of Israel* at paragraph 46; Orna Ben-Naftali & Keren Michaeli, *supra* note 132 at 463-464; UNHRC, Alston Targeted Killings Report, paragraph 41

²⁷³ UNHRC, Alston Targeted Killings Report, paragraph 41; ICJ, *Nicaragua Case*, paragraph 195; Howard A Wachtel 'Targeting Osama bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy' (2005) 55 *Duke Law Journal* 677, 693: 'a state may use past practices of terrorist groups and past instances of aggression as evidence of a recurring threat. In light of this threat, a state may invoke Article 51 to protect its interests if there is sufficient reason to believe that a pattern of aggression exists.'

In the *Oil Platforms Case*, the ICJ disallowed the United States' contention that the repeated attacks from the platforms constituted an 'armed attack' in the aggregate.²⁷⁴ The high threshold for the qualification of low-intensity incidences as armed attack was reaffirmed in the *Wall Advisory Opinion*²⁷⁵ and in the *Armed Activities in the Congo*.²⁷⁶ Before responding with force to attacks by non-State actors, States should generally assess each attack on its merits with a view to determining whether it amounts to an 'armed attack'.²⁷⁷

With the ever-increasing threats being posed by transnational armed groups, a popular construction of self-defence appears to be that of the *Caroline Case* (anticipatory self-defence).²⁷⁸ This incident justified the use of force against non-State entities on the territory of another State, especially where the territorial State fails to prevent attacks emanating from its territory.²⁷⁹

However, considerable problems arise with regard to the lawfulness of anticipatory targeted killings of non-State entities whose conduct does not engage the responsibility of any State.²⁸⁰ In many instances the attack against which the targeted killing operation is

²⁷⁴ ICJ, *Oil Platforms Case (Iran v. US)* I.C.J Reports, 2003, 161.

²⁷⁵ ICJ, *Wall Advisory Opinion* I.C.J Reports, 2004, 136.

²⁷⁶ ICJ, *Armed Activities in the Congo Case* I.C.J Reports, 2005, 116.

²⁷⁷ UNHRC, Alston Targeted Killings Report, paragraph 41; ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14 at 100-01, paragraphs 195 and 199; ICJ, *Armed Activities in the Congo Case* I.C.J Reports, 2005, 116.

²⁷⁸ *Caroline Case* (1897) cited in Nils Melzer, *ibid*; Michael N Schmitt, *supra* note 203 at 533; Noam Chomsky 'The New War Against Terror' transcribed from audio recorded during Chomsky's talk at the Technology and Culture Forum at MIT 24 October 2001 available online at <http://www.urban75.com/Action/news142.html> cited in Mathew J Machon *Targeted Killing as an Element of US Foreign Policy in the War on Terror* (2006) 5; David J Harris, *supra* note 136 at 748; Malcolm N Shaw, *supra* note 136 at 1028; Emanuel 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' (2001) 15 *Temple International and Comparative Law Journal* 196.

²⁷⁹ ICJ, *Wall Advisory Opinion Case* I.C.J. Reports, 2004, 136; ICJ, *Armed Activities in the Congo* I.C.J Reports, 2005, 168, paragraph 149; Gary Solis, *supra* note 84 at 7; Michael N Schmitt, *supra* note 169 at 646; William Hays Parks, *supra* note 17 at 7; Mordechai Kremnitzer, *supra* note 73 at 12 and 14; Nils Melzer, *ibid* at 52.

²⁸⁰ ICJ, *Wall Advisory Opinion* I.C.J Reports, 2004, 134 at paragraph 216; Amos N Guiora, *supra* note 132 at 323; UNHRC, Alston Targeted Killings Report, 12-13, paragraph 39: 'Controversy has arisen, however, in three main areas: whether the self-defence justification applies to the use of force against non-state actors and what constitutes an armed attack by such actors; the extent to which self-defence alone is a justification for targeted killings; and, the extent to which States have a right to "anticipatory" or "pre-emptive" self-defence.'; George P Fletcher & Jens David Ohlin *Defending Humanity: When Force is Justified and Why* (2008) 12 cited in Nigel D White 'Defending Humanity: When Force is Justified and Why' by George P Fletcher & Jens David

conducted is neither occurring nor imminent, but is likely to take place in the near future.²⁸¹ This scenario places the burden of proving that the impending attack is of such gravity as to create a self-defence situation with the State which seeks to use force.

Proponents of anticipatory self-defence hold that the 'inherent' customary right of self-defence is unrestricted by Article 51 of the UN Charter.²⁸² The textual formulation of Article 51 has been construed broadly to encompass not only an actual or imminent threats but also 'continuing threats'.²⁸³ This finds support in Security Council Resolutions 1367 and 1373 which are affirmed in State practice.²⁸⁴

In this regard, the proponents consider targeted killing to be permissible when the suspected terrorist is visible rather than only when the planned attack is already imminent or is being carried out.²⁸⁵ The contentions of the proponents of anticipatory self-defence should, however, be strictly regulated otherwise the Article 2(4) customary prohibition on the use of force would be diminished.

Opponents of anticipatory self-defence take a more restrictive approach to interpreting Article 51 of the UN Charter. They hold that the use of force (especially

Ohlin' (2009) 10 *Melbourne Journal of International Law* 379, 379-380; Nigel D White, *supra* note 268 at 235, 236 and 255; Nils Melzer, *ibid* at 53; Leo van den Hole, *supra* note 269 at 95; Michael N Schmitt, *ibid* at 534.

²⁸¹ Emanuel Gross, *ibid* at 1196; Mordechai Kremnitzer, *ibid* at 13; Nicholas J Kendall 'Israeli Counter-Terrorism: "Targeted Killings" Under International Law' (2002) 80 *North Carolina Law Review* 1069, 1079; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 92; Chris Downes, *supra* note 18 at 287.

²⁸² Abraham D Sofer, *supra* note 268 at 107; UNHRC, Alston Targeted Killings Report, paragraph 40; David J Harris, *ibid* at 748; Malcolm N Shaw, *ibid* at 1026; Nils Melzer, *supra* note 3 at 53; Emanuel Gross, *supra* note 73 at 1196; Louis Beres, *supra* note 16 at 165; Nicholas J Kendall, *supra* note 281 at 1079.

²⁸³ Gary Solis, *supra* note 73 at 7; Tyler J Harder, *supra* note 16 at 19, 34; Daniel B Pickard, *supra* note 266 at 21, 27; Louis Beres, *supra* note 16 at 847; Michael N Schmitt, *supra* note 169 at 644; Jeffrey F Addicott, *supra* note 140 at 769, 774; Jonathan Ulrich 'The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism' (2005) 45 *Virginia Journal of International Law* 1029, 1050; Joshua Raines, *supra* note 16 at 238; William Hays Parks, *supra* note 17 at 8; Robert F Turner 'It's Not Really "Assassination": Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites' (2003) 37(3) *University of Richmond Law Review* 799, 803; Christine Gray, *supra* note 481 at 112.

²⁸⁴ UN Security Council, Res. 1368 (2001) 12 September 2001; UN Security Council, Res. 1372 (2001) 28 September 2001; UNHRC, Alston Targeted Killings Report, paragraph 40; Malcolm N Shaw, *supra* note 136 at 1028; Micheal N Schmitt, *supra* note 203 at 532; Press Release, NATO Statement by the North Atlantic Council, 12 September 2001; Terrorist Threat to the Americas, OAS Doc.RC.24/RES.1/01 (21 Sept 2001).

²⁸⁵ W Taft & A Buchwald 'Pre-emption, Iraq and International Law' (2003) 97 *American Journal of International Law* 557; Nils Melzer, *supra* note 3 at 53; UNHRC, Alston Targeted Killings Report, paragraph 45.

targeted killings) in the absence of an actual or imminent armed attack is unlawful.²⁸⁶ They view such use of force as being likely to be open to abuse leading to arbitrary killings on the basis of suspicion and unverifiable information provided by intelligence agencies.²⁸⁷ Additionally, the broad and permissive interpretation of self-defence based on the 'just' nature of the 'broader cause' (for which force is used) may cause violations of IHL and human rights law.²⁸⁸

Targeted killing under the law of the use of force is often vindicated under the notions of necessity and proportionality.²⁸⁹ These two grounds proceed from the premise that the harm sought to be averted is far greater than that which the killings seek to prevent.²⁹⁰ The above justifications thus appear as the standards by which the permissibility of violations of the targeted individual's right to life and of the territorial sovereignty of another State is measured.

This implies that a targeted killing would be permissible if the threat posed by the (imminent or continuing) activities of the targeted individual outweighs the harm that would attend violations of: i) the individual's due process guarantees; ii) another State's sovereignty; and iii) the possibility of incidental civilian casualties. This argument

²⁸⁶ Ziyad Motala & David T Butle Ritchie 'Self-Defense in International Law, The United Nations, and the Bosnian Conflict' (1995) 57 *University of Pittsburgh Law Review* 1, 29; Jason S Wratford 'The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad' (2007) 60 *Air Force Law Review* 30, 55; UNHRC, Alston Targeted Killings Report, paragraph 45; Nils Melzer, *supra* note 3 at 53.

²⁸⁷ UNHRC, Alston Targeted Killings Report, paragraph 37; Chris Downes, *supra* note 18 at 287; Nils Melzer, *ibid* at 53; Georg Nolte, *supra* note 235 at 116; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 92

²⁸⁸ ICJ, *Nuclear Weapons Advisory Opinion*, I.C.J Reports, 1996, 226, paragraph 25; Jasmine Moussa 'Can Jus Ad Bellum Override Jus in Bello?: Reaffirming the Separation of the Two Bodies of Law' (2008) 872 *International Review of the Red Cross* 963; Dapo Akande 'Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court' (1997) 68 *British Yearbook of International Law* 209; UNHRC, Alston Targeted Killings Report, paragraph 42; Roy Schondorf, *supra* note 42 at 308.

²⁸⁹ ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14 at paragraph 194; UNHRC, Alston Targeted Killings Report, paragraph 39; Oscar Schachter 'The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620, 1633-34; Israel H CJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 40.

²⁹⁰ *Al-Aulaqi v Obama* (Complaint for Declaratory and Injunctive Relief) paragraph 2; ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226 Dissenting Opinion of Judge Higgins, paragraph 5; Nils Melzer, *supra* note 3 at 53; Jonathan Ulrich, *supra* note 283 at 1057; Philip B Heymann & Juliette N Kayyem, *supra* note 73 at 60, 67; Michael P Scharf 'Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons through Sanctions, Use of Force and Criminalization' (1999) 20 *Michigan Journal of International Law* 477-521; Jane Mayer, *The Predator War*, *The New Yorker*, 26 October 2009.

incorrectly ignores the parallel applicability of the law of the use of force with human rights law and IHL in situations of targeted killing.²⁹¹

Disregard for the rules of these other regimes in pursuit of self-defence objectives results in State and individual responsibility.²⁹² Thus, using force in self-defence to the exclusion of the requirements of human rights law and IHL would be unlawful.²⁹³

Extra-territorial targeted killings may quite obviously be justified if they are carried out on the basis of self-defence with the territorial State's consent.²⁹⁴ The existence of a legitimate self-defence situation is not, however, sufficient to legitimate a particular incident of targeted killing.²⁹⁵ This is because the law of self-defence determines the lawfulness of a targeted killing operation only with respect to the injured State. With regard to the injured individual, human rights law and IHL determines the lawfulness of the targeted killing.²⁹⁶ Thus, targeted killing operations (even in legitimate self-defence situations) must cumulatively conform to the rules of human rights law and IHL (where applicable).

The upshot of the above discussion is that while the presence of consent legitimates resort to the use of force in self-defence, this does not absolve (both the consenting and the targeting) States' obligations to observe human rights and IHL regarding the use of lethal force against an individual.²⁹⁷ After a targeted killing operation, the consenting State should

²⁹¹ UNHRC, Alston Targeted Killings Report, paragraph 43; ICJ, *Nuclear Weapons Opinion*, paragraph 25.

²⁹² ILC, Articles on State Responsibility at 166-67; Article 2(4) UN Charter; ICJ, *Corfu Channel Case* I.C.J Reports, 1949, 4 at paragraph 202; UN Security Council, UN Doc. S/RES/1304 (2000); ICJ, *Armed Activities in the Congo* I.C.J Reports, 2005, 168, paragraphs 154 and 216; ICJ, *Wall Advisory Opinion* I.C.J Reports, 2004, 134; ICJ, *Corfu Channel Case* I.C.J Reports, 1949, 4 at paragraph 202; Article 8, ILC Draft Articles; ILC *Commentary on Draft Articles on State Responsibility* (2001) 104; ICJ, *Nicaragua Case*, I.C.J Reports, 1986, 64 at paragraph 115; ICTY, *Prosecutor v Tadic* (1999) 38 ILM 1518, 1541; Ian Brownlie, *supra* note 96 at 449; David J Harris, *ibid* at 758; Malcolm N Shaw, *supra* note 136 at 707-8 and 1021; Derek Bowett, *supra* note 268 at 1021.

²⁹³ Malcolm N Shaw, *ibid* at 708; UNHRC, Alston Targeted Killings Report, paragraph 43.

²⁹⁴ UN Security Council, UN Doc. S/RES/1304 (2000); ICJ, *Corfu Channel Case* I.C.J Reports, 1949, 4 at paragraph 202; ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14 at paragraph 246; ICJ, *Armed Activities in the Territory of the Congo*, paragraphs 154 and 216; ICJ, *Wall Advisory Opinion* I.C.J Reports, 2004, 134; David J Harris, *ibid* at 758; Nils Melzer, *supra* note 3 at 75; UNHRC, Alston Targeted Killings Report, paragraph 37.

²⁹⁵ Special Rapporteur (Executions), E/CN.4/2005/7, at paragraph 41; Nils Melzer, *supra* note 3 at 75.

²⁹⁶ Nils Melzer, *supra* note 3 at 74-75; UNHRC, Alston Targeted Killings Report, paragraph 37.

²⁹⁷ Article 6, ICCPR; UNGA, Resolution on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, A/Res/51/191 of 10 March 2005, paragraph 1; UNHRC, Alston Targeted Killings Report, paragraph 37; Report of Special Rapporteur (Executions), E/CN.4/2005/7, paragraph 41.

carry out a follow-up investigation into the extent to which such killing is conducted in accordance with applicable human rights law and IHL.²⁹⁸

In the event that a targeted killing operation is found to have unlawfully contravened restrictions on the use of force, liability attaches at two levels. First, a violation of the limitations on using force in self-defence engages both State and individual criminal responsibility for aggression.²⁹⁹ Secondly, any unlawful killing in violation of IHL may engage individual responsibility for war crimes.³⁰⁰ It is noteworthy that self-defence may not be invoked as a vindication of a State's conduct if it results in violations of IHL.³⁰¹

4. Legal Concerns Arising from the Notion of Targeted Killing

The ascertainment of the identity of the target ordinarily precedes the decision to strike such a target.³⁰² This is consonant with the principle of distinction which requires parties to an armed conflict to distinguish between civilian objects and military objectives.³⁰³ However, in

²⁹⁸ UNHRC, Alston Targeted Killings Report, paragraph 38; Israel HCJ, *PCATI v Israel*, paragraph 40.

²⁹⁹ UNSC, Resolution 611 of 25 April 1986; UNSC, Press Release SC/8039 of 25 March 2004: '[a] draft resolution that would have condemned the most recent extrajudicial execution of Sheikh Ahmed Yassin along with six other Palestinians on Monday would have called for a complete cessation of extrajudicial killings...'; UNSG, Secretary-General Urges Middle East Parties to Avoid Escalation of Violence, Following Targeted Killings, Rocket Attacks, available at <http://www.un.org/News/Press/docs/2006/sgsm10341.doc.htm>; UNSG, Press Release SG/SM/9210 of 22 March 2004; Steven R David, *supra* note 84 at 4; Michael N Schmitt, *supra* note 169 at 626; Nils Melzer, *ibid* at 30; Alston Targeted Killings Report, paragraph 43.

³⁰⁰ UNHRC, Alston Targeted Killings Report, paragraph 43; US Military Court in Germany, *Trial of Otto Skorzeny and Others* (1947), United Nations War Crimes Commission, Law Reports of Trials of War Criminals, vol. IX, 1949, 90-93; Israel Military Court, *Military Prosecutor v Omar Mahmud Kassem and Others* (1969) ILR vol. 42, 1971, 470-483; US Supreme Court, *Eain v Wilkes* (1981) 454 US 894, L. Ed. 2d 208, 102 S. Ct. 390.

³⁰¹ ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 79; Article 21, ILC Draft Articles; ILC, Draft Articles on State Responsibility at 166-67; UNHRC, Alston Targeted Killings Report, paragraph 43.

³⁰² US Supreme Court, *Ex parte Quirin* (1942) 317 U.S. 1, 31; *Osman Bin Haji Mohamed Ali and Another v The Public Prosecutor* (1969) Law Reports, vol. 1 Appeal Cases, 430-455; Nigeria Supreme Court, *Pius Nwaoga v The State* (1972) ILR, 494-497; Nils Melzer, *ibid* at 415; Amos N Guiora, *supra* note 132 at 323.

³⁰³ Article 48 and 50 AP I; ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226, paragraph 78: 'The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack.; Israel Military Court, *Military Prosecutor v Omar Mahmud Kassem and Others* (1969) ILR vol. 42, 1971, 470-483; Jean-Marie Henckaerts & Louis Doswald-Beck, *supra* note 140 at Rule 1; Marco Sassoli & Antoine A Bouvier, *supra* note 139 at 807, 810; Michael N Schmitt, *supra* note 203 at 136; Nils Melzer, *ibid* at 407.

the case of many transnational terrorist organizations,³⁰⁴ which are the main objects of targeted killing, the element of distinction becomes exceedingly blurred.³⁰⁵ To a large extent this results from the involvement of civilians in hostilities coupled with the exploitation by these terrorist organizations of the difficulty in determining their identities to dissimulate their activities.³⁰⁶

The absence of uniforms within the ranks of the terrorist groups raises concerns about the ability to identify, with certainty, individuals as belonging to a hostile force.³⁰⁷ Thus, the legal status and by extension the culpability of an individual not wearing a uniform but suspected of involvement in terrorism is far less easily ascertained.³⁰⁸ To compound this, the identification of individuals as terrorists grows more difficult as organizations, such as Al-Qaeda, become a network of small dispersed cells, or even individuals, thereby making the association with a hostile armed group even more tenuous.³⁰⁹

Another legal issue that compounds the difficulties surrounding the classifying and evaluating of targeted killings is the fact that these operations are carried on outside the immediate theatre of the conflict.³¹⁰ Examples include counter-terrorist engagements involving targeted killings in Yemen, Pakistan, or Somalia.³¹¹ A move towards the vindication of targeted killings in such situations brings about the unnecessary expansion of

³⁰⁴ Tom Ruys, *supra* note 17 at 10; White House *The National Security Strategy of the United States of America* (2002) 15; Israel HCJ, *PCATI v Israel*, paragraph 2; Israel HCJ, *Iyad v Israel* C.A. 6659/06 (pending).

³⁰⁵ UNHRC, Alston Targeted Killings Report, 18, paragraph 56; Knut Dörmann 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85 *International Review of the Red Cross* 45, 47.

³⁰⁶ Gabriella Blum & Philip Heymann 'Law and Policy of Targeted Killing' (2010) 1 *Harvard National Security Journal* 145-170; Article 50(3), AP I; See ICTY, *Prosecutor v Galic* (Appeal Judgment) IT-98-29-A (30 November 2006), paragraphs 135-138; Israel HCJ, *Public Committee Against Torture in Israel v Israel*, paragraph 36 and 40.

³⁰⁷ Gabriella Blum & Philip Heymann, *supra* note 239 at 146; Roy Schondorf, *supra* note 42 at 308.

³⁰⁸ Gabriella Blum & Philip Heymann, *ibid* at 157 and 169.

³⁰⁹ Gabriella Blum & Philip Heymann, *ibid* at 169; UNHRC, Alston Targeted Killings Report, paragraph 55.

³¹⁰ Gabriella Blum & Philip Heymann, *supra* note 239 at 156.

³¹¹ Gabriella Blum & Philip Heymann, *ibid* at 151; UNHRC, Alston Targeted Killings Report, paragraph 55; Michael N Schmitt, *supra* note 203 at 526; Amnesty International, Pakistan: U.S. Involvement in Civilian Deaths, January 31, 2006, available at <http://web.amnesty.org/library/Index/ENGASA330022006> (accessed 17 September 2010); Mark Mazzetti, Pentagon Sees Move in Somalia as Blueprint, *The New York Times*, January 13, 2007, A6; Michael R Gordon & Thomas L Friedman, Details of U.S. Raid in Somalia: Success So Near, a Loss So Deep, *The New York Times*, October 25, 1993, A1.

the geographical scope of the armed conflict.³¹² Additionally, such a vindictory move will be encumbered by rules concerning the peaceful relation of states, notably Article 2(4) of the UN Charter.³¹³

The upshot of this legal concern is that, if unrestrained, targeted killings may increasingly be deployed against individuals or in territories that are much harder to justify.³¹⁴ This may be illustrated by the furore raised over a US ‘hitlist’ of drug lords alleged to have been bankrolling the Taliban in Afghanistan:³¹⁵

Recent reports about a U.S. “hit list” of Afghan drug lords, even though supposedly taking place in an active combat zone, have sparked criticism that drug lords, even when they finance the Taliban, do not fit neatly within the concept of “combatant,” and must instead be treated with law enforcement tools.

A related legal concern that is germane to the very nature of targeted killing is the issue of incidental civilian casualties.³¹⁶ Targeted killing operations aimed at terrorists invariably cause incidental harm to civilians and objects that are not legitimate military targets.³¹⁷ The legitimacy of the extent of incidental harm to civilians in the course of an armed conflict is pegged on its proportionality to the anticipated military gain that stands to be achieved.³¹⁸

³¹² Gabriella Blum & Philip Heymann, *ibid* at 156.

³¹³ Gabriella Blum & Philip Heymann, *ibid* at 155.

³¹⁴ Gabriella Blum & Philip Heymann, *ibid* at 148.

³¹⁵ Gabriella Blum & Philip Heymann, *ibid* at 156; Patrick Gallahue, *supra* note 68 at 2.

³¹⁶ Article 58(1)(c), AP I; UNHRC, Alston Targeted Killings Report, paragraph 30; Michael N Schmitt “Direct Participation in Hostilities” and 21st Century Armed Conflict’ in Horst Fischer, Wolff Heintschel von Heinegg & Christian Raap (eds.) *Crisis Management and Humanitarian Protection* (2004) 547.

³¹⁷ Michael N Schmitt, *supra* note 316 at 547; UNHRC, Alston Targeted Killings Report, paragraph 79; Report of the Mission of the UN Special Rapporteur (Executions) to Israel and Lebanon, A/HRC/2/7, paragraphs 30, 68-70; Report of the Mission of the UN Special Rapporteur to Afghanistan, A/HRC/11/2/Add.4, paragraphs 9, 23-24; Report of the Special Rapporteur (Executions), E/CN.4/2003/3, paragraph 10.

³¹⁸ Robert Kolb & Richard Hyde, *supra* note 138 at 131; ICTY, *Prosecutor v Galic* (Trial Judgment) IT-98-29-T (5 December 2003), paragraph 51; *Ethiopia v Eritrea* (Western Front, Aerial Bombardment and Related Claims—Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25 & 26) (Ethiopia-Eritrea Claims Commission) (19 December 2005), paragraph 113; Michael N Schmitt, *ibid* at 546-47; Israel H CJ, *PCATI v Israel*, paragraphs 36 and 40.

In the *Caroline* incident, Mr. Webster indicated that the use of force in self-defence should not be ‘unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.’³¹⁹ The *jus ad bellum* proportionality flowing from Article 51 of the UN Charter has been interpreted as encompassing the means and method being used as well as the nature of the target against whom the attack is being directed.³²⁰

5. Terrorist Threats: Terrorism and Targeted Killing in Contemporary Legal Doctrine

The attacks on the twin towers in New York, of September 11, 2001, are regarded as having been the unveiling not only to America but also the rest of the world of a new and continuing threat.³²¹ This threat was qualitatively different and far deadlier than previously known threats.³²² In assessing the threats posed by terrorism and the contemporary legal doctrine concerning the lawfulness of targeted killing using drones, we must characterize the nature of the conflict.

a. Defining and Characterizing Terrorism

As Naftali and Michaeli hold, terrorism, like pornography, is much easier to recognize than it is to define.³²³ Terrorism defies the classical moulds that international law had set out for

³¹⁹ ICJ, *Oil Platforms*, paragraph 51; ICJ, *Nicaragua Case*, paragraph 194; ICJ, *Nuclear Weapons Opinion*, para 41.

³²⁰ Amy E Eckert & Manooher Modifi ‘Doctrine or Doctrinaire – The First Strike Doctrine and Pre-emptive Self-Defense under International Law’ (2004) 12 *Tulane Journal of International & Comparative Law* 117, 136.

³²¹ Tom Ruys, *supra* note 17 at 97; Mordechai Kremnitzer, *supra* note 73 at 12.

³²² Thomas Michael McDonnell ‘Assassination/ Targeted Killing of Suspected Terrorists—A Violation of International Law?’, December 2005, available at http://library.law.pace.edu/blogs/jib/2005/12/assaainationtargeted_killing.html (accessed 10 July 2010); Stephen G Rademaker ‘Use of Force after 9/11’ (2004-2005) 5 *Chicago Journal of International Law* 461 citing President George W Bush *Address at National Defense Union* (Feb 11, 2004), in 40 *Weekly Comp Pres Doc* 216, 216 (Feb 16, 2004): ‘America and the entire civilized world will face this threat for decades to come. We must confront the danger with open eyes and unbending purpose. I have made clear to all the policy of this Nation: America will not permit terrorists and dangerous regimes to threaten us with the world’s most deadly weapons’; Emanuel Gross, *supra* note 278 at 195: ‘[They] were vicious reminders of the danger [of] terrorism’.

³²³ Israel HCJ, *PCATI v Israel*, paragraph 2; *Hamdan v Rumsfeld* 126 S. Ct. 2749 (2006); *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964); William F Wright ‘Limitations on the Prosecution of International Terrorists by the International Criminal Court’ (1999) 8 *MSU-DCL Journal of International Law* 139, 141; Joseph J Lambert *Terrorism and Hostages in International Law* (1990) 13-23 Grotius Publications: Cambridge; Ingrid Detter *The Law of War* (2000) 25 Cambridge University Press: Cambridge; Torsten Stein ‘How Much Humanity Do

situations of armed conflict.³²⁴ In its modern forms, categorizing terrorism as ‘international’ or ‘non-international’ armed conflicts may cause certain difficulties.³²⁵ This is primarily because the dynamic of present day terrorism is such that its conduct, actors, forms and manifestations, and its means and methods, are so dynamic as to be compatible with what it was earlier cut out to be.³²⁶

A ‘terrorist’ will in the present research be defined in terms of the following disjunctive criteria set down by the UN Security Council as individuals who commit criminal acts, including against civilians with the intent to cause death or serious bodily injury, and/or; take hostages, with the purpose to provoke terror in general public or within a group of persons or particular persons; intimidate a population or compel a government or an international organization to do or to abstain from doing any act; or commit acts that constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.³²⁷

A supplementary definition of terrorism was provided by former UN Secretary General Kofi Annan who stated in his Report *In Larger Freedom* as any act ‘intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act’.³²⁸

A better characterization of US conflict with al Qaeda would be an armed conflict of a transnational character.³²⁹ This is primarily because the concerned belligerents in such a conflict normally comprise individuals of varying nationalities and also the fact that the

Terrorists Deserve?’ in Delissen & Tanja *Humanitarian Law of Armed Conflict: Challenges Ahead* (1991) 567, 569 Martinus Nijhoff Publishers: London cited in Ben-Orna Naftali & Keren Michaeli, *supra* note 18 at 271.

³²⁴ Ben-Orna Naftali & Keren Michaeli, *ibid* at 271.

³²⁵ Ben-Orna Naftali & Keren Michaeli, *ibid* at 271.

³²⁶ Ben-Orna Naftali & Keren Michaeli, *ibid* at 271.

³²⁷ UNSC, Resolution 1566 of 8 October 2004, UN Doc S/Res/1566, 2, paragraph 3.

³²⁸ UNSG, Report by the Secretary General of the UN ‘In Larger Freedom: Towards Development, Security and Human Rights for All’, UN Doc A/59/2005, paragraph 91.

³²⁹ UNHRC, Alston Targeted Killings Report, paragraph 53-54.

location of hostilities would invariably transcend borders of states.³³⁰ Advantageous to such a characterization is the fact that it implicitly skirts the restrictive and state-centric textual formulation of Common Article 2 of the Geneva Conventions of 1949.³³¹

This characterization, however, is not without its challenges. In the absence of explicit legal recognition of ‘transnational’ armed conflict in any international treaty or agreement, there is no clarity as to the specific regulations that would be applicable in such a conflict.³³² However, this challenge is not insurmountable as the law of international armed conflict is supposed to apply whenever a conflict is beyond the scope of internal armed conflict.³³³

More important, is that fact that customary international law would definitely be applicable in this situation.³³⁴ This is consonant with the Martens Clause which states ‘the principles of the law of nations, as they result from the usages established among civilized peoples,’ would apply. Any assertion should be rejected that, insofar as international law has taken a gradualist approach in considering non-state actors as its subjects, its protections do not extend thus far.³³⁵ This is because with such recognition there is a contemporaneous recognition and protection of the rights of concerned individuals.³³⁶ The upshot of this is that however termed, in the engagements against terrorists, customary international law will come into play.³³⁷

In this regard, we must note that the Geneva Conventions’ extensive ratification elevates them to the status of rules of customary IHL.³³⁸ According to the ICRC Study

³³⁰ Harold Koh, *supra* note 39; Michael N Schmitt, *supra* note 203 at 533.

³³¹ Article 2, GCs: ‘[t]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them...’

³³² UNHRC, Alston Targeted Killings Report, paragraph 57.

³³³ ICJ, *Wall Advisory Opinion* I.C.J Reports, 2004, 163 at paragraph 46; ICTY, *Prosecutor v Tadic* (Defence on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1-AR72 (2 October 1995), paragraph 97.

³³⁴ Nils Melzer, *supra* note 3 at 32-35; Gabriella Blum & Philip Heymann, *supra* note 239 at 158.

³³⁵ Ian Brownlie, *supra* note 96 at 62-67.

³³⁶ Ian Brownlie, *ibid* at 62-67.

³³⁷ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 60.

³³⁸ ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226 at paragraph 79; ICJ, *North Sea Continental Shelf Case* I.C.J Reports, 1951, 131, paragraph 72; David J Harris, *supra* note 139 at 27.

‘majority of the provisions of the Geneva Conventions, including Common Article 3, are considered to be part of customary international law.’³³⁹ It is noteworthy that many of the provisions of the Additional Protocols are considered as being reflective of customary law.³⁴⁰ A salient example of this is Article 75 of AP I³⁴¹ which has received scholarly endorsement.³⁴²

b. (Counter-terrorist) Combat Engagements against Non-State Actors

The notion of a war against terrorism or transnational terrorist organizations brings about the issue of whether a state can legitimately use force against a non-state actor.³⁴³ The use of force in this case will be dependent on whether force is used on a states’ own territory, or on the territory of another state with or without consent. Classical international law emphatically rejects such a proposition. In 1758, Vattel stated that ‘the sovereign power alone is possessed of authority to make war’³⁴⁴ while Jean Jacques Rousseau declared in 1763 that ‘each State can have only other States, and not men, as enemies since no true relationship can be established between things of different natures.’³⁴⁵

Later developments in international law revealed an inclination towards the recognition of non-state actors as belligerents and thus parties to armed conflicts. The United States, for instance, engaged in armed conflict with guerrillas in the Philippines in spite of their lacking in sovereign status.³⁴⁶ This conflict significantly furthered the

³³⁹ ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226 at paragraph 79: ‘they constitute intransgressible principles of international customary law’; William H Taft IV ‘The Law of Armed Conflict After 9/11: Some Salient Features’ (2003) 28 *Yale Journal of International Law* 319, 321-22.

³⁴⁰ William H Taft IV, *ibid* at 322.

³⁴¹ William H Taft IV, *ibid* at 322-23.

³⁴² Yoram Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) 32; Adam Roberts ‘Counter-terrorism, Armed Force and the Laws of War’ (2002) *Survival* 16.

³⁴³ UNHRC, Alston Targeted Killings Report, paragraph 40.

³⁴⁴ Emerich De Vattel ‘The Law of Nations’ in Béla Kapossy & Richard Whatmore (eds.) *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (2008) 9.

³⁴⁵ Jean Jacques Rousseau ‘Social Contract’ in Roger D Masters & Christopher Kelly (eds.) *The Collected Writings of Rousseau* (1994) 128, 136.

³⁴⁶ Carol Chomsky ‘The United States-Dakota War Trials: A Study in Military Injustice’ (1990) 43 *Stanford Law Review* 13, 13-14 cited in David W Glazier ‘Playing by the Rules: Combating al Qaeda within the Law of War’ (2009) 51 *William & Mary Law Review* 957, 990.

development of IHL with the war crimes trials that were conducted in its wake under the concept of command responsibility.³⁴⁷

The continued recognition of non-State actors as equal belligerents received support from the UN General Assembly's broadening of belligerent status to 'national liberation movements' in international armed conflicts³⁴⁸ and the subsequent codification of this in the 1977 Additional Protocols. This was a progressive development considering that initially the primary province of international law of armed conflict was regulating the intercourse of States. The recognition of non-State actors leads one to the conclusion that in combating transnational terrorists, nothing should preclude a state from invoking IHL.

c. Classifying Enemy Status in the 'War on Terror'

The distinction of persons who are legally permitted to participate in hostilities is fundamental to the functioning of the law of armed conflict.³⁴⁹ This is essential to determining the varying degrees of protection due to an individual. One of the aspects of the 'war on terror', thus far a wellspring of much controversy, concerns the classification of enemy status.³⁵⁰ Thus, an important step to ensure adherence to the laws of armed conflict is the clarification of the legal status of those engaging in armed conflict.³⁵¹

This will promote better protections that are available to the parties to an armed conflict. IHL distinguishes between combatants and civilians and provides them with

³⁴⁷ David W Glazier 'Precedents Lost: The Neglected History of the Military Commission' (2005) 46 *Virginia Journal of International Law* 5, 52.

³⁴⁸ UNGA, Resolution 3103 (XXVIII) of 12 December 1973, U.N. Doc. A/RES/3103.

³⁴⁹ ICTY, *Prosecutor v Tadic* (Decision of 2 October 1995), paragraphs 122, 127; ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 78; Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* note 140 at Rule 1.

³⁵⁰ *Hamdan v Rumsfeld* 126 S. Ct. 2749 (2006); Nils Melzer, *supra* note 3 at 319; MN Schmitt, *supra* note 203.

³⁵¹ Israel HCJ, *Public Committee Against Torture in Israel v Israel*, paragraph 30; Nils Melzer, *ibid* at 314.

protections that are peculiar to the status.³⁵² There have also been calls for the staking out of another status of those combatants who are not privileged or properly so-called.³⁵³ The subsequent subsections undertake an analysis of the rules governing the eligibility of an individual for inclusion in these classifications and the legal implications of selection.

i) Combatant Status

The international law of armed conflict distinguishes between combatants and non-combatants.³⁵⁴ One of the earlier attempts at distinction can be evinced from Francis Lieber who brought to attention the need for classification of guerrillas and prisoners of war.³⁵⁵ Subsequent to this, Francis Lieber produced the Lieber Code which contributed significantly to the Brussels Declaration of 1874.

The term ‘combatant’ applies to those persons who are legitimately allowed to participate in armed conflict under international law.³⁵⁶ These include members of the regular armed forces (except medical personnel, chaplains, civil defence personnel, and members of the armed forces who have acquired civil defence status) and irregular forces under responsible command, who carry their arms openly and distinguish themselves from the civilian population.³⁵⁷

In vindicating the targeted killings of suspected terrorists, the presumption of their ‘unprivileged’ combatancy is usually made by the party conducting the operation.³⁵⁸ This, however, needs to be ascertained as a matter of fact since the legality of such targeted

³⁵² ICTY, *Prosecutor v Tadic* (Decision of 2 October 1995), paragraph 122; Article 48, AP I; Article 51, AP I.

³⁵³ UNHRC, Alston Targeted Killings Report, paragraph 65; Nils Melzer, *ibid* at 309.

³⁵⁴ Article 48, AP I; Jean-Marie Henckaerts & Louise Doswald Beck, Rule 1; Robert Kolb & Richard Hyde, *supra* note 138 at 47; ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 66 at paragraph 78.

³⁵⁵ Francis Lieber *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (1862) 7-8.

³⁵⁶ Jean-Marie Henckaerts & Louise Doswald Beck, Rule 8; Michael N Schmitt, *supra* note 140 at 144.

³⁵⁷ The Commander's Handbook on the Law of Naval Operations, NWP-14M (1995) Washington DC: Department of the Navy 5-2.

³⁵⁸ MH Hoffman ‘Terrorists are Unlawful Belligerents, not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law’ (2002) 34(2) *Case Western Reserve Journal of International Law* 227–230.

killings is hinged on the demonstrable nature of the selected individual as not being a protected person or a person who is immune to lawful attack.³⁵⁹

Article 4(A)(2) of GC III stipulates which conditions must be met in order for one to qualify as a combatant. Kretzmer sets out these requirements thus: i) wearing a fixed distinctive sign; ii) carrying arms openly, and iii) conducting operations in accordance with the laws and customs of war.³⁶⁰ The criteria of Article 4(A)(2) of GC III criteria for combatant status effectively precludes members of terrorist groups from meriting combatant status.

ii) Civilian Status

Civilian status in customary international law is defined in the negative sense as person who is not a combatant.³⁶¹ This negative definition is aptly captured in Article 50 of AP I which defines a 'civilian' as 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.' Kolb & Hyde explain that the negative formulation is significant as it defines a 'civilian' from the relational perspective of 'combatant' status so as to avert any uncertainty as to status which may 'operate to the detriment of civilians.'³⁶²

The negative formulation of civilian status is captured in the ICRC definition thus: 'all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levee en masse*'.³⁶³ Schmitt notes the significance of this definition is to exclude all persons encompassed by Article 1 of the 1907 Hague Regulations IV,³⁶⁴ Article 4(A)(2) of the GC III and Article 43(1) of AP I,³⁶⁵ thus presenting a classic understanding of

³⁵⁹ Nils Melzer, *supra* note 3 at 311.

³⁶⁰ David Kretzmer, *supra* note 74 at 191.

³⁶¹ Jean-Marie Henckerts & Louise Doswald Beck, *supra* note 140, Rule 5 at 11; Nils Melzer, *ibid* at 310; Robert Kolb & Richard Hyde, *supra* note 138 at 127; Patrick Gallahue, *supra* note 63 at 4.

³⁶² Robert Kolb & Richard Hyde, *ibid* at 127; Yves Sandoz, et al., *supra* note 185 at 611, paragraph 1917.

³⁶³ ICRC, *Interpretive Guidelines on Direct Participation*, *supra* note 153 at 26; Article 4(A)(6), AP I.

³⁶⁴ Article 13, Hague Convention IV; Michael N Schmitt, *supra* note 203 at 543.

³⁶⁵ Article 43(1), AP I: '[A]ll organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal

the term ‘civilian’.³⁶⁶ Article 51 of AP I underscores the fact that civilian status is definitive of those non-combatants who neither take up arms nor participate in any way in hostilities.³⁶⁷

Thus, it is discernible that the rights accorded to civilians as non-combatants entail a corresponding duty on their part to refrain from participating in hostilities.³⁶⁸ Dinstein underscores the fact that civilians are afforded a conditional set of protections under international law, for instance protection of life, dignity and personal liberty.³⁶⁹

The conditional aspects discernible from Article 51 AP I which entitles civilians to protections ‘unless and for such time as they take a direct part in hostilities’³⁷⁰ are two-fold. There is a material condition which involves not only actual participation in hostilities but also active preparations for a planned attack, and a temporal condition which specifies that ‘for such time’ as the proscribed conduct subsists.³⁷¹ Thus, if a civilian takes a direct part in hostilities all the rights and protections due to them under the Geneva Conventions shall be lost and the civilian will be categorised as an unlawful combatant.³⁷²

iii) Unlawful Combatancy

The preceding subsections on combatant and civilian status lead to the conclusion that the targeted terrorists qualify neither for combatant nor civilian status.³⁷³ In the *Hostages Case*, the tribunal used ‘unlawful combatants’ to refer to members of resistance movements and

disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.’; Nils Melzer, *supra* note 3 at 392-393; Jean-Marie Henckaerts & Louise Doswald-Beck, Rule 6.

³⁶⁶ Michael N Schmitt, *supra* note 162 at 15; Article 53(3), AP I; Michael N Schmitt, *ibid* at 544.

³⁶⁷ Yoram Dinstein ‘Unlawful Combatancy’ in Fred Borch & Paul Wilson (eds.) *International Law and the War on Terror* 79, 151; Kenneth Watkin ‘Warriors without Rights?: Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy’ (2005) Harvard Program on Humanitarian Policy and Conflict Research, Occasional Paper; Adam Roberts ‘Counter-terrorism, Armed Force, and the Laws of War’ (2002) 44 *Survival* 7 cited in Michael N Schmitt, *supra* note 169 at 14; Israel HCJ, *PCATI v Israel*, paragraph 30.

³⁶⁸ Dieter Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflict* (1995) 210 Oxford University Press: New York cited in Ben-Orna Naftali & Keren R Michaeli, *supra* note 212 at 265; *PCATI v Israel*, para 30.

³⁶⁹ Yoram Dinstein, *supra* note 342 at 29; ICTY, *Prosecutor v Blaskic* (Judgment of 29 July 2004), para 157.

³⁷⁰ Article 51(3), AP I; ICTY, *Prosecutor v Strugar* (Jurisdiction), paragraphs 17-21; Yoram Dinstein, *ibid* at 50.

³⁷¹ Article 13(3), AP I; ICTY, *Prosecutor v Akayesu*, paragraph 629; Nils Melzer, *supra* note 3 at 346.

³⁷² Nils Melzer, *ibid* at 332; ICRC, *Interpretive Guidelines on Direct Participation*, *supra* note 153 at 66-68.

³⁷³ Israel HCJ, *PCATI v Israel*, paragraph 30: ‘civilians who are unlawful combatants’; Nils Melzer, *ibid* at 332.

armed groups.³⁷⁴ Articles 75 and 45 of AP I (when read together) point to the fact of the presence of individuals who are neither combatants nor civilians.³⁷⁵ This creates some doubts as to what rights and protections due to these individuals.

The status that appropriately fits the circumstances of this group is that of ‘unlawful combatant’ which denotes engagement in hostilities of an individual in the absence of the legal sanction of IHL.³⁷⁶ The Court in *Ex Parte Quirin* determined that the law of armed conflict distinguishes between lawful and unlawful combatants.³⁷⁷ Thus, as unlawful combatants, the targeted individuals will not merit the full privileges of lawful combatants, for instance, the accordance of Prisoner of War status when they fall into enemy hands.³⁷⁸ Unlawful combatants therefore enjoy only the minimum basic protections of Common Article 3 and Article 75 of AP I.³⁷⁹

Consequently, shorn of the special protections due to civilians and combatants, the unlawful combatant is a legitimate target who may lawfully be subjected to attack.³⁸⁰ However, it is noteworthy that the erstwhile civilian status of unlawful combatants can be regained upon their laying down of arms and discontinuing all activities related to

³⁷⁴ UNWCC, *USA v Wilhelm List and Others* (1948) LRTWC vol. VIII, Case No. 47.

³⁷⁵ Article 45, AP I: ‘[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.’; Nils Melzer, *ibid* at 332.

³⁷⁶ *Boumediene v Bush*, No.s 05-5062 (D.C. Cir., February 2007); Michael N Schmitt, *supra* note 203 at 549; Roberta Arnold ‘Terrorism in International Humanitarian Law and Human Rights Law’ in Roberta Arnold & Noëlle Quéniévet (eds.) *International Humanitarian Law and Human Rights Law: Towards a New Margin in International Law* (2008) 488; Nils Melzer, *ibid* at 332; Christian M De Vos, *supra* note 12 at 511-12.

³⁷⁷ US Supreme Court, *Ex Parte Quirin*, 317 US 1 (1942), paragraph 30–31: ‘by universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.’

³⁷⁸ Knut Dörmann, *supra* note 305 at 46: “[U]nlawful/unprivileged combatant/belligerent” is “understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy”; Michael N Schmitt, *ibid* at 543: ‘[A]rticle 4 only identifies those eligible for [POW] status, not those susceptible to lawful attack.’

³⁷⁹ ECtHR, *Ireland v UK* (1978) 2 EHRR at 107; Michael N Schmitt, *supra* note 169 at 14; William H Taft, *supra* note 339 at 321: ‘certain minimal standards apply to the detention of the unprivileged belligerents.’

³⁸⁰ *Rasul v. Bush* 542 US 1 (2004); *In re Guantanamo Detainees* 355 F. Supp. 2d 311 (D.D.C 2005); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld* 542 US 507, 569; Michael N Schmitt, *ibid* at 13.

hostilities.³⁸¹ So as not to engender a ‘revolving door’ scenario the onus lies with the reformed unlawful combatant to unequivocally make evident his non-engagement in active hostilities.³⁸²

6. An Overview of Targeting Principles in International Law

The international legal regime governing targeting involves selection of the target and the limitations of incidental civilian harm. The applicable international law is found in two sources: (i) the Fourth Hague Convention of 1907 which regulates the ‘means and methods’ of warfare,³⁸³ and the 1977 Additional Protocols to the Geneva Conventions.³⁸⁴

Some commentators argue that the two Additional Protocols merged the Hague rules for regulating the methods of warfare with the Geneva rules for protecting victims of armed conflicts.³⁸⁵ In exploring the principles of targeting, the methods by which, as well as the circumstances in which the object of the attack may be targeted, will be considered. This sub-section explores the application of the principles of military necessity, distinction, proportionality, and precautions in the conduct of targeted killings.

The international principles of lawful targeting have three premises.³⁸⁶ The first flows from the fact that a belligerent does not have an unlimited right to attack the enemy.³⁸⁷ The second is a prohibition on launching any kind of attacks on a civilian population.³⁸⁸ The

³⁸¹ Israel H CJ, *PCATI v Israel*, paragraph 34, 39 and 40; See Nils Melzer for further treatment of the regaining of civilian status and its attendant protections under the ‘affirmative disengagement approach’.

³⁸² Michael N Schmit, *supra* note 140 at 143; David Kretzmer, *supra* note 74 at 193 citing W Hays Parks ‘Air War and the Laws of War’ (1990) 32 *Air Force Law Review* 1, 118-20; MN Schmitt, *supra* note 203 at 551.

³⁸³ See Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Jan. 26, 1910, reprinted in Adam Roberts & Richard Guelff (eds.) *Documents on the Law of War* (1982) 48.

³⁸⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), June 8, 1977, 1125 U.N.T.S. 609; 26 I.L.M 568 (1987).

³⁸⁵ Chris Jenks, *supra* note 104 at 665.

³⁸⁶ Robert Kolb & Richard Hyde, *supra* note 138 at 46-49.

³⁸⁷ Article 35, AP I; Robert Kolb & Richard Hyde, *ibid* at 47.

³⁸⁸ Article 48, AP I; ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 78: ‘States must never make civilians the object of the attack’; Robert Kolb & Richard Hyde, *supra* note 138 at 127; ICTY, *Prosecutor v Galic* (Appeal Judgment) IT-98-29-A (30 November 2006), paragraphs 135-138.

third is the need to distinguish between combatants and non-combatant with a view to sparing the latter from the adverse effects of hostilities.³⁸⁹

Consequently, under lawful targeting, all ‘reasonable precautions’ must be taken to ensure that only military objectives are targeted thereby avoiding unnecessary incidental civilian injury, death and destruction to property.³⁹⁰ These three principles are integral to the objective steps that are factored into the targeting process. They are essential in the determination of whether, when and how an object of an attack may be targeted.

a. Necessity

In *jus in bello*, *jus ad bellum* and also in human rights law, this principle restricts the use of force. It demands that less grave methods be attempted and found insufficient to ‘deter further attacks making up the terror campaign’.³⁹¹ Resort to targeted killing in the context of countering suspected terrorists must therefore preclude the presence of non-lethal alternatives.³⁹² Targeted killings must thus only be resorted to when mere incapacitation is insufficient and when it is objectively indispensable to intentionally kill the targeted individual.³⁹³

Under human rights law, necessity demands that any operation be in pursuit of a legitimate aim (other than killing of an individual) and it places a test of ‘absolute necessity’.³⁹⁴ This implies that the force used must be: i) strictly unavoidable (qualitatively

³⁸⁹ Article 57(2)(a)(ii), AP I: ‘take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event, minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects’; Robert Kolb & Richard Hyde, *ibid* at 133.

³⁹⁰ Article 57(2)(a)(ii), AP I, *ibid*; ECtHR, *Bankovic v Belgium* Application No. 52207/99.

³⁹¹ *Rasul v Bush* 72 USLW 4596 (2004); Michael N Schmitt ‘Targeting and Humanitarian Law: Current Issues’ (2004) 34 *Israel Yearbook on Human Rights* 83; Michael N Schmitt, *supra* note 316 at 525-554.

³⁹² Amos N Guiora, *supra* note 132 at 325; UNHRC, Alston Targeted Killings Report, 23, paragraph 77.

³⁹³ ECtHR, *McCann*, paragraph 149; Nils Melzer, *supra* note 3 at 228; Marko Milanovic, *supra* note 42 at 389: ‘A civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed. In the words of the Court, “Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force.”’

³⁹⁴ UNHRC, *Suarez de Guerero v Columbia* (1982), paragraph 13.1 to 13.3; UNHRC, *Baboeram et al. v Suriname*, paragraph 14.3 and 15; IACiHR, *Alejandro Case*, paragraph 37 and 45; IACiHR, *Chumbivilcas Case*, paragraph 136 and 138; IACiHR, *Report on Terrorism and Human Rights*, paragraph 87; IACiHR, *Alejandro v Cuba*,

necessary);³⁹⁵ ii) of such a minimal degree or manner as to achieve the legitimate purpose (quantitative necessity);³⁹⁶ and iii) that which, at the moment of its application, is used against a person who presents or continues to present a threat (temporal necessity).³⁹⁷

Jus in bello necessity (military necessity) obliges States defending themselves against armed attacks to resort only to such measures as are required to achieve legitimate military objectives.³⁹⁸ *Jus ad bellum* necessity, on the other hand, requires States to assess whether they have means to defend themselves other than through armed force.³⁹⁹ Thus, the main aim of necessity is to enable the assessment whether force may be used as a means to counter the effects of an ongoing or future action.⁴⁰⁰ This underlies the idea that, rather than

paragraph 42; IACiHR, *Country Report on Guatemala* (2001), paragraph 50; ACHPR, *Oéudraogo v Burkina Faso* (2001) paragraph 4; ECtHR, *Andronicou and Constantinou v Cyprus*, Application No. 25052/94, Judgment of 9 October (1997), paragraph 193; ECiHR, *Ayetkin v Turkey*, Application No. 22880/93, Report of 18 September (1997), paragraph 91; ECtHR, *Avsar v Turkey*, Application No.25657/94, Judgment of 10 July (2001) paragraph 390; ECtHR, *Gül v Turkey*, Application No. 22676/93, Judgment of 14 December (2000), paragraph 83; ECtHR, *Güleç v Turkey*, Application No. 21593/93, Judgment of 27 July (1998), paragraph 73 and 83; ECtHR, *Handyside v the United Kingdom*, Application No. 5493/72, Judgment of 27 July (1998); ECtHR, *Jordan v United Kingdom*, Application No. 24746/94, Judgment of 4 (2001), paragraph 110; ECiHR, *Kelly and others v the United Kingdom*, Application No. 17579/90, Admissibility Decision of 13 January (1993); ECtHR, *Makaratzis v Greece*, Application No. 50385/99, Judgment of 20 December (2004), paragraph 64-66; ECtHR, *McCann and others v the United Kingdom*, Application No. 18984, Judgment of 27 December (1995), paragraph 146-150 and 192-214; ECtHR, *Nachova and others v Bulgaria*, Application No.s 43577/98 and 43579/98, Judgment of 6 July (2005), paragraph 95; ECtHR, *Shanaghan v the United Kingdom*, Application No. 37715/97, Judgment of 4 May (2001), paragraph 87; ECtHR, *Streletz, Kessler and Krenz v Germany*, Application No.s 34044/96, 35532/97 and 44801/98, Judgment of 22 March (2001), paragraph 87, 96 and 97; ECiHR, *Wolfgang v Germany*, Application No. 11257/84, Admissibility Decision of 6 October (1986).

³⁹⁵ ECtHR, *Nachova Case*, paragraph 108; ECtHR, *Handyside Case*, paragraph 48; Nils Melzer, *ibid* at 101.

³⁹⁶ UNHRC, *de Guerero Case*, paragraph 13.1 to 13.3; ECtHR, *Güleç Case*, paragraphs 71 and 73; ECtHR, *McCann Case*, paragraph 212; ECtHR, *Nachova Case*, paragraph 108; IACiHR, *Alejandro Case*, paragraph 42; IACiHR, *Chumbivilcas v Peru* (1999), paragraph 136; ACHPR, *Ouédraogo Case*, paragraph 4; ECtHR, *Gül Case*, paragraph 82; ECiHR, *Ayetkin Case*, paragraph 96; IACiHR, *Guatemala Country Report* (2001), paragraph 50; IACiHR, Report on Terrorism and Human Rights, paragraphs 87, 92; Nils Melzer, *ibid* at 101.

³⁹⁷ Article 42, GC III; IACiHR, *Alejandro Case*, paragraph 42; IACiHR, *Niera Alegria Case*, paragraphs 43, 62, 69 and 72; ECtHR, *McCann Case*, paragraphs 70, 132 and 196; Nils Melzer, *ibid* at 152.

³⁹⁸ ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226 at paragraph 78; ICTY, *Prosecutor v Galic* (Trial Judgment) IT-98-29-T (5 December 2003) at paragraph 51; Michael N Schmitt, *supra* note 316 at 547.

³⁹⁹ UNHRC, Alston Targeted Killings Report, paragraph 43; Oscar Schachter, *supra* note 289 at 1633-34.

⁴⁰⁰ Christopher C Joyner & Anthony Clark Arend 'Anticipatory Humanitarian Intervention: An Emerging Legal Norm' (1999-2000) 10 *USAFA Journal of Legal Studies* 27, 32; ICJ, *Oil Platforms Case*, paragraph 51.

being reactive, retaliatory and retributive, the targeted killing of a particular individual must be meant to prevent only ongoing or future attacks.⁴⁰¹

b. Distinction

In *jus in bello*, the belligerent parties to an armed conflict must differentiate between military objectives, civilian objects and civilian persons.⁴⁰² Attacks may be directed only against military objectives.⁴⁰³ With specific regard to targeting, the principle of distinction is derived from the IHL prohibition against indiscriminate attacks which, among other limitations, are ‘not directed at a specific military objective.’⁴⁰⁴

A critical question posed in the conduct of targeted killing operations is whether members of transnational organized armed groups constitute military objectives.⁴⁰⁵ Targeted killing is only lawful when the target is a ‘combatant’, ‘fighter’ or a civilian ‘for such time’ as they directly participate in hostilities.⁴⁰⁶ Members of organized armed groups may not qualify as combatants: although they may have a structure of command organized under a command responsible to a party to an armed conflict, they may fail to meet the visibility requirement for combatant status under Article 43 of AP I.⁴⁰⁷

⁴⁰¹ Article 51(6), AP I; Robert Kolb & Richard Hyde, *supra* note 138 at 174; Michael N Schmitt, *ibid* at 546; Nigel D White, *supra* note 268 at 235, 236 and 255. For an illustration of retributive attacks, see for instance BBC News, Chechen Warlord Busayev ‘Killed’, 10 July 2006 available at <http://news.bbc.co.uk> (accessed on 2 October 2010) where the then Russian President Vladimir Putin stated that Busayev had been killed in ‘deserved retribution’ for his violent terror attacks in a special operation of the Russian security service FSB.

⁴⁰² Article 48 AP I; Article 51(2), AP I; Article 52(1), AP I; Article 23(g), Hague Regulations IV; Article 25, Hague Regulations IV; F Kalshoven & L Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (2001) 14, 138; Jean-Marie Henckerts & Louise Doswald-Beck, *supra* note 140 at 60: ‘Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.’

⁴⁰³ ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14 at paragraph 114; Article 52(2), AP I; Jean-Marie Henckerts & Louise Doswald-Beck, *ibid*; Article 43(2), AP I; Michael N Schmitt, *supra* note 203 at 543-544.

⁴⁰⁴ Article 51(4) AP I; ICJ, *Nuclear Weapons Advisory Opinion*, I.C.J Reports, 1996, 226, paragraph 78 (July 8).

⁴⁰⁵ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, H CJ 796/02, paragraph 39.

⁴⁰⁶ Article 51(3), AP I; Article 13(3), AP I; Jean-Marie Henckerts & Louise Doswald-Beck, *ibid* at 19, Rule 6; Article 52(1), AP I; Article 50(1), AP I; Nils Melzer, *supra* note 3 at 317; UNHRC, *Alston Targeted Killings Report*, paragraph 30; Israel HCJ, *Public Committee Against Torture in Israel v Israel*, paragraph 30.

⁴⁰⁷ Nils Melzer, *supra* note 3 at 307. These include responsible command, fixed and recognizable distinctive emblem, carrying arms openly and compliance with IHL.

The principle of distinction distinguishes between persons who may be legitimately targeted (military objectives) and those who are protected from direct attack (protected persons).⁴⁰⁸ This principle has attained the normative status of customary international law.⁴⁰⁹ Enabling provisions which restate the customary norm of distinction in international and internal armed conflicts are Articles 48 and 51(2) of AP I.⁴¹⁰

The import of the above provision is that, ‘the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.’⁴¹¹ However, civilians are apt to lose the protection of international humanitarian law protection ‘for such time as they take a direct part in hostilities.’⁴¹²

By virtue of recurrent direct involvement with, and participation in, hostilities and activities amounting to a ‘continuous combat function’,⁴¹³ members of organized armed groups are usually not accorded civilian status and the protections attendant on it.⁴¹⁴ Thus,

⁴⁰⁸ Nils Melzer, *supra* note 3 at 300; UNHRC, Alston Targeted Killing Report, paragraph 30.

⁴⁰⁹ ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226 at paragraph 78; ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paragraph 100–127 (October 2, 1995); ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeal Judgment, paragraph 110 (July 29, 2004); ICTY, *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, paragraph 45 (December 5, 2003); Article 8(2)(b)(i), ICC Statute; Jean-Marie Henckerts & Louise Doswald Beck, *supra* note 140 at 3: ‘State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.’; Michael N Schmitt, *supra* note 203 at 542.

⁴¹⁰ Article 48 AP I: ‘[i]n 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 operations only against military objectives.’; ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 78; Article 51(2): ‘The civilian population as such, as well as individual civilians, shall not be the object of attack.’; ICTY, *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October (1995), paragraphs 122-27; Michael N Schmitt, *ibid* at 542-43; Robert Kolb & Richard Hyde, *supra* note 138 at 47.

⁴¹¹ Article 51(1), AP I; Article 57, AP I; Jean-Marie Henckerts & Louise Doswald-Beck, *ibid* at Rule 6.

⁴¹² Article 51(3), AP I; ICTY, *Prosecutor v Strugar*, paragraphs 17-21; Michael N Schmitt, *supra* note 162 at 14; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 39; Jean-Marie Henckerts & Louise Doswald-Beck, *supra* note 140, Rule 6 at 19; ICRC, *Interpretive Guidelines on the Notion of Direct Participation*, *supra* note 153 at 80-81; Michael N Schmitt, *ibid* at 546 and 550.

⁴¹³ ICTY, *Prosecutor v Blaskic*, paragraphs 157-158; ICTY, *Prosecutor v Tadic*, paragraph 127; UNHRC, Alston Targeted Killings Report, 20; Robert Kolb & Richard Hyde, *supra* note 138 at 202; Michael N Schmitt, *ibid* at 551; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 27 and 40.

⁴¹⁴ ICTY, *Prosecutor v. Duško Tadić* (Judgment of 7 May 1997), paragraph 639; See the contrary view in Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 39 where such individuals are considered ‘civilians who are unlawful combatants’; UNHRC, Alston Targeted Killings Report, paragraph 89; Michael N Schmitt, *ibid* at 550; Nils Melzer, *supra* note 3 at 35; See also Yoram Dinstein, *supra* note 342.

the targeting and subsequent killing of such individuals may amount to a legitimate military objective subject to the non-indiscriminate nature and regulated conduct of the attack.⁴¹⁵

c. Proportionality

Proportionality (under IHL) limits the degree of force used and also requires that the only lawful object of an attack should be a resultant weakening of the enemy's military force.⁴¹⁶

Proportionality requires that an attack should be clearly kept within the necessity of the attack.⁴¹⁷ Thus, from this flows the requirement that the conduct of hostilities must not cause disproportionate harm to the civilian population and civilian objects.⁴¹⁸

Civilians who may be within the vicinity of the attacks against legitimate targets are entitled to the IHL's protections.⁴¹⁹ These civilians are protected from the harmful effects of such an attack, especially those incidental deaths or injuries, and collateral loss or damage to their property that arises in the wake of a targeted drone strike.⁴²⁰

As can be expected, making a decision on the proportionality of a particular choice of target causes great difficulty because it assesses civilian injury or loss life against the expected objectives of an attack.⁴²¹ The principle of proportionality balances the imperatives

⁴¹⁵ UNHRC, Alston Targeted Killings Report, paragraph 89; Nils Melzer, *ibid* at 325; ICRC, *Interpretive Guidelines on Direct Participation*, *supra* note 153 at 66; Michael N Schmitt, *supra* note 316 at 547-48.

⁴¹⁶ ICJ, *Nicaragua Case*, paragraph 78; Article 35(1), AP I: 'In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited'; Article 51(5), AP I; UNHRC, Alston Targeted Killings Report, at 10; Michael N Schmitt, *ibid* at 546: 'The principle, customary law in both international and non-international armed conflicts and codified in AP I, prohibits as indiscriminate an attack which may be expected to cause incidental loss 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'; Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* note 140, Rules 14 and 19.

⁴¹⁷ Article 22, Hague Regulations IV; Article 35(1), AP I; UNHRC, Alston Targeted Killings Report, at 10; Robert Kolb & Richard Hyde, *supra* note 164 at 48; David Rodin *War and Self-Defence* (2002) 41.

⁴¹⁸ ICJ, *Nuclear Weapons Advisory Opinion* (Dissenting Opinion of Judge Higgins), paragraph 20; Israel HCJ, *Public Committee Against Torture in Israel v Israel*, paragraph 46; Michael N Schmitt, *ibid* at 547; Robert Kolb & Richard Hyde, *ibid* at 48; Jean-Marie Henckaerts & Louise Doswald Beck, *supra* note 140 at Rule 14.

⁴¹⁹ UNHRC, Alston Targeted Killings Report, 10, paragraph 30; Robert Kolb & Richard Hyde, *ibid* at 48.

⁴²⁰ UNHRC, Alston Targeted Killings Report, 10, paragraph 30; Robert Kolb & Richard Hyde, *ibid* at 48; Sharon Weill 'The Targeted Killing of Salah Shehadeh' (2009) 7 *Journal of International Criminal Justice* 617; Jean-Marie Henckaerts & Louise Doswald-Beck, *ibid* at Rule 14, 19; Michael N Schmitt, *ibid* at 548.

⁴²¹ Article 51(5)(b), AP I; ICTY, *Prosecutor v Kupreskic*, paragraph 524; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 46; Robert Kolb & Richard Hyde, *ibid* at 48.

of military necessity and the 'inherent' human right to life.⁴²² Thus, proportionality requires a value judgment as to whether the harm likely to be caused by the force used in an operation is justified in view of the expected gains.⁴²³

Advances in modern warfare have refocused the principle of proportionality by not only proscribing indiscriminate attacks but also determining the 'extent to which civilians are entitled to be protected from the collateral effects of war'.⁴²⁴ Unmanned drones represent the great advantage which technological advancement (in smart and precision bombing) brings to the limitation of collateral damage. Drones have greater surveillance capabilities which afford better precision, and are thus better placed to limit civilian casualties and injuries.⁴²⁵

However, the efficacy of this precision is largely dependent on human intelligence. Thus, precaution must be taken to ensure that the intelligence on which targeted killing decisions are based is accurate and is continuously being verified.⁴²⁶

AP I goes on to elaborate the notion of an indiscriminate attack by outlining it as one 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.'⁴²⁷

Kretzmer identifies three aspects that need to be factored into the determination of the proportionality of the targeted killing of a suspected terrorist as follows: i) the danger to life posed by the continued activities of the terrorists; ii) the chance of the danger to human

⁴²² Article 6(1), ICCPR; UNHRC, General Comment No. 6 (1982), paragraph 1; Manfred Nowak, *supra* note 218 at 105; BG Ramcharan, *supra* note 218 at 6; Yoram Dinstein *supra* note 218 at 116; IACtHR, *Villagran Morales*, paragraph 144; ECtHR, *Ergi Case*, paragraph 79, 81; UNHRC, *Suarez de Guerero v Colombia* (1982), paragraph 13.1; IACtHR, *Myrna Mack Chang v Guatemala*, paragraph 152; IACiHR, Country Report on Haiti (1988), 1; UNHRC, *Baboeram et al. v Suriname* (1984), paragraph 14.6; ECtHR, *Özkan Case*, paragraph 180-81.

⁴²³ William Hays Parks, *supra* note 382 at 178; Nils Melzer, *supra* note 3 at 357; UNHRC, Alston Targeted Killings Report at paragraph 30; Articles 51(5)(b) and 57, AP I; David J Harris, *supra* note 136 at 895.

⁴²⁴ J G Gardam 'Necessity and Proportionality in *Jus ad Bellum* and *Jus in Bello*' in L Boisson de Chazournes & P Sands (eds.) *International Law, the International Court of Justice and Nuclear Weapons* (1999) 284.

⁴²⁵ UNHRC, Alston Targeted Killings Report, paragraph 81.

⁴²⁶ UNHRC, Alston Targeted Killings Report, paragraph 81.

⁴²⁷ Article 51(5)(b) AP I; Israel H CJ, *Beit Sourik Village Council v Israel* (2004) H CJ 2056/04, paragraph 37.

life being realized if the activities of the suspected terrorist are not halted immediately; and iii) the danger that civilians will be killed or wounded in the attack on the suspected terrorist.⁴²⁸

The customary nature of the principle of proportionality was affirmed in the *Nuclear Weapons Case* where the ICJ stated that myriad provisions of the AP I reflect customary international law.⁴²⁹ The ICTY reaffirmed this in the *Kupreskic Case* where it characterized the provisions of Articles 57 and 58 of AP I as constituting customary international law.⁴³⁰ The import of these provisions is that proportionality may preclude an attack on a lawful target if the anticipated incidental injuries and collateral damage would be disproportionate to the expected military gain.⁴³¹

In the practice of targeting, proportionality is more oriented towards expected results (incapacitating or killing the would-be attacker) and less towards the limitation of the degree of force used (in view of the attacker's intention and the harm being averted).⁴³² This expected result orientation is however prone to subjective determinations that are informed by individual evaluations of the operations commander.⁴³³

As such, considerable latitude is afforded to (military or law enforcement) commanders thereby increasing their discretion when making evaluations. This does not,

⁴²⁸ David Kretzmer, *supra* note 74 at 204; Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* note 140 at Rule 14; Article 51(5)(b), AP I; Article 57(2)(a)(iii), AP I; Article 57(2)(b), AP I: '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 prohibited. See also Michael N Schmitt, Charles Garraway & Yoram Dinstein 'The Manual on the Law of Non-International Armed Conflict with Commentary' (2006), *reprinted in* (2006) 36 *Israel Yearbook of Human Rights* (Special Supplement) paragraph 2.1.1.4; United Kingdom Ministry of Defence, *The Manual on the Law of Armed Conflict* (2004) paragraph 5.3.3; Israel H CJ, *PCATI v Israel*, paragraph 40.

⁴²⁹ ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 43; Jean-Marie Henckaerts & Louise Doswald-Beck, *ibid*, Rules 14 and 19; Michael N Schmitt, Charles Garraway & Yoram Dinstein, *ibid* at paragraph 2.1.1.4; Michael N Schmitt, *supra* note 203 at 546-547; *Public Committee Against Torture in Israel v Israel*, paragraph 40 and 46.

⁴³⁰ ICTY, *Prosecutor v. Kupreskic*, paragraph 524 where the ICTY confirmed that distinction was a customary norm in both international and internal armed conflicts 'not only because they specify and flesh out general and pre-existing norms, but also because they do not appear to be contested by any State including those which have not ratified the protocol'; *Public Committee Against Torture in Israel v Israel*, paragraph 40 and 46.

⁴³¹ Robert Kolb & Richard Hyde, *supra* note 138 at 132; Michael N Schmitt, *supra* note 187 at 547.

⁴³² Michael N Schmitt, *supra* note 203 at 547.

⁴³³ Michael N Schmitt, *ibid* at 547.

however, affect the objective requirements of proportionality which aim at fostering accountability of commanders.⁴³⁴ Under IHL, proportionality necessarily requires parties to the conflict to consciously reflect on the adverse effects of any single targeting against the anticipated military gains.⁴³⁵ Under human rights law, requires an operation to be carried out for the purpose of preventing an unlawful attack on human life.⁴³⁶

d. Precaution

In recognition of the imperfections bedeviling even the latest and most advanced targeting technologies, IHL requires the observance of the principle of precaution.⁴³⁷ Article 57 of AP I sets out the precautions that need to be taken prior to an attack.⁴³⁸ Foremost in this requirement is that ‘in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.’⁴³⁹

Further, persons undertaking the targeting should ‘do everything feasible’ to make certain that the target is indeed a military objective and more importantly to ‘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.’⁴⁴⁰

In seeking to conform to the requirements of Article 57 when targeting, certain means are relied upon. These encompasses robust intelligence gathering, effective

⁴³⁴ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 39.

⁴³⁵ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 46.

⁴³⁶ Nils Melzer, *supra* note 3 at 424.

⁴³⁷ Article 57, AP I; Nils Melzer, *supra* note 3 at 365; UNHRC, Alston Targeted Killings Report, *supra* note 45 at 10: Precaution requires that, before every attack, armed forces must do everything feasible to: i) verify the target is legitimate, (ii) determine what the collateral damage would be and assess necessity and proportionality, and (iii) minimize the collateral loss of lives and/or property; Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* note 140 at Rules 15-21: “‘Everything feasible’ means precautions that are ‘practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.’”

⁴³⁸ Article 57, AP I; Michael N Schmitt, *supra* note 203 at 547.

⁴³⁹ Article 57(1), AP I; Jean-Marie Henckaerts & Louise Doswald-Beck, *ibid* at Rule 15; Michael N Schmitt, *supra* note 140 at 155.

⁴⁴⁰ Article 57(2)(a), AP I; Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* note 140 at Rule 14.

verification of accuracy of information, and objectively estimating of collateral damage.⁴⁴¹ Should the envisaged use of a particular method of targeting fail to satisfy the requirements of IHL, its threat or use would be unlawful.⁴⁴²

Under human right law, law enforcement operations (including targeted killings) must be planned, organized and controlled so as to minimize, to the greatest extent possible, recourse to lethal force. Operations which rely on intelligence information should ensure such intelligence is thoroughly verified before resorting to lethal force so as to prevent situations where individuals are killed on mere suspicion.⁴⁴³

However, in recognition of the realistic circumstances of law enforcement agents, human rights law places a standard of 'reasonableness in the circumstances'.⁴⁴⁴ This enables resulting unintended loss of life to be defensible if they are a consequence of (an honest) mistaken belief in the prevailing circumstances at the time.⁴⁴⁵

7. Targeted Killing, Law Enforcement and the Question of Extrajudicial Killing

Targeted killings that are carried out during the absence of an armed conflict include those to which the law of self-defence applies and those to which it does not. Such killings are regulated under the law enforcement regime.⁴⁴⁶ In the later case, the restrictions of law enforcement are applicable and these require compliance with both international human

⁴⁴¹ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 40; Michael N Schmitt, *supra* note 316 at 548 and 551; Michael N Schmitt, *supra* note 140 at 155-157.

⁴⁴² ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226 at paragraphs 77-78.

⁴⁴³ ECtHR, *McCann Case*, paragraph 193 and 211; UNHRC, *de Guereiro Case*, paragraph 13.2; IACtHR, *Alejandro Case*, paragraph 42; IACtHR, *Niera Alegria Case*, paragraph 43, 62 and 69; UNHRC, Report of the Special Rapporteur (Executions), 8 March 2006 (ECN.4/2006/53), paragraph 22; Michael N Schmitt, *ibid* at 530.

⁴⁴⁴ ECtHR, *Andronicou and Constantinou Case*, paragraph 183; ECtHR, *Jordan Case*, paragraph 110; ECtHR, *Makaratzis Case*, paragraph 66, 69; ECtHR, *McKerr Case*, paragraph 116; ECtHR, *Gül Case*, paragraph 78

⁴⁴⁵ ECtHR, *Andronicou and Constantinou Case*, paragraph 192; ECtHR, *Kelly Case*, paragraph 99; ECtHR, *Makaratzis Case*, paragraph 66; ECtHR, *Gül Case*, paragraph 78; ECtHR, *McCann Case*, paragraph 200; ECtHR, *Jordan Case*, paragraph 110; ECtHR, *McKerr Case*, paragraph 116; Michael N Schmitt, *ibid* at 530.

⁴⁴⁶ UNHRC, Alston Targeted Killings Report, paragraph 31 and 44; Michael N Schmitt, *supra* note 203 at 528.

rights law and municipal law.⁴⁴⁷ Any killing that does not comply with these requirements amounts to extrajudicial and arbitrary killing, which is unlawful.⁴⁴⁸

The domestic restrictions on the use of lethal force in law enforcement situations vary from State to State.⁴⁴⁹ However, there are certain fundamental principles which are common to all States. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials is a good example of the fundamental standards to be observed in law enforcement officials.⁴⁵⁰ It provides a model for the restriction of States' resort to potentially lethal law enforcement techniques.⁴⁵¹

Human rights law restricts resort to lethal law enforcement methods so as to safeguard the 'inherent right to life' and further proscribes 'arbitrary' deprivation of life.⁴⁵² Though not couched in the 'arbitrary' formulation, Article 2 of the ECHR proscribes the 'intentional' deprivation of life unless it is 'absolutely necessary' or 'in defence of any person from unlawful violence'.⁴⁵³

⁴⁴⁷ UNHRC, Alston Targeted Killings Report, paragraph 44; Michael N Schmitt, *ibid* at 528.

⁴⁴⁸ Michael N Schmitt, *ibid* at 528; Nils Melzer, *supra* note 3 at 94; UNHCR, General Comment No. 6 (1982), paragraph 3; UNHCR, *Suarez de Guero v Columbia*, paragraph 13.1; UNHCR, *Baboeram et al. v Suriname*, paragraph 14.3; Report of the Special Rapporteur (Executions), 13 January 2003, E/CN.4/2003/3, paragraph 39; Report of the Special Rapporteur (Executions), 22 December 2004, E/CN.4/2005/7, paragraph 19; Report of the Special Rapporteur (Executions), 9 January 2002, E/CN.4/2002/74, paragraph 8.

⁴⁴⁹ Michael N Schmitt, *ibid* at 528: 'Domestic norms regarding the use of deadly force [...] vary [...] Some states [...] authorize the use of deadly force to protect critical infrastructure. Whatever the state-specific standards, any use of deadly force by a state's agents contravening them will self-evidently be unlawful.'

⁴⁵⁰ UN Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; See also UNGA, Code of Conduct for Law Enforcement Officials, Adopted by UNGA Resolution 217A of 10 December 1948.

⁴⁵¹ David Kretzmer, *supra* note 74 at 171; See UNHCR, 1990, U.N. Doc. A/CONF.144/28/Rev.1, prov. 9 available at www.unhcr.ch/html/menu3/b/h_comp43.htm (accessed 12 November 2010): 'Law enforcement officials shall not use firearms against persons except in self-defense or defense against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving a grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.'

⁴⁵² Article 6, ICCPR; Article 4, ACHR; Article 4, ACHPR.

⁴⁵³ The European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 4 November 1950, entry into force: 3 September 1953, as amended by Protocols Nos 3, 5, 8 and 11 which entered into force on Sept. 21, 1970, Dec. 20, 1970, Dec. 20, 1971, Jan 1, 1990, and Nov. 1, 1998

The regulation of targeted killing under law enforcement is guided by strict necessity and absolute proportionality. Strict necessity obliges the use of less lethal methods (arrest or non-lethal incapacitation) if they are available and reasonably likely to achieve the objective.⁴⁵⁴ Absolute proportionality requires the use of only that degree of force needed to achieve the legitimate end.⁴⁵⁵

Schmitt notes that certain situations which meet the proportionality and necessity requirements, for instance a suicide bomber in a crowded area, may warrant the use of lethal force.⁴⁵⁶ This observation is borne out by the ruling of the European Court in the *McCann Case* where it was held that the targeted killing of three suspected IRA terrorists did not violate Article 2 of the European Convention.⁴⁵⁷

In situations such as in *McCann*, where less-lethal methods are impractical without forewarning the suspected terrorist, targeted killing may be permissible.⁴⁵⁸ But, permissibility in this case would be subject to the reliability of information regarding the suspect's future intention to attack and the unavailability of any other opportunity to prevent the attack.⁴⁵⁹

However, it must be noted that, in self-defence situations, the presumption of innocence applies thus requiring reliable information of the status of the target, his intention and ability to carry out an attack.⁴⁶⁰ This implies that law enforcement operations must be planned, organized and controlled in a way that minimizes, to the greatest extent possible, recourse to lethal force.⁴⁶¹

respectively cited in Michael N Schmitt, *supra* note 203 at 529; ECtHR, *Gül Case*, paragraph 12; ECtHR, *Sreletz, Kessler and Krenz v Germany* (2001), paragraph 87, 97 and 102; ECtHR, *Gülec v Turkey* (1998) paragraph 71, 73 and 83; ECtHR, *McCann Case*, paragraph 213.

⁴⁵⁴ ECtHR, *Ayetkin v Turkey* (1997), paragraph 91.

⁴⁵⁵ Michael N Schmitt, *supra* note 203 at 529.

⁴⁵⁶ Michael N Schmitt, *ibid* at 529.

⁴⁵⁷ ECtHR, *McCann Case* (Judgment of 5 September 1995) cited in Michael N Schmitt, *ibid* at 530.

⁴⁵⁸ Michael N Schmitt, *ibid* at 530.

⁴⁵⁹ Michael N Schmitt, *ibid* at 530.

⁴⁶⁰ Michael N Schmitt, *ibid* at 530.

⁴⁶¹ ECtHR, *McCann Case*, paragraph 150 and 194; ECtHR, *Nachova Case*, paragraph 93; ECtHR, *Andronicou and Constantinou Case*, paragraph 171; ECtHR, *Gül Case*, paragraph 84.

From the above scenario, a mistaken targeted killing resulting from using drones will only be consonant with human rights if the State agents were acting on the reasonable belief, under the circumstances that such action is necessary to avert an imminent attack by the targeted individual.⁴⁶² If the requisite preconditions are not fulfilled, the lethal use of force would constitute an ‘extrajudicial killing’ which is an unlawful deprivation of life.⁴⁶³

8. Analysis of Contemporary Legal Doctrine on Targeted Killing

The pages of history are interleaved with various accounts of sovereigns undertaking to dispose of selected individuals considered either as private or public enemies.⁴⁶⁴ On this subject, eminent historians, philosophers and jurists have written numerous volumes on assassination, political murder and tyrannicide.⁴⁶⁵

In this regard, the notion of targeted killing is not an emergent concept, whether as a matter of fact or as a subject of legal discussion.⁴⁶⁶ The 21st century version of targeted killing has involved covert operations⁴⁶⁷ predominantly carried out by secret service agents and military undercover units.⁴⁶⁸ This has been a turbulent period which witnessed escalating incidents by terrorist groups which resorted to violent acts (including aerial hijackings, hostage takings and bomb attacks) as a forceful means of advancing political or ideological goals.⁴⁶⁹

The resultant pressure on law enforcement agencies led to the development of specialized units within the extant police and security forces to deal with the terrorist

⁴⁶² Michael N Schmitt, *ibid* at 530.

⁴⁶³ Michael N Schmitt, *ibid* at 530.

⁴⁶⁴ UNHRC, Alston Targeted Killings Report, 5-9; Nils Melzer, *supra* note 3 at 9.

⁴⁶⁵ See Michael N Schmitt, *supra* note 169 at 613; Patricia Zengel, *supra* note 117 at 125; and Kenneth Watkin, *supra* note 17 at 169 for an overview of an exposition of assassination by various writers of the 13th, 16th, 17th and 18th centuries. See also Franklin L Ford *Political Murder: From Tyrannism to Terrorism* (1985) cited in Nils Melzer, *supra* note 3 at 9.

⁴⁶⁶ Nils Melzer, *ibid* at 9.

⁴⁶⁷ Nils Melzer, *ibid* at 9: ‘In most cases, these operations were both *clandestine* and *covert*. In clandestine operations, the emphasis is placed on the concealment of the *operation* as such, whereas *covert* operations are planned and executed so as to conceal the identity of, or permit plausible denial by, the *sponsor of the operation*.’ (Emphasis in the original).

⁴⁶⁸ Nils Melzer, *supra* note 3 at 9.

⁴⁶⁹ UNHRC, Alston Targeted Killings Report at 4; Nils Melzer, *ibid* at 9.

situations.⁴⁷⁰ In many instances these elite counter-terrorist units pursued ‘shoot-to-kill’ policies which were largely criticised on grounds of its unlawfulness, illegitimacy and attendant allegations of collusion, corruption and arbitrariness.⁴⁷¹ Owing to the doubtful legality of these operations and the non-accountability occasioned by the secrecy involved, targeted killing was couched in a ‘shadowy real of half-legality’.⁴⁷²

Currently, in contrast to earlier attitudes, targeted killing is gradually gaining legitimacy as a method of counter-terrorism and ‘surgical’ warfare.⁴⁷³ Several States are, whether expressly or implicitly, acknowledging that in their efforts to contain terrorist or insurgent activities they have resorted to targeted killing.⁴⁷⁴

In analyzing the contemporary legal doctrine on targeted killing, the permissibility of the practice will be discussed under three regimes namely; i) the law of inter-State use of force; ii) human rights law; and iii) IHL. With these systems of legal rules as the framework for analysis, the sources of international law (treaties, custom, general principles, judicial decisions and juristic teachings) will periodically be referred to in the exercise of clarifying contemporary debates on the subject of targeted killing.⁴⁷⁵

a. Analysis of the Notion of Targeted Killing under the Law of Inter-State Use of Force

Resort by a State to targeted killing of a selected individual, for instance a suspected terrorist, within another State is regulated by the UN Charter’s prohibition on the use of

⁴⁷⁰ Nils Melzer, *ibid* at 9.

⁴⁷¹ Nils Melzer, *ibid* at 9.

⁴⁷² Nils Melzer, *ibid* at 9.

⁴⁷³ Nils Melzer, *ibid* at 9.

⁴⁷⁴ Nils Melzer, *ibid* at 9.

⁴⁷⁵ Jeffrey F Addicott, *supra* note 140 at 751-85; William C Banks & Peter Raven-Hansen ‘Targeted Killing and Assassination: The U.S. Legal Framework’ (2003) 37(3) *University of Richmond Law Review* 667-749; Louis R Beres, *supra* note 16 at 157-77; Louis R Beres, *supra* note 16 at 847-69; Tyler J Harder, *supra* note 16 at 1-39; Joseph B Kelly, *supra* note 17 at 101-11; Daniel B Pickard, *supra* note 266 at 3-35; W Michael Reisman ‘Some Reflections on International Law and Assassination under the Schmitt Formula’ (1992) 17 *Yale Journal of International Law* 687-90; Michael N Schmitt, *supra* note 169 at 609-85; Jonathan Ulrich, *supra* note 283 at 1029-63; Kenneth Watkin, *supra* note 140 at 281-314 cited in Nils Melzer, *ibid* at 51.

force under Article 2(4).⁴⁷⁶ Zengel contends that state-sponsored targeted killing should be considered as one of the many methods by which states use force and thus should be treated within the same circumstances and constraints that govern the use of force.⁴⁷⁷ Vindication of such use of force is legally permissible either in situations of self-defence,⁴⁷⁸ with the permission of the State on whose territory the attack is to occur,⁴⁷⁹ or with the permission of the UN Security Council.⁴⁸⁰

Discussions of targeted killing under the law of inter-State use of force usually proceed from the premise of self-defence in two ways: first, targeted killing is resorted to as a pre-emptive and defensive strategy against attacks of transnational organized armed groups

⁴⁷⁶ Yoram Dinstein *War, Aggression, and Self-Defence* (2001) 178; ICJ, *Corfu Channel Case* I.C.J Reports, 1949, 4; Malcolm N Shaw, *supra* note 136 at 1021; Ian Brownlie, *supra* note 96 at 732; David J Harris, *supra* note 136 at 723-24; Derek Bowett, *supra* note 268 at 152; Ian Brownlie *International Law and the Use of Force by States* (1963) 265-8; *Partial Award: Ius ad Bellum Case*, paragraph 10; Christine Gray 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?' (2006) 17 *European Journal of International Law* 699, 711-12; *Guyana v Suriname* (2007) available at www.pca-cpa.org (accessed 27 May 2010).

⁴⁷⁷ Patrica Zengel, *supra* note 117 at 225 cited in Daniel B Pickard, *supra* note 266 at 22.

⁴⁷⁸ ICJ, *Nicaragua Case* I.C.J Reports, 1986, 94, paragraph 176; Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 2; David J Harris, *ibid* at 748; Malcolm N Shaw, *supra* note 136 at 1024; Ian Brownlie, *supra* note 96 at 732; RY Jennings 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82; Michael N Schmitt, *supra* note 203 at 528; Mordecai Kremnitzer, *supra* note 73 at 3; Louis Beres, *ibid* at 160; Louis Beres, *supra* note 16 at 847; Chris Downes, *supra* note 18 at 286; Tyler J Harder, *supra* note 16 at 10-19; Nicholas J Kendall, *supra* note 73 at 1078; William H Parks, *ibid* at 7; Daniel B Pickard, *supra* note 266 at 22; W Michael Reisman, *supra* note 475 at 688; Michael N Schmitt, *ibid* at 531; Jonathan Ulrich, *supra* note 283 at 1034; Kenneth Watkin, *ibid* at 283 cited in Nils Melzer, *ibid* at 51.

⁴⁷⁹ ICJ, *Corfu Channel Case*, I.C.J Reports, 1949, 4; ICJ, *Armed Activities in the Congo Case* I.C.J Reports, 2005, paragraph 147; ICJ, *Nicaragua Case* (Judgment), I.C.J Reports, 1986, 14, paragraph 202 which declared the principle of non-intervention as a norm of customary international law and referred to it as 'a corollary of the principle of sovereign equality of States'; David J Harris, *supra* note 136 at 725; Chris Downes, *supra* note 18 at 280; Mary Ellen O'Connell, *supra* note 186 at 328; Tom Ruys, *supra* note 17 at 22 cited in Nils Melzer, *ibid* at 51; Philip B Heymann & Juliette N Kayyem, *supra* note 73 at 68; Chris Downes, *ibid* at 286.

⁴⁸⁰ ICJ, *Armed Activities Case*, paragraph 145; ICJ, *Oil Platforms Case*, paragraph 72; ICJ, *Nicaragua Case*, paragraph 235; *Partial Award: Ius ad Bellum Case*, paragraph 10; UN Security Council Resolution 502, UN Doc. 5/PV 2360; Malcolm N Shaw, *supra* note 136 at 1026; David J Harris, *supra* note 136 at 749; Ian Brownlie, *supra* note 96 at 733; Michael N Schmitt, *ibid* at 528; Anne-Marie Slaughter 'Mercy Killings: Why the United Nations Should Issue Death Warrants Against Dangerous Dictators', *Foreign Policy* 1; Ian Brownlie 'The Use of Force in Self-Defence' (1961) 37 *British Yearbook of International Law* 183; Chris Downes, *supra* note 18 at 286; Daniel B Pickard, *supra* note 266 at 10 cited in Nils Melzer, *ibid* at 51.

operating within the territory of another State,⁴⁸¹ and secondly, as a pre-emptive measure against the leader of a ‘rogue’ State intending to acquire weapons of mass destruction.⁴⁸²

Both of these scenarios, based as they are on self-defence have led to debate about the element of an ‘armed attack’ which is a precondition for the exercise of self-defence.⁴⁸³ With specific emphasis on transnational terrorist attacks a question is posed: when does a single incident, or a series, of terrorist attacks amount to an ‘armed attack’ within the meaning of Article 51 UN Charter?⁴⁸⁴

In answering this question, most authors take the interpretive approach used in the *Caroline Case* where the extent of force used in self-defence is required to be commensurate with the violation against which the self-defence is being employed.⁴⁸⁵ Thus, this leads one

⁴⁸¹ ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14 at 103; Malcolm N Shaw, *ibid* at 1027; Yoram Dinstein *War, Aggression and Self-Defence* (2005) 213; Christine Gray *International Law and the Use of Force* (2000) 115; Michael Byres ‘Terrorism, Use of Force and International Law after 11 September 2001’ (2002) 51 *International and Comparative Law Quarterly* 401; Ian Brownlie, *ibid* at 732-3; Michael N Schmitt, *supra* note 203 at 530.

⁴⁸² Nils Melzer, *supra* note 3 at 52; Louis Beres, *supra* note 16 at 848; David J Harris, *ibid* at 770, 775; Michael Bothe ‘Terrorism and the Legality of Pre-emptive Force’ (2003) 14 *European Journal of International Law* 227; Abraham D Sofer ‘On the Necessity of Preemption’ (2003) 14 *European Journal of International Law* 209; Christine Gray ‘The US National Security Strategy and the New “Bush Doctrine” on Preemptive Self-Defence’ (2002) 1 *Chinese Journal of International Law* 437; Christopher Greenwood ‘International Law and the United States’ Air Operation against Libya’ (1987) 89 *West Virginia Law Review* 933; Michael J Glennon ‘The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter’ (2001-2) 25 *Harvard Journal of Law and Public Policy* 539; Michael N Schmitt, *supra* note 203 at 534.

⁴⁸³ ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14, 96 at paragraph 195; ICJ, *Oil Platforms Case* I.C.J Reports, 2003, 161 at paragraph 72; ICJ, *Aerial Incident of July 3, 1988* I.C.J Reports, 1996, 9; *Korean Airlines Flight 007 Incident* cited in David J Harris, *ibid* at 208; Yoram Dinstein, *ibid* at 178; Malcolm N Shaw, *ibid* at 1025; Ian Brownlie *International and the Use of Force by States* (1963) 112-3 and 264; David J Harris, *ibid* at 741; Ian Brownlie, *ibid* at 732; *Libyan People’s Bureau Incident* cited in David J Harris, *ibid* at 307; ICJ, *Oil Platforms Case*, paragraph 51.

⁴⁸⁴ ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226, 245: ‘[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law’; ICJ, *Oil Platforms Case* I.C.J Reports, 2003, 161 at paragraph 51; ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14 at paragraph 195; See also Dissenting Opinion of Justice Robert Jennings in ICJ, *Nicaragua Case*, I.C.J. Reports, 1986 at 543; Amos N Guiora, *supra* note 132 at 323; ICJ, *Wall Opinion* (Judge Higgins), paragraph 33.

⁴⁸⁵ ICJ, *Oil Platforms Case* I.C.J Reports, 2003, 161 at paragraph 77: ‘neither “Operation Praying Mantis” as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence’; ICJ, *Nicaragua Case*, I.C.J Reports, 1986 at 14, 94 and 103: ‘self-defence would only warrant only measures which are proportional to the armed attack and necessary to respond it, a rule established in customary international law.’; Malcolm N Shaw, *supra* note 136 at 1025 citing the Legal Adviser to the US Department of State, who noted that ‘the exercise of the inherent right of self-defence depends upon a prior delict, an illegal act that presents an immediate, overwhelming danger to an actual and essential right of the state. When these conditions are present, the

to the conclusion that defensive and deterrent military action is warranted not only against States but also against non-State actors.⁴⁸⁶

The ICJ decision in the *Oil Platforms Case* took into account the argument raised by the United States that the attacks launched by Iran represented a ‘cumulation of events’ amounting to an armed attack warranting resort to force in self-defence.⁴⁸⁷ Additionally, this decision represents the acceptance of the lawfulness of self-defence action, particularly where the territorial State from which these non-State actors operate fails to prevent cross-border attacks.⁴⁸⁸

The anticipatory nature of pre-emptive targeted killings launched against suspected terrorists as an act of self-defence has not been without controversy.⁴⁸⁹ In some instances the attack by these terrorists is neither occurring, nor imminent, but is *likely* to occur in the near

means used must then be proportionate to the gravity of the threat or danger’; David J Harris, *supra* note 136 at 752; Ian Brownlie, *supra* note 96 at 734; Rebecca MM Wallace, *supra* note 136 at 282.

⁴⁸⁶ David J Harris, *ibid* at 775-76; Malcolm N Shaw, *ibid* at 1024-1025; Ian Brownlie, *ibid* at 745; Christine Gray, *supra* note 481 at 97; Nils Melzer, *ibid* at 52; Michael N Schmitt, *supra* note 203 at 533 and 534.

⁴⁸⁷ ICJ, *Oil Platforms Case* I.C.J Reports, 2003, 161 at paragraphs 62 and 64; David J Harris, *ibid* at 752, 755; Malcolm N Shaw, *ibid* at 1032; Ian Brownlie, *ibid* at 732; D Greig ‘Self-Defence and the Security Council: What Does Article 51 Require?’ (1991) 40 *International and Comparative Law Quarterly* 366.

⁴⁸⁸ ICJ, *Armed Activities in the Congo Case* I.C.J Reports, 2005, 168 at paragraph 153; ICJ, *Oil Platforms Case* I.C.J Reports, 2003, 161 para 64; Malcolm N Shaw, *ibid* at 1026; Ian Brownlie, *ibid* at 732-33; David J Harris, *ibid* at 764-65; Christine Gray, *ibid* at 97; Jeffrey F Addicott, *supra* note 140 at 772; Mordecai Kremnitzer, *supra* note 73 at 12, 14; William H Parks, *supra* note 17 at 7; Michael N Schmitt, *supra* note 203 at 646; Gary Solis, *supra* note 73 at 7 cited in Nils Melzer, *ibid* at 52; UNHRC, Alston Targeted Killings Report, *supra* note 45 at 12; Abraham D Sofer ‘Terrorism, The Law, and the National Defense’ (1989) 126 *Military Law Review* 89, 103.

⁴⁸⁹ Antonio Cassese *supra* note 207 at 310-11: ‘it is more judicious to consider such action [anticipatory self-defence] as *legally prohibited*, while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds and the community will eventually condone them or mete out lenient condemnation’ (emphasis in original); David J Harris, *supra* note 136 at 755-56; Louis D Henkin *How Nations Behave* (1979) 141-42: ‘Nothing in... its drafting ... suggests that the framers of the Charter intended something broader than the language implied ... It was that mild, old fashioned Second World War which persuaded all nations that for the future national interests will have to be vindicated, or necessary change achieved, as well as can be by political means, but not by war and military self-help. They recognised the exception of self-defence in emergency, but limited to actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication ... It is precisely in the age of the major deterrent that nations should not be encouraged to strike first under pretext of prevention or pre-emption.’; Malcolm N Shaw, *supra* note 136 at 1028; Mordechai Kremnitzer, *supra* note 73 at 3; David Kretzmer, *supra* note 74 at 172; Amos N Guiora, *supra* note 132 at 322; Nils Melzer, *ibid* at 51.

future.⁴⁹⁰ Pre-emptive targeted killings are defended from a standpoint of the State's 'inherent' right of self-defence in customary international law undergirded by the argument that due to the clandestine nature of terrorist activities and of the potentially destructive effects of their attacks, targeted killings are permissible.⁴⁹¹

Thus, in light of the foregoing argument, the proponents of pre-emptive self-defence hold that targeted killing of individuals who pose grave threats to a State's security is lawful not only when the attacks are imminent or ongoing but also when these individuals are 'visible'.⁴⁹²

Those who are opposed to the notion of pre-emptive targeted killings of in self-defence proceed from a position of the textual interpretation of Article 51 UN Charter which proscribes any inter-State use of force until a concrete 'armed attack' actually occurs or is patently imminent.⁴⁹³ They contend that, if permitted, it would lead to an arbitrary use

⁴⁹⁰ Ian Brownlie, *ibid* at 734; Christine Gray, *supra* note 482 at 437-47; Derek Bowett, *supra* note 268 at 118-9: 'no state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardise its very existence.'; Malcolm N Shaw, *ibid* at 1029; Tom J Farer 'Beyond the Charter Frame: Unilateralism or Condominium Frame?' (2002) 96 *American Journal of International Law* 359-64; Chris Downes, *supra* note 18 at 287; Emanuel Gross *supra* note 73 at 1196; Nicholas J Kendall, *supra* note 281 at 1079; Mordecai Kremnitzer, *supra* note 73 at 13 cited in Nils Melzer, *ibid* at 53.

⁴⁹¹ ICJ, *Nicaragua Case*, I.C.J Reports, 1986, 94, paragraph 176: 'reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" (in the French text the 'droit naturel') of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.'; Malcolm N Shaw, *supra* note 136 at 1029; David J Harris, *supra* note 136 at 775; Ian Brownlie, *supra* note 96 at 732; Ian Brownlie, *supra* note 476 at 275; Thomas M Frank *Recourse to Force: State Action Against Threats and Armed Attacks* (2002) 267; Nils Melzer, *ibid* at 53; ICJ, *Nuclear Weapons* (Separate Opinion of Judge Higgins), paragraph 34; ICJ, *Nuclear Weapons* (Separate Opinion of Judge Kooijmans), paragraph 35; ICJ, *Nuclear Weapons* (Declaration of Judge Buergenthal), paragraph 6; Michael N Schmitt, *supra* note 203 at 533.

⁴⁹² Israel HCJ, *State of Israel v Marwan Barghouti* (2002) 92134/02; David Kretzmer, *supra* note 74 at 205; Amos N Guiora, *supra* note 132 at 324-25; Louis R Beres, *supra* note 16 at 165; Emanuel Gross, *supra* note 73 at 1196; Nicholas J Kendall, *supra* note 281 at 1079 cited in Nils Melzer, *supra* note 3 at 53.

⁴⁹³ ICJ, *Nicaragua Case* I.C.J Reports, 1986, 103; Ian Brownlie, *supra* note 96 at 734; David J Harris, *supra* note 136 at 775; Malcolm N Shaw, *supra* note 136 at 1026, 1030; Nils Melzer, *ibid* at 53; Christine Gray, *supra* note 481 at 115; Yoram Dinstein, *supra* note 481 at 213; Michael N Schmitt 'Counter-terrorism and the Use of Force in International Law' (2002) 32 *Israeli Yearbook of Human Rights* 53-116 cited in Michael N Schmitt, *supra* note 203 at 532; M Byers, *supra* note 481 at 401; David Rodin *War and Self-Defence* (2002) 40, cited in Nigel White, *supra* note 268 at 383; Philip B Heymann & Juliette N Kayyem, *supra* note 73 at 63.

of force based on speculation, or at best, unverifiable information⁴⁹⁴ provided by intelligence services,⁴⁹⁵ which is in contravention to Article 2(4) UN Charter.⁴⁹⁶

b. Analysis of the Notion of Targeted Killing under Human Rights Law

Wilful killing of selected individuals under human rights is a law enforcement issue governed by the notion of the inalienable right to life.⁴⁹⁷ The protection of every human being's 'inherent right to life'⁴⁹⁸ is a *jus cogens* norm widely recognized by most international human rights treaties as one of the highest rights on the normative hierarchy.⁴⁹⁹

The UN Human Rights Committee (HRC) clarified the non-derogability of the right to life in General Comment No. 29 by stating that the existence of an emergency does not vindicate the deprivation of an individual's right to life.⁵⁰⁰ General Comment No. 6 of the HRC further states that, apart from the negative obligation on States not to violate the right

⁴⁹⁴ Examples are usually given of the United States' invasion in 2003 of Iraq on the basis that it was exercising its inherent right of anticipatory self-defense against a 'rogue' State that possessed and produced Weapons of Mass Destruction. See also the speech of President Bush at West Point on 1 June 2002, available at <http://www.whitehouse.gov/news/releases/2002/06/2002601-3.html> (accessed 19 September 2010).

⁴⁹⁵ Chris Downes, *supra* note 18 at 287; Georg Nolte, *supra* note 235 at 116; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 92; Nils Melzer, *supra* note 3 at 53, Jane Mayer, *supra* note 6 at 4; UNHRC, Alston Targeted Killings Report, paragraph 20, 21: 'The CIA is not required to identify its target by name; rather, targeting decisions may be based on surveillance and "pattern of life" assessments.'

⁴⁹⁶ Malcolm N Shaw, *ibid* at 1030; David J Harris, *ibid* at 723-24; Ian Brownlie, *ibid* at 734; See *The National Security Strategy of the United States of America*, White House, Washington, September 2002, 15.

⁴⁹⁷ UNHRC, General Comment No. 6 (1982), paragraph 1; Malcolm N Shaw, *ibid* at 1074.

⁴⁹⁸ Article 6, ICCPR; Article 3, UDHR; Article 4, ACHR; Article 2, ECHR; Nils Melzer, *ibid* at 184.

⁴⁹⁹ ICJ, *Nicaragua Case (Merits)*, paragraph 218; ICTY, *Tadic Case (Jurisdiction)*, 2 October 1995, paragraph 102; ICTY, *Delalic Case (Judgment)* of 16 November 1998, paragraph 303; ICTR, *Rutaganda Case (Judgment)* of 6 December 1999, paragraph 106; ICJ, *Armed Activities in the Congo Case*, paragraph 216 and 219; ICJ, *Barcelona Traction Case*, paragraph 34; ICJ, *US Diplomatic and Consular Staff in Tehran Case*, paragraph 91; Israel HCJ, *Public Committee Against Torture in Israel v. the Government of Israel*, paragraph 98; Antonio Cassese 'General Round-Up' in Antonio Cassese & Joseph Weiler (eds.) *Change and Stability in International Law-Making* (1988) 175; Francisco Martin 'The Unified Use of Force Rule Revisited: The Penetration of the Law of Armed Conflict by International Human Rights Law' (2002) 65 *Saskatchewan Law Review* 405, 407.

⁵⁰⁰ UNHRC, General Comment No. 29 on Article 4 of the ICCPR (2001), 31 August 2001, CCPR/C/21/Rev.1/Add.1 1, at 6, paragraphs 8, 10 and 15; Orna Ben-Naftali & Keren Michaeli, *supra* note 18 at 253; Nils Melzer, *supra* note 3 at 58; Mordechai Kremnitzer, *supra* note 73 at 1.

to life, States are also obliged to prevent the deprivation of an individual's right to life by private actors and State agents.⁵⁰¹

Thus, States owe an obligation not only to persons endangered by terrorist attacks but also to the terrorists themselves.⁵⁰² The obligations owed to suspected terrorists include the presumption of innocence,⁵⁰³ treatment of the suspects in accordance with due process,⁵⁰⁴ and fair trial guarantees by an independently constituted court followed by sentencing in accordance with the law.⁵⁰⁵ This places a duty on State agents to objectively scrutinize each operation so as to avoid arbitrary or erroneous targeting which violate human rights.⁵⁰⁶

A notable feature in contemporary international law is the growing complementarity between IHL and human rights law, both in law enforcement situations and in the conduct of hostilities.⁵⁰⁷ This complementarity is important as there may be law enforcement situations that involve targeting where IHL applies, but outside the conduct of hostilities (for instance in an occupied territory).

⁵⁰¹ UNHRC, General Comment No. 6 on Article 6 of the ICCPR' (Sixteenth session) (1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.5 (2001) at paragraph 5; Mordechai Kremnitzer, *ibid* at 73 at 14; David Kretzmer, *supra* note 74 at 184; Nils Melzer, *ibid* at 58; UN Special Rapporteur (Executions), E/CN.4/2002/74, paragraph 8.

⁵⁰² Nils Melzer, *ibid* at 58 and 207; David Kretzmer, *ibid* at 182; Mordechai Kremnitzer, *ibid* 14.

⁵⁰³ Nils Melzer, *supra* note 3 at 90; Christian M De Vos, *supra* note 12 at 503; Robert Kolb & Richard Hyde, *supra* note 138 at 269; Israel HCJ, *Public Committee Against Torture in Israel v Government of Israel*, paragraph 40.

⁵⁰⁴ Article 75(4), AP I; Yutaka Arai-Takahashi 'Fair Trial Guarantees in Occupied Territory – The Interplay between International Humanitarian Law and Human Rights Law' in Roberta Arnold & Noëlle Quéniwet *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (2008) 467.

⁵⁰⁵ Article 75(4), AP I; UNHRC, General Comment No. 29; UNHRC, *Gonzalez del Rio v Peru*, Communication No. 263/1987, U.N. Doc. A/48/40 (1992) maintaining that the right to fair trial by independently constituted and impartial tribunal is 'an absolute right that may suffer no exception'; Israel HCJ, *Beit Sourik Village Council v the Government Israel*, HCJ/2056/04 (30 June 2004); Christian M De Vos, *supra* note 12 at 504; David Kretzmer, *ibid* at 178; Robert Kolb & Richard Hyde, *ibid* at 271; Mako Milanovic, *supra* note 42 at 389.

⁵⁰⁶ Report of the Special Rapporteur (Executions), 8 March 2006, E/CN.4/2006/53, paragraph 51: 'If there is a solid factual basis for believing that a suspect is [...] capable of detonating his explosive if challenged, and if, to the extent possible, that information has been evaluated by persons with experience and expertise, use of lethal force may be justified'; B'Tselem, *Israel's Assassination Policy*, *supra* note 131 at 8; Vincent-Joel Proulx, *supra* note 236 at 888; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 78, 80; Mordechai Kremnitzer, *supra* note 73 at 1; Christian Tomuschat, *supra* note 171 at 140; Nils Melzer, *supra* note 3 at 60;

⁵⁰⁷ Malcolm N Shaw, *supra* note 136 at 1074-75; Theodore Meron & A Rosas 'A Declaration of Minimum Humanitarian Standards' (1991) 81 *American Journal of International Law* 375; A Eide, A Rosas & Theodore Meron 'Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards' (1995) 89 *American Journal of International Law* 215, 217; UNGA Resolution 2675 (XXV) which emphasized that fundamental human rights 'continue to apply in situations of armed conflict'; Nils Melzer, *ibid* at 89.

A noteworthy feature of the proscription on the deprivation of the right to life, for example in Article 6 of the ICCPR, is a qualification of the prohibition to instances where it is 'arbitrary'.⁵⁰⁸ A glaring omission is the absence of any definition of 'arbitrary'.⁵⁰⁹ This shortfall is cured by the textual interpretation of other human rights treaties, a notable example being Article 2 of the ECHR which proscribes intentional deprivation of life. This provision adopts a proportionality standard to determine whether the deprivation was 'absolutely necessary'.⁵¹⁰

The ECtHR in the *McCann Case* clarified the preconditions for the lawful deprivation of life established by Article 2 of the ECHR⁵¹¹ as including 'absolute necessity'⁵¹² and 'strict proportionality'.⁵¹³ The jurisprudence of the European Court has upheld the absolute necessity requirement in the *Nachova Case*⁵¹⁴ and the strict proportionality requirement in the *Gulec Case*⁵¹⁵ and *Ergi Case*.⁵¹⁶ The above preconditions also require all reasonable precautionary measures to be factored into the organization of the operation to prevent the

⁵⁰⁸ Article 6(1) and (2), ICCPR; Article, 4(1) and (2), ACHR, Article 4, ACHPR; ICTY, *Furundzija Case*, 121 ILR, 213, 271; Rene Provost *International Human Rights and Humanitarian Law* (2002); Malcolm N Shaw, *ibid* at 1074; Tom Ruys, *supra* note 17 at 20; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 77.

⁵⁰⁹ Manfred Nowak, *supra* note 218 at 110; Daniel D Nsereko 'Arbitration Deprivation of Life: Controls on Permissible Deprivations' in BG Ramcharan (ed.) *The Right to Life in International Law* (1985) 248; CK Boyle 'The Concept of Arbitrary Deprivation of Life' in BG Ramcharan (ed.) *The Right to Life in International Law* (1985) 224; Nils Melzer, *supra* note 3 at 92-93; UNHRC, General Comment No. 6 (1982), paragraph 3.

⁵¹⁰ Article 2, ECHR: '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 defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection.'; ECtHR, *Gül Case*, paragraph 83.

⁵¹¹ ECtHR, *McCann v. United Kingdom*, paragraph 148: '[t]he text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in subparagraphs (a), (b) or (c).'; ECtHR, *Makaratzis Case*, para 72.

⁵¹² ECtHR, *McCann v. United Kingdom*, paragraph 148, 149; ECtHR, *Isayeva v The Russian Federation*, Application No. 57950/00, paragraph 181; ECtHR, *McKerr v Turkey*, Application No. 28883/95, Judgment (4 May 2001), paragraph 22; ECtHR, *Gülec v Turkey*, Application No. 21593/93, Judgment (27 July 1998) paragraph 16; ECiHR, *Ayetkin Case*, paragraph 98 and 111; See Articles 8(2), 9(2), 10(2) and 11(2), ECHR.

⁵¹³ ECtHR, *McCann Case*, paragraph 149; ECtHR, *Andronicou and Constantinou Case*, paragraph 171.

⁵¹⁴ ECtHR, *Nachova and others v. Bulgaria*, Application No.s 43577/98 and 43579/98, Judgment (6 July 2005), paragraph 95; ECtHR, *Jordan Case*, paragraph 104; ECtHR, *Kelly and Others*, paragraph 93; ECtHR, *Gül Case*, paragraph 77; ECtHR, *Shanaghan Case*, paragraph 87; ECtHR, *Andronicou and Constantinou*, paragraph 193.

⁵¹⁵ ECtHR, *Gülec v. Turkey*, Application No. 21593/93, Judgment (27 July, 1998), paragraph 83.

⁵¹⁶ ECtHR, *Ergi v. Turkey*, Application No. 23818/94, Judgment, (28 July 1998), paragraph 79.

deprivation of life being based on mere suspicion, or situations where less lethal measures would have sufficed.⁵¹⁷

In the *Juan Carlos Abella Case*, the Court clarified the ‘arbitrary’ element by holding that lethal force need not be used against persons who no longer pose a threat to security.⁵¹⁸ Similarly, in *Niera Alegria* the Court clarified the necessity and proportionality elements by taking the view that disproportionate or excessive force leading to loss of life amounts to arbitrary deprivation of life.⁵¹⁹ Additionally, the Court has held as ‘arbitrary’ any deprivation of life resulting from the failure of domestic law to regulate the use of lethal force as well as the disregard for all reasonable precautionary measures.⁵²⁰

Under human rights law, targeted killing is permissible only in the most extreme circumstances (when used for defensive purposes),⁵²¹ for instance the prevention of a concrete and immediate danger of death or serious physical injury.⁵²² The above circumstance must be premised on a strong presumption that the anticipated deprivation of life is in violation of the right to life.⁵²³ The upshot of this is that, under the law enforcement system of rules, targeted killing is not permissible, unless there is no other viable (or

⁵¹⁷ IACtHR, *Alejandro Case*, paragraph 42; UNHRC, *de Guerero Case*, paragraph 13.2; IACtHR, *Niera Alegria Case*, paragraphs 43, 62 and 69; Nils Melzer, *supra* note 3 at 102; UNHRC, Alston Targeted Killings Report, paragraph 77; ACiHPR, *Ouédraogo Case*, paragraph 4; UNHRC, *Suriname Case*, paragraph 14.3; UNHRC, General Comment No. 6 (1982), paragraph 3; IACtHR, *Myrna Mack Case*, paragraph 153.

⁵¹⁸ IACiHR, *Juan Carlos Abella v. Argentina*, Case 11.137, Report No 55/97, IACiHR, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997) paragraphs 204, 218, 245; Inter-American Commission on Human Rights, Report on ‘Terrorism and Human Rights’ (2002), OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 Oct. 2002, 74, paragraph 91; IACtHR, *Myrna Mack Case*, paragraph 134.6; UNHRC, *de Guerero Case*, paragraph 13.1 to 13.3.

⁵¹⁹ IACtHR, *Neira Alegria and others v Peru*, Judgment on the Reparations of September 19, paragraphs 74-76; IACtHR, *Alejandro Case*, paragraph 42; IACiHR, *Report on Terrorism and Human Rights*, 74, paragraph 92; IACiHR, *Country Report Guatemala* (2001), paragraph 50; ECtHR, *Gül Case*, paragraph 82.

⁵²⁰ UNHRC, *Suriname Case*, paragraph 14.3; UNHRC, *de Guerero Case*, paragraphs 13.1 to 13.3; UNHRC, *General Comments No. 6* (1982), paragraph 3; IACtHR, *Myrna Mack Case*, paragraph 153; IACtHR, *Alejandro Case*, paragraph 42; IACtHR, *Niera Alegria Case*, 43, 62 and 69; ECtHR, *Gül Case*, paragraph 84 and 86.

⁵²¹ ECtHR, *Andronicou and Constantinou Case*, paragraph 192 and 193; Amnesty International, *Israel Must End its Policy of Assassinations*, *supra* note 76 at 3; Mordechai Kremnitzer, *supra* note 73 at 1; Nils Melzer, *ibid* at 108.

⁵²² IACtHR, *Alejandro Case*, paragraph 37, 42; Nils Melzer, *supra* note 3 at 59-60; IACiHR, *Report on Terrorism and Human Rights*, paragraph 86; ECtHR, *Andronicou and Constantinou Case*, paragraph 192 and 193.

⁵²³ Nils Melzer, *ibid* at 60; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 78; Orna Ben-Naftali & Keren Michaeli, *supra* note 18 at 286; Mordechai Kremnitzer, *ibid* at 2; Tom Ruys, *supra* note 17 at 20; Amnesty International, *Israel Must End its Policy of Assassinations*, *ibid* at 2; ECtHR, *Makaratzis*, paragraph 69.

available) opportunity to protect the individuals who are objects of the impending attack by apprehending the suspect.⁵²⁴

c. Analysis of the Notion of Targeted Killing under IHL

Most of the analysis concerning the lawfulness of targeted killings under IHL proceeds from the position that there is an ongoing ‘armed conflict’.⁵²⁵ This begs the question whether a particular situation in which targeted killing is used can be classified as an international or internal armed conflict within the meaning of IHL.⁵²⁶ The question raised by the preceding statement has led to divergent conclusions drawn from the cases of the Israeli-Palestinian confrontation,⁵²⁷ and the US engagements in the ‘war on terrorism’⁵²⁸ which has led several authors to suggest that the legal concept of an ‘armed conflict’ in IHL requires further clarification.

⁵²⁴ Amnesty International, *Israel Must End its Policy of Assassinations*, *ibid* at 3-4.

⁵²⁵ Israel HCJ, *Public Committee Against Torture in Israel v Israel*, paragraph 16; US Supreme Court, *Hamdan v Rumsfeld*, 67; Jean-Philippe Lavoyer ‘International Humanitarian Law and Terrorism’ in Liesbeth Lijnzaad, Johanna Van Sambeek & Bahia Tahzib-Lie (eds.) *Making the Voice of Humanity Heard* (2004) 269; Harold Koh, *supra* note 39 at 4; UNHRC, Alston Targeted Killings Report, 16. It is noteworthy that the concept of an ‘armed conflict’ has been the subject of much scholarly discussion, judicial determination, for instance, in *Nicaragua*. So contested is the notion of an armed attack that the ECtHR notably evades using the term. See for instance, ECtHR, *Ergi v Turkey*, Applicant No. 23818/94, (Judgment, 28 July 1998), paragraphs 16, 20, 22, 27, 79 and 85; ECtHR, *Isayeva v The Russian Federation*, 57950/00, Judgment (24 February, 2005), paragraph 180; ECtHR, *Isayeva, Yusupova and Bazayeva v The Russian Federation*, Applications No.s 57947/00, 57948/00 and 57949/00, Judgment, (24 February 2005), paragraph 27; *Hamdan v Rumsfeld*, 126 S.Ct. 2749 at 2794-2796.

⁵²⁶ US Supreme Court, *Hamdan v Rumsfeld*, 67; ICTY, *Prosecutor v Kunarac*, Judgment of 15 July 1999, paragraphs 131 and 145; Malcolm N Shaw, *supra* note 136 at 1072; Nils Melzer, *supra* note 3 at 55, 266.

⁵²⁷ Arguments for the applicability of the rules of international armed conflict have been raised by Amnesty International, *Israel Must End its Policy of Assassinations*, *supra* note 76 at 2; Antonio Cassese, *supra* note 17 at 2; and Tom Ruys, *supra* note 17 at 32. Arguments for the applicability of rules of non-international armed conflict have been raised in Orna Ben-Naftali & Keren Macheli, *supra* note 18 at 258; B’Tselem, *Israel’s Assassination Policy*, *supra* note 131 at 6; Steven R David, *supra* note 84 at 15; Georg Nolte ‘Weg in eine andere Rechtsordnung: Vorbeugende Gewaltandwendung und gezielte Tötungen’, *Franfurter Allgemeine Zeitung*, 10 January 2003, 8; Christian Tomuschat, *supra* note 171 at 137 cited in Nils Melzer, *supra* note 3 at 55.

⁵²⁸ Arguments that this conflict may be part of an international armed conflict have been raised in Tom Ruys, *supra* note 17 at 30. Arguments that this conflict may qualify, on the basis of sufficient intensity, as non-international armed conflict have been raised in David Kretzmer, *supra* note 74 at 201; Mordecai Kremnitzer, *supra* note 73 at 4; Tom Ruys, *ibid* at 30. Other arguments that these incidences are only subject to IHL in ‘designated zones of active combat’ are raised in Philip B Heymann & Juliette N Kayyem, *supra* note 73 at 64 cited in Nils Melzer, *ibid* at 55.

Targeted killing in situations of occupation such as in the Israeli-Palestinian situation brings into question whether human rights should be observed by an occupying power in spite of the applicability of IHL.⁵²⁹ The contemporary consensus in international law is that, outside the conduct of hostilities, the use of lethal force against civilians must be governed by the human rights standard of strict necessity.⁵³⁰

Within the conduct of hostilities, however, the targeted killing of selected individuals is only permissible insofar as the principle of distinction is observed and that those who are being targeted are legitimate military targets (including combatants or civilians directly participating in hostilities).⁵³¹

The nature of terrorist operations blurs the legal standards of distinction and 'direct participation' in armed hostilities. In targeted killing operations there is considerable difficulty where the individuals being targeted are not visibly engaged in armed conflict at the time of targeting.⁵³²

For purposes of distinction under IHL, the resultant question is whether terrorists in their legal position as organised non-State armed groups are to be regarded as civilians or as combatants.⁵³³ Regarding them as civilians makes their targeting legally permissible only 'for such time' as they are directly participating in hostilities, whilst regarding them as unprivileged combatants would open them to attack at all times.⁵³⁴ Should terrorists be

⁵²⁹ Amnesty International, *Israel Must End its Policy of Assassinations*, *supra* note 76 at 2; Orna Ben-Naftali & Keren Michaeli, *supra* note 18 at 262, 264; Georg Nolte, *supra* note 527 at 8; PCATI/LAW, *Assassination Policy of Israel*, *supra* note at 85; Christian Tomuschat, *ibid* at 140 cited in Nils Melzer, *ibid* at 56; ICJ, *Wall Advisory Opinion*, paragraphs 111, 112, 113, 114, 118 and 119; Mordchai Kremnitzer, *ibid* at 2.

⁵³⁰ ECHR, *Cyprus v Turkey* (First and Second Applications), Report of the Commission of 10 July 1976, paragraphs 509-10; IACiHR, *La Tablada*, Report No. 55/97, Case 11.137 and OEA/Ser.L/V/II.98, paragraph 153; *Coard v United States of America*, Case No. 10.951; Amnesty International, *Israel Must End its Policy of Assassinations*, *supra* note 76 at 2; Orna Ben-Naftali & Keren Michaeli, *ibid* at 262; Mordecai Kremnitzer, *ibid* at 10; Georg Nolte, *ibid* at 8; PCATI/LAW *Assassination Policy of Israel*, *ibid* at 86; Tom Ruys, *ibid* at 35; Christian Tomuschat, *ibid* at 140 cited in Nils Melzer, *ibid* at 56; Malcolm N Shaw, *supra* note 136 at 1075.

⁵³¹ Michael N Schmitt, *supra* note 203 at 545; Nils Melzer, *ibid* at 57; Malcolm N Shaw, *supra* note 136 at 1063.

⁵³² Nils Melzer, *supra* note 3 at 56; UNHRC, Alston Targeted Killings Report, 1, paragraphs 60 and 61.

⁵³³ Yves Sandoz, Christophe Swinarski & Bruno Zimmerman, *supra* note 185 at paragraphs 1942 and 4787.

⁵³⁴ Jeffrey F Addicott, *supra* note 140 at 783; Antonio Cassese, *supra* note 17 at 5; UNHRC, Alston Targeted Killings Report, paragraph 65; ICRC, *Guidelines on Direct Participation in Hostilities*, *supra* note 153 at 66; Orna Ben-Naftali & Keren Michaeli, *supra* note 18 at 265; Chris Downes, *supra* note 16 at 281; William H Parks,

found to be civilians, questions regarding the material and temporal scope of their participation in hostilities automatically arise in order to justify their targeting.⁵³⁵

Considerable criticism, the most prominent being the shortcutting of the technicalities of IHL (thus creating more definitional problems than it resolves),⁵³⁶ has been levelled against the simplistic attribution of the status of legitimate military targets to suspected terrorists.⁵³⁷ This has led to consensus on the fact that each specific act (of suspected terrorists) should be assessed as to whether it amounts to direct participation so as to determine how long such individuals may be directly attacked.⁵³⁸

Extant literature on the conduct of targeted killings under IHL elaborates the concept of military necessity and proportionality by requiring that such killing must offer a concrete military advantage.⁵³⁹ In addition, targeted killing can comply with IHL only if it is not treacherous or perfidious.⁵⁴⁰ The precision of targeting must also be borne in mind so as to limit as much as possible incidental deaths and injuries, and collateral damage resulting from erroneous targeting.⁵⁴¹

supra note 17 at 7; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 90; Joseph B Kelly, *supra* note 144 at 110; Mordecai Kremnitzer, *supra* note 73 at 5; Christian Tomuschat, *supra* note 171 at 139; Kenneth Watkin, *supra* note 17 at 145; Kenneth Watkin, *supra* note 140 at 311; Nils Melzer, *ibid* at 56.

⁵³⁵ Michael N Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5 *Chicago Journal of International Law* 511, 533.

⁵³⁶ Nils Melzer, *supra* note 3 at 56.

⁵³⁷ Orna Ben-Naftali & Keren Michaeli, *supra* note 18 at 270; Steven R David, *supra* note 84 at 15; Chris Downes, *supra* note 16 at 281; Georg Nolte, *supra* note 527 at 8 cited in Nils Melzer, *ibid* at 56.

⁵³⁸ Antonio Cassese, *ibid* at 5; Nils Melzer, *ibid* at 56; William Hays Parks, *ibid* at 6; Orna Ben-Naftali & Keren Michaeli, *ibid* at 278; Tom Ruys, *supra* note 17 at 28; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 86; Joseph B Kelly, *ibid* at 110.

⁵³⁹ Article 52(2), AP I; Jean-Marie Henckerts & Louise Doswald-Beck, *supra* note 140 at Rule 14; Michael N Schmitt, Charles Garraway & Yoram Dinstein, *supra* note 428 at paragraph 1.2.2; Malcolm N Shaw, *supra* note 136 at 1063; Michael N Schmitt, *supra* note 316 at 546-47; Robert Kolb & Richard Hyde, *supra* note 138; Nils Melzer, *ibid* at 428.

⁵⁴⁰ Steven R David, *ibid* at 15; Tyler J Harder, *supra* note 16 at 35; Joseph B Kelly, *supra* note 144 at 101; Nicholas J Kendall, *supra* note 73 at 1076; Mordecai Kremnitzer, *supra* note 102 at 3; William H Parks, *supra* note 17 at 4; Tom Ruys, *supra* note 17 at 23; Michael N Schmitt, *supra* note 169 at 633; Patricia Zengel, *supra* note 117 at 131 cited in Nils Melzer, *ibid* at 57: 'targeted killings must comply with the prohibitions of treachery and perfidy.'

⁵⁴¹ B'Tselem, *Israel's Assassination Policy*, *supra* note 131 at 8; Vincent-Joel Proulx, *supra* note 236 at 888; Mordechai Kremnitzer, *supra* note 73 at 7, 8 cited in Nils Melzer, *ibid* at 57.

The sum of all contemporary legal concerns flowing from an analysis of the legality of targeted killing under IHL revolves around the question of the qualification of the incident as an armed conflict,⁵⁴² the clarification of the status of the participants in such a conflict,⁵⁴³ and the legal standards of precaution and proportionality.⁵⁴⁴

9. Conclusion on the Contemporary Legal Doctrine on Targeted Killing

This chapter has laid out the legal rules governing the use of lethal force so as to situate targeted killing within the context of the applicable international law. The critical importance of the interpretation of the combatancy status of suspected terrorists, the principles of (military and absolute) necessity, and (strict) proportionality has also been noted as significant. These standards should be applied concurrently and complementarily to the extent that they are applicable to the specific situation in question to avoid a gray area or half legality. The resulting standards would restrict the use of lethal force to situations where it is objectively unavoidable in the pursuit of a legitimate purpose.

⁵⁴² UNHRC, Alston Targeted Killings Report, paragraph 47; Harold Koh, *supra* note 39 at 3.

⁵⁴³ Nils Melzer, *ibid* at 56-57; UNHRC, Alston Targeted Killings Report, paragraph 59.

⁵⁴⁴ Nils Melzer, *supra* note 3 at 57; Malcolm N Shaw, *supra* note 136 at 1063; ECtHR, *Bankovic v Belgium*, Judgment of 12 December 2001; William J Fenrick 'Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia' (2001) *European Journal of International Law* 489.

III. PARADIGMATIC CONTEXTS OF TARGETED KILLING USING DRONES IN CONTEMPORARY STATE PRACTICE

1. Introduction

This section assesses the legality of targeted killings using drones in contemporary State practices using three systems of regulations. These comprise rules which govern certain situations where targeted killing may be applied (with a view to restrict targeted killing). The first one is the self-defence regime which governs the legality of transnational use of force. The second one is the law enforcement regime which deals with human rights implications of the use of lethal force in law enforcement. The third one is the hostilities regime which concerns IHL.

2. Targeted Killing using Drones within the Rules Governing Self-Defence

States dealing with terrorist threats (or attacks) face grave challenges with regard to the observance and respect for rules of international law. It has been suggested by some that in international law, there are no rules dealing with terrorist organizations.⁵⁴⁵ This raises the issue of what, if any, norms of international law apply in the event that there is a military conflict between a transnational organized armed group (such as al-Qaeda) and a State.

The hallmark of contemporary *jus ad bellum* is embedded and embodied in Article 2(4) of the UN Charter.⁵⁴⁶ It provides thus:

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.⁵⁴⁷

⁵⁴⁵ See for instance Senator Warren Rudman: 'in the war on terrorism there are no rules. They [the terrorists] have none and we have to take whatever risk you have to take to make them fear us.'

⁵⁴⁶ Yoram Dinstein 'Jus ad Bellum Aspects of the War on Terrorism' in Wybo P Heere *Terrorism and the Military: International Legal Implications* (2003) 13.

⁵⁴⁷ Article 2(4), UN Charter.

The ICJ in the *Nicaragua Case* held that Article 2(4) reflects customary law while Dinstein contends that its proper construction is an all-encompassing one, thus disallowing the use of force for whatever reason.⁵⁴⁸ Nevertheless, resort by States to the use of force is made explicitly permissible upon Security Council authorization in response to ‘a threat to the peace, breach of the peace, act of aggression’,⁵⁴⁹ or in the exercise of the inherent right of individual or collective self-defence if an armed attack occurs against a member of the UN.⁵⁵⁰

Thus, the international regulation of contemporary *jus ad bellum* is premised upon the provisions of Articles 2(4), 39 and 51 of the UN Charter. Novel threats of terrorist attacks, especially by non-State entities such as terrorist organizations, raise questions whether *jus ad bellum* is capable of dealing with such threats. The present UN Charter-based and customary international law on the use of force indicates that recourse to force in self-defence in response to terrorist attacks is permissible under Article 51.⁵⁵¹ It should be noted, however, that the strict wording of Article 51 limits use of force to a response to an ‘armed attack’ and not to a mere threat to the peace.⁵⁵²

Article 51 implies that use of force is to a large extent discretionary, since it requires no prior approval from the Security Council. Rather, the Article merely obliges the State concerned to inform the Council of its intention. Upon receipt of such a report, the Council may allow the action or it may order the State to cease and desist from any further action.⁵⁵³

⁵⁴⁸ Yoram Dinstein, *supra* note 481 at 82-85.

⁵⁴⁹ Article 39, UN Charter.

⁵⁵⁰ Article 51, UN Charter.

⁵⁵¹ Tyler J Harder, *supra* note 16 at 10, 19; Mordechai Kremnitzer, *supra* note 73 at 3; Louis Beres, *supra* note 16 at 160; Michael N Schmitt, *supra* note 162 at 621, 645; William Hays Parks, *supra* note 17 at 7; Michael P Scharf ‘Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons through Sanctions, Use of Force, and Criminalization’ (1999) 20 *Michigan Journal of International Law* 477, 497; Chris Downes, *supra* note 17 at 286; Emanuel Gross, *supra* note 73 at 1194; Christian Tomuschat, *supra* note 171 at 138; Nicholas J Kendall, *supra* note 73 at 1078

⁵⁵² Yoram Dinstein, *supra* note 226 at 16; UNHRC, Alston Targeted Killings Report, paragraph 39; Nils Melzer, *ibid* at 51; Georg Nolte, *supra* note 235 at 116; Mordechai Kremnitzer, *ibid* at 12; Emanuel Gross, *ibid* at 1194; Nicholas J Kendall, *ibid* at 1078; PCATI/LAW, *Assassination Policy of Israel*, *supra* note 17 at 92; Oscar Schachter *International Law in Theory and Practice* (1991) 1633-34.

⁵⁵³ Yoram Dinstein, *ibid* at 16.

Resort to lethal force under the law of inter-State use of force is regulated by certain standards. These include necessity, proportionality and imminence. These limitations to using lethal force in self-defence are discussed below.

a. Necessity in Self-Defence

Necessity in *jus ad bellum* is concerned with whether force may be used.⁵⁵⁴ This implies that other alternative less forceful measures must have been considered and found to be insufficient.⁵⁵⁵ Thus, the necessity requirement requires the absence of less severe measures.⁵⁵⁶ This requirement may be subdivided into two tests: i) the ‘means’ test which means the adversary has, or is imminently about to possess, the capability to cause harm; and ii) the ‘intent’ test which means the adversary is known to possess the intention to use that means against the state.⁵⁵⁷ In the absence of less lethal means, the use of lethal force will be permissible. However, caution needs to be taken since necessity is a question of fact and must be analyzed on a case to case basis.⁵⁵⁸

A pertinent question concerns whether isolated attacks by terrorists meet the necessity precondition for the applicability of self-defence. The arising of a self-defence situation is contingent upon the attacks having risen to the level of an ‘armed attack’.⁵⁵⁹ Whilst States are obliged to exhaust all less grave measures for resolving their disputes before taking recourse resorting to armed force,⁵⁶⁰ this is largely impractical for terrorist situations. Terrorists’ motives are mostly irreconcilable with States’ self-preservation as some aim at totally destroying a State.⁵⁶¹

⁵⁵⁴ Oscar Schachter, *supra* note 552 at 1633-34.

⁵⁵⁵ Michael N Schmitt, *supra* note 203 at 525-554.

⁵⁵⁶ Amos N Guiora, *supra* note 132 at 325.

⁵⁵⁷ Nigel D White ‘Defending Humanity: When Force is Justified and Why by George P Fletcher and Jens David Ohlin’ (2009) 10 *Melbourne Journal of International Law* 379, 383.

⁵⁵⁸ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 60.

⁵⁵⁹ Robert F Teplitz ‘Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?’ (1995) 28 *Cornell International Law Journal* 569, 578 cited in Jason S Wratchford, *supra* note 286 at 72.

⁵⁶⁰ Wallace F Warriner ‘The Unilateral Use of Coercion Under International Law: A Legal Analysis of The United States Raid on Libya on April 14, 1986’ (1988) 37 *Naval Law Review* 49, 62-63.

⁵⁶¹ Jason S Wratchford, *supra* note 286 at 42.

In this scenario Christine Gray notes that States may use force not in response to each incursion in isolation but to the whole series of incursions, since they collectively amount to an armed attack.⁵⁶² Antonio Cassese argues that for terrorist attacks to reach the level of an 'armed attack', each incident would have to form part of a consistent pattern of violent actions rather than just being merely isolated or sporadic attacks.⁵⁶³ He goes on to contend that the requirement for the use of force as a means of 'last resort' suggests that isolated incidents of terrorist attacks would not sanction the use of force in self-defence.⁵⁶⁴

While the above explanations are theoretically sound, they are 'out of touch with the realities of State practice' and the threat posed by terrorism.⁵⁶⁵ A single isolated attack, for instance the September 11th attacks, as well as a series of sporadic attacks may have similarly devastating effects that may warrant a state's recourse to the use of force as a matter of necessity.⁵⁶⁶

The above explanations adopt a narrow approach to determining necessity by examining the number of attacks, as opposed to a broad approach encompassing the 'scale and effects' of the attacks and the nature of the attacker.⁵⁶⁷ Therefore, from a holistic perspective (absent feasible alternatives), an isolated attack as well as a series of small scale attacks may satisfy the necessity precondition for the resort the use of lethal force in self-defence.⁵⁶⁸

⁵⁶² Christine D Gray, *supra* note 481 at 125 which notes that in the *Nicaragua Case* it was implied that a series of minor incidences could collectively be considered to amount to an armed attack.; Mary Ellen O'Connell *International Law and the Use of Force: Cases and Materials* (2005) 277: '[i]f a state experiences a single attack on its territory and has no evidence of future attacks, then it has no case for military force for the purpose of self-defense against attacks' cited in Jason S Wratchford, *ibid* at 72.

⁵⁶³ Antonio Cassese 'The International Community's "Legal" Response to Terrorism' (1989) 38 *International and Comparative Law Quarterly* 576 cited in Jason S Wratchford, *supra* note 461 at 72.

⁵⁶⁴ Antonio Cassese, *ibid* at 576; Jason S Wratchford, *ibid* at 72.

⁵⁶⁵ Nigel D White, *supra* note 557 at 381.

⁵⁶⁶ ICJ, *Oil Platforms Case* I.C.J Reports, 2003,161, paragraph 72.

⁵⁶⁷ Mikael Nabati 'International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)' (2003) 13 *Transnational Law and Contemporary Problems* 771, 780; Jason S Wratchford, *ibid* at 73.

⁵⁶⁸ ICJ, *The Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea Intervening)*, (Judgment) (2002); ICJ, *Oil Platforms Case*, (Judgment) (2003); Jason S Wratchford, *supra* note 461 at 73.

b. Proportionality in Self-Defence

Proportionality presents some challenges with specific regard to counter-terrorism engagements. An analysis is contingent upon whether the attack has already taken place, or is merely imminent.⁵⁶⁹ Should the attack be considered to be imminent, proportional force is which (is of a certain degree) as to be reasonably necessary to stop the attack, as measured against the anticipated gravity of an impending attack.⁵⁷⁰

In the case of an actual attack, proportionality may be viewed in relation to the actual damage resulting from the attack, as well as the deterrence of future attacks by the terrorist organization.⁵⁷¹ Any strategy that involves lethal force in self-defence should be centred primarily on the current terrorist threat rather than on punishing past conduct. It is noteworthy, however, that preventing grave threats that are with imminent future threats may also be a defensible reason for using lethal force.⁵⁷²

Targeted killing when used as a self-defence strategy against attacks by transnational terrorist organisations raises the question concerning who can be legally targeted. In this respect, Brown notes that, when 'a terrorist organization is responsible for an attack, a State may use counter-force not only against the individuals, but also against the entire organization.'⁵⁷³

c. Imminence in Self-Defence

Immediacy in *jus ad bellum* may be analyzed by the 'imminence test' which requires the anticipated attack to be so imminent and of such magnitude that a State 'cannot afford to

⁵⁶⁹ Michael N Schmitt, *supra* note 493 at 65-66; Rein Müllerson 'Jus ad Bellum and International Terrorism' (2003) 79 *International Law Studies* 116-119, 122; Michael D Banks 'Addressing State (Ir)Responsibility: The Use of Military Force as Self-Defense in International Counter-terrorism Operations' 200 *Military Law Review* 54, 101.

⁵⁷⁰ Michael N Schmitt, *supra* note 203 at 534.

⁵⁷¹ Davis Brown 'Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses' (2003) 11 *Cardozo Journal of International and Comparative Law* 3-4, 35.

⁵⁷² Michael N Schmitt, *ibid* at 534.

⁵⁷³ Davis Brown, *ibid* at 3-4.

wait to absorb the first blow'.⁵⁷⁴ Yoram Dinstein identifies 'immediacy' as being distinct from 'necessity' and 'proportionality'. However, he notes that 'a State cannot be expected to shift gears from peace to war instantaneously'.⁵⁷⁵

While recognizing imminence as a 'component and corollary of the requirement of necessity',⁵⁷⁶ David Rodin observes that imminence is inevitability rather than unavoidability and indispensability.⁵⁷⁷ In the final analysis, it would appear that the requirement of imminence, taken together with necessity and proportionality, impliedly enjoins States neither to act too early (as it would be pre-emptive) nor too late (as it would be retaliatory).⁵⁷⁸ Both of these responses are prohibited in international law.

As indicated by the ICJ in the *Oil Platforms* case, for a self-defence situation to arise the threat must be of a certain level of severity. Thus, the determination of imminence of the threat must always be guided by its severity and additionally should be an objective question of fact assessed on a case by case basis. If this is not observed it would be an effective setting of a dangerous precedent.⁵⁷⁹

3. Targeted Killing Using Drones within the Rules Governing Law Enforcement

Law enforcement comprises all territorial and extraterritorial measures taken by States to maintain public security, law and order or to otherwise exercise its authority or power over individuals in any place or manner whatsoever.⁵⁸⁰ In the case of hostile military engagements between States and non-State actors considerable overlaps exist between the regulations of law enforcement and hostilities.⁵⁸¹ These two regimes have, 'as a matter of

⁵⁷⁴ Martin L Cook 'Ethical and Legal Dimensions of the Bush "Preemption" Strategy' (2004) 27(3) *Harvard Journal of Law and Public Policy* 797, 810; Philip B Heymann & Juliette N Kayyem, *supra* note 73 at 63.

⁵⁷⁵ Yoram Dinstein, *supra* note 546 cited in Nigel D White, *supra* note 557 at 383.

⁵⁷⁶ David Rodin *War and Self-Defence* (2002) 41.

⁵⁷⁷ David Rodin, *ibid* at 40, cited in Nigel White, *ibid* at 383.

⁵⁷⁸ Philip B Heymann & Juliette N Kayyem, *ibid* at 5: 'Targeted killing cannot be an instrument of retributive punishment'; David Kretzmer, *supra* note 74 at 175 and 201; Nigel D White 'Self-Defence, Security Council Authority and Iraq' in Richard Burchill, Nigel D White & Justin Morris (eds.) *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (2005) 235, 236 and 255.

⁵⁷⁹ Nigel D White, *supra* note 557 at 382.

⁵⁸⁰ Nils Melzer, *supra* note 3 at 88-89.

⁵⁸¹ Nils Melzer, *ibid* at 88-89.

factual concept',⁵⁸² been described as being antagonistic but not necessarily mutually exclusive.⁵⁸³

From the outset it must be stated that this research focuses on the legality of the use of lethal force in international law and only uses domestic applications for illustration of international law requirements.

a. Law Enforcement Rules: Human Rights Law and IHL

As a system of regulation, law enforcement consists of rules, principles and standards of international law, that govern the conduct and determine the lawfulness of activities falling within the maintenance of security and order.⁵⁸⁴ Melzer states that the regime of law enforcement entails balancing 'the collective interest in enforcing public security, law and order against the conflicting interest in protecting individual rights and liberties.'⁵⁸⁵ The rules of law enforcement are also applicable in situations of belligerent occupation everyday maintenance of law and order.

It is noteworthy that, in certain instances, the conduct of hostilities may be pursued with the aim of law enforcement.⁵⁸⁶ An example may be drawn from a situation where an armed conflict is mounted by a State so as to suppress an internal insurgency. In this case, the operation of the regime of law enforcement will not be disrupted so long as the violence does not reach the threshold of the conduct of hostilities.⁵⁸⁷ Kenneth Watkin observes in this regard that the European Court has repeatedly interpreted the right to life guaranteed by the European Convention to apply to the context of military use of lethal force'.⁵⁸⁸

⁵⁸² Nils Melzer, *ibid.*

⁵⁸³ Nils Melzer, *supra* note 3 at 88-89.

⁵⁸⁴ Nils Melzer, *ibid.*

⁵⁸⁵ Nils Melzer, *ibid* at 90.

⁵⁸⁶ IACtHR, *Las Palmeras v Colombia (Preliminary Objections)* Inter-American Court of Human Rights Series C No. 67 (4 February 2000); IACiHR, *Abella (La Tablada) v Argentina* (1997); Nils Melzer, *ibid* at 89.

⁵⁸⁷ Marko Sassoli & Antione Bouvier, *supra* note 139 at 264 cited in Nils Melzer, *ibid* at 89.

⁵⁸⁸ Fransisco F Martin 'The Unified Use of Force Rule Revisited: The Penetration of the Law of Armed Conflict by International Human Rights Law' (2002) 65 *Saskatchewan Law Review* 405, 407.

The standards of international law pertinent to rules of law enforcement are drawn principally from human rights law (and to a lesser extent IHL).⁵⁸⁹ When law enforcement involves armed conflict, the rules of human rights are supplemented by IHL.⁵⁹⁰ Note must however be made of the fact that IHL applies only for such time, and for such circumstances that law enforcement activities do not reach the level of the conduct of hostilities.⁵⁹¹

Another point that merits note is the fact that the *lex specialis* principle would require the lawfulness of activities undertaken within law enforcement to be governed by IHL.⁵⁹² This leaves the residual authority to the *lex generalis* of human rights law which protects the right to life in conditions of peace as well as situations falling short of the conduct of hostilities.⁵⁹³ Human rights law also ensures the due process guarantees of its subjects.

b. Applicability of IHL under the Rules Governing Law Enforcement

IHL reduces the effects of armed conflicts on specifically protected persons.⁵⁹⁴ It also provides a protective cover to individuals from arbitrary deprivation of the right to life outside the conduct of hostilities.⁵⁹⁵ With regard to international armed conflicts, IHL prohibits ‘wilful killing’⁵⁹⁶ whereas in internal armed conflicts Common Article 3 prohibits ‘murder’.

It is however important to note from the outset that regardless of the terminological difference, both the notions of ‘wilful killing’ and ‘murder’ are not substantively

⁵⁸⁹ Nils Melzer, *ibid* at 88-90.

⁵⁹⁰ Robert Kolb & Richard Hyde, *supra* note 138 at 270.

⁵⁹¹ Robert Kolb & Richard Hyde, *ibid* at 270.

⁵⁹² ICJ, *Nuclear Weapons Advisory Opinion* I.C.J. Reports, 1996, 226 at paragraph 29; Louise Doswald-Beck ‘The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?’(2006) 89 *International Review of the Red Cross* 881, 882.

⁵⁹³ ECtHR, *Cyprus v Turkey*, Applications No.s 6780/74 and 6950/75, Judgment (26 May 1975).

⁵⁹⁴ Common Article 3, Geneva Conventions; Article 57, AP I; Article 51, AP I.

⁵⁹⁵ Common Article 3, Geneva Conventions; Article 14, GC I; Article 16, AP I; Articles 13(1) and 130, GC III; Article 42, GC III; UNHRC, General Comment No. 6 (1982), paragraph 3; IACtHR, *Niera Alegria v Peru* (1995), paragraph 72; IACtHR, *Myrna Mack Chang v Guatemala* (2003), paragraph 153; ACHPR, *Ouédraogo v Burkina Faso* (2001), paragraph 4; ACHPR, *Civil Liberties Organization v Chad* (1995), paragraph 22.

⁵⁹⁶ Article 50, GC I; Article 51, GC II; Article 130, GC III; Article 147, GC IV.

dissimilar.⁵⁹⁷ The ICRC Commentary categorizes ‘wilful killing’ as covering deaths that occur as a result of any wilful act or omission accompanied by an intent to cause death.⁵⁹⁸ The constitutive elements in ‘wilful killing’ are aptly illustrated by the ICTY in the *Blaskic Case* which defined ‘wilful killing’ with reference to ‘grave breaches’ of the Geneva Conventions system thus:

For the material element of the offence [ie of wilful killing], it must be proved that the death of the victim was the result of the accused as a commander. The intent, or *mens rea*, needed to establish the offence of wilful killing exists once it has been demonstrated that the accused intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death.⁵⁹⁹

The *Blaskic Case* lays the foundation stones for the interpretive path that viewed ‘wilful killing’ from the perspective of the intent to occasion death or grievous bodily injury through a particular physical act or omission.⁶⁰⁰ This construction was reaffirmed by the ICTY in the *Kordic & Cerkez Case* where the *mens rea* requirement was indicated as requiring the establishment of the accused’s intent to kill, or to inflict serious bodily injury in reckless

⁵⁹⁷ ICTY, *Prosecutor v Blaskic*, paragraph 181: ‘[t]he content of the offence of murder under Article 3 is the same as for wilful killing under Article 2.’; ICTY, *Prosecutor v Kordic and Cerkez*, paragraph 233: ‘the elements of the offence of “murder” under Article 3 of the Statute are similar to those which define a “wilful killing” under Article 2 of the Statute, with the exception that under Article 3 of the Statute the offence need not have been directed against a “protected person” but against a person “taking no active part in hostilities”’; ICTY, *Prosecutor v Delalic*, paragraph 422: ‘[t]here can be no line drawn between “wilful killing” and “murder” which affects their content.’; Nils Melzer, *supra* note 3 at 148-49.

⁵⁹⁸ Jean Pictet (ed.) *The Geneva Conventions of 12 August 1949, Commentary, First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952) 371 ICRC: Geneva; Jean Pictet (ed.) *The Geneva Conventions of 12 August 1949, Commentary, Second Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1960) 267 ICRC: Geneva; Jean Pictet (ed.) *The Geneva Conventions of 12 August 1949, Commentary, Third Geneva Convention Relative to the Treatment of Prisoners of War* (1960) 626 ICRC: Geneva; Jean Pictet (ed.) *The Geneva Conventions of 12 August 1949, Commentary, Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958) 597 ICRC: Geneva cited in Nils Melzer, *supra* note 3 at 146.

⁵⁹⁹ ICTY, *Prosecutor v Blaskic* (Judgment of 3 March 2000) paragraph 153 cited in Nils Melzer, *ibid* at 147.

⁶⁰⁰ Nils Melzer, *ibid* at 147.

disregard of human life.⁶⁰¹ The *actus reus* component required the death of the victim to be the result of the accused's acts or omissions.⁶⁰²

Knut Dörmann identifies with an interpretive approach that considers the material and subjective elements that are constitutive of the notion of 'wilful killing'.⁶⁰³ In this regard, the material element describes unlawful acts or omissions occurring in relation to an armed conflict and causing the death of one or more persons protected under the Geneva Conventions.⁶⁰⁴ The subjective element, 'wilful', on the other hand, includes 'intent' and 'recklessness', but not ordinary negligence.⁶⁰⁵

The prohibition of 'murder' in non-international armed conflicts was clarified by the ICTR in the *Musema Case* which defined it as the 'unlawful, intentional killing of a human being', and also where the requisite objective elements were identified.⁶⁰⁶ The objective elements for 'murder' include the death of the victim as a result of the accused's or a subordinate's unlawful act or omission coupled with an intent requirement where the accused or a subordinate must have had the intention to kill or to inflict grievous bodily harm on the deceased with the knowledge of its likelihood to result in the victim's death. Additional to this is a requirement that the accused is reckless as to whether or not the victim's death occurs.⁶⁰⁷

The elements set out in the *Musema Case* were restated by the ICTY in the *Vasiljevic Case* and further held to be constitutive of the definition of murder 'under customary international law'.⁶⁰⁸ In the wake of this development came the *Semanza Case* where the ICTR clarified further on the *mens rea* requirement in internal armed conflict thus:

⁶⁰¹ ICTY, *Prosecutor v Kordic and Cerkez* (Judgment of 26 February 2001) paragraph 229; Nils Melzer, *ibid* at 147.

⁶⁰² Nils Melzer, *ibid* at 147.

⁶⁰³ Knut Dörmann *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2002) 394.

⁶⁰⁴ Knut Dörmann, *ibid* at 394; Nils Melzer, *ibid* at 147.

⁶⁰⁵ Nils Melzer, *ibid* at 147.

⁶⁰⁶ ICTR, *Prosecutor v Musema* (Judgment of 27 January 2000), paragraph 215; Nils Melzer, *ibid* at 147.

⁶⁰⁷ Nils Melzer, *ibid* at 147.

⁶⁰⁸ ICTY, *Prosecutor v Vasiljevic* (Judgment of 29 November 2002), paragraph 193; Nils Melzer, *ibid* at 147.

Murder under Article 4 refers to the intentional killing of another which need not be accompanied by a showing of premeditation. The Chamber reaches this conclusion having considered the use of the term “meurtre” as opposed to “assassinat” in the French version of the Statute.⁶⁰⁹

The comparative jurisprudence developed by the ICTY and ICTR with regard to the definition of ‘murder’ in internal armed conflicts received judicial pronouncement by the Trial Chamber of the ICTY in the *Kristic Case*.⁶¹⁰ In this case a determination had to be made on whether ‘murder’ within the meaning of Articles 3 and 5 of the ICTY Statute had been committed. The Court found this contention to be in the affirmative because ‘thousands of Bosnian Muslims’ were murdered and ‘summarily executed on several sites within the Drina Corps.’⁶¹¹

With respect to the substantive content, there is no indication of the existence of a qualitative difference between ‘wilful killing’ prohibitions in IACs and ‘murder’ prohibitions in NIACs, as was argued in *Isayeva et al. v The Russian Federation*.⁶¹² The primary basis of the similarity between these two prohibitions is the idea of disallowing all intentional or reckless acts that lead to the death of persons protected by the Geneva Conventions and Additional Protocols.⁶¹³

In view of the foregoing, resort to the use of deadly force – whether in an IAC or a NIAC – against persons who are not legitimate military targets will be governed under the

⁶⁰⁹ ICTY, *Prosecutor v Semanza* (Judgment of 15 May 2003), paragraph 373; Nils Melzer, *ibid* at 148.

⁶¹⁰ ICTY, *Prosecutor v Kristic* (Judgment of 2 August 2001), paragraph 485 and 489; Nils Melzer, *ibid* at 148.

⁶¹¹ Nils Melzer, *ibid* at 147.

⁶¹² ECtHR, *Isayeva, Yusupova and Bazayeva v The Russian Federation*, Applications No.s 57947/00, 57948/00 and 57949/00, Judgment (24 February 2005), paragraph 161-167, 166 where Rights International, the Centre for Human Rights Law submitted that norms of IHL should ‘be construed in conformity with international human rights law governing the right to life and to humane treatment’.

⁶¹³ US Supreme Court, *Eain v Wilkes* (1981) 454 US 894, L. Ed. 2d 208, 102 S. Ct. 390: ‘indiscriminate use of violence against civilian populations, innocent parties, is a prohibited act, and as such, is a common crime of murder, punishable both in [Israel and the United States]’; Nils Melzer, *ibid* at 149.

law enforcement regime. Additionally, as Kleffner notes, there is merit in using IHL as the basis for interpreting human rights law as this improves compliance with IHL.⁶¹⁴

c. The Rules Governing Law Enforcement in Occupied Territories

In situations of occupation the question of whether or not the territory is ‘occupied’ within the international law of belligerent occupation⁶¹⁵ is invariably a factual question. An illustration of this is Article 42 of the Hague Regulations IV which states thus: ‘[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised’.⁶¹⁶

Melzer identifies two underlying assumptions that can be discerned from the definition of an occupied territory; i) that the occupier has effective control over the territory in question; and ii) that there exists no other independent authority, other than that of the occupant in the area.⁶¹⁷ The existence of effective control is thus measured by the ‘factual ability’ of the occupying State to assume responsibilities that attach to an occupying power such as the issuance and enforcement of directives to the inhabitants of the territory.⁶¹⁸

The scope of application of the ICCPR as stated in Article 2(1) enjoins State parties to ensure the rights of ‘all individuals within its territory and subject to its jurisdiction.’⁶¹⁹ The notion of ‘subject to its jurisdiction’ is indicative of extraterritorial obligations to States

⁶¹⁴ Jan K Kleffner ‘Improving Compliance with International Humanitarian Law through the Establishment of an Individual Complaints Procedure’ (2002) 15 *Leiden Journal of International Law* 241; For a contrary viewpoint see Kenneth Watkin, *supra* note 17 at 2.

⁶¹⁵ Nils Melzer, *supra* note 3 at 155.

⁶¹⁶ Nils Melzer, *ibid* 155-56.

⁶¹⁷ Nils Melzer, *supra* note 3 at 156: ‘The existence of such other authority in the area within the occupied territory has, however, no bearing on the State of occupation, if that area is surrounded and cut off from the rest of the occupied territory.’

⁶¹⁸ ICJ, *Legal Consequences of a Wall Opinion* I.C.J. Reports, 2004, 134; B’Tselem ‘Israeli Violations against Lebanese Civilians’ 11; UNHRC *Question of Human Rights in the Occupied Arab Territories, including Palestine*, Report of the Human Rights Inquiry Commission established pursuant to Commission Resolution S-5/1 of 19 October 2000, U.N. Doc. E/CN.4/2001/121 of 16 March 2001, paragraph 41; Nils Melzer, *ibid* at 156.

⁶¹⁹ UNGA, Resolution 2200 (XXI) of 16 December 1996, at 53, U.N. Doc. A/6546.

who may be exercising their authority across their territorial borders.⁶²⁰ The fact that it was placed immediately after 'territory' is also particularly telling.

The formulation of the provision of Article 2(1) ICCPR was clarified by the UN Human Rights Committee whose interpretation implied the contemplation of situations where a State exercises its jurisdiction over a foreign territory.⁶²¹ The UN Committee stated that, 'the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant.'⁶²²

In arriving at the determination that the human rights protections were due to the Palestinians in the Occupied Palestinian Territory,⁶²³ UN Committee highlighted the 'exercise of effective jurisdiction by Israeli security forces'⁶²⁴ and more importantly,

⁶²⁰ See UNHRC, *Sergio Euben Lopez Bourgos v Uruguay* (1981) Communication 52/79, paragraph 12.3 where the Human Rights Committee opined that the textual formulation of Article 2(1) of the ICCPR 'does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it'; See also ICJ, *Wall Opinion*, paragraph 109; UNHRC, *Lilian Celiberti de Casariego v Uruguay* (1981) Communication 56/79; UNHRC, *Montero v Uruguay* (1983) Communication 106/81; David J Harris, *supra* note 136 at 602.

⁶²¹ UNHRC, Views of the Human Rights Committee Under Article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights' at paragraphs 10(3), 12(3), U.N. Doc. ICCPR/C/13/D/52/1979 (July 29, 1981) cited in Kyle K Bradley 'A Mending Wall: A Critical Look at the International Court of Justice's Analysis in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (2005) 19 *Temple International & Comparative Law Journal* 419, 427.

⁶²² UNHRC, Concluding Observations of the Human Rights Committee: Israel, paragraph 11, U.N. Doc. CCPR/CO/78/ISR (Aug 21, 2003) cited in Kyle K Bradley, *ibid* at 427; See also UNHRC, *Sergio Euben Lopez Bourgos v Uruguay* (1981) Communication 52/79, at paragraph 12.3.

⁶²³ See for instance ICJ, *Wall Opinion* I.C.J. Reports, 2004, 134 where in finding Israel in breach of its human rights obligations, the court opinion has reaffirmed the provisions of the UNHRC's *General Comment No. 27* which clarified the fact that any derogation from human rights obligations must be necessary for the pursuit of a legitimate aim proportionate to the intended objective.

⁶²⁴ UNHRC, Concluding Observations of the Human Rights Committee: Israel, paragraph 10, U.N. Doc. CCPR/C/79/Add.93 (August 18, 1998) cited in Kyle K Bradley, *ibid* at 428.

consonant to the *Nuclear Weapons Advisory Opinion*,⁶²⁵ the fact that most protections provided by the ICCPR do not automatically end during war.⁶²⁶

d. The Legality of Targeted Killing as a Means of Law Enforcement

In some cases such as those involving insurgencies and internal strife, the situation of the violence may escalate to the threshold of non-international armed conflict.⁶²⁷ In such instances law enforcement operations by the State in bid to restore law and order will be governed by the normative construct of hostilities.⁶²⁸ This effectually places the resort to targeted killing by State agents within the remit of both human rights law and IHL.⁶²⁹

The ruling in the *Jesuits in El Salvador Case* underscored the fact that the international responsibility attributable to the State for extrajudicial executions in El Salvador arose from both human rights and humanitarian law.⁶³⁰ The IACiHR decried the extrajudicial executions which ‘violated the right to life enshrined in Article 4 of the American Convention, together with the principles recognized in common Article 3 of the Geneva Conventions of 1949’.⁶³¹ It was also held to be a violation of the right to human dignity.⁶³²

⁶²⁵ ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226 at 240.

⁶²⁶ Kyle K Bradley, *ibid* at 428; ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 137 where the court opined that the construction of a ‘wall, along the route chosen, and its associated regime infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order’.

⁶²⁷ William Abresch ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005) 16 *European Journal of International Law* 742 and 746.

⁶²⁸ Wolff Heinschel von Heinegg ‘The Rule of Law in Conflict and Post-Conflict Situations: Factors in War to Peace Transitions’ (2004) 27 *Harvard Journal of Law and Public Policy* 868-869: ‘[t]he law of international armed conflict is especially designed to serve as binding guidelines for armed forces in engaged in combat operations.’

⁶²⁹ Adam Roberts ‘Implementation of the Laws of War in the Late Twentieth Century Conflicts’ in Michael N Schmitt & Leslie Green (eds.) *The Law of Armed Conflict: Into the Next Millennium* (1998) 366: ‘[a]lthough the right to life is inevitably subject to certain limitations in times of war and insurgency, its existence can potentially provide a basis for those whose rights have been undermined (or their surviving relatives) to argue that an armed force acted recklessly, granted its obligations.’

⁶³⁰ IACiHR, *Case Concerning the Massacre of the Jesuits in El Salvador*, Case, No. 10.488, Report No. 136/99, 22 December 1999, paragraph 158 and 161; Nils Melzer, *supra* note 3 at 172.

⁶³¹ IACiHR, *Case Concerning the Massacre of the Jesuits in El Salvador*, paragraph 237: ‘The Salvadoran State, through agents of the Armed Forces who perpetrated the extrajudicial executions described herein, has violated the right to life enshrined in Article 4 of the American Convention, together with the principles recognized in Common Article 3 of the Geneva Conventions of 1949....’

The above analysis of the rules governing law enforcement in situations of occupation suggests that, outside the conduct of hostilities, using lethal force including targeted killing is restricted. This is contrary to the idea that the laws of occupation modify the conventional human rights law thus increasing the latitude of the occupying powers' use of lethal force.⁶³³

It is important to note, however, that the application of the legal restrictions on deprivation of life gives due consideration to the characteristic high levels of threats and other relevant circumstances prevailing in an occupied territory. Thus, in the interpretation and application of the standards of necessity, proportionality and precaution when dealing with deprivations of life,⁶³⁴ (to some extent) human rights law is modified by the laws of occupation. This has been evinced most notably in the Occupied Palestinian Territories.

4. Targeted Killing Using Drones within the Rules Governing the Conduct of Hostilities

a. Drone Strikes and the Principles of International Humanitarian Law

i) Drone Strikes and the Principle of Distinction

IHL has been specially designed to govern situations of armed conflicts. In such situations, certain categories of persons may be deprived of their right to life by 'the deliberate or intended use of lethal force.'⁶³⁵ Distinction is a cardinal principle of IHL which requires the

⁶³² Orna Ben-Naftali & Noam Zamir 'The Shooting of a Handcuffed, Blindfolded Palestinian Demonstrator' (2009) 7 *Journal of International Criminal Justice* 155, 163.

⁶³³ Nils Melzer, *supra* note 3 at 167; ICJ, *Wall Opinion*, paragraphs 112 and 113.

⁶³⁴ Israel HCJ, *Beit Sourik Village Council v The Government of Israel*, HCJ/2056/04 (30 June 2004), paragraph 35: '[t]he provisions create a single tapestry of norms that recognizes both human rights and the needs of the local population as well recognizing security needs from the perspective of the military commander'.

⁶³⁵ ECtHR, *Isayeva v The Russian Federation*, Application No. 57950/00, Judgment (24 February, 2005) paragraph 169; ECtHR, *Isayeva, Yusupova and Bazayeva v The Russian Federation*, Applications No.s 57947/00, 57948/00 and 57949/00, Judgment (24 February, 2005), paragraph 173.

differentiation between non-combatants (who may not be subjected to any attack) and combatants (who may be lawfully targeted).⁶³⁶ Additionally, military objectives must be differentiated from civilian objects.⁶³⁷ Therefore, distinction obliges parties to an armed conflict to only direct attacks against combatants and military objectives.⁶³⁸

It is noteworthy that distinction is both integral and complementary to the other IHL principles of military necessity and proportionality.⁶³⁹ On the one hand, military necessity prohibits intentional destruction of property, not necessitated by the imperatives of armed conflict,⁶⁴⁰ which in no way elicits a military advantage.⁶⁴¹ On the other, distinction precludes incidental injury and loss to the civilian population that is disproportionate to the military advantage gained from the attack.⁶⁴² On the issue of distinction, it is noteworthy that Leslie Green makes the convincing, if controversial, case that attacks upon non-combatants are acceptable insofar as the harm done is proportional to the military gain achieved.⁶⁴³

Drone attacks appear to satisfy the distinction requirement which proscribes 'indiscriminate attacks'⁶⁴⁴ or employing 'a method or means of combat the effects of which cannot be limited as required.'⁶⁴⁵ Being precision weapons, drones may be defended as being capable of discriminating between combatants and civilians, and further directing 'surgical'

⁶³⁶ Article 13(1), AP II; ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 78; Noelle Quenivet, *supra* note 216 at 342; Jean-Marie Henckaerts 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 857 *International Review of the Red Cross* 24.

⁶³⁷ ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 226 at paragraph 78.

⁶³⁸ Louise Doswald-Beck, *supra* note 592 at 899.

⁶³⁹ ICJ, *Nicaragua Case (Merits)* I.C.J Reports, 1996, 14 at 114; Antonio Cassese, *supra* note 207 at 400; Frits Kalshoven & A Zegveld, *supra* note 402 at 14 and 138.

⁶⁴⁰ Article 23(g), Hague Convention IV.

⁶⁴¹ Michael N Schmitt, *supra* note 203 at 542-43; Nathan A Canestaro 'American Law and Policy on Assassination of Foreign Leaders: The Practicality of Maintaining the Status Quo' (2005) 26 *Boston College International and Comparative Law Review* 457.

⁶⁴² Article 51, AP I; Article 57, AP I; Jean-Marie Henckaerts & Louise Doswald Beck, *supra* note 140 at Rules 14 and 19; Michael N Schmitt, *ibid* at 543; Nathan A Canestaro, *ibid* at 457.

⁶⁴³ Leslie Green, *supra* note 319 at 326.

⁶⁴⁴ Article 51(4)(a), AP I; Article 51(5)(b), AP I.

⁶⁴⁵ Article 51(4)(c), AP I.

attacks against specific individuals.⁶⁴⁶ However, in view of the possibility of some ‘incidental loss’⁶⁴⁷ of civilian lives and property, proportionality requires any drone strikes to balance ‘collateral damage’⁶⁴⁸ against the ‘concrete and direct military advantage anticipated’ with regard to the relevant circumstances of each strike.⁶⁴⁹

ii) Drone Strikes and the Principle of Military Necessity

The principle of military necessity as understood in contemporary legal doctrine draws from the Lieber Code of 1863 which allowed measures that are prerequisite to the securing of legitimate military victory.⁶⁵⁰ The provisions of Articles 55 and 35 of AP I are reflective of the definition of military necessity in the Article 14 of the Lieber Code which is also reaffirmed *In re Wilhelm List and Others*.⁶⁵¹

The requirements in IHL for military necessity are dual: i) that the action is necessary for the achievement of a legitimate military purpose; and ii) that the action should not be inconsonant with IHL.⁶⁵² International jurisprudence⁶⁵³ and contemporary legal

⁶⁴⁶ Nils Melzer, *supra* note 3 at 9.

⁶⁴⁷ ECtHR, *Ergi v Turkey* (1998), paragraph 79.

⁶⁴⁸ Theodore Meron ‘The Humanization of Humanitarian Law’ (2000) 94 *American Journal of International Law* 240.

⁶⁴⁹ Article 57(2), AP I; Judith G Gardam, *supra* note 424 at 406; Noelle Quenivet, *supra* note 216 at 345.

⁶⁵⁰ See Articles 14, 15 and 16 of Lieber Code; ICJ, *Corfu Channel Case*, 22; ICJ, *Nicaragua Case (Merits)*, paragraph 218; ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 78, 95; ICTY, *Furundzija Case* (Judgment of 10 December 1998), paragraph 183; ICTY, *Kupreskic Case* (Judgment of 14 January 2000); IACiHR, *Abella (La Tablada) Case*, paragraph 158.

⁶⁵¹ Yves Sandoz et al., *supra* note 185 at paragraph 1397; United Nations War Crimes Commission, *In re Wilhelm List and Others* Law Reports of Trials of War Criminals, volume VIII, at 66 defined military necessity thus: ‘Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money [...] It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but does not permit the killing of innocent inhabitants for the purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of enemy forces.’

⁶⁵² Nils Melzer, *supra* note 3 at 285.

⁶⁵³ United Nations War Crimes Commission, *Wilhelm List Case* para 66; ICJ, *Nuclear Weapons Advisory Opinion* paragraph 78; ILC Draft Articles, 40, Commentary paragraph 5, pp 284; NCH Dunbar ‘Military Necessity in War Crimes Trials’ (1952) 29 *British Year Book of International Law* 446-452 cited in Nils Melzer, *ibid* at 285.

doctrine⁶⁵⁴ of IHL have confirmed the veracity of the above statement on these two requirements.

Military necessity therefore requires commanders of a drone strike to assess whether the kind and degree of force used would objectively correspond to what is reasonably necessary to achieve the legitimate purpose of that operation.⁶⁵⁵ Considering that drones are principally used for the targeted killing of selected individuals, military necessity demands that either the individuals are combatants or that they directly participate in hostilities at the time of the attack.⁶⁵⁶ Additionally, all other requirements of IHL must be met cumulatively in order for a drone attack to be lawful.

iii) Drone Strikes and the Principle of Proportionality

The customary principle of proportionality prohibits resort to military action, the effects of which outweigh the military advantage accruing from the damage brought upon the enemy.⁶⁵⁷ Thus, proportionality encompasses within prohibited acts or attacks, whose effects are unreasonable or excessive.⁶⁵⁸ Proportionality is reflected in Article 51(5)(b) of AP I

⁶⁵⁴ Yoram Dinstein 'Military Necessity' in Rudolf Bernhardt (ed.) *Encyclopaedia of Public International Law* (1997) 396; Christopher Greenwood 'Historical Development and Legal Basis' in Dieter Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflicts* (1995) note 130; Michael N Schmitt, *supra* note 169 at 640; Yoram Dinstein, *supra* note 481 at 18; William Gerald Downey Jr. 'The Law of War and Military Necessity' (1953) 47 *American Journal of International Law* 254; Robert W Gehring 'Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I' (1980) 19 *Military Law and Law of War Review* 14; Henri Meyrovitz 'Principle of Superfluous Injury or Unnecessary Suffering—From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977' (1994) No. 299 *International Review of the Red Cross* 98, 106; Stefan Oeter 'Means and Methods of Combat' in Dieter Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 401 cited in Nils Melzer, *ibid* at 285.

⁶⁵⁵ Nils Melzer, *supra* note 3 at 285.

⁶⁵⁶ Michael N Schmitt, *supra* note 203 at 528.

⁶⁵⁷ ICTY, *Prosecutor v Kupreskic* (Judgment of 14 January 2000), paragraph 524; Jean Marie-Henckaerts & Louise Doswald-Beck, *supra* note 140, Rule 14 at 46: 'State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.'; ICTY, *Prosecutor v Kupreskic* (Judgment of 14 January 2000), paragraph 524; William J Fenrick 'The Rule of Proportionality in Protocol I in Conventional Warfare' (1982) 92 *Military Law Review* 91, 126; Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* note 140 at Rule 14, pp. 46; Nils Melzer, *supra* note 3 at 358; Robert Kolb & Richard Hyde, *supra* note 138 at 47.

⁶⁵⁸ Michael C Bonafede 'Here, There and Everywhere: Assessing the Proportionality Doctrine and U.S. Use of Force after the September 11 Attacks' (2002) 88 *Cornell Law Review* 155, 166; Yves Sandoz, *supra* note 185, paragraph 1980; Nils Melzer, *ibid* at 360; APV Rogers *Law on the Battlefield* (1996) 23; Robert Kolb & Richard Hyde, *ibid* at 48.

which proscribes any ‘attack which may be expected to cause incidental loss of civilian life’ the effects of ‘which would be excessive in relation to the concrete and direct military advantage anticipated’.⁶⁵⁹

Thus, proportionality limits belligerents’ right to use armed force. Proportionality exhibits a realistic acceptance of the fact that a military attack would invariably be attended by, at least, some incidental civilian death, injury or loss of property.⁶⁶⁰ Proportionality is, thus, attributed with the accommodation of ‘the needs of humanity and the practical inevitabilities of warfare’.⁶⁶¹ This principle importantly establishes absolute ‘limits at which the necessity of war ought to yield to the requirements of humanity.’⁶⁶²

Proportionality in a drone attack requires an objective value judgment as to whether the harm likely to be caused by the force used in the operation is justified in view of the expected military advantage.⁶⁶³ Thus, even an attack on a legitimate military target would be unlawful if the incidental civilian casualties would be disproportionate to the specific military gain of the attack.⁶⁶⁴

The proportionality of a drone attack would, therefore, be strictly determined using the resulting incidental harm *vis-a-vis* the concrete military gain. This implies that the determination of ‘proportionality in attack’ must be objective. Also, the assessment of proportionality should factor in other values protected by IHL against the effects of hostilities.⁶⁶⁵

iv) Drone Strikes and the Principle of Precaution

⁶⁵⁹ See ICJ, *Nicaragua Case*, I.C.J Reports, 1986, 14 at paragraph 78 where the ICJ opined that this principle was reflective of customary international law.

⁶⁶⁰ ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14.

⁶⁶¹ William J Fenrick, *supra* note 657 at 462.

⁶⁶² Nils Melzer, *supra* note 3 at 357-58.

⁶⁶³ Nils Melzer, *ibid* at 357.

⁶⁶⁴ ICJ, *Nuclear Weapons Advisory Opinion* (Dissenting Opinion of Judge Higgins), paragraph 20.

⁶⁶⁵ ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, paragraph 30: ‘states must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality’.

Integral to the test used in determining the proportionate nature of an attack is the reasonable care element which is impressed upon the attacking party by Article 57(1) of AP I.⁶⁶⁶ Prior to the use of precision weapons such as drones, incidental civilian loss and death was attributable to no less than three causes: i) a lack of full knowledge about the target; ii) inability to direct a minimum amount of force needed to destroy the target; and iii) an inability to guarantee the weapon hits only the target.⁶⁶⁷

Therefore, when planning a drone attack, reasonable care and precaution need to be factored into the process of target selection, method of attack, and the assessment of tactical and strategic military advantage to be achieved with the target's destruction.⁶⁶⁸

With specific reference to drone attacks, an initial observation elicits the conclusion that they are far more proportional as compared to other methods because of their 'surgical' or pinpointed nature.⁶⁶⁹ This will, however, need to be balanced against the 'concrete and direct' military advantage engendered by the attack.⁶⁷⁰ Thus, before launching a drone attack the circumstances at the time must be analyzed with a view to taking all feasible and reasonable precaution to ensure that the prospective subject of the attack is a legitimate military target and that the intended attack would not cause disproportionate collateral damage.⁶⁷¹

The formulation of the knowledge requirement in Article 57 of AP I restricts the pre-attack analysis only to information that is available at the moment. This does not, however, preclude a 'should have known' reading to the proportionality principle. That the provision of 'precautions in attack' found in Article 57 AP I require the cancellation of an attack based

⁶⁶⁶ Nils Melzer, *ibid* at 358: 'The operation of this value judgment is an integral part also of the duty to take all feasible precautionary measures in attack.'

⁶⁶⁷ Michael N Schmitt "'*Bellum Americanum*": The U.S. View of Twenty-First Century War and its Potential Implications for the Law of Armed Conflict' (1998) 19 *Michigan Journal of International Law* 1051, 1080; William J Fenrick, *ibid* at 462.

⁶⁶⁸ Randy W Stone 'Protecting Civilians During Operation Allied Force: The Enduring Importance of Proportional Response and NATO's Use of Force in Kosovo' (2001) 50 *Catholic University Law Review* 501, 522 cited in William J Fenrick, *ibid* at 462.

⁶⁶⁹ UNHRC, Alston Targeted Killings Report, paragraph 81

⁶⁷⁰ William J Fenrick, *ibid* at 463.

⁶⁷¹ William J Fenrick, *ibid* at 463.

on a projection of the disproportional incidental harm likely to arise is particularly telling.⁶⁷² Implicit in this requirement is the contention that launching an attack in disregard to the eventuality of disproportionate incidental casualties when the attacking commander ‘knows or should have known’ is a blatant disregard for the Article 57 AP I provision on the principle of proportionality.⁶⁷³

Contemporary challenges posed by the use of drones for targeted killing revolve around the uncertainty of intelligence and the difficulty in establishing the legal status of a potential target.⁶⁷⁴ This would require the organization and control of a drone strike operation so that intelligence information is continuously reviewed for verification, and upon a finding of inaccuracy, the operation be cancelled or aborted.⁶⁷⁵

b. When and Against Whom May Drone Strikes be Directed?: Deconstructing the Notion of Direct Participation in Hostilities

The principle of distinction expressed in Article 48 and 51(2) of AP I entrenches the inviolability of civilians in situations of armed conflict thereby protecting them from attack.⁶⁷⁶ The only exception is in cases where civilians directly take part in hostilities,⁶⁷⁷ and it is noteworthy that this is a principle of customary international law.⁶⁷⁸ The principle of

⁶⁷² Michael N Schmitt, *supra* note 162 at 13.

⁶⁷³ William J Fenrick, *ibid* at 463.

⁶⁷⁴ Michael N Schmitt, *supra* note 667 at 1080-1081.

⁶⁷⁵ Article 57(2), AP I; Jean-Marie Henckerts & Louise Doswald-Beck, *supra* note 140 at Rule 16; UNHRC, Alston Targeted Killings Report, paragraph 78; Nils Melzer, *supra* note 3 at 364.

⁶⁷⁶ Article 48, AP I: ‘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 operations only against military objectives.’; Article 51(2), AP I: ‘[t]he 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.’

⁶⁷⁷ Article 51(3), AP I; Article 13(3), AP II; Israel H CJ, *Public Committee Against Torture in Israel v the Government of Israel*, H CJ 769/02; UNHRC, Alston Targeted Killings Report, paragraph 58; Robert Kolb & Richard Hyde, *supra* note 138 at 128.

⁶⁷⁸ ICTY, *Prosecutor v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case No. IT-94-1-AR72, (2 October 1995), paragraph 127.

distinction and the notion of direct participation in hostilities are the guidelines by which to determine who may be lawfully targeted in a situation of armed conflict.⁶⁷⁹

Distinction acknowledges military necessity and provides for the temporary loss of civilian status for those who get involved in hostilities.⁶⁸⁰ This provides much clarification on questions of who can be categorized as persons who may lawfully be targeted and those who are protected from attack. Absent such a determinative guideline, the protective element of IHL will be compromised to a large extent.⁶⁸¹ It is in this regard that mention must be made of the ICRC's efforts in clarifying these two principles.⁶⁸²

The notion of 'direct participation in hostilities' is capable of being elaborated so as to encompass the commission of a specific act specifically designed to support a party to an armed conflict, and which is to the detriment of another party. This is referred to as the belligerent nexus requirement.⁶⁸³ Also, direct participation in hostilities is identifiable when it is likely to cause direct harm to the military operations or military capacity of the other party, or, alternatively, to inflict death, injury or destruction on persons or objects not under the effective control of the acting individual.⁶⁸⁴

Thus, another category of individuals (a 'continuous combat function')⁶⁸⁵ has been suggested so as to include the actions of individuals which satisfy the 'direct causal of harm' requirement used for establishing direct participation by a member of an armed group.⁶⁸⁶

⁶⁷⁹ Michael N Schmitt, *supra* note 162 at 13; UNHRC, Alston Targeted Killings Report, paragraph 58.

⁶⁸⁰ See Article 3(1) Common to all the Four Geneva Conventions of 1949: 'Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely'; Articles 8(2)(b)(i) and 8(2)(e)(i), ICC Statute; Michael N Schmitt, *supra* note 162 at 12.

⁶⁸¹ Michael N Schmitt, *supra* note 162 at 12.

⁶⁸² International Committee of the Red Cross (ICRC) *Overview of the ICRC's Expert Process (2003-2008)*, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/directparticipation-report_res/\\$File/overview-of-the-icrcs-expert-process-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/directparticipation-report_res/$File/overview-of-the-icrcs-expert-process-icrc.pdf) (accessed 10 September 2010); ICRC, *Interpretive Guidelines on Direct Participation*, *supra* note 153 at 66-68.

⁶⁸³ UNHRC, Alston Targeted Killings Report, 20 at paragraphs 62-65; Michael N Schmitt, *ibid* at 17.

⁶⁸⁴ Jan Römer, *supra* note 3 at 167; ICRC, *Interpretive Guidelines on Direct Participation*, *ibid* at 46 cited Michael N Schmitt, *ibid* at 18 which defines direct participation in hostilities to include acts 'likely to adversely affect the military operations or military capacity of a party to the conflict.'

⁶⁸⁵ ICRC, *Interpretive Guidelines on Direct Participation*, *ibid* at 35 which defines 'continuous combat function' thus: [t]hrough the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on

i) The Temporal Element: ‘For Such Time’

The temporal element of direct participation in hostilities is derived from the words ‘for such time’ in the text of Article 51 of AP I. The ICRC Commentary on AP I provides that direct participation includes ‘preparation for combat and return from combat’,⁶⁸⁷ however, ‘once he ceases to participate, the civilian regains the right to protection.’⁶⁸⁸

This appears to suggest that a civilian can be a ‘farmer by day, fighter by night’⁶⁸⁹ which has elicited criticism for engendering a ‘revolving door’ scenario.⁶⁹⁰ The effect of this is that it leads terrorists to conceal themselves in civilian settlements thus encumbering efforts to combat terrorism.⁶⁹¹

To counter this demerit, the ‘membership approach’ was suggested, whereby membership in an armed group casts one as a legitimate military target anywhere and at any time because of a ‘continuous combat function’.⁶⁹² Upon renouncing their membership, the

the basis of conclusive behaviour, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation

⁶⁸⁶ Michael N Schmitt, *supra* note 162 at 22.

⁶⁸⁷ Yves Sandoz, et al., *supra* note 185 at paragraph 1943; Nils Melzer, *supra* note 3 at 344.

⁶⁸⁸ Yves Sandoz et al., *ibid* at paragraph 1944; Nils Melzer, *ibid* at 347.

⁶⁸⁹ UNHRC, Alston Targeted Killings Report, *supra* note 3 at 20; Nils Melzer, *supra* note 154 at 858; Nils Melzer, *supra* note 3 at 347; Michael N Schmitt, *supra* note 316 at 505, 510; William Hays Parks, *supra* note 382 at 119.

⁶⁹⁰ Nils Melzer, *supra* note 3 at 347; Hellen Duffy *The “War on Terror” and the Framework of International Law* (2005) 230; Yael Stein ‘By Any Name Illegal and Immoral: Response to “Israel’s Policy of Targeted Killing”’ (2003) 17 *Ethics & International Affairs Journal* 127, 129.

⁶⁹¹ William Hays Parks, *supra* note 382, at 118–20.

⁶⁹² Israel HCJ, *Sakhwiletal v Commander of Judea* (1979) HC 434/79: ‘The Court considered the fact that the son was convicted by the Military Court of Ramallah of membership in an unlawful organisation, of providing shelter to a person who had committed an offence in violation of security legislation, and of possessing explosives. It was proven to the Court that the son had knowingly used his room which the respondent had ordered sealed as a shelter for a member of the Al-Fatah organisation (one who had actually engaged in sabotage activity in Jerusalem) and as a hiding place for a sack of explosives. Taking cognisance of the purpose for which the room had served, the Court found the argument on the illegality of the respondent’s order groundless.’; US District Court for the Eastern district of New York, *Mahmoud El-Abed Ahmad v George Wigen* (1989) 89-CV-715: ‘In sworn statements, the co-conspirators implicated petitioner and described their mutual membership in the Abu Nidal Organization, an international terrorist group. That group publicly announced its responsibility for the attack.’; ICRC, *Interpretive Guidelines on Direct Participation*, *supra* note 153 at 66;

onus rests with the civilians to demonstrate their affirmative disengagement from the armed group and from the conduct of hostilities.⁶⁹³

Insofar as the membership approach appears to contravene the substantive ‘direct’ and the temporal ‘for such time’ elements of direct participation in hostilities, this approach is gaining currency over the ‘revolving door’ approach.⁶⁹⁴ However, the merits of focusing on a member of an armed groups’ function (kind of acts) rather than status (combatant or unprivileged combatant) are lost with the prospect of their being targetable ‘all the time’.⁶⁹⁵

It is noteworthy that the temporal element of direct participation in hostilities retains a higher protective provision for civilians as compared to members of armed forces to whom the temporal limitation standard does not apply.⁶⁹⁶ This has sparked some criticism over the ‘incongruity’ in protection which would result in the disruption of the balance of ‘balance of military necessity and humanity that permeates IHL.’⁶⁹⁷

ii) The Substantive Element: ‘Directly Participate’

The substantive element ‘directly participate’ requires a ‘direct causal relationship between’ the actions of a civilian and ‘the harm done to the enemy at the time and place where the activity occurs.’⁶⁹⁸ Schmitt notes that implicit in this is an underlying ‘but for’ causation between the civilian’s action and the resultant harm.⁶⁹⁹ This may be illustrated by an

UNHRC, Alston Targeted Killings Report, 20, paragraph 65; Marco Sassoli & Antoine A Bouvier, *supra* note 139 at 818, 872; Nils Melzer, *supra* note 3 at 351; Michael N Schmitt, *supra* note 162 at 17.

⁶⁹³ International Committee of the Red Cross *Summary Report: Third Expert Meeting on the Notion of Direct Participation in Hostilities* (2005) 63-65, available at:

<http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/> (accessed 10 September 2010) (hereinafter ICRC Expert Report); Michael N Schmitt, *supra* note 162 at 17.

⁶⁹⁴ ICRC, Third Expert Report on the Notion of Direct Participation in Hostilities, *supra* note 693 at 60; Richard D Rosen ‘Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity’ (2009) 42 *Vanderbilt Journal of Transnational Law* 683, 738-41.

⁶⁹⁵ UNHRC, Alston Targeted Killings Report, 21, paragraph.

⁶⁹⁶ Michael N Schmitt, *supra* note 162 at 16; David Kretzmer, *supra* note 74 at 193.

⁶⁹⁷ Michael N Schmitt, *ibid* at 16; William Hays Parks, *supra* note 382 at 143.

⁶⁹⁸ Yves Sandoz et al., *supra* note 185 at paragraph 1679; Israel HCJ, *A v State of Israel*, CrimA 3261/08 (IsrSC 2008).

⁶⁹⁹ Michael N Schmitt, *supra* note 535 at 508. See for a contradicting view ICRC Expert Report, *supra* note 569 at 34 which outlines one expert’s view that stating of the inappropriateness of the ‘but for’ causation.

example of civilians working in a munitions factory who would not be directly participating in hostilities, as contrasted with civilians preparing the weapon systems on the front line who would be directly participating in hostilities.⁷⁰⁰

In this regard, Schmitt points out that while a civilian providing strategic intelligence analysis would not be directly participating in hostilities, a civilian providing tactical intelligence would be.⁷⁰¹ This leads to the conclusion that in determining that a civilian, in fact, does ‘directly participate’ in hostilities is a factual question to be assessed on a case-by-case basis.⁷⁰²

iii) The Substantive Element: ‘Hostilities’

The substantive element of ‘hostilities’ lacks a clear and precise definition under the law of armed conflict.⁷⁰³ Some clarity was introduced by the ICRC Commentary which provides that hostilities ‘should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.’⁷⁰⁴

On its face, this is a very narrow interpretation that would seem to exclude a terrorist attack on civilians which is similar to combat operations.⁷⁰⁵ The ICRC experts were generally of the opinion that ‘hostilities’ was broader than ‘military operations’, but narrower than ‘war sustaining activities’ designed to sustain the general ‘war effort’.⁷⁰⁶ Thus, it is apparent that these combat activities overlap with the substantive element of ‘direct.’ In this regard, it is not far-fetched to suggest that in situations where civilian actions bear a direct belligerent nexus to an armed conflict, it qualifies as hostilities.

c. Drones Strikes and the Location of Hostilities

⁷⁰⁰ David Kretzmer ‘Civilian Immunity in War: Legal Aspects’ in Igor Primoratz (ed.) *Civilian Immunity in War* (2007) 91; Michael N Schmitt, *supra* note 535 at 508; Michael N Schmitt, *supra* note 316 at 544–45.

⁷⁰¹ Michael N Schmitt, *supra* note 535 at 509; Michael N Schmitt, *supra* note 316 at 543–44.

⁷⁰² Michael N Schmitt, *ibid* at 508.

⁷⁰³ ICRC, Third Expert Report on the Notion of Direct Participation in Hostilities, *supra* note 693 at 17.

⁷⁰⁴ Yves Sandoz et al., *supra* note 185 at paragraph 1942.

⁷⁰⁵ David Kretzmer, *supra* note 592 at 91; William Hays Parks, *supra* note 565 at 134.

⁷⁰⁶ ICRC, Third Expert Report on the Notion of Direct Participation in Hostilities, *ibid* at 18–21.

Conventional armed conflicts were carried out either on the territory of the belligerent States or at sea. However, in the case of a non-State actor such as a transnational terrorist organization bereft of any territory to their claim, the dynamic of armed conflict changes.⁷⁰⁷ This does not preclude a suspected terrorist from being targeted legitimately while on the territory of a State party with which the terrorist organization is engaged in armed conflict.⁷⁰⁸

This begs the question whether such suspected terrorists may be lawfully targeted while on the territory of a State that is a not party to the armed conflict.⁷⁰⁹ In such circumstances it has been suggested that targeting may be permissible with either the permission of the State on whose territory the attack is to be launched or that of the UN Security Council.⁷¹⁰

A different criterion applies for situations in which the threshold for self-defence provided for in Article 51 of the UN Charter is reached.⁷¹¹ Here, the injured State – that which has been subjected to terrorist attacks of such gravity – has a qualified right to engage the terrorist even if they are on the territory of a neutral State. The precondition for the exercise of the right to self-defence rests in the inability or unwillingness by the territorial State to prevent the terrorist organization from using its territory to launch attacks (or as a safe haven).⁷¹²

d. Civilian Involvement in Targeted Killing: The Question of State Agents and Private Military Contractors

⁷⁰⁷ UNHRC, Alston Targeted Killings Report, paragraph 54

⁷⁰⁸ UNHRC, Alston Targeted Killings Report, paragraph 68.

⁷⁰⁹ UNHRC, Alston Targeted Killings Report, paragraph 54.

⁷¹⁰ UNSC, Resolution 1373 of 28 September 2001; Chris Downes, *supra* note 17 at 286; Nils Melzer, *supra* note 3 at 51.

⁷¹¹ Mordechai Kremnitzer, *supra* note 73 at 12; Emanuel Gross, *supra* note 73 at 1194; Nicholasa J Kendall, *supra* note 73 at 1078.

⁷¹² ICJ, *Nicaragua Case*, paragraph 194; UNHRC, Alston Targeted Killings Report, paragraph 35; Gary Solis, *supra* note 73 at 7; Michael N Schmitt, *supra* note 169 at 646; Mordechai Kremnitzer, *ibid* at 12 and 14; William Hays Parks, *supra* note 17 at 7; Jeffrey F Addicott, *supra* note 140 at 772.

The use of drones poses pertinent questions concerning the legal status of non-military personnel who engage in certain functions that are necessary for the proper functioning of the targeted killing operations.⁷¹³ Civilian involvement in targeted killing may manifest itself through an agency relationship between the State and government personnel, for instance intelligence and police forces or private contractors who are authorised by the law to provide certain services to the State.⁷¹⁴

An important distinction to be made at this stage is that between *de facto* and *de jure* State agency which establishes the attributability of actions or omissions of individuals or entities to the State.⁷¹⁵ *De jure* State agency typically involves persons who are ordinarily empowered to exercise authority on behalf of the State.⁷¹⁶ These include police, paramilitary, military and other auxiliary State agencies.⁷¹⁷

De facto agency is ascribable to persons who are instructed or directed to act on behalf of the State (provided there is proof of State authorization).⁷¹⁸ Within this group one is apt

⁷¹³ UNHRC, Alston Targeted Killings Report, paragraph 20; Jane Mayer, *supra* note 6. Examples of the involvement of non-military personnel in targeted killing operations include: the targeted killing of Qaed Senyan Al-Harethi (CIA), the attempt on Ayman al-Zawahiri (CIA); Haitham al-Yemeni (CIA); Zelimkhan Muslimovich Yandarbiyev (KGB); Al-Khatib (Russian Intelligence); Khalail al-Wazir (Mossad and Sarayat Matkal); the attempt on Khalid Mashal (Mossad); Salah Shehadeh (GSS) and Sheikh Ahmad Yassin (IDF).

⁷¹⁴ *Hyatt International Corporation v Government of the Islamic Republic of Iran* (1985) 9 Iran-U.S.C.T.R 72 at 88-94; David J Harris, *supra* note 136 at 427; Ian Brownlie *System of the Law of Nations: State Responsibility* (1983) 159-166; DM Chirwa 'State Responsibility for International Law' in Mashood A Baderin & Manisuli Ssenyonjo (eds.) *International Human Rights Law: Six Decades After the UDHR and Beyond* (2010) 398.

⁷¹⁵ Article 2, ILC Draft Articles; Article 4, ILC Draft Articles; PCIJ, *Phosphates in Morocco (Italy v France)* (Preliminary Objections) [1938] P.C.I.J. (Ser. A/B), No. 74, 28; *Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), 669, 678 (1931); ICJ, *Nicaragua Case*, (Merits, Judgment) I.C.J. Reports 1986, 117-118, paragraph 226; ICJ, *Reparations for Injuries Case*, I.C.J Reports, 1949, 174 at 179; ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* I.C.J Reports, 1999, 62 at 88-89, paragraph 66; David J Harris, *ibid* at 423; Malcolm N Shaw, *ibid* at 701; David J Harris, *ibid* at 424: 'Conduct attributable to the State can consist of actions or omissions.'

⁷¹⁶ Article 2, ILC Draft Articles; IACtHR, *Velásquez Rodríguez* at paragraph 170: 'under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions...'; ICJ, *Corfu Channel Case* (Merits) (1949) I.C.J Reports 4, 22-23; ICJ, *Diplomatic and Consular Staff Case* (1980) I.C.J Reports 31-32, paragraph 63 and 67; PCIJ, *Chorzow Factory Case* (1928) P.C.I.J Series A No. 9 at 21; David J Harris, *ibid* at 424: 'Conduct attributable to the State can consist of actions or omissions.'

⁷¹⁷ IACtHR, *Velásquez Rodríguez* paragraph 170; ICJ, *Corfu Channel Case* I.C.J Reports, 1949, 4; *Caire Case* (1920) 5 R.I.A.A, 519; Malcolm N Shaw, *supra* note 136 at 699; David J Harris, *supra* note 136 at 424.

⁷¹⁸ ICJ, *US Diplomatic and Consular Staff in Tehran Case*, I.C.J Reports, 1980, 3 at paragraph 58; ICJ, *LaGrand Case* (Provisional Measures) I.C.J Reports, 1999, 9 at 16 paragraph 28; ICJ, *Gabcikovo-Nagymaros Project Case*

to find private contractors, armed resistance groups and other military outfits that are connected to that State.⁷¹⁹ Such a connection for attributing States responsibility is established on the basis of the State's acknowledgement or adoption of the operations of these organizations as being its own.⁷²⁰ This need not be expressly stated but may be inferred from State conduct as long as it is clear and unequivocal.⁷²¹

The rules of State responsibility recognize the attributability of conduct of a person or group of persons (such as civilian military contractors) to a State, provided that they are acting on the instructions of, or under the direction or control of, that State.⁷²² In the case of civilians who control the unmanned drone and carry out the actual targeting, their conduct will be attributable to the State to the extent that it is authorized by that State.⁷²³

I.C.J Reports, 1997, 7 at 77, paragraph 135; ECtHR, *Norris v Ireland* (1988) E.C.H.R., Series A, No. 142, paragraph 31; David J Harris, *supra* note 136 at 425, 432; DM Chirwa, *supra* note 714 at 403; *Heirs of Duc de Guise Case* R.I.A.A., vol XIII, (1951), 150 at 161; *Pellat Case* R.I.A.A., vol V, (1929), 534 at 536; *Mallén Case* R.I.A.A., vol. IV, (1927) at 536; *Caire Case* R.I.A.A., vol. V, (1929), 516 at 531.

⁷¹⁹ Article 4(2) ILC Draft Articles; David J Harris, *ibid* at 423, 425; ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* I.C.J Reports, 1999, 62 at 87, paragraph 62: 'According to a well-establishment rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule ... is of a customary character ...'; ICJ, *Nicaragua Case (Merits)*; *Tadic Case Judgment* (1999); ICJ, *Genocide Convention Case*, I.C.J Reports, 2007; *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), 455, at 477 (1902); *Chattin Case*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 282, at pp. 285–286 (1927); *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *ibid.*, vol. XIII (Sales No. 64.V.3), 389, at 438 (1955).

⁷²⁰ Article 5, ILC Draft Articles; Article 8, ILC Draft Articles; ICJ, *US Diplomatic and Consular Staff in Tehran Case*, 3 and 57 to 60; ICJ, *Nicaragua Case (Merits)*, paragraphs 113 to 115; ICTY, *Tadic Case* (Judgment of 15 July 1999), paragraph 88 to 145; Article 11, ILC Draft Articles on State Responsibility (2001).

⁷²¹ Article 5, ILC Draft Articles; Article 8, ILC Draft Articles; ICJ, *Nicaragua Case (Merits)*, paragraphs 75 to 125; ICTY, *Tadic Case* (Judgment of 15 July 1999), paragraph 88 to 145; Nils Melzer, *supra* note 3 at 73.

⁷²² ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14; ICTY, *Prosecutor v Tadic* (1999) I.L.M, vol. 38, 1518 at 1541, paragraphs 11 and 145; ICJ, *Genocide Convention Case*, I.C.J Reports, 2007, paragraphs 403; *The 'Zafiro' Case*, R.I.A.A., vol. VI, (1925), 160; *Yeager v Islamic Republic of Iran* (1987) 17 Iran-USCTR 92 at 104, paragraph 43: '[the Guards] at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object ...'; J Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 110; David J Harris, *supra* note 136 at 429-30; DM Chirwa, *supra* note 714 at 403.

⁷²³ Article 9, ILC Draft Articles; *Sansolini and Others v Bentivegna and Others* (1957) Italy, Court of Cassation ILR, vol. 24, 986-990; *Yeager v Islamic Republic of Iran* (1987) 17 Iran-USCTR 92, at 104, paragraph 43; *Caire Case*, (1929) 5 R.I.A.A 516, 530; *The 'Zafiro' Case*, UNRIAA, vol. VI (Sales No. 1955 V.3), p. 160 (1925); *Lehigh Valley Railroad Company and Others (U.S.A. v. Germany) (Sabotage Cases)* R.I.A.A., vol. VIII (Sales No. 58.V.2), at 84 (1930) and at 458 (1939); David J Harris, *ibid* at 430; Malcolm N Shaw, *ibid* at 703, 705; Ian Brownlie, *ibid* at 450.

Thus, the ramifications of the existence of a *de jure* or *de facto* agency is the responsibility of the State for the adverse effects of the agent's acts if that State neglected or refused to protect the rights of the injured States (or individuals).⁷²⁴ This also implies an obligation to make reparations or to take other remedial measures.⁷²⁵

5. Summary on the Use of Drones for Targeted Killing in Contemporary State Practice

This subsection has outlined the various regulatory regimes that have been used to analyze the permissibility of targeted killings using drone attacks. It highlights the ways in which these methods of analysis bring about concurrence and how they lead to dissimilarity thereby leading to different conclusions on the legality of the use of drones for targeted killing in international law.

It seems rather tenuous to argue that the imperatives of self-defence can justify unlawful deaths resulting from the practice of targeted killing.⁷²⁶ Specifically, if the targeted individual's rights under human rights law are violated, the State's inherent right of self-defence cannot supersede the unlawfulness of the killing.⁷²⁷ Rather, the killing would have to be vindicated within the regulatory regime of human rights.⁷²⁸ In this regard, any argument predicated on the non-applicability of human rights law (in self-defence situations) could be

⁷²⁴ ILC, Draft Article 11 Commentary, 81 at paragraph 4; ILC, Report on State Responsibility (2001); ICJ, *Spanish Zone of Morocco Claims (Great Britain v Spain)* (1925) 2 R.I.A.A., 615: 'Responsibility is the necessary corollary of a right. All rights of an international character involve international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparations'; PCIJ, *Chorzow Factory (Jurisdiction)* (1927) P.C.I.J Series A, No. 9, 21; PCIJ, *Chorzow Factory (Indemnity)* (1928), P.C.I.J Series A, No. 17, 29; ICJ, *Reparations Case* (1949) I.C.J Reports 184; ICJ, *Peace Treaties Case* (1950) I.C.J Reports 228; ICJ, *Phosphates in Morocco Case (Preliminary Objections)* (1938) P.C.I.J Series A/B, No. 74, 28; *Coenca Brothers v Germany* (1927-28) Annual Digest 4; David J Harris, *supra* note 136 at 421; Malcolm N Shaw, *supra* note 136 at 435 and 437.

⁷²⁵ PCIJ, *Chorzow Factory Case (Merits)* (1928) P.C.I.J Series A No. 17 at 9: 'it is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation'; ICJ, *Corfu Channel Case*, I.C.J Reports, 1949, 4 at 23; ICJ, *Legal Consequences of the Wall Advisory Opinion*, I.C.J Reports, 2004, 134; Article 42, ILC Draft Articles; ICJ, *Corfu Channel Case (Merits)* I.C.J Reports, 1949, 4 at 22-23; ICJ, *Diplomatic and Consular Staff Case* I.C.J Reports, 1980, 3 at 31-32 at paragraphs 63, 67; ICJ, *Gabcikovo-Nagymaros Project Case* I.C.J Reports, 1997, 7, 38; PCIJ, *Spanish Zones of Morocco Case* (1923) 2 RIAA, 615; Article 13, ILC Draft Articles; *Island of Palmas Case* (1949) RIAA, vol. II, 829 at 845; Malcolm N Shaw, *ibid* at 696-97; David J Harris, *ibid* at 423-24; DM Chirwa, *supra* note 714 at 398.

⁷²⁶ ILC, Articles on State Responsibility at 166-67; UNHRC, Alston Targeted Killings Report, paragraph 43.

⁷²⁷ UNHRC, Alston Targeted Killings Report, paragraph 43.

⁷²⁸ UNHRC, Alston Targeted Killings Report, paragraph 42-43.

rebutted by the counter-argument that human rights law is applicable at all times, and further that certain rights (like the right to life) are peremptory norms from which no derogation (including in self-defence) may be had.⁷²⁹

There is a serious need for the restriction of the predominant presumption under IHL that the use of lethal force is necessary when targeting members of organized armed groups such as terrorists or insurgents.⁷³⁰ A comparison of the legal preconditions for the lawful deprivation of the targeted individual's life, under human rights law and IHL, point towards some relative similarity.⁷³¹ This may be illustrated by certain requirements, for instance the 'legitimate purpose' in human rights and 'military objective' in IHL.⁷³²

6. The Legitimation of Targeted Killings and its Implications on International Law

a. The Continuity of Targeted Killings and the Formation of New Rules of Custom

Given the present attractions of targeted killings in international law as an effective, if sometimes unlawful, method of eliminating individuals deemed to be enemies of the State, it would not be surprising if many more states adopted the practice.⁷³³

Article 38(1)(b) of the ICJ Statute defines customary rules of international law as those which have progressively been developed by the practice of States.⁷³⁴ The uniform continuity of States' conduct (on a specific practice for instance targeted killing) eventually crystallizes into 'a general practice accepted as law'.⁷³⁵ It is also important to note that in

⁷²⁹ Nils Melzer, *supra* note 3 at 55; UNHRC, Alston Targeted Killings Report, paragraph 93.

⁷³⁰ Jan Römer, *supra* note 3 at 167.

⁷³¹ Malcolm N Shaw, *supra* note 136 at 1074; Jan Römer, *ibid* at 166.

⁷³² Jan Römer, *supra* note 3 at 166.

⁷³³ UNHRC, Alston Targeted Killings Report, *supra* note 45 at 9.

⁷³⁴ Ian Brownlie, *supra* note 96 at 7; Malcolm N Shaw, *supra* note 136 at 69, 84; David J Harris, *supra* note 136 at 19.

⁷³⁵ Article 38, ICJ Statute; ICJ, *Asylum Case (Columbia v Peru)* I.C.J Reports, 1950, 266; ICJ, *Rights of Passage over Indian Territory Case (Portugal v India)*, I.C.J. Reports, 1960, 6.

their practice, States observe and conform to these rules out of a shared sense of a legal obligation (or justification) to do so.⁷³⁶

The ICJ in the *Continental Shelf Case* stated that customary international law is comprised of two elements which include:⁷³⁷ i) an objective element (*usus*) which is State practice;⁷³⁸ and ii) a subjective element which is the *opinio juris*.⁷³⁹ This outlines a dichotomy in which State practice is the material element of customary international law while *opinio juris* is its psychological element.⁷⁴⁰ Within this schema, whilst the material element is evinced by the practice and behavior of States, the psychological element is derived from the

⁷³⁶ JL Brierly *The Law of Nations: An Introduction to the International Law of Peace* (1963) 61 cited in Ian Brownlie, *ibid* at 6; See also ICJ, *Fisheries Case*, I.C.J Reports, 1951, 191: 'Customary international law is the generalization of the practice of states'; Malcolm N Shaw, *supra* note 136 at 71; David J Harris, *supra* note 136 at 19; Ian Brownlie, *supra* note 96 at 6; Fischer Williams *Some Aspects of Modern International Law* (1934) 44-46; Rebecca MM Wallace, *supra* note 136 at 9 defines custom as 'practice followed by those concerned because they feel legally obliged to behave in such a way'.

⁷³⁷ ICJ, *Continental Shelf case (Libyan Arab Jamahiriya v Malta)*, (Judgment of 3 June 1985), I.C.J. Reports, 1985, 29-30 paragraph 27: 'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.'; Malcolm N Shaw, *ibid* at 70; Rebecca MM Wallace, *ibid* at 9; ICJ, *Nuclear Weapons Advisory Opinion*, I.C.J Reports, 1996, 226, 253.

⁷³⁸ State practice (*usus*) includes any act, articulation or other behavior of a State that discloses the State's conscious attitude with respect to its recognition of a rule of customary international law. The International Law Commission took up the task of setting out elements that are constitutive of 'Evidence of Customary International Law'. These include official acts and statements, treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisors, and practice of international organizations. See ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14 at paragraph 190; ICJ, *Nuclear Test Case* I.C.J Reports, 1974, 253; ICJ, *Genocide Advisory Opinion*, I.C.J Reports, 1951, 25 where the ICJ relies on the practice of an international organ – the Council of the League of Nations – in making a determination on reservations to multilateral conventions; ICJ, *Nicaragua Case* ICJ Reports, 1986, 14 at 406; ICJ, *Gabcikovo-Nagymaros Project Case* I.C.J Reports, 1997, at paragraph 49-58; ICJ, *Barcelona Traction Case (Second Phase)* I.C.J Report, 1970, 3; ICJ, *Interhandel Case*, I.C.J Reports (1959), 27; Ian Brownlie, *supra* note 73 at 6; ICJ, *Nottenbohm Case* I.C.J Reports, 1955, 4; US Supreme Court, *Paquete Habana Case* (1900) 175 US 677; *The Scotia* (1871) 14 cited in Michael N Shaw, *supra* note 136 at 78 and 79; David J Harris, *supra* note 136 at 19.

⁷³⁹ In contrast to State practice which entails the conduct of States, *opinio juris* is the 'psychological element' that is reflective of a legal obligation. The distinction between *opinio juris* and other conduct that may be adopted by States is found in the presence of a 'legal obligation' to pursue such conduct. See ICJ, *Parking Privileges for Diplomats Case*, ILR 70, 396 (Fed. Admin. Ct., FRG); ICJ, *North Sea Continental Shelf Case* I.C.J Reports, 1969, 3; PCIJ, *Lotus Case* (1927) Series A, No. 10, 18; Ian Brownlie, *supra* note 96 at 6, 8; Malcolm N Shaw, *ibid* at 71, 80; Rebecca MM Wallace, *supra* note 136 at 9.

⁷⁴⁰ Malcolm N Shaw, *supra* note 136 at 70; Rebecca MM Wallace, *ibid* at 9 and 16.

subjective conviction held by States that the requisite behavior is necessitated by law and not subject to discretion.⁷⁴¹

b. Legal Status of Targeted Killing in Customary International Law

Targeted killing has elicited both support and opposition. Shaw notes that the threshold for the emergence of a legally binding custom depends on the strength of the alleged new rule *vis-a-vis* the prior one and the opposition elicited by the new rule.⁷⁴² Official statements in support of the practice and policy of targeted killing have been calibrated with guileful precision.⁷⁴³ However, the duty to protect and to respect life, both in domestic and in international law, must not be given the same parity of esteem as the international right of states to self-defence, but rather should precede it.

Both the US position on targeted killing, as elaborated on by the Secretary of State Department Harold Koh, and the Israeli position, as elaborated by Chief Justice Barak in *Public Committee Against Torture in Israel v Israel*, have lent added legitimacy to targeted killing in international law.⁷⁴⁴ In both accounts which are, as yet, the most precocious admissions of States' engagement in policies of targeted killing, the concerned States have attempted to defend their policies under international law.⁷⁴⁵

The Israeli declared State policy and the US lethal covert operations involving targeted killing, though scarcely noticed, are an effective starting point for an emergent doctrine of targeted killing in international law. This may later evolve into customary

⁷⁴¹ Rebecca MM Wallace, *ibid* at 9-19; Malcolm N Shaw, *ibid* at 70; David J Harris, *supra* note 136 at 19, 790; Ian Brownlie, *supra* note 96 at; R Müllerson, *supra* note 136 at 161; ICJ, *Continental Shelf Case*, Judgment I.C.J Reports 1985, 29 at paragraph 27.

⁷⁴² Malcolm N Shaw, *supra* note 136 at 83: 'It will then depend upon how other states react as to whether this process of legislation is accepted or rejected.'; ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14 at paragraph 109: '[r]eliance by a State of a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.'; See Judge Alvarez, *Anglo-Norwegian Fisheries Case*, I.C.J Reports, 1951, 116, 152 and Judge Loder, *Lotus Case*, P.C.I.J, Series A, No. 10 (1927), 18, 34 cited in Malcolm N Shaw, *ibid* at 71.

⁷⁴³ Nils Melzer, *supra* note 3 at 9-10.

⁷⁴⁴ Harold Koh, *supra* note 39 at 2-4; Israel H CJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraphs 21 and 61.

⁷⁴⁵ Harold Koh, *supra* note 39 at 2-4; Israel H CJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraphs 26, 28, 30, 39, 40, 60 and 61.

international law. Support for the emergence of new customary law on self-defence targeted killing may be drawn from the *North Sea Continental Shelf Case* which reaffirmed the position that a short passage of time would not prevent the formation of customary law.⁷⁴⁶

The most essential element, however, of the *North Sea Continental Shelf Case* is that it underscores the importance of State practice being accompanied by *opinio juris* however little the time that has elapsed.⁷⁴⁷ This will flow from practice of other States justifying the taking up of such a policy as suggested in *Nicaragua*.⁷⁴⁸ The PCIJ underscored the prominence of *opinio juris* in the process of making customary international law in the *SS Lotus Case*.⁷⁴⁹ This was restated in the *Nicaragua Case* which presented a cogent summation of the complementary importance of state practice and *opinio juris*.⁷⁵⁰

Opinio juris is, however, perennially plagued with evidentiary problems when the need arises to illustrate a change in the practice of States.⁷⁵¹ More specifically is the question

⁷⁴⁶ ICJ, *North Sea Continental Shelf Case* I.C.J Reports, 1969, 3.

⁷⁴⁷ ICJ, *North Sea Continental Shelf Cases* I.C.J Reports, 1969, 43 cited in Ian Brownlie, *ibid* at 9: 'Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.'; ICJ, *Right of Passage Case*, I.C.J Reports, 1960, 6, 42-3; ICJ, *Asylum Case*, I.C.J Reports, 1950, 266, 277; Malcolm N Shaw, *supra* note 136 at 78.

⁷⁴⁸ Malcolm N Shaw, *ibid* at 82; ICJ, *Nicaragua Case* I.C.J Reports, 1986, 108-109 citing *North Sea Continental Shelf Cases* I.C.J Reports, 1969, 44: 'for a new custom to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the *opinion juris sive necessitates*. Either the States taking such action or other States in a position to react to it must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it..."'

⁷⁴⁹ PCIJ, *SS Lotus Case* P.C.I.J. Report, Series A, No. 10 (1927) where the PCIJ provided clarification on the critical nature of *opinio juris* in the establishment of custom is one of the foremost authoritative pronouncements in this respect; Ian Brownlie, *supra* note 73 at 8-9; Malcolm N Shaw, *ibid* at 80.

⁷⁵⁰ ICJ, *Nicaragua Case (Merits)* I.C.J Reports, 1986, 14 at 108-109: 'In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*'.

⁷⁵¹ Malcolm N Shaw, *supra* note 136 at 82; Rebecca MM Wallace, *supra* note 136 at 17; ICJ, *Nicaragua Case* I.C.J Reports, 98.

regarding the determination of when a change in the extant custom has occurred. In dealing with this situation the onus of proving the existence of a practice has in most circumstances been left to the party alleging it.⁷⁵²

For instance, Russia and Australia have positively indicated their interest in adopting the tactics used by Israel and US to counter enemies of the State.⁷⁵³ Additionally, as noted by Shaw, the fact that Israel and the US are 'intimately connected' with targeted killing owing to their 'special relationship with the subject-matter' creation of a new custom is possible.⁷⁵⁴

The practice of targeted killing by Israel and the US which are 'specially affected' has been 'extensive and virtually uniform' and has been carried out in a manner suggesting that a general recognition of a legal obligation is involved.⁷⁵⁵ However, the practice of other States is (as yet) unclear to conclusively establish a rule of customary international law.

It is important to note that non-treaty instruments may become evidence of customary obligations.⁷⁵⁶ In the *Nicaragua Case*, the ICJ confirmed that the UNGA Resolutions may evince the formation of *opinio juris*.⁷⁵⁷ This evidentiary importance of UNGA Resolutions in establishing the formation of new rules of custom was reaffirmed in the *Nuclear Weapons Advisory Opinion* thus:⁷⁵⁸

even if they are not legally binding, (UNGA resolutions) may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is

⁷⁵² Rebecca MM Wallace, *ibid* at 17-18.

⁷⁵³ UNHRC, Alston Targeted Killings Report, *supra* note 45 at 5-9; See also ICJ, *El Salvador/Honduras Case*, I.C.J Reports, 1992, 351, 601.

⁷⁵⁴ Malcolm N Shaw, *supra* note 136 at 75; ICJ, *North Sea Continental Shelf Case* I.C.J Reports, 1969, 3 at 42-3.

⁷⁵⁵ ICJ, *North Sea Continental Shelf Cases* I.C.J Reports, 1969, 3 at paragraph 74; Michael N Schmitt, *supra* note 140 at 132.

⁷⁵⁶ See ICJ, *Genocide Advisory Opinion* I.C.J Reports, 1951, 25 where the ICJ relied on the practice of an international organ (the Council of the League of Nations) in making a determination on reservations to multilateral conventions.

⁷⁵⁷ ICJ, *Nicaragua Case* ICJ Reports, 1986, 14 at 406; Malcolm N Shaw, *supra* note 136 at 78.

⁷⁵⁸ ICJ, *Nuclear Weapons Advisory Opinion* ICJ Reports, 1996, 226.

necessary to look at its content and the conditions of its adoption; it is also necessary to see whether *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule

This is a pertinent point considering that UN Security Council Resolutions 1368⁷⁵⁹ and 1373⁷⁶⁰ (dealing with anti-terrorism measures) received unanimous support. These have been held by some commentators as being indicative of an instantaneous development of a new rule of customary international law with regard to anticipatory self-defence against terrorist attacks.⁷⁶¹ Subsequently, the Security Council adopted 'resolution after resolution reaffirming' 1368 and 1373, and thereby endorsing the consistency of anticipatory self-defence (against non-State actors) with the law of self-defence.⁷⁶²

The important point in the above argument would be the rate and breadth of acceptance, and the consistency of State practice.⁷⁶³ For instance, the unanimous adoption of both initial Resolutions by the UN Security Council and the subsequent endorsement of its contents by other States including regional organizations makes a credible case for the reflection of new custom.⁷⁶⁴

⁷⁵⁹ UNSC, Resolution 1368 of 12 September 2001, U.N. Doc. S/RES/1368; Michael N Schmitt, *supra* note 203 at 532.

⁷⁶⁰ UNSC, Resolution 1373 of 28 September 2001, U.N. Doc. S/RES/1373 (2001) (28 September 2001); Michael N Schmitt, *ibid* at 532.

⁷⁶¹ Michael N Schmitt, *ibid* at 532; Bin Cheng 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian Journal of International Law* 23; Malcolm N Shaw, *supra* note 136 at 71.

⁷⁶² UNSC, Resolution 1378 of 14 November 2001, U.N. Doc. S/RES/1378; UNSC, Resolution 1383 of 6 December 2001, U.N. Doc. S/RES/1383; UNSC, Resolution 1386 of 20 December 2001, U.N. Doc. S/RES/1386; UNSC, Resolution 1390 of 16 January 2002, U.N. Doc. S/RES/1390; Michael N Schmitt, *ibid*.

⁷⁶³ Nigel D White, *supra* note 268 at 235, 236 and 255; Abraham D Sofaer, *supra* note 268 at 107; ICJ, *Fisheries Case*, I.C.J Reports, 1951, 116 at 131; ICJ, *Genocide Case* I.C.J Reports, 1951, 25; ICJ, *Asylum Case* I.C.J Reports, 1950, 276-7; ICJ, *Rights of United States Nationals in Morocco Case* I.C.J Reports, 1952, 200; ICJ, *Nottenbohm Case* (Second Phase) I.C.J Reports, 1955, 30; ICJ, *Right of Passage Case* (Merits) I.C.J Reports, 1960, 40, 43, 62, 99 and 136; ICJ, *North Sea Continental Shelf Cases* I.C.J Reports, 1969, 43, 86, 229 and 246; ICJ, *Nicaragua case* (Merits) I.C.J Reports, 1986, 98, paragraph 186; Ian Brownlie, *supra* note 73 at 7.

⁷⁶⁴ UNHRC, Alston Targeted Killings Report, *supra* note 45 at 13; Press Release, NATO Statement by the North Atlantic Council (12 September 2001); OAS, Terrorist Threat to the Americas, Res. 1, 24th Meeting of Consultation of Ministers of Foreign Affairs, OAS Doc. RC.24/RES.1/01 (September 21, 2001) cited in Michael N Schmitt, *ibid* at 532.; Michael N Schmitt 'Counter-terrorism and the Use of Force in International Law' (2002) 32 *Israeli Yearbook of Human Rights* 53-116 cited in Michael N Schmitt, *supra* note 45 at 532.

However, the practice of the ICJ has been that the proponent of a custom must prove that establishment of such a custom is to become binding on the other party.⁷⁶⁵ Thus, in determining whether a new rule of custom has occurred, the objective element of a sharing ‘in principle’ of the content of the alleged new rule must be satisfied.⁷⁶⁶

c. Acquiescence: Legal Basis for a Developing Customary Rule of Targeted Killing?

Acquiescence was defined in the *Gulf of Maine Case* as the ‘tacit recognition manifested by unilateral conduct which the other party may interpret as consent’.⁷⁶⁷ Thus, absent any protest, States’ acquiescence to the conduct of other States leads to the assumption of the acceptance of such conduct as legitimate.⁷⁶⁸ Additionally, drawing from the *Lotus Case* this may be indicative of *opinio juris*.⁷⁶⁹

The most popular legal basis on which targeted killing is vindicated is premised on States’ ‘inherent’ right to resort to the use of force in self-defence.⁷⁷⁰ The ‘inherent’ textual formulation of self-defence leads to an interpretation that places Article 51 higher than Article 2(4) (prohibition of the use of force) in the normative hierarchy.⁷⁷¹

Article 51 of the UN Charter has been broadly interpreted by States to allow for anticipatory self-defence against future terrorist attacks. September 11th 2001 saw the Al-

⁷⁶⁵ Ian Brownlie, *supra* note 96 at 7; Malcolm N Shaw, *supra* note 136 at 83; ICJ, *Asylum Case* I.C.J Reports, 1950, 276; ICJ, *SS Lotus Case* PCIJ Series A, No. 10, 1927.

⁷⁶⁶ ICJ, *Nicaragua Case*, I.C.J Reports, 1986, 14 at paragraph 109: ‘[r]eliance by a State of a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.’; Malcolm N Shaw, *supra* note 136 at 83: ‘It will then depend upon how other states react as to whether this process of legislation is accepted or rejected.’ See Judge Alvarez, *Anglo-Norwegian Fisheries Case*, I.C.J Reports, 1951, 116, 152 and Judge Loder, *Lotus Case*, P.C.I.J, Series A, No. 10 (1927), 18, 34 cited in Malcolm N Shaw, *supra* note 73 at 71.

⁷⁶⁷ ICJ, *Gulf of Maine Case* I.C.J Reports, 1984, 246, 305; Malcolm N Shaw, *ibid* at 84.

⁷⁶⁸ See *Grand Duchy of Luxembourg v Cie. Luxembourgeoise de Télédiffusion*, 91 ILR, 281, 266 cited in Malcolm N Shaw, *ibid* at 85.

⁷⁶⁹ PCIJ, *SS Lotus Case* P.C.I.J, Series A, No. 10, 1927, 28: ‘only if such abstention were based on their [the states] being conscious of having a duty to abstain, would it be possible to speak of an international custom.’; MacGibbon ‘Customary International Law and Acquiescence’ (1957) 33 *British Yearbook of International Law* 131; HS McDougal et al. *Studies in World Public Order* (1960) 763-772 cited in Malcolm N Shaw, *ibid* at 85.

⁷⁷⁰ George P Fletcher & Jens David Ohlin *Defending Humanity: When Force is Justified and Why* (2008) 19; Nigel D White, *supra* note 557 at 379-380.

⁷⁷¹ See Derek Bowett, *supra* note 268 at 187; Myres McDougal & Florentino Feliciano, *supra* note 193 at 232-41 cited in Nigel D White, *ibid* at 380.

Qaeda's well coordinated attacks on the Twin Towers. Al-Qaeda had previously attacked two US embassies and the US warship *USS Cole*.⁷⁷² In the wake of these attacks, non-State entities (especially terrorist organizations) became more significant in contemporary international law on the use of force.⁷⁷³ The principal aggressor in these incidences was a non-State entity: Al-Qaeda.⁷⁷⁴

Subsequently, States appeared to have accepted a revisionist interpretation of Article 51 which placed no limits on States to conduct anticipatory self-defence attacks on non-States entities.⁷⁷⁵ The UN Security Council passed resolution 1368⁷⁷⁶ and (barely two weeks later) resolution 1373⁷⁷⁷ recognizing the right to individual and collective self-defence against terrorism (especially non-State actors). Regional organizations, for instance North Atlantic Treaty Organization, at the invocation of its founding treaty's Article 5 provision on collective self-defence,⁷⁷⁸ and the Organization of American States also endorsed self-defence as being applicable to terrorist attacks.⁷⁷⁹

In addition to this, on the specific question of anticipatory self-defence, State practice (has since) indicated nothing but a continuing acceptance of the contention that large-scale terrorist attacks constitute 'armed attacks' thus vindicating self-defence.⁷⁸⁰ The ensuing State practice,⁷⁸¹ the adoption of a series of UNSC resolutions reaffirming Resolutions 1368 and

⁷⁷² US Supreme Court, *Hamdan v Rumsfeld*, 548 US (2006) 67; Leo van den Hole, *supra* note 221 at 71; Nils Melzer, *supra* note 3 at 266.

⁷⁷³ Martin L Cook, *supra* note 574 at 808; Amos N Guiora, *supra* note 132 at 324.

⁷⁷⁴ Martin L Cook, *ibid*.

⁷⁷⁵ Michael N Schmitt, *supra* note 203 at 532; Thomas Frank *Recourse to Force: State Action Against Threats and Armed Attacks* (2004) 96 Cambridge: Cambridge University Press.

⁷⁷⁶ UNSC, Resolution 1368 of 12 September 2001, U.N. Doc. S/RES/1368 (2001); Michael N Schmitt, *ibid* at 532.

⁷⁷⁷ UNSC, Resolution 1373 of 28 September 2001, U.N. Doc. S/RES/1373 (2001); Michael N Schmitt, *ibid* at 532.

⁷⁷⁸ UNHRC, Alston Targeted Killings Report, 13, paragraph 40 and 41.

⁷⁷⁹ Press Release, NATO Statement by the North Atlantic Council (12 September 2001); OAS, Terrorist Threat to the Americas, Res. 1, 24th Meeting of Consultation of Ministers of Foreign Affairs, OAS Doc. RC.24/RES.1/01 (September 21, 2001) cited in Michael N Schmitt, *ibid* at 532.

⁷⁸⁰ Michael N Schmitt, *supra* note 493 at 53-116 cited in Michael N Schmitt, *supra* note 203 at 532.

⁷⁸¹ States including the United Kingdom, Australia, Israel, China, Russia and Egypt have endorsed this revisionist interpretation of Article 51 which permits the use of anticipatory self-defence.

1373,⁷⁸² and the adoption of resolutions by regional organizations⁷⁸³ to the same effect makes a compelling case for the continuing evolution of the acceptance of targeted killing as anticipatory self-defence by States against attacks by non-State entities.

In view of the post-September 11 widening of the scope of the right to self-defence, the unanimous passing of UNSC Resolutions 1368 and 1373 authorizing use of ‘any means’ against terrorists, and of the absence of any official protests (from the UN General Assembly or regional organizations) to the targeted killing of suspected terrorists, a strong case may be made for other States’ acquiescence in a new rule of customary international law.⁷⁸⁴

This is supported by the *Anglo-Norwegian Fisheries Case* which suggested that States acting contrary to established customs with the acquiescence of other States are not bound by the prior custom.⁷⁸⁵ Thus, States, such as the US and Israel, may not be bound by earlier restrictions on the use of force. The practice of other States may very well buttress this new rule making it a concrete and substantive principle for States countering terrorist attacks. Russia, for instance, has deployed ‘seek and destroy’ State agents to hunt down insurgents on the premise of its necessity in its ‘fight against terrorism.’⁷⁸⁶ This may begin a trend.

d. Conclusion on the Formation of a New Rule of Custom on Targeted Killing

An analysis of State practice, particularly the case law, illuminates the contemporary prevalence of the practice of targeted killing generally, and specifically those resulting from the use of drones.⁷⁸⁷ As has been evinced by the cases (viewed throughout the research) , the prospect of anticipatory self-defence and other attendant benefits easily sway States into adopting targeted killing policies.⁷⁸⁸ Coupled with the allure of maintaining secrecy and of

⁷⁸² UNSC, Resolution 1378 of 14 November 2001; UNSC Resolution 1383 of 6 December 2001; UNSC, Resolution 1386 of 20 December 2001; UNSC, Resolution 1390 of 16 January 2002.

⁷⁸³ ICJ, *The Asylum Case (Columbia v Peru)* I.C.J Reports, 1950, 226.

⁷⁸⁴ Malcolm N Shaw, *supra* note 136 at 85; ICJ, *Gulf of Maine Case* I.C.J Reports, 1984, 246 at 305.

⁷⁸⁵ ICJ, *Anglo-Norwegian Fisheries Case* I.C.J Reports, 1951, 116.

⁷⁸⁶ Simon Saradzhyan ‘Russia’s System to Combat Terrorism and Its Application in Chechnya’ in RW Orttung & A Makarychev *National Counter-terrorism Strategies* (2006) 185; BBC, Chechens ‘Confirm’ Warlord’s Death, 29 April 2002; BBC, Chechen Rebel Basayev Dies, 10 July 20 cited in UNHRC, Alston Targeted Killings Report, paragraph 23.

⁷⁸⁷ UNHRC, Alston Targeted Killings Report, paragraph 79.

⁷⁸⁸ UNHRC, Alston Targeted Killings Report, paragraph 80.

the disregard to the ‘intrusive’ prescriptions of human rights requirements, to States, targeted killing policies are enormously appealing.⁷⁸⁹

The decisions in the cases mentioned (on targeted killings) are derived from the various different circumstances and can therefore be applied to a broad area of similar cases. This enables a critical examination of drone attacks. Thus (proceeding by analogy), the extent to which courts or tribunals would set the scales for the permissibility of the use of drones for targeted killing in international law can be deduced. Irrespective of the differing constructions of States on their international legal obligations (drawn from their practice and jurisprudence), there is some degree of similarity on their attitudes towards targeted killings using drones.⁷⁹⁰

However, for a concrete determination of the existence of a uniform contemporary State practice of targeted killing using drone attacks, more evidence of the acceptance by other States of the practice will be required.⁷⁹¹ Thus, in the final analysis, only the passage of time and the increased (and consistent) adoption of the practice of targeted killing by several States coupled with a subjective element of being bound, can a definite conclusion be of the *formation* of a new customary law be made.⁷⁹² Presently, it can only suffice to say that there is an indication of States trending towards the practice of targeted killing using drones.

⁷⁸⁹ Israeli HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 2.

⁷⁹⁰ UNHRC, Alston Targeted Killings Report, 9, paragraphs 4 and 27.

⁷⁹¹ ICJ, *Fisheries Case* I.C.J Reports, 1951, 116 at 131; ICJ, *Genocide Case* I.C.J Reports, 1951, 25; ICJ, *Asylum Case* I.C.J Reports, 1950, 276-7; ICJ, *Rights of United States Nationals in Morocco Case* I.C.J Reports, 1952, 200; ICJ, *Nottenbohm Case (Second Phase)* I.C.J Reports, 1955, 30; ICJ, *Right of Passage Case (Merits)* I.C.J Reports, 1960, 40, 43, 62, 99 and 136; ICJ, *North Sea Continental Shelf Cases* I.C.J Reports, 1969, 43, 86, 229 and 246; ICJ, *Nicaragua case (Merits)* I.C.J Reports, 1986, 98, paragraph 186; Nigel D White, *supra* note 268 at 235, 236 and 255; Abraham D Sofaer, *supra* note 268 at 107; Ian Brownlie, *supra* note 96 at 7.

⁷⁹² Ian Brownlie, *supra* note 96 at 7; Malcolm N Shaw, *supra* note 136 at 69, 84; David J Harris, *supra* note 136 at 19.

IV. THE USE OF UNMANNED DRONES FOR TARGETED KILLING: WITHER THE RULE OF LAW?

1. Main Findings and Conclusion

While international law does not specifically prohibit targeted killing using drones, it places strict standards on circumstances under which lethal force may be resorted to. These standards protect individuals against intentional or arbitrary deprivation of life. This chapter provides a summary of the conditions and modalities of the lawfulness of the use of drones for targeted killing in international law.

2. Targeted Killings Using Drones and Concerns for the Rule of Law

States engaged in counter-terrorist or counter-insurgent operations usually come to the conclusion that the rule of law should defer to the imperatives of maintaining State security.⁷⁹³ Thus, in disregard of the restrictive standards by which the law constrains choice of means and tactics by which States may resort to using lethal force, such States usually adopt policies which are not in strict conformity with international law.⁷⁹⁴

While States' observance of the rule of law may not necessarily guarantee absolute security (or justice), the principle stands as a safeguard against the arbitrary loss of life.

⁷⁹³ Israel HCJ, *Hilu Case*: 'as long as a state of belligerency exists, Jewish settlement in occupied territories serves genuine security needs.'; Israel HCJ, *Ayub et al. v Minister of Defence et al. (The Beth El Case)* (1978); Israel HCJ, *Matawa et al v Minister of Defence et al. (The Bekaot Case)* (1978), 33(2) Piskei Din 113: 'An Occupying State may take preventive measures against terrorist activities and acts of sabotage even in areas where they do not actually occur'; Israel HCJ, *Barake v The Minister of Defense* HCJ 9293/01, 56(2) PD 509; Israel HCJ, *Barake v The Minister of Defense* HCJ 3114/02, 56(3) PD 11; Israel HCJ, *Almandi v The Minister of Defense* HCJ3451/02, 56(3) PD 30; Israel HCJ, *Ajuri v The Military Commander of Judea and Samaria Area*, 56(6) PD 352; Nils Melzer, *supra* note 3 at 431; Marco Sassoli & Antoine A Bouvier, *supra* note 139 at 814.

⁷⁹⁴ Nils Melzer, *ibid* at 431.

Without prejudice to the pragmatic difficulties facing States under threats of (or actual) terrorist attacks, the legal conditions and modalities on the use of lethal force must be kept strictly within the rule of law.

Hence, there is a serious necessity for international law constantly to adapt to the competing needs, on the one hand, of States to protect themselves as well as their citizens both abroad and at home, and, on the other hand, to uphold international peace.

So as to ensure that States using drones for targeted killings conform to the rule of law, certain preconditions must be satisfied. First, the objective legal requirements applicable to the peculiar circumstances of a particular targeted killing operation must be ascertained as having being cumulatively met. Secondly, the objective legal requirements need to be complemented by procedures that ensure compliance of States with these requirements.

This second precondition includes an obligation on the State to investigate unlawful deprivation of life by State agents.⁷⁹⁵ The third precondition obliges States to conform to the values by which a democratic society would ordinarily use to confront threats to its security.

3. Drawing Inferences from Targeted Killing in International Law

The purpose of this research has been to analyse the question of the permissibility in international law of the use of drones for targeted killing in international law. It also sought to determine the various modes of international responsibility for drone-related breaches of international law. Additionally, the research set out to establish the threshold at which

⁷⁹⁵ UNHRC Resolution 2004/37 of 27 April 2004, paragraph 5; UNGA Resolution 34/169 of 17 December 1979; UNHRC, General Comment No. 6 (1982), paragraph 4; UNHRC, General Comment No. 31 (2004), paragraph 15; UNHRC, *Bleier Case*, paragraph 13.3; UNHRC, *Miango Muiyo*, paragraph 9; UNHRC, *Suriname Case*, paragraph 14.2; IACiHR, *Alejandro Case*, paragraph 47; IACiHR, *Abella (La Tablada) Case*, paragraph 244; IACtHR, *Velasquez Rodriguez Case*, paragraph 166; ECtHR, *Isayeva Case*, paragraph 209; ECtHR, *Kaya Case*, paragraph 86; ECtHR, *Jordan Case*, paragraph 105; ECtHR, *Güleç Case*, paragraph 77; ECtHR, *McCann Case*, paragraph 169; ECtHR, *Ergi Case*, paragraph 82; ECtHR, *Shanaghan Case*, paragraph 88; ECtHR, *Isayeva and others Case*, paragraph 208, 225; ECtHR, *Orhan Case*, paragraph 344, 348; ECtHR, *Kelly and others Case*, paragraph 94.

culpability or liability lies in cases where breaches of international law occurs for complicity in the commissions of serious human rights and humanitarian law violations.

Contemporary armed conflict, especially transnational terrorist attacks, presents novel challenges to *jus ad bellum* and *jus in bello* that have regulated the modalities of interstate use of force and the conduct of armed conflict.⁷⁹⁶ Although numerous arguments premised on the inadequacy of the current conduct of hostilities regime have been propounded, it appears that there is no absence of normative guidelines.⁷⁹⁷

Extant international law has within its provisions a robust system of rules to govern new realities and challenges posed by armed conflicts of post WWII provenance. Most notably is the unique array of challenges that continually confront States engaged in armed conflicts with terrorist organizations.⁷⁹⁸

The present framework of international law was crafted on a State-centric approach to international relations. It did not contemplate the non-State actor. But, upon a progressive reading and constructive interpretation, it offers a robust normative ensemble capable of governing contemporary inter-State use of force.⁷⁹⁹

This law is capable of meeting the challenges posed by non-State organized armed groups. It allows for the defensive use of force to avert an imminent attack. Individuals who do not observe the laws and customs of war are not entitled to its protective privileges and thus assume the capacity of unlawful combatants. This proceeds from the logic that individuals who participate in terrorist acts should not be afforded the special status of persons protected under IHL.

⁷⁹⁶ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 31-40.

⁷⁹⁷ Nils Melzer, *supra* note 3 at 431.

⁷⁹⁸ Israel HCJ, *Public Committee Against Torture in Israel v the Government of Israel*, paragraph 2: '[Among the tactics employed by the Israelis to counter terrorism is] the policy of targeted frustration, [in which] security forces act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel.'; *Hamdan v Bush*, 126 S. Ct. 2749 (2006).

⁷⁹⁹ UNHRC, Alston Targeted Killings Report, paragraph 41.

Thus, suspected terrorists who engage in armed conflict (unlawfully) may be targeted in accordance with IHL. However, the customary international law concepts of necessity, discrimination, and proportionality must be satisfied. This leads to the conclusion that targeted attacks against suspected terrorists do not necessarily constitute extrajudicial killings if they are legitimately carried out in self-defence, law enforcement or in active hostilities.

Cast in this light, the law of inter-State use of force (ie self-defence) provides a regulatory regime to address the challenges posed by the emergence and unprecedented increase of non-State actors' attacks on states and the resulting response by States to use lethal force.

The use of modern military precision technology and their weapon systems should work in concert with humanitarian and human rights law regulations. This enables the number of civilian casualties to be kept at a minimum in accordance with the laws of armed conflict. In deploying advanced methods of targeted killing such as drones, care must be taken to ensure that they do not occasion the unintended consequences of increasing the risk to specifically protected persons and objects.

Improved technology and enhanced targeting capabilities will minimize targeting mistakes and the incidental civilian casualties. This will arguably improve compliance with the laws of armed conflict.

4. Targeted Killing Using Drones in the Exercise of Self-Defence

When conducted outside the territory of the targeting State, a targeted killing may, under certain circumstances, be defensible under the State's right to self-defence (including anticipatory self-defence).⁸⁰⁰ However legitimate a State's right to resort to the use of force for purposes of self-defence, the degree of force used is not unlimited.⁸⁰¹ In this regard

⁸⁰⁰ UNHRC, Alston Targeted Killings Report, paragraph 86.

⁸⁰¹ Article 51, UN Charter; ICJ, *Nicaragua Case* I.C.J Reports, 1986, 14 at paragraph 194; UNHRC, Alston Targeted Killings Report, paragraph 35; Karen DeYoung, U.S. Options in Pakistan Limited, Washington Post, 4 May 2009.

whatever actions are taken in self-defence, it is imperative that the force deployed should be absolutely necessary and strictly proportionate.⁸⁰² Thus in the event that targeted killings are adopted, these rules should be complied with.

In sum, in order for a targeted killing to be permissible under international law under the regulatory system of hostilities, it must conform to certain requirements. A self-defence targeted killing should be necessary which implies an absence of less severe measures.⁸⁰³ It must also be for a strictly defensive purpose.⁸⁰⁴ Also, the degree of force used should be proportionally restricted to only that which is 'reasonably required to foil an anticipated armed attack or defeat an ongoing one.'⁸⁰⁵

This obliges the targeting party to explore less forceful measures as indicated in the *Caroline* incident.⁸⁰⁶ A targeted killing in self-defence must also be so imminent and of such magnitude that a State 'cannot afford to wait to absorb the first blow'.⁸⁰⁷ The requirement of imminence, taken together with necessity and proportionality, impliedly enjoins States neither to act too early as it would be pre-emptive nor too late as it would be retaliatory.⁸⁰⁸ In self-defence targeted killing situations, the severity of the threat level must be assessed objectively on a case by case basis.⁸⁰⁹

5. Targeted Killing Using Drones in the Conduct of Hostilities

⁸⁰² Judith Gardam, *supra* note 195 at 391.

⁸⁰³ Nils Melzer, *supra* note 3 at 439.

⁸⁰⁴ Amos N Guiora, *supra* note 132 at 325; Michael N Schmitt, *supra* note 203 at 525.

⁸⁰⁵ Michael N Schmitt, *ibid*; Ziyad Motala & David T ButleRitchie, *supra* note 286 at 29 stating that use of force in self-defence is permissible when used against a 'real and ongoing threat'; Jason S Wratchford, *supra* note 286 at 55.

⁸⁰⁶ David J Harris, *supra* note 136 at 747. In the *Caroline*, one of the correspondences from Mr. Webster to Mr. Fox indicated that an act of self-defence should not be 'unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.'; Amy E Eckert & Manooher Modifi, *supra* note 320 at 136: 'The, proportionality flowing from Article 51 of the UN Charter has been interpreted as encompassing the means and method being used as well as the nature of the target against whom the attack is directed.'

⁸⁰⁷ Martin L Cook, *supra* note 574 at 810.

⁸⁰⁸ Nigel D White, *supra* note 268 at 235, 236, 255.

⁸⁰⁹ Nigel D White, *supra* note 268 at 382.

While targeted killing in the conduct of hostilities may appear to limit incidental harm by focusing on selected individuals, it may bring about the protraction of an armed conflict.⁸¹⁰ Unmanned drones present a distinct military advantage over the enemy and also provide a certain degree of protection to civilians.⁸¹¹

However, extreme caution needs to be taken to ensure the presence of human control in such operations.⁸¹² While the technology used in precision attacks is a welcome addition to modern armed conflict, it must be strictly regulated by the law.⁸¹³

Thus, whilst certain individuals may be lawfully targeted in the conduct of hostilities, it is imperative to note that the right to attack is not unlimited. In some exceptional circumstances, no person can lawfully be killed.⁸¹⁴ This points to the fact that the scope of targeted killing is restricted and that it applies only at the extreme end of permissible methods of conducting hostilities.⁸¹⁵

⁸¹⁰ UNHRC, Alston Targeted Killings Report, paragraph 54; Nils Melzer, *supra* note 3 at 430; ICTR, *Akayesu Case* (Judgment of 2 September 1998), paragraph 619; ICTY, *Delalic Case* (Judgment of 16 November 1998), paragraph 184; ICTY, *Tadic Case* (Jurisdiction, 2 October 1995), paragraph 70.

⁸¹¹ Article 48, AP I; ICJ, *Nuclear Weapons Advisory Opinion* I.C.J Reports, 1996, 66 at paragraph 78; Israel Military Court, *Military Prosecutor v Omar Mahmud Kassem and Others* (1969) ILR vol. 42, 1971, 470-483; Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* note 140 at Rule 1; Marco Sassoli & Antoine A Bouvier, *supra* note 139 at 807, 810; Michael N Schmitt, *supra* note 140 at 136; Nils Melzer, *ibid* at 407.

⁸¹² This is because the robots neither possess the ability to differentiate between legitimate military targets from those protected under the laws of armed conflict nor civilians from combatants.

⁸¹³ UNHRC, Alston Targeted Killings Report, *supra* note 45 at paragraph 27.

⁸¹⁴ Article 23(e), Hague IV; Article 41(2), AP I; Article 35(2), AP I; See the St Petersburg Declaration which unreservedly prohibits means and methods of warfare that 'uselessly aggravate the sufferings of disabled men or rendering their death inevitable'; US Military Tribunal Nuremberg, *US v Ernst von Weizsaecker et al. (The Ministries Case)*, Count three (1949), 14 TWC 308; Common Article 3, Geneva Conventions; Article 12, GC I; Jean-Marie Henckaerts & Louise Doswald Beck, *supra* note 140 at 164 at Rule 47: 'Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is: ... (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness.'; *Prosecutor v Hamdan*, 548 U.S., 630-31; ICTY, *Prosecutor v Karadzic and Mladic*, IT-95-5/18, First Indictment, 24 July 1995, paragraphs 26 and 44; ICTY, *Prosecutor v Galic*, IT-98-29, Initial Indictment, 24 April 1998, count 1, Judgment of Appeals Chamber, 30 November 2006, Judgment of Trial Chamber, 5 December 2003; ICTY, *Prosecutor v Dukic*, IT-96-20, Initial Indictment, 29 February 1996, paragraph 7; ICTY, *Prosecutor v Martić*, IT-95-11, Initial Indictment, 25 July 1995, paragraphs 16 and 18; ; Michael N Schmitt, *supra* note 140 at 139-141.

⁸¹⁵ Article 52(2), AP I; UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report of 7 December 1993 (E/CN.4/1994/7), paragraph 610; IACiHR, *Caracoles Community (Bolivia)*, Resolution No. 30/82, Case No. 7481, 8 March 1982, consideration 5 in conjunction with resolution 2 cited in Nils Melzer, *supra* note 3 at 172; IACiHR, *Country Report on Colombia* (1999), paragraph 202, 206 and 293; US Supreme Court, *Eain v Wilkes* (1981) 454 US 894, L. Ed. 2d 208, 102 S. Ct. 390: 'indiscriminate use of violence against

In sum, in order for a targeted killing to be permissible under international law regulating hostilities, it must conform to certain requirements. A targeted killing, in both international and internal armed conflicts, must constitute an integral part of the conduct of hostilities.⁸¹⁶ Such an attack must also not be directed against an individual protected against direct attack.⁸¹⁷ This implies that any attack must be likely to contribute effectively to the achievement of a direct and concrete military advantage.⁸¹⁸

Additionally, the incidental death, injury or destruction should be proportional to the anticipated military advantage.⁸¹⁹ This requires that non-lethal alternatives should be considered.⁸²⁰ In order for a particular operation of targeted killing to satisfy the international legal requirements, the following preconditions must be met cumulatively.⁸²¹

6. Targeted Killing Using Drones as an Exercise of Law Enforcement

As a means of law enforcement, targeted killing creates a dilemma situation since on one hand it may, in extreme circumstances be justified for the prevention of an attack against human life.⁸²² On the other hand, it leads to situations that are contrary to the very principles that underlie law enforcement (protection of the human life of everybody).⁸²³

civilian populations, innocent parties, is a prohibited act, and as such, is a common crime of murder, punishable both in [Israel and the United States]'; Marco Sassoli & Antoine Bouvier, *supra* note 139 at 875; Jean-Marie Henckaerts & Louise Doswald-Beck, *ibid* at Rule 8; Michael N Schmitt, *supra* note 140 at 138.

⁸¹⁶ Nils Melzer, *supra* note 3 at 859; UNHRC, Alston Targeted Killings Report, paragraph 57; Nils Melzer, *supra* note 3 at 426.

⁸¹⁷ ICTY, *Prosecutor v Kordic and Cerkez* (Trial Judgment) IT-95-14/2-T (26 February 2001) at paragraph 256; RJ Delahunty 'Is the Geneva POW Convention "Quaint"?' (2007) 33 *Willamette Mitchell Law Review* 1635, 1654; Robert Kolb & Richard Hyde, *supra* note 160 at 47; Jean S Pictet, *supra* note 499 at 205; Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* note 140 at Rule 6; Michael N Schmitt, *supra* note 140 at 142; Nils Melzer, *supra* note 3 at 426; Michael N Schmitt, *supra* note 169 at 609; William Hays Parks, *supra* note 17 at 4; Michael N Schmitt, *supra* note 316 at 511.

⁸¹⁸ Nils Melzer, *ibid* at 426.

⁸¹⁹ Nils Melzer, *ibid* at 426.

⁸²⁰ Israel HCJ, *Sakhwil et al. v Commander of the Judea and Samaria Region* (1979) H.C. 434/79 reprinted in (1980) 10 *Israel Yearbook on Human Rights* 345; Nils Melzer, *ibid* at 426.

⁸²¹ Nils Melzer, *ibid* at 426.

⁸²² IACiHR, Country Report Colombia (1999), paragraph 213. See also paragraph 169: '[n]ot all killings occurring outside of combat activities necessarily imply arbitrary deprivations of life. Thus, for example, deaths which occur as a result of police actions in the defence of the public order do not constitute violations of the right to life where they are carried out with proper respect for proportionality....'; IACiHR, *Alejandro et al. v*

Most cases of law enforcement appear to be the result of incomplete intelligence gathering, disregard for less-than-lethal measures and deficient organization of the operations.⁸²⁴ Thus, since resort to targeted killing is a use of force *in extremis*, it must be strictly regulated by the principles that are intended to protect individual life.⁸²⁵ Additionally, States should carefully assess the long term consequences of using targeted killing in law enforcement.⁸²⁶

Under law enforcement, the use of potentially lethal force to secure the incapacitation or arrest of a suspected terrorist is permissible.⁸²⁷ While potentially lethal force is permissible if used against persons whose past conduct indicates that they continue to pose a potential but unspecified threat to human life, the intentional killing of an individual can *only* be justified by the protection of human life from a concrete and specific threat.⁸²⁸

Cuba, Case No. 11.589, Report No.86/99, 29 September 1999, paragraph 39; IACiHR, *Abella (La Tablada) v Argentina*, paragraph 158; Nils Melzer, *ibid* at 425.

⁸²³ UNHRC, *Baboeram et al. v Suriname*, paragraph 14.3 to 15: 'State party has failed to submit evidence proving that these persons were shot while trying to escape'. From the above statement, Nils Melzer argues that when evidence is adduced by the authorities indicating that lethal force was used by state forces to prevent the escape of a suspect, this would vindicate the subsequent deprivation of life. See Nils Melzer, *ibid* at 95; UNHCR, *Suarez de Guero v Colombia*, paragraph 13.1 to 13.2; IACiHR, *Chumbivilcas v Peru*, paragraph 138; ECiHR, *Khashiyev & Akayeva v Russia*, nos. 57942/00 and 57945/00, ECHR 24 February 2005; ECiHR, *Ergi v Turkey*, no. 66/1997/850/1057, ECHR 28 July 1998; Nils Melzer, *ibid* at 425-26: 'Particularly, States that are regularly confronted with terrorist attacks may be tempted to adopt broad shoot-to-kill policies against suspected suicide bombers, and other persons likely to represent an extreme danger to the lives of their citizens.'

⁸²⁴ Israel HCJ, *Muhammad Abd al-Aziz Hamdan v The General Security Service* (1996) HCJ, 8049/96, at paragraph 6; Israel HCJ, *Abd al-Halim Bilbeisi v General Security Service* (1996) HCJ-VR 336/96; Nils Melzer, *ibid* at 426.

⁸²⁵ Françoise Hampson 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 *International Review of the Red Cross* 549; ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 25: 'The Court observes that the protection of the International Covenant of 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 a time of national emergency'; Nils Melzer, *ibid* at 426.

⁸²⁶ Nils Melzer, *ibid* at 426.

⁸²⁷ Israel HCJ, *Muhammad Abd al-Aziz Hamdan v The General Security Service* (1996) HCJ, 8049/96, at paragraph 6; Israel HCJ, *Abd al-Halim Bilbeisi v General Security Service* (1996) HCJ-VR 336/96.

⁸²⁸ Nils Melzer, *ibid* at 235.

In sum, targeted killing must only be resorted to in a very narrow set of circumstances and must be strictly controlled by the law.⁸²⁹ A targeted killing under law enforcement must be absolutely necessary (in qualitative, quantitative and temporal terms) to protect human life from unlawful attack.⁸³⁰ This implies that the operation should be organized such a way as to minimize to the greatest extent possible the recourse to lethal force.⁸³¹ It must also have a sufficient legal basis and be for a strictly preventive purpose as opposed to a retributive one.⁸³²

Importantly, the operation must pursue the legitimate aim of protecting life and should avoid having the killing of a suspect as the actual objective.⁸³³ In the event that an unlawful targeted killing does occur, the State whose agents conducted the operation is duty-bound to investigate.⁸³⁴ In order for a particular operation of targeted killing to satisfy the international legal requirements, the above preconditions must be met cumulatively.⁸³⁵

⁸²⁹ Nils Melzer, *supra* note 3 at 426: ‘Ultimately, it should be recognized that the term “law enforcement” comprises the notions of both “law” and “force”. Neither can “law” be effectively protected without the possibility to resort to “force” including *in extremis*, even the method of targeted killing. Nor can such “force” be used without being subjected to the rule of “law” and to the principles and values it endeavours to protect.’

⁸³⁰ Article 58(c), AP I; Nils Melzer, *ibid* at 425; Article 57(3), AP I.

⁸³¹ Article 35, AP I; ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 78; Article 57(3), AP I; IACiHR, *Disabled People’s International v United States* (1996) Report No.3/96; Israel HCJ, *Sakhwil et al. v Commander of the Judea and Samaria Region* (1979) H.C. 434/79 reprinted in (1980) 10 *Israel Yearbook on Human Rights* 345; Marco Sassoli & Antoine Bouvier, *supra* note 139 at 170; Nils Melzer, *ibid* at 425.

⁸³² UNHRC, General Comment No. 6 (1982), paragraph 3; UNHRC, *de Guerero Case*, paragraph 13.3; ECtHR, *Streletz Case*, paragraph 87 and 102; ECtHR, *Makaratzis Case*, paragraph 25, 67 and 70; UNHRC, *Suriname Case*, paragraph 14.3; UNHRC, *Myrna Mack Case*, paragraph 153; ECtHR, *Nachova Case*, paragraph 96 and 99; ECtHR, *Ayetkin Case*, paragraph 108; ECtHR, *McCann Case*, paragraph 154; Jörg Arnold, Nora Karsten & Helmut Kreicker ‘The German Border Guard Cases before the European Court of Human Rights’ (2003) 11(1) *European Journal of Crime, Criminal Law and Criminal Justice* 67, 82; Nils Melzer, *ibid* at 425.

⁸³³ Nils Melzer, *ibid* at 416, 425; ECtHR, *McKerr Case*, paragraph 111; IACiHR, *Abella Case*, paragraph 244.

⁸³⁴ UNHCR, General Comment No. 6 (1982), paragraph 3; ACHPR, *Ouédraogo v Burkina Faso*, Communication No. 204/97, Decision of 1 May 2001, 29th Ordinary Session, April/May 2001, paragraph 3; IACtHR, *Myrna Mack Chang v Guatemala*, paragraph 153; ECtHR, *Ergi Case*, paragraph 82, 86; ECtHR, *Güleç Case*, paragraph 77, 83; ECtHR, *Isayeva and others Case*, paragraph 208, 225; ECtHR, *Jordan Case*, paragraph 105; ECtHR, *Kaya Case*, paragraph 86; ECtHR, *Kelly and others Case*, paragraph 94; ECtHR, *McCann Case*, paragraph 169; ECtHR, *McKerr Case*, paragraph 111; ECtHR, *Orhan Case*, paragraph 344, 348; ECtHR, *Özkan Case*, paragraph 193; ECtHR, *Shanaghan Case*, paragraph 88; UNHRC, *Bleir Case*, paragraph 13.3; UNHRC, General Comment No. 6, paragraph 4; UNHRC, General Comment No. 31, paragraph 15; UNHRC, *Miango Muiyo Case*, paragraph 9; UNHRC, *Suriname Case*, paragraph 14.2; IACiHR, *Abella Case*, paragraph 244; IACiHR, *Alejandre Case*, paragraph 47; ACiHPR, *Civil Liberties Organisation v Chad*, paragraph 22.

⁸³⁵ ECtHR, *Kudia v. Poland*, ECHR, 30210/96 (26 October 2000), paragraph 90-94; Nils Melzer, *ibid* at 425.

7. Conclusion on the Use of Drones for Targeted Killing

The lack of transparency by States engaged in targeted killing operations has been cited as a matter of deep concern.⁸³⁶ The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has asserted that the transparency requirement is an obligation on States under both human rights law and IHL which ensures better accountability.⁸³⁷ Most States that conduct targeted killing operations using drones are rarely transparent about their policies or the procedural organization and control.⁸³⁸

These States may (sometimes) have valid tactical or security reasons not to disclose the criteria for selecting targets. However, without the disclosure of the legal rationale as well as the bases for target selection, it would be impossible to confirm the authenticity or otherwise of intelligence relied upon, or to ensure that unlawful targeted killings do not result in impunity. This contravenes States' human rights law and IHL obligations regarding the right to life.⁸³⁹

States also avoid disclosing information on who has been targeted, the attendant incidental harm, the full legal basis of their operations, and the procedural safeguards.⁸⁴⁰ This creates an unacceptable 'accountability vacuum' which gives States a virtual and impermissible license to kill.⁸⁴¹

⁸³⁶ UNHRC, Alston Targeted Killings Report, paragraph 87.

⁸³⁷ UNHRC, Alston Targeted Killings Report, paragraph 87; Philip Alston & Hina Shamsi, A Killer Above the Law?, The Guardian, 5 February 2010: 'Accountability is an independent requirement of international law. When complete secrecy prevails, it is negated. Secrecy also provides incentives to push the margins in problematic ways.'

⁸³⁸ UNHRC, Alston Targeted Killings Report, paragraph 87; Philip Alston & Hina Shamsi, A Killer Above the Law?, The Guardian, 5 February 2010: 'Drones lend themselves to secrecy. Used without fanfare in remote and inaccessible areas, they are invisible to all but their potential victims.'

⁸³⁹ Article 50, GC I; Article 51, GC II; Article 130, GC III; Article 147, GC IV; Articles 11, 85 and 87(3), AP I; ECOSOC, Resolution 1989/65 of 24 May 1989.

⁸⁴⁰ UNHRC, Alston Targeted Killings Report, paragraph 91; Philip Alston & Hina Shamsi: 'Drones lend themselves to secrecy. Used without fanfare in remote and inaccessible areas, they are invisible to all but their potential victims. The military advantages are obvious, but so too are the potential rule-of-law problems'.

⁸⁴¹ UNHRC, Alston Targeted Killings Report, paragraphs 87, 88, 89, 90 and 91; Philip Alston & Hina Shamsi, *ibid*: 'In a zone of secrecy, there is no way to know if the 90 people reportedly killed in 11 subsequent strikes were legitimate targets or simply retaliatory killings'.

This secrecy further frustrates any efforts to ensure the lawfulness of these killings. This is compounded by the absence of *post facto* accountability-seeking mechanisms to ensure the investigation, prosecution and punishment of wrongful killings.⁸⁴²

The above situation violates the international legal framework that limits the lawful use of lethal force against selected individuals.⁸⁴³ Thus, in order to ensure compliance with the standards of international law, States must enhance transparency about targeted killing operations, especially those using drones. This will subsequently ease the attainment of accountability for wrongful killings.⁸⁴⁴

The process of target selection must also be strictly controlled within the legal rules applicable to a particular situation. Individuals whose conduct gives support to the general war effort (including economic support, political advocacy and propaganda) should not be targeted since they are protected by human rights law and further, they are not directly participating in hostilities. For instance, the US has expanded its list of targets as to include some (alleged Taliban-supporting) Afghanistani drug lords.⁸⁴⁵ Such individuals do not constitute a 'party' to an armed conflict and are, therefore, not legitimate targets.

While human rights standards demand the use of less-lethal methods before resorting to lethal force, and further advocate for the incremental use of force, certain situations may

⁸⁴² UNHRC, Alston Targeted Killings Report, paragraph 92; Philip Alston & Hina Shamsi, *ibid*: 'Unless governments voluntarily disclose information, human rights monitors and independent journalists are unable to verify claims that there are limited or no civilian casualties, let alone to weigh them against credible reports that hundreds of innocents have died.'

⁸⁴³ ICJ, *Wall Advisory Opinion*, paragraph 108-111: 'ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."'; UNHRC, *Lopez v Uruguay* (1984), paragraphs 12.1-12.3; ECtHR, *Kaya v. Turkey*, Judgment of 19 February 1998, 1998-I R.J.D. 297, 140; ECtHR, *McCann and others v. UK*, ECHR, Judgment of 27 September 1995, Series A, No. 324, 140; IACtHR, *Neira Alegria Case*, Judgment of 19 January 1995, Inter-Am.Ct.H.R. (Ser. C) No. 20 (1995); E/CN.4/2006/53, paragraph 35: 'States party to the ICCPR can be held responsible for violations of the rights under the Covenant when the violations are perpetrated by authorized agents of the State, including on foreign territory.'; UNHRC, Alston Targeted Killings Report, 26, paragraph 87; Michael N Schmitt, *supra* note 140 at 134.

⁸⁴⁴ Philip Alston & Hina Shamsi, *A Killer above the Law?*, The Guardian, 5 February 2010: 'Accountability is an independent requirement of international law. When complete secrecy prevails, it is negated. Secrecy also provides incentives to push the margins in problematic ways. History contains numerous examples of government secrecy breeding abuse. Drone programmes are perfect candidates'

⁸⁴⁵ Patrick Gallahue, *supra* note 68 at 3.

not allow this.⁸⁴⁶ Therefore, the municipal legal framework must be cognizant of the possibility that the threat is so imminent that graduated use of force is not possible. It must also ensure that appropriate safeguards are in place so that the assessment of imminence is reliably made.⁸⁴⁷

The outcome of a targeting killing operation is usually dependent on its control and organization. The first element in organization is ensuring the reliability of information used to support the targeting decision.⁸⁴⁸ This will then be complemented by a structure to continuously verify the accuracy of such information and also the detection of any unreliable information.⁸⁴⁹

Additionally, it is important to take into account the types of weapons used with keen attention being paid to their proportionality,⁸⁵⁰ and also to minimizing civilian casualties to the greatest extent possible.⁸⁵¹ These operations must be organized in such a way that at the detection of an error, the operation can be cancelled or suspended.⁸⁵²

In order to ensure accountability, the organization of a targeted killing operation must have an after-the-fact assessment in place to investigate alleged unlawful targeted killings and either to identify and prosecute perpetrators, or to extradite them to another State that has made out a *prima facie* case for the unlawfulness of a targeted killing.⁸⁵³

It is submitted that, while Governments have a responsibility to protect their citizens against dangers arising from terrorist or other attacks, actions taken in this pursuit must

⁸⁴⁶ Israel HCJ, *Muhammad Abd al-Aziz Hamdan v The General Security Service* (1996) HCJ, 8049/96, at paragraph 6; Israel HCJ, *Abd al-Halim Bilbeisi v General Security Service* HCJ-VR 336/96; UNHRC, Alston Targeted Killings Report, *ibid* at paragraph 74; HPCR Commentary, *supra* note 141 at Section G.32(a).

⁸⁴⁷ UNHRC, Alston Targeted Killings Report, paragraph 74; UNHRC, *de Guerero Case*, paragraph 13.1-13.3.

⁸⁴⁸ UNHRC, Alston Targeted Killings Report, paragraph 89; HPCR Commentary, Section G.32(a).

⁸⁴⁹ UNHRC, Alston Targeted Killings Report, paragraph 89; HPCR Commentary, Section G.32(a)-(c) and 39.

⁸⁵⁰ Yves Sandoz et al., *supra* note 185 at Section 2207; UNHRC, Alston Targeted Killings Report, *ibid* at paragraph 89; Philip B Heymann & Juliette N Kayyem, *supra* note 73 at 68.

⁸⁵¹ Article 57, AP I; UNHRC, Alston Targeted Killings Report, paragraph 89; Michael N Schmitt, *supra* note 140 at 149-57; HPCR Commentary, *supra* note 141 at Section G.32(c).

⁸⁵² Article 57(2)(b), AP I; UNHRC, Alston Targeted Killings Report, paragraph 89; UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) paragraph 5.32.9.

⁸⁵³ Common Article 3; Article 49, GC I; Article 50, GC II; Article 129, GC III; Article 146, GC IV; Articles 3 and 4, GC IV; Article 75, AP I; UNHRC, Alston Targeted Killings Report, paragraph 90.

strictly conform to the standards of self-defence, human rights and humanitarian law.⁸⁵⁴ Otherwise, States' actions (even in legitimate situations for using force) are likely to be 'more readily associated with criminal behaviour than with acceptable Government policy.'⁸⁵⁵ The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions captures the above point thus:⁸⁵⁶

Empowering governments to identify and kill 'known terrorists' places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted. While it is portrayed as a 'limited exception' to international norms, it actually creates the potential for an endless expansion of the relevant category to include any enemies of the State, social misfits, political opponents, or others. And it makes a mockery of whatever accountability mechanisms may have otherwise constrained or exposed such illegal action under either humanitarian or human rights law.

It is further submitted that, the increasingly prolific use of lethal robotic technologies by States, especially but not limited to targeted killing of suspected terrorists is a matter for serious legal, ethical and moral consideration.⁸⁵⁷ Particularly troubling is the inevitable ease with which the sanctity of life is violated by using autonomous or semi-autonomous 'killer robots' such as unmanned Predator drones.⁸⁵⁸

The onus, thus, rests with States which opt to use such lethal technologies to: i) publicly identify which rules of international law they rely on as bases for targeted killing; ii) to satisfactorily specify the legal rationale for deciding to kill rather than to capture; iii) to outline (where appropriate) the procedural safeguards that ensure targeted killing operations comply with the law, and also the remedial measures taken in the event that unlawful killings result.⁸⁵⁹

⁸⁵⁴ Report of the Special Rapporteur (Executions), 13 January 2003, E/CN.4/2003/3, paragraph 39.

⁸⁵⁵ Nils Melzer, *supra* note 3 at 435; Georg Nolte, *supra* note 235 at 117 and 128.

⁸⁵⁶ Report of the Special Rapporteur (Executions), 22 December 2004, E/CN.4/2005/7, paragraph 41.

⁸⁵⁷ UNHRC, Alston Targeted Killings Report, paragraph 2.

⁸⁵⁸ UNHRC, Alston Targeted Killings Report, paragraph 2.

⁸⁵⁹ Philip Alston & Hina Shamsi, A Killer Above the Law?, *The Guardian*, 5 February 2010: 'The US refuses to disclose the programme's legal justification, the safeguards designed to minimise civilian harm, or the follow-up inquiries conducted.'

This will effectively restrict circumstances under which States may justify unlawful conduct by asserting that they are preserving their national security against terrorist attacks. In such circumstances, the unlawful conduct is usually interpreted as a viable exculpatory circumstance (within the regulatory legal regime) even when it departs not only from the State's obligations applicable in situations falling short of an armed conflict, but also in the conduct of hostilities.

There is general agreement, but not complete uniformity, in legal doctrine that lethal force should *only* be used in cases of legitimate self-defence, in the conduct of hostilities or where absolutely necessary in law enforcement situations. However, the reality of State practice is unfortunately different. Of grave concern is the fact that, the threshold at which lethal force may be used has decreased in the wake of this State practice.

In this atmosphere, States will most likely interpret the exculpatory circumstances allowing for their use of force in very broad terms. This would expand the individuals against whom, and the circumstance in which lethal force may be used beyond permissible limits, thus resulting in the excessively permissive application of the standards regulating the use of lethal force.

Therefore, on a cautionary note, unless concrete measures are taken to arrest the prosecution of such a trend, with sustained State practice there would be high likelihood of the emergence of a new rule of custom on targeted killing. The above scenario provides a plausible answer to the research question: What implications does the use of unmanned Predator drones for targeted killing have on the interpretation, application and formation of international law?

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