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The Lawful Use of Targeted Killing in Contemporary International Humanitarian Law

by Scott D. MacDonald

I. Introduction

International humanitarian law (“IHL”), or the law of armed conflict (“LOAC”), is a branch of international law designed to regulate the conduct of belligerent states during an armed conflict. [1] However, conflicts in the modern era are drastically different than the interstate hostilities envisioned at the time the bulk of IHL was developed. Contemporary conflicts, such as the 'War on Terror' between states and non-state actors, have resulted in new military tactics to address the complications inherent in these modern conflicts. The controversial use of targeted killing is amongst these new tactics. For the purposes of this discussion, targeted killing is the “intentional slaying of a specific alleged terrorist or group of alleged terrorists undertaken with explicit governmental approval where they cannot be arrested using reasonable means.” [2] The inability to arrest suspected terrorists reflects the transnational aspect to these conflicts as the victim state is unable to exert enforcement jurisdiction beyond its borders. [3] Until such time as new international norms develop to specifically address targeted killing, the legality of this tactic must be assessed against existing IHL. Under contemporary IHL, targeted killing is lawful although highly circumscribed.

The use of targeted killing is deservedly controversial. Licensing state authorities to slay suspected enemies immediately raises concerns ranging from human rights issues to the abuse of state power. [4] On the other hand, states cannot be expected to allow their civilian populations and armed forces to be attacked with impunity by well-armed transnational terrorist organizations that have essentially entered into an armed conflict with the victim state. Where one stands on this controversial issue frequently informs the terminology employed. Those opposed to targeted killing commonly use such terms as 'extra-judicial execution' or 'assassination'. Those in favour of the tactic use such terms as 'preventive strike'. In striving for neutrality, this discussion will exclusively employ the term 'targeted killing'.

As with any use of force in an armed conflict, the legality of targeted killings will depend on conformity with the principles of IHL. The three most important principles to this discussion are: distinction, necessity, and proportionality. In demonstrating that targeted killings are lawful in certain circumstances, this discussion will begin by showing that IHL is the correct legal regime to assess the lawfulness of targeted killing and then turn to address how targeted killing can be reconciled with each of these IHL principles. Particular emphasis will be placed on the only judicial consideration of targeted killing, the Israeli Supreme Court decision in *Public Committee Against Torture in Israel v. Israel* (“PCATF”). [5]

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II. Armed Conflict And The Applicability Of IHL

A significant portion of the dispute over the legality of targeted killing is a result of the fact that, “it does not fit comfortably into either of the two models that generally control the state's use of deadly force: human rights law and international humanitarian law (IHL).” [6] However, until such time as new norms develop to address modern conflicts, targeted killing must be evaluated against the existing legal regimes. The key feature that distinguishes these two regimes is the presence of an armed conflict, the definition of which can be problematic due to the exacting language found in the relevant conventional law.

In the absence of an armed conflict, the applicable legal regime is international human rights law. Under this regime, the only available state response to terrorist organizations is the use of law enforcement techniques. However, the obvious problem with the law enforcement model is that it is premised on the notion that the terrorist or terrorist organization is within the enforcement jurisdiction of the victim state. [7] While this is an acceptable model to address domestic terrorism, transnational terrorism creates numerous challenges to the effectiveness of law enforcement. A state cannot exert extraterritorial law enforcement jurisdiction without the cooperation of the state in which the suspected terrorist is located. In many instances this would grant effective impunity to members of a terrorist organization.

IHL/LOAC is a *lex specialis* that partially supersedes human rights law in the course of an international or non-international armed conflict. [8] IHL represents a balance between military necessity and human rights reflecting “the relativity of human rights, and the limits of military needs.” [9] In relation to targeted killing, the key human right at stake is found in Art. 6(1) of the *International Covenant on Civil and Political Rights*: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” [10] Under IHL it is possible for state authorities to take lives, even those of civilians, in a manner that is not arbitrary. Thus, a state may lawfully deprive people of their lives so long as the strictures of IHL are obeyed.

The International Court of Justice (“ICJ”) commented on the interplay between these two aspects of the international human rights regime in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. [11] In that decision, the Court stated:

... 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. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable

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lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself. [12]

From this dictum it may be concluded that international human rights law and international humanitarian law are coextensive. An individual's right to life is protected even during hostilities. However, during an armed conflict, the *lex specialis* of LOAC is engaged and the permissibility of the loss of life must be assessed against that legal regime. While the ICJ was referring to the threat or use of nuclear weapons, this conclusion is equally applicable to targeted killings.

Unless IHL is engaged, the deprivation of life caused by a targeted killing will be arbitrary and impermissible. However, as indicated by the ICJ, there must be an armed conflict before IHL can apply. Thus, as a preliminary issue, the legality of targeted killings will depend on the existence of an armed conflict. The judiciary of the two states that acknowledge using targeted killing, Israel and the United States ("U.S."), [13] have both determined that their respective nations are engaged in armed conflicts. The Israeli Supreme Court ruled that Israel is engaged in an international armed conflict, the *Intifadas*, with several Palestinian terrorist organizations. [14] However, the U.S. Supreme Court held that the U.S. 'War on Terror' with al-Qaeda constituted a non-international armed conflict. [15]

Despite these authoritative domestic decisions, there is still room for doubt whether the hostilities in which the Israel and the U.S. are embroiled constitute an armed conflict under IHL. According to the Geneva Conventions, an 'international armed conflict' requires conflict between two or more High Contracting Parties. [16] Thus, a conflict between a single state and a non-state actor, such as a terrorist organization, will not qualify as an 'international armed conflict'. The First Additional Protocol to the Geneva Conventions ("Protocol I") expanded the definition of 'international armed conflict' to include, "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination...". [17] None of the situations identified in Protocol I are applicable to the 'War on Terror'. However, Israel may be considered an alien occupier under Protocol I and the ICJ has held that GC IV applies to the Israeli-Palestinian Conflict. [18] Further, the ICJ has stated that the inherent right to self-defence, enshrined under Art. 51 of the United Nations Charter, only applies to an attack from another state and not from non-state actors. [19]

Where armed groups, such as terrorist organizations, "engage in organized violence without belonging to a State, it must be determined whether the hostilities are sufficiently intense or

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protracted for that group to become an independent party to a non-international armed conflict.” [20] Common Article 3 of the Geneva Conventions essentially defines non-international conflicts as all conflicts not of an international character. [21] However, this definition was subsequently narrowed by the Second Additional Protocol to the Geneva Conventions addressing non-international armed conflicts. [22] Protocol II applies to:

all armed conflicts which are not covered by [Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Thus, Protocol II limits 'non-international armed conflicts' to those conflicts occurring in a state against armed groups exercising control over a portion of that state's territory. Once more, this would seem to exclude conflicts such as the *Intifadas* or the 'War on Terror'.

Judicial consideration of armed conflicts has adopted identification standards without reference to a territorial control component. The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) held:

we find that an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached... [23]

The Statute of the International Criminal Court followed a similar model in applying war crimes to:

conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. [24]

Given the broad scope of the Geneva Conventions, and the fundamental purpose of IHL to protect elementary considerations of humanity, the territorial requirements on non-international armed conflicts should be considered immaterial. [25] Further, these definitions of 'non-international armed conflicts' require only that the conflict take place in the territory of a state, not necessarily that of the victim state. Given that the primary purpose of LOAC is to protect

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civilians, the definition of armed conflict should be cast as inclusively as possible. The unfortunate alternative could be an unrecognized *de facto* armed conflict wherein the civilian population is largely unprotected. As stated in the *Nuclear Weapons Case*, international human rights laws would still be applicable; however, human rights laws may not be fully observed in hostilities against parties hiding amongst the civilian population.

Without a specific territorial component to define a 'non-international armed conflict', there remains only that the conflict must involve one or more organized armed groups and be of a protracted nature. As President Barak noted in *PCATI*, "a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states." [26] Accordingly, there can be little doubt that many terrorist organizations qualify as 'organized armed groups'. Further, the duration of the *Intifadas* and the 'War on Terror' demonstrate the protracted nature of the conflict. In general terms, any conflict of a similar nature to these will be, *prima facie*, an armed conflict and engage IHL.

III. IHL and The Principle of Distinction

Having established the *prima facie* applicability of IHL to conflicts between states and terrorist organizations, the lawfulness of targeted killing must now be assessed against the principles of that legal regime. These rules of IHL are "intransgressible principles of customary international law." [27] While IHL may depend on the presence of an armed conflict, the international or non-international character of that conflict becomes irrelevant as the substantive requirements of IHL discussed herein apply equally to both. [28]

The most fundamental principle of IHL is that of distinction. This principle requires belligerents to distinguish between combatants and civilians. The distinction between combatants and civilians is crucial as combatants take part in the hostilities, making them legitimate targets, while civilians do not participate in the hostilities and cannot be legitimate targets. [29] Additional Protocol I enshrines this principle at Art. 48:

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. [30]

Both Additional Protocols further state, "The civilian population as such, as well as individual civilians, shall not be the object of attack." [31]

However, the protection afforded to civilians is not absolute. Non-combatants have a duty not to participate in the hostilities. [32] Consequently, civilians who breach this duty become legitimate targets "*for such time as they take a direct part in hostilities.*" [33] This principle has likely

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achieved the status of binding customary international law. [34] Therefore, targeted killing may only be lawfully employed against terrorists if they are either deemed combatants, or civilians during the period in which they take a direct part in hostilities. Each of these possibilities will now be addressed.

A. Combatants

IHL was created to apply between states and did not envision non-state actors such as terrorist organizations. [35] The definition of 'combatants' is based on the traditional view of a state's armed forces and militias. Combatants are defined in the Third Geneva Convention as:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war. [36]

The definition of a civilian is framed in the negative. Any person that is not a combatant within the above definition is a civilian; if there is any doubt as to a person's status, they must be considered a civilian. [37] While there is frequent reference to 'unlawful combatants' by states, contemporary IHL does not recognize any status other than combatants and civilians. [38]

The terrorists that are likely to be targeted for killing do not meet the requirements to be considered combatants. They are not members of the armed forces of a state participating in the conflict. While organized terrorist groups may have a command structure with an individual responsible for his subordinates, none of the other requirements are met. There is no fixed distinctive symbol, arms are not carried openly, and operations are not conducted in accordance with laws and customs of war. In most instances, terrorist groups strive to achieve the opposite of these requirements.

B. Civilians

As members of organized terrorist groups do not meet the definition of combatants, they must be considered civilians. Civilians are legitimate targets only if they directly participate in hostilities

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and, even then, only for the period of time during which they are directly participating. The lawfulness of a targeted killing will be determined by its compliance with each of these three criteria: direct participation, in hostilities, for the period of participation. Unfortunately, none of these criteria are defined in LOAC.

i. Direct Participation

Civilians only lose their protection under IHL if they take a direct part in hostilities. Civilians taking an indirect part in hostilities continue to enjoy protection. However, there is no accepted definition of taking a 'direct part' in hostilities. The International Committee of the Red Cross ("ICRC") Commentary on Protocol I on Art. 51(3) provides:

"direct" participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked. [39]

The ICRC Commentary on Art. 43(2) of Protocol I adds a causal and temporal link to direct participation: "Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place." [40]

Taken together, the ICRC Commentary on these Articles suggests that, "a very close correlation should exist between the act performed by the civilian and the threat to the adverse party." [41] This reasoning accords with the goal of IHL to preserve civilian lives. The more distant the correlation between the act and the harm, the greater the possibility that civilians will be targeted on suspicion of threat rather than immediacy of harm. Unfortunately, the ICRC Commentary does little to clarify the required strength of the correlation or provide any objective criteria upon which it may be measured. Absent more certain guidance, the directness of civilian participation may be interpreted broadly or narrowly.

In his expert opinion to the Court in *PCATI*, Professor Cassese suggests that 'direct participation' should be construed in an extremely narrow fashion. [42] Only those individuals actually engaged in armed action, such as planting a bomb or firing a missile, or in the process of deployment while openly carrying arms are directly participating in combat. [43] Cassese further provides that civilian terrorists who plan attacks are not legitimate targets unless they are openly carrying arms or are present at a legitimate military target; in all other situations such individuals are only subject to arrest and prosecution. [44] The primary harm this position seeks to avoid is lives being taken on mere suspicion of terrorist activities. [45] Weakly acknowledging Israel's

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security concerns regarding suicide bombers, Cassese opined that a civilian suspected of carrying explosives may be fired upon if they refuse to comply with requests to demonstrate they are not carrying explosives. [46] However, even this permissible use of force appears to be derived from the law enforcement model rather than IHL.

This narrow construction of 'direct participation' is unsatisfactory to victim states, appears disconnected from the realities of conflicts such as the *Intifadas*, and potentially engenders disrespect for IHL. It is very difficult, if not impossible, for armed forces to identify an immediate threat. [47] Requiring an overly close correlation between the act and the harm may be tantamount to requiring states to wait until it is too late. This is particularly so given that success for organized terrorist groups will depend on concealing the threat from state authorities until the harm has occurred. Obviously, this increases the risk or threat faced by victim states. Terrorists will have the best of both worlds as they will be protected civilians the majority of the time and only sacrifice this shield while actually carrying out a terrorist act. [48] It is doubtful that this 'revolving door' approach is tenable; particularly as it permits the leaders and planners of terrorist organizations complete impunity should the victim state be unable to arrest them. [49]

In addition, IHL may suffer as the distinction between civilian and combatant becomes less distinct. [50] Civilians have a duty to avoid participating in armed conflicts. However, a narrow construction of 'direct participation' would allow civilians to become intimately involved in hostilities with only the briefest loss of immunity, if at all. This is an unacceptable conclusion to the victim states that would face additional imbalance in an already asymmetric conflict.

In *PCATI*, President Barak took a more expansive view of direct participation. In effect, the Court took a functional approach and deemed that those civilians performing combatant functions are directly participating in hostilities. [51] Some of these directly participating functions include: gathering military intelligence, transporting people to participate in hostilities, operating or servicing weapons systems, and transporting ammunition. [52] Perhaps most importantly, the Court held that those who decide upon and plan the terrorist acts are directly participating in hostilities. [53] However, the Court noted that there were several forms of indirect participation that did not result in the loss of civilian immunity. Amongst these forms of indirect participation are: selling food or medicine to the terrorist organization, providing general strategic analysis, general logistical support, and providing financial aid. [54]

Although some authors are critical of the Court's expansion of 'direct participation', [55] it represents a more balanced and practical approach than that of Prof. Cassese. State authorities will have some freedom to act against individuals that are effectively participating as combatants without the requirement for an immediate causal link to a specific act. Under a narrow construction of 'direct participating', the civilian-terrorist could only be targeted when actually planting a bomb or other terrorist act. The leaders and planners of terrorist organizations, typically distanced from such activities, would perpetually retain their civilian immunity. In

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practical terms, the *PCATI* decision's functional approach allows for terrorist leaders to be targeted in the same manner as officers in a state's conventional armed forces. It extends 'direct participation' throughout a terrorist organization's entire chain of command. [56] Further, the Judgment provides specific guidance on the categories of persons that may be targeted. While neither the list of direct participants nor indirect participants is exhaustive, the military commanders that will be required to make determinations on targeted killings will have far better direction.

Ultimately, there is no fixed point upon which the directness of a terrorist's participation can be evaluated:

Treaty IHL does not define direct participation in hostilities, nor does a clear interpretation of the concept emerge from State practice or international jurisprudence. The notion of direct participation in hostilities must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL. [57]

Accordingly, it appears that any reasonable definition of 'direct participation' will suffice so long as state authorities act in good faith and respect the object and purpose of IHL. The manner in which President Barak interpreted 'direct participation' meets these criteria. Protection is still provided to civilians and those who indirectly participate, keeping with the purpose and object of IHL. Further, the Court imposed a heavy evidential burden on Israeli armed forces to verify that individuals are direct participants before they can be targeted. [58] The requirement for verification, along with obligatory judicial review, [59] helps ensure that good faith is maintained in determining whether a suspected terrorist is a direct participant.

ii. Hostilities

There is also no universally accepted definition for 'hostilities'. According to the ICRC Commentary on Protocol I, "the word "hostilities" covers not only the time that the civilian actually makes use of a weapon but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon." [60] Further, civilian immunity is dependent on refraining from hostile acts and, "Hostile acts 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." [61] On its face, the definition of 'hostilities' appears to exclude acts committed against the civilian population. [62] However, this exclusion appears anachronistic and, "acts which by nature or objective are intended to cause damage to civilians should be added to that definition." [63]

Under this definition, a terrorist is clearly engaging in hostilities at the time they are using or carrying a weapon. Interestingly, it is also possible to commit hostile acts without being armed.

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The Commentary is silent on whether this would include planning and orchestrating a terrorist attack. The Israeli Supreme Court held that, “a civilian is taking part in hostilities when using weapons in an armed conflict, while gathering intelligence, or while preparing himself for the hostilities.” [64]

Once again, in the absence of a universally accepted definition for 'hostilities', the only criteria is that the state have a good faith interpretation that respects the objects and purposes of IHL. The *PCATI* definition meets these criteria as it continues to distinguish illegitimate civilian targets from legitimate ones based on clearly identified categories of participation. The nature of 'hostilities' is reasonably interpreted so as to allow a balance between protecting civilian life and allowing for the necessity of military action against those preparing for hostilities. Perhaps most importantly, this definition of hostilities has been rightfully expanded to include acts committed against the civilian population.

iii. For Such Time

Civilians are only legitimate targets “*for such time* as they take a direct part in hostilities.” [65] This temporal element permits non-combatants to regain their immunity by disengaging from hostilities. However, there is considerable controversy over the interpretation of this element. The ICRC Commentary on Protocol II provides that when a civilian directly participates in hostilities, “it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked...” [66] While vague, this definition appears to inherently incorporate an element of threat. Phrased conversely, it would appear that a civilian-terrorists may be attacked for such time as they present a threat to the state. However, the definition is silent as to whether terrorist leaders and planners constitute such a threat.

The Israeli Supreme Court noted the lack of consensus regarding the phrase 'for such time' and presented a spectrum upon which the term could be evaluated. [67] At one end of the spectrum is the civilian who takes up arms on a single occasion. The Court held that such a civilian is protected from the moment they detach themselves from the activity. [68] On the other end of the spectrum is a civilian that has joined a terrorist organization and, “in the framework of his role in that organization he commits a chain of hostilities with short periods of rest between them...” [69] The Court held that, in this instance, a civilian loses their immunity for such time as they are committing the chain of acts; particularly given that the rest between acts is nothing more than preparation for the next act. [70] This ruling has significantly expanded the scope of the term 'for such time'.

The *PCATI* Judgment has been criticized for the expansive interpretation of the period in which a civilian may lose their protection. Eichensehr notes that the Court's reading of 'for such time'

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follows a membership-based model that “destroys the temporal nexus between lawful attack and the threat posed by the target.” [71] According to this perspective on the Judgment, an active threat is no longer required to justify the use of force; rather, active membership in a terrorist organization alone is sufficient. [72]

This concern is somewhat exaggerated. The Court imposed a strong evidentiary burden on the use of targeted killing. [73] In the Court's view, thoroughly verified information demonstrating direct participation is an absolute requirement to the use of targeted killing. In doing so, the Court's approach to this temporal element appears to exercise good faith and accord with the object and purpose of IHL. The Court struck an appropriate balance between protecting civilians and closing the revolving door on terrorists being protected as civilians while participating in hostilities at their convenience.

IV. The Principle of Necessity

The principle of necessity, or military necessity, requires that military action be both necessary for the achievement of a legitimate military purpose, and not otherwise prohibited by IHL. [74] Enmeshed in this principle is the notion that the type and degree of force used must be necessary for the achievement of a legitimate military goal. [75] One of the primary purposes of this principle is to avoid senseless slaughter; however, the threshold for military necessity is extremely low. When considered against the backdrop of targeted killing, necessity should prevent killing an isolated target who could be captured or arrested without threat to state authorities or protected civilians. [76] Kretzmer advances this notion even further stating, “a state may not target suspected terrorists if there is a *reasonable possibility* of apprehending them and putting them on trial.” [77] This position would correctly place a serious limit on the use of targeted killing in areas controlled by the state or where there is cooperation from the state in which the terrorist is located.

Another limit imposed by the principle of necessity is the prohibition against reprisals. [78] In this context, targeted killing could not be used to punish terrorists for past acts. Rather, the use of force may only be justified in defence. In this instance, targeted killing should only be employed when it is necessary to prevent a terrorist attack. This inserts a further burden of proof on state authorities, not only must they positively demonstrate that the suspected individual is a member of a terrorist organization, they must also demonstrate that killing that individual is necessary to prevent a further attack. Although the evidential burden should be strict, an individual's past actions will likely be a factor in assessing the probability of future threat. [79] Assessed against the principle of necessity, a targeted killing will be lawful if: there is no reasonable possibility of arresting the terrorist, the killing is necessary to prevent future attacks, and there is verified proof of the identity of the terrorist and intent to commit future terrorist acts.

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V. The Principle of Proportionality

The principle of proportionality in IHL, also known as proportionality in attack, is considered customary law and has been defined by the ICRC:

Launching 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. [80]

This definition of proportionality focuses on the collateral damage rather than the damage done directly to the object of the attack. As indicated above, the decision of whether to capture or kill a terrorist is largely a matter of necessity. However, proportionality may factor into this decision if the potential damage to civilians from an attempted capture is greater than it would be from a targeted killing. [81]

Generally, an attack will be proportionate “if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it.” [82] This is a values-based test and difficult to perform. However, to overcome the vagueness of the principle, “the presumption must be that if there is a danger that civilians will be killed or wounded in the attack, the attack will be unlawful.” [83] Kretzmer suggests three factors that should be balanced in determining if a targeted killing is proportional:

1. the danger to life posed by the continued activities of the terrorists; 2. the chance of the danger to human life being realized if the activities of the suspected terrorist are not halted immediately; and 3. the danger that civilians will be killed or wounded in the attack on the suspected terrorist. [84]

These factors balance the security needs of the state with the IHL objective of minimizing civilian casualties. Properly considered, these factors allow the presumption against civilian casualties to be lifted, but the evidential burden required to do so must be commensurately rigorous. [85]

Should state authorities determine that it is necessary to remove the threat posed by an individual terrorist, the potential harm to civilians from a targeted killing must be weighed against that of the alternative: an incursion to capture or kill the target. Disregarding any issues of state sovereignty, the least damaging means of obtaining the goal should be selected. This is one of the advantages to targeted killing that its advocates trumpet. Targeted killing, “if properly executed, not only enables the State to more effectively protect itself within a legal context but also leads to minimizing the loss of innocent civilians caught between the terrorists... and the State.” [86] However, targeted killing is not always properly executed in a proportional manner. For example,

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the highly publicized killing of Salah Shehada in which a one tonne bomb was used on a building in Gaza, killing sixteen people, injuring over eighty, and destroying four residential buildings. [87] This targeted killing was highly disproportional and would almost certainly constitute a violation of IHL. Targeted killing can respect the principle of proportionality; however, the tactic must be used in a manner that minimizes, or eliminates, the impact on the civilian population.

VI. Conclusion

As President Beinisch observed, “The legal difficulties with which we must contend stem primarily from the fact that international law has not yet developed the laws of armed conflict to respond to combat against terrorist organizations, as opposed to a regular army.” [88] However, targeted killing appears to be becoming an established practice as a tool in combating terrorism. The continued use of targeted killing by Israel and the U.S. evidences their belief in the tactic's efficacy and they would seem unlikely to abandon it. Consequently, norms may be developing to address and govern targeted killing. [89] The *PCATI* Judgment has been well received by leading experts like Professor Cassese and, [90] as the first judicial consideration of targeted killing, will likely provide the foundation for any emerging norms.

Perhaps the two most novel features of the Judgment are that it imposes a very strong burden of proof on state authorities before executing a targeted killing, and that it requires an *ex post* judicial review of the targeted killing. There are very legitimate concerns regarding due process in targeted killings. [91] The requirement for thoroughly verified information and judicial review should assist in mitigating fears over due process. Consequently, it would not be unexpected for an emerging norm to incorporate these features of the Judgment.

States have a duty to protect their citizens; however, this duty must be balanced against the duty to safeguard the lives of innocent civilians affected by the conflict between state and terrorist. To state authorities, the use of targeted killing is tempting. It offers the promise of being able to strike at those causing harm while causing minimal collateral damage to innocents. However, to do so the tactic must be used judiciously and as an exceptional measure of last resort. [92] It has been demonstrated that targeted killings can be lawful under contemporary IHL. However, as observed by President Barak, it is ultimately impossible to say whether targeted killing is always legal or always illegal. [93] Each use of targeted killing is unique and its lawfulness will depend on whether IHL has been respected in that specific instance.

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Notes:

[1]See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004) at 4 [Dinstein, *Conduct of Hostilities*].



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- [2]W. Jason Fisher, “Targeted Killing, Norms, and International Law” (2006) 45 Colum. J. Transnat'l L. 711 at 715 [Fisher].
- [3]Gabriella Blum & Philip Heymann, “Law and Policy of Targeted Killings” (2010) 1 Harv Nat'l Sec. J. 145 at 161.
- [4]David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” (2005) 16 E.J.I.L. 171 at 174 [Kretzmer].
- [5]*Public Committee Against Torture in Israel v. Israel*, (2007) 46 I.L.M. 375 (Supreme Court of Israel sitting as the High Court of Justice, 16 December 2006) [PCATI].
- [6]Richard Murphy & Afsheen John Radsan, “Due Process and Targeted Killing of Terrorists” (2009) 31 Cardozo L. Rev. 405 at 408 [Murphy & Radsan].
- [7]Kretzmer, *supra* note 4 at 179.
- [8]*Ibid.* at 185.
- [9]PCATI, *supra* note 5 at para. 22.
- [10]*International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 17, arts. 9-14, 6 I.L.M. 368 (entered into force 23 March 1976)[ICCPR].
- [11]*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226 [*Nuclear Weapons Case*].
- [12]*Ibid.* at para. 25.
- [13]Fisher, *supra* note 2 at 739 – 740.
- [14]PCATI, *supra* note 5 at paras. 18 and 21.
- [15]*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) at 630.
- [16]See e.g. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) at Art. 2(1) [GC IV].
- [17]*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, International Committee of the Red Cross (ICRC), 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979) [Protocol I].
- [18]*Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at para. 101 [*Legal Consequences of the Wall*].
- [19]*Ibid.* at 139.
- [20]Nils Melzer, *Targeted Killing in International Law* (New York: Oxford University Press, 2008) at 250 [Melzer].
- [21]GCIV, *supra* note 14 at Art. 2.
- [22]*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, International Committee of the Red Cross (ICRC), 8 June 1977, 1125 UNTS 69 (entered into force 7 December 1978) [Protocol II].
- [23]*Prosecutor v. Tadic* (1995), Case No. IT-94-1-AR72 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), (1996) 35 I.L.M. 35 at para. 70 [*Tadic*].
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[24] *Rome Statute of the International Criminal Court*, 17 July 1998, A/CONF. 183/9 (entered into force 1 July 2002).

[25] Melzer, *supra* note 20 at 259.

[26] *PCATI*, *supra* note 5 at para. 21.

[27] *Nuclear Weapons Case*, *supra* note 11 at para. 79.

[28] See Jean-Marie Henckaerts, *et al.*, “Customary International Humanitarian Law” online: ICRC <<http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>> at XXXV [Henckaerts].

[29] See *e.g.* Orna Ben-Naftali & Keren R. Michaeli, “We Must Not Make a Scarecrow of the Law’: A Legal Analysis of the Israeli Policy of Targeted Killings” (2003) 36 *Cornell Int’l L. J.* 233 at 265 [Ben-Naftali & Michaeli].

[30] Protocol I, *supra* note 17 at Art. 48.

[31] *Ibid.* at Art. 51(2).

Protocol II, *supra* note 19 at Art. 13(2).

[32] Ben-Naftali & Michaeli, *supra* note 29 at 265.

[33] Protocol I, *supra* note 17 at Art. 51(3) [emphasis added].

[34] See *PCATI*, *supra* note 5 at para. 30.

[35] Amos Guiora, “Targeted Killing as Active Self-Defense” (2004) 36 *Case W. Res. J. Int’l L.* 320 at 323 [Guiora].

[36] *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art. 4A(1) & (2) [GCIII].

[37] Protocol I, *supra* note 17 at Art. 50(3).

[38] See *PCATI*, *supra* note 5 at para. 28.

[39] Yves Sandoz, *et al.*, “Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977” online: ICRC <<http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument>> at Art. 51(3) [Commentary on Protocol I].

[40] *Ibid.* at Art. 43(2).

[41] Helen Keller & Magdalena Forowicz, “A Tightrope between Legality and Legitimacy: an Analysis of the Israeli Supreme Court’s Judgment on Targeted Killing” (2008) 21 *Leiden J. Int’l L.* 185 at 209 [Keller & Forowicz].

[42] Antonio Cassese, “Expert Opinion on Whether Israel’s Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law” online: Stop Torture <<http://www.stoptorture.org.il/files/cassese.pdf>>.

[43] *Ibid.* at para. 12 and 13.

[44] *Ibid.* at para. 15.

[45] *Ibid.*



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[46]*Ibid.* at para. 16.

[47]Keller & Forowicz, *supra* note 41 at 209.

[48]Kretzmer, *supra* note 4 at 193.

[49]*Ibid.*

[50]*PCATI*, *supra* note 5 at para. 34.

[51]*Ibid.* at para. 35.

[52]*Ibid.*

[53]*Ibid.* at para. 37.

[54]*Ibid.*

[55]See *e.g.* Keller & Forowicz, *supra* note 41 at 210.

[56]*PCATI supra* note 5 at para. 37.

[57]Nils Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law” online: North Atlantic Treaty Organization Allied Command Operations <http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC_002_0990.pdf> at 41.

[58]*PCATI*, *supra* note 5 at para. 40.

[59]*Ibid.* at para.54.

[60]Commentary on Protocol I, *supra* note 39 at Art. 51(3).

[61]*Ibid.*

[62]See Eric Christensen, “The Dilemma of Direct Participation in Hostilities” (2009) 19 J. Transnat'l L. & Pol'y 281 at 288.

[63]*Ibid.*

[64]*PCATI*, *supra* note 5 at para. 33.

[65]Protocol I, *supra* note 17 at Art. 51(3) [emphasis added].

[66]Yves Sandoz, *et al.*, “Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977” online: ICRC <<http://www.icrc.org/ihl.nsf/COM/475-760019?OpenDocument>> at Art. 13(3) [Commentary on Protocol II].

[67]*PCATI*, *supra* note 5 at para. 39.

[68]*Ibid.*

[69]*Ibid.*

[70]*Ibid.*



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[71]Kristen Eichensehr, “On Target? The Israeli Supreme Court and the Expansion of Targeted Killings” (2007) 116 Yale L.J. 1873 at 1875 [Eichensehr].

[72]*Ibid.* at 1876 – 1877.

[73]*PCATI*, *supra* note 5 at para. 40.

[74]Melzer, *supra* note 20 at 285.

[75]Murphy & Radsan, *supra* note 6 at 417.

[76]*Ibid.*

[77]Kretzmer, *supra* note 4 at 203 [emphasis added].

[78]Murphy & Radsan, *supra* note 6 at 417.

[79]*Ibid.* at 418.

[80]Henckaerts, *supra* note 28 at 46.

[81]*PCATI*, *supra* note 5 at para. 40.

[82]*Ibid.* at para. 45.

[83]Kretzmer, *supra* note 4 at 211.

[84]*Ibid.* at 203.

[85]*Ibid.*

[86]Guiora, *supra* note 35 at 324.

[87]Ben-Naftali & Michaeli, *supra* note 29 at 280.

[88]*PCATI*, *supra* note 5 at 407 [no pinpoint citation available].

[89]Fisher, *supra* note 2 at 741 – 742.

[90]Antonio Cassese, “On Some Merits of the Israeli Judgment on Targeted Killings” (2007) 5 J.I.C.J. 339.

[91]See 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” (2004) 56 Hastings L.J. 801 at 877 – 878.

[92]See Guiora, *supra* note 35 at 328.

[93]*PCATI*, *supra* note 5 at para. 60.