

PREDATOR PRINCIPLES: LAWS OF ARMED CONFLICT AND TARGETED KILLINGS*

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If it seems a nasty thought that death and pain are at the center of legal interpretation, so be it ... As long as death and pain are part of our political world, it is essential that they be at the center of the law. The alternative is truly unacceptable—that they be within our polity but outside the discipline of the collective decision rules.

Robert Cover, *Violence and the Word* (1986)

I. Introduction

A missile fired from a distant State hits a moving car. A person opens a letter and dies from poison released from it. A bomb in a minivan explodes as a convoy of vehicles passes, killing several people and injuring a hundred others. A man is having dinner at his home when a missile hits and levels the entire structure killing everyone inside. Two men inject poison into the body of another man. A wheelchair-bound man leaving a mosque is attacked by a helicopter. A commando unit invades a man's home and shoots him in front of his children.

What do these events have in common? They are all examples of targeted killing.

In the past, these covert and clandestine operations of targeted killings were, for the most part, considered of doubtful legality or illegitimate.¹ But now there appears to be a growing acceptance of targeted killing “as a method of counter-terrorism and ‘surgical warfare.’”² While no government in the past would admit to assassinating its enemies, governments have now openly

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¹ NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 9 (2008).

² *Id.*

acknowledged that they use targeted killings “to curb insurgent or terrorist activities.”³ Perhaps, such governments believe that the prevailing climate of hatred or insecurity justifies actions that were once considered unspeakable.

Israel openly admits that targeted killing is a state policy in its conflict with Palestinian militants.⁴ After 9/11 the United States, Pakistan, and Russia openly adopted the method of targeted killing “in their efforts to counter terrorism and insurgency.”⁵ Russia admits to having “liquidated Chechen rebel leaders in order to suppress the secessionist movement in Northern Caucasus.”⁶ The United States attempted ‘decapitation strikes’ against Saddam Hussein in 2003.⁷ Even in the post-Bush era, targeted killings are believed to be “on the rise from Dubai to Dagestan, from Yemen to Waziristan.”⁸ The Obama Administration approved “the targeted killing of an American citizen, the radical Muslim cleric Anwar al-Awlaki”⁹ who is believed to be hiding in Yemen.

As a purely military strategy devoid of morality, targeted killing seems to make sense. Targeted killing may even be argued as a moral choice because it may reduce the total number of deaths. After all, if only key individuals are targeted, more people are spared. This, of course, assumes that targeted killing is so precise that there is negligible collateral damage.

What is the response of the international community to this policy of targeted killing?

It has been mixed. The varied responses are perhaps reflective of the “legal murkiness surrounding the international community’s response to terrorism.”¹⁰ Some cases were condemned, others condoned, and a few were brought before courts.¹¹ Some consider targeted killing as extra-judicial executions or

³ *Id.* at 9-10.

⁴ Helen Keller & Magdalena Forowicz, *A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court’s Judgment on Targeted Killing*, 21 LEIDEN J OF INT’L L 185, 186 (2008); STEPHEN R. DAVID, FATAL CHOICES: ISRAEL’S POLICY OF TARGETED KILLINGS 1, Mideast Security And Policy Studies No. 51, The Begin-Sadat Center For Strategic Studies Bar-Ilan University (September 2002) available at <http://www.biu.ac.il/Besa/david.pdf>; NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW xi (2008).

⁵ Melzer, *supra* note 1 at xi.

⁶ Melzer, *supra* note 1 at 10.

⁷ *Id.*

⁸ Mark Medish & Joel McCleary, *State Sponsored Assassinations: A time to KILL*, The Times of India, April 17, 2010, available at <http://timesofindia.indiatimes.com/articleshow/5824255.cms?prtpage=1>.

⁹ Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, New York Times, available at <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html> (April 6, 2010).

¹⁰ Chris Downes, *Targeted Killings in an Age of Terror: The Legality of the Yemen Strike*, 9 J. OF CONFLICT AND SECURITY L 277 (2004).

¹¹ Melzer, *supra* note 1 at xi.

assassinations.¹² Others consider targeted killing as “legitimate acts of war carried out as part of the state’s inherent right to self-defence.”¹³ But for the most part, targeted killing “remain[s] extremely controversial and...is located at the very point of tension between deeply rooted beliefs and values held by various stakeholders.”¹⁴

But what is targeted killing in the first place? While killing an enemy is normally expected and deemed legitimate in war, can the same rule apply in armed conflicts short of war? Is targeted killing justified by the oft-invoked “war on terror”? Is it legal to target confirmed and suspected terrorists at any time? Who is authorized under the law to undertake a targeted killing? Is any method of targeted killing acceptable? To what extent is collateral damage acceptable?

Targeted killing falls within the ambit of several legal regimes including the law of armed conflict (*jus in bello*), international human rights law, the law on international use of force (*jus ad bellum*), and domestic laws. One author has used the “analogy of tectonic plates, sometimes bordering upon each other, sometime[s] overlapping, forever in motion”¹⁵ to describe the interplay of these various regimes. While it is ideal to evaluate the practice of targeted killing in the context of all these regimes, that requires a lengthier discussion that is a proper project for another time.¹⁶ This paper undertakes a more modest albeit more focused analysis of targeted killing viewed strictly from the lens of the laws of armed conflict.

This paper argues that targeted killing is allowed under international law provided that: (1) the circumstances fall within the coverage of the law of armed conflict, and (2) the party to the armed conflict strictly complies with the principles on the conduct of hostilities. Furthermore, simply labeling the targets as terrorists does not justify targeted killing in the absence of an armed conflict. If States insist on characterizing military action against terrorists or similar armed groups as an armed conflict, then they must strictly abide by the law of armed conflict. States cannot invoke the laws of armed conflict and lawfully target particular individuals without affording those same individuals the privileges of lawful targets and without complying with the conditions of lawful targeting.

¹² David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* EUR. J. OF INT’L L. 2, 171, 173 (2005) and n10.

¹³ *Id.* See also J. Nicholas Kendall, *Israeli Counter-Terrorism: Targeted Killings Under International Law*, 80 N. C. L. REV. 1069, 1078 (2002).

¹⁴ Melzer, *supra* note 1 at xi.

¹⁵ Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT’L L. 499 (2005).

¹⁶ The author originally wrote this paper in April 2010 for a seminar titled “International Humanitarian Law” under Professor Gabor Rona of Columbia Law School. Therefore time, space, and subject matter constraints prohibited the incursion onto other fields. As originally written, the paper already far exceeded the requirements of the course.

Part II clarifies the concepts of the law of armed conflict as well as the requirements for its application. It explains that the existence of an armed conflict must first be established before the law of armed conflict can apply as well as the requisites for an international and non-international armed conflict.

Part III discusses the concept of targeted killing, its elements, and how it is defined. The suggested definitions of a number of authors are evaluated and a more accurate definition is offered. This part also discusses the current practice of targeted killing by summarizing examples of targeted killing undertaken by States.

Part IV analyzes the applicable rules of armed conflict that States must comply with if and when they decide to engage in targeted killing. Specifically, this part discusses the principles of distinction, military necessity, proportionality, and precaution. It also discusses the lawful means and methods of combat under the laws of armed conflict.

Part V concludes this paper by reiterating that (i) targeted killing is only justified in the context of an armed conflict, (ii) how the principles of the law of armed conflict must be strictly complied with by States, and (iii) the need for the international community to insist that the law of armed conflict be strictly obeyed.

II. Laws of Armed Conflict

A. Clarifying the Concepts and Terms

The law of armed conflict (“LOAC”) is also known as international humanitarian law (“IHL”) or *jus in bello*.¹⁷ Some scholars equate LOAC with the law of war.¹⁸ Others believe they refer to different things.¹⁹ Engaging in this semantic debate would not be productive at this point. For purposes of this paper, LOAC will be considered synonymous with IHL and covers both what is known as the Geneva Law and the Hague Law as contained in international customary law and international treaties.

The Geneva Law may be defined as “the legal regime for the protection of victims of armed conflict, in particular those who reside in areas under the control

¹⁷ HECTOR OLASOLO, UNLAWFUL ATTACKS IN COMBAT SITUATIONS: FROM THE ICTY’S CASE LAW TO THE ROME STATUTE 1 (2008).

¹⁸ Christopher Greenwood, *The Law of War (International Humanitarian Law)* 784 in MAURICE EVANS (ED.), INTERNATIONAL LAW (2006).

¹⁹ Melzer, *supra* note 1 at 244 and n.9.

of the party to the conflict to which they are not affiliated.”²⁰ These are primarily found in the four Geneva Conventions of 1949, which in this paper will be referred to collectively as “Geneva Conventions” or individually as GC I, GC II, GC III or GC IV.

The Hague Law “deals with the way in which the hostilities must be conducted and regulates the use of means and methods of warfare.”²¹ It is sometimes referred to as the *law of hostilities* because it governs the conduct of hostilities. This is found primarily in the Hague Conventions of 1899 and their successors of 1907.

The Additional Protocols of 1977 are also part of LOAC and, together with the Geneva Conventions and the Hague Conventions, form the bulk of what is referred to here as *conventional IHL* as opposed to *customary IHL*. The latter comprises the rules of IHL which form part of customary international law. Conventional IHL is binding only to the State-Parties to the international treaties and conventions, while customary IHL is binding on all States. For purposes of this paper, LOAC consists of both conventional and customary IHL.

The existence of an armed conflict is a *conditio sine qua non* for the application of IHL.²² If there is no armed conflict, then a State has no business applying the rules of LOAC. Note, however, that a declaration of war is not crucial. Common Article 2 of the Geneva Conventions provides that the conventions “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.”²³ What matters is that the facts on the ground establish the existence of an armed conflict.

Note, further, that the Geneva Conventions also apply “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”²⁴

B. Armed Conflict

LOAC applies when there is an armed conflict. However, there is no codified definition of *what* an armed conflict is.

²⁰ Olasolo, *supra* note 18.

²¹ *Id.*

²² *Id.* at 30.

²³ The Geneva Conventions I to IV, art. 2 par. 1.

²⁴ *Id.*

In the *Tadić* case, the court stated that:

we find that an armed conflict exists whenever there is a **resort to armed force between States or protracted armed 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; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.²⁵ (*emphasis supplied*)

Therefore, based on this case an armed conflict exists if:

1. there is a resort to force between two States; or
2. there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

The second type appears to be reiterated by the Rome Statute of the International Criminal Court when it states in Article 8 Section 2(f) thereof that “[i]t 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.”²⁶

While the Geneva Conventions do not define the term *armed conflict*, it does recognize two types of armed conflict: international and non-international.

1. *International Armed Conflict*

International Armed Conflict (“IAC”), as defined by Common Article 2, is an armed conflict involving two or more “High Contracting Parties.” In other words, IAC is “any difference arising between two States and leading to the intervention of armed forces...even if one of the Parties denies the existence of a state of war.”²⁷ In an Opinion Paper, the International Committee on the Red

²⁵ *The Prosecutor v. Dusko Tadić*, Case No. IT-94-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

²⁶ Rome Statute of the International Criminal Court, 2187 UNTS 90.

²⁷ Gabor Rona, *An Appraisal of US Practice Relating to Enemy Combatants*, VOLUME 10 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 237 (2007) citing J. PICTET, ED., COMMENTARY, I GENEVA

Cross ("ICRC") adopted the *Tadic* formulation and stated that an IAC "exist[s] whenever there is resort to armed force between two or more States."²⁸

It must be noted however that Additional Protocol I ("AP I") "extends the notion of 'international armed conflict' to:"²⁹

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, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.³⁰

Thus, under AP I, IAC may be between a State and an armed group fighting against colonial domination, alien occupation, and against racist regimes in the exercise of their right of self-determination. Thus, apart from States, it is possible for an armed group to be a party to an IAC.

As may be gleaned from Part III B below, the targeted killings conducted by Israel are in the context of the Israel-Palestinian conflict. Is this conflict an IAC? The Supreme Court of Israel would answer this in the affirmative. Chief Justice Barak in *PCATI v. Govt. of Israel* classified the armed conflict between Israel and the terrorist organizations as IAC even though Israel is not, strictly speaking, in armed conflict with any particular State,³¹ unless Palestine is considered a State for this purpose. Neither did the decision characterize the Palestinians as "peoples who are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." The text of the decision indicates that the basis of the characterization is the fact that the conflict involves "an armed conflict between the occupying States in an area subject to belligerent occupation."³² The ruling relied mainly on a statement written by *Cassese* in his work on international law wherein he stated that "an armed conflict which takes place between an Occupying Power and rebel or insurgent groups –

CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (1994)

²⁸ How is the Term "Armed Conflict" Defined in International Humanitarian Law? International Committee of the Red Cross (ICRC) Opinion Paper, available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf) (March 2008).

²⁹ Melzer, *supra* note 1 at 247.

³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [hereinafter "Additional Protocol I], art. 1(4).

³¹ At least not in this dispute.

³² *Public Committee Against Torture in Israel et al. Government of Israel et al.* 13 December 2006 HCJ 769/02, par. 18.

whether or not they are terrorist in character, amounts to an international armed conflict.”³³

Keller and Forowicz point out that “the Israeli-Palestinian conflict has been interpreted by a few UN bodies as a non-international armed conflict.”³⁴ Nevertheless they deem the characterization by Chief Justice Barak as “appropriate” considering “that it grants substantial protection to innocent civilians.”³⁵ However, even if it were characterized as a non-international armed conflict, similar if not equivalent protection would be afforded to civilians as a matter of customary IHL. However, admittedly, rights and obligations or combatants and civilians are laid out in greater detail in an IAC.

2. *Non-International Armed Conflict*

The obligations arising from a non-international armed conflict (“NIAC”) is described in Common Article 3 of the Geneva Conventions. However, the term itself is not expressly defined. It merely states that it refers to cases of “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”³⁶ Given that Common Article 3 provides the scope of its coverage, it may be taken as a description, if not a definition, of NIAC.

The provision can be interpreted to mean that NIAC refers to all types of armed conflicts that are not IACs and which occur in the territory of one of the State-Parties to the Conventions. Considering the universal coverage of the Geneva Conventions, the latter condition is widely held to be irrelevant.³⁷

However, Additional Protocol II (“AP II”) which provides for the protection of victims of NIACs limits its scope to armed conflicts:

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.³⁸(Emphasis supplied)

³³ *Id.* citing A. CASSESE, INTERNATIONAL LAW 420 (2005 ed).

³⁴ Helen Keller & Magdalena Forowicz, *A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court's Judgment on Targeted Killing*, 21 LEIDEN J. OF INT'L L. 185, 193 (2008).

³⁵ *Id.*

³⁶ Geneva Conventions I to IV, art 3.

³⁷ *Supra* note 1 at 259.

³⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict [hereinafter Additional Protocol II] Article 1(1).

Thus, AP II only covers armed conflicts between armed forces of a State and “dissident armed forces” or other organized armed groups under responsible command and who exercise control over a part of its territory that allows it to carry out sustained and concerted military operations.

However, AP II also states that it “develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application.”³⁹ Thus, Melzer has expressed the view that although AP II provides a narrower view of NIAC, it “cannot serve as a general delimitation of the concept.”⁴⁰ This view seems to be consistent with the quoted text of AP II.

Furthermore, given the limited scope of AP II, it is clear that “it does not apply when governmental forces are confronting non-State actors exclusively outside of their own territory or when a conflict within a State does not involve its own government forces.”⁴¹ Nevertheless, Common Article 3 should apply in these cases.

The second part of the *Tadic* definition, which refers to “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”, appears to correspond to NIAC.

But must the armed conflict be “within a State” to be considered NIAC? This requirement appears to correspond to the narrow AP II definition of NIAC, which as stated earlier does not limit the Common Article 3 definition. As explained by Rona, even if “hostilities spill over beyond the boundaries of a single State, the conflict remains non-international so long as there is no use of force between two or more States.”⁴² State practice also shows that “non-international armed conflicts have regularly involved military operations by States on the territory of neighboring States without necessarily opposing the affected States and, thus, without internationalizing the conflict.”⁴³

In addition, the temporal requirement that the armed conflict be protracted should also not be considered as a *conditio sine qua non*.⁴⁴ As the Inter-American Commission on Human Rights (“IACHR”) decided in the *Tablada* case, because of “the concerted nature of the hostile acts undertaken by the attackers, the direct

³⁹ *Id.*

⁴⁰ Melzer, *supra* note 1 at 255-256.

⁴¹ *Id.* at 257.

⁴² Rona, *supra* note 28 at 237.

⁴³ Melzer, *supra* note 1 at 259.

⁴⁴ *Id.* at 257.

involvement of governmental armed forces, and the nature and level of the violence attending the events in question”⁴⁵, the conflict was an NIAC despite its brief duration.

What is important to qualify as NIAC is that:

1. the violence must go beyond “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence;”⁴⁶
2. the “armed contentions must be between organized groups of individuals that are sufficiently identifiable based on objective criteria.”⁴⁷

That is why the so-called “war against terrorism” may not qualify as an armed conflict because “[n]o social phenomenon, whether terrorism, capitalism, Nazism, communism, drug abuse or poverty can be a ‘party’ to a conflict.”⁴⁸ Rona notes that:

“Terror” or “terrorism” cannot be a party to a conflict. As a result, a war on terror cannot be a humanitarian law event. It has been suggested that wars against proper nouns (e.g. Germany and Japan) have advantages over those against common nouns (e.g. crime, poverty, terrorism), since proper nouns can surrender and promise not to do it again.⁴⁹

Therefore the “war on terrorism” is not an armed conflict *per se* and does not give rise to an application of IHL. The original conflict against Afghanistan, for example, was a case of IAC because it was a conflict between two States. But when the Taliban was defeated and removed from power, the conflict against the Taliban became an NIAC. An armed conflict against a terrorist group like Al-Qaeda may qualify as an NIAC, but such non-State actor “would have to be objectively identifiable and sufficiently organized to carry out military operations reaching the threshold of intensity required for an armed conflict.”⁵⁰ The U.S. Supreme Court in *Hamdan v. Rumsfeld* has in fact ruled that there exists between Al-Qaeda and the U.S. an NIAC.⁵¹

In recent years, targeted killings have been conducted against alleged terrorists. However, targeted killings carried out in the name of the “war on terror” alone do not fall within the coverage of armed conflict. These killings

⁴⁵ *Abella v. Argentina (La Tablada)*, Case No. 11.137, Report No. 55/97, 18 November 1997.

⁴⁶ Additional Protocol II, art. 1 (2).

⁴⁷ Melzer, *supra* note 1 at 263.

⁴⁸ *Id.*

⁴⁹ Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War of Terror”* FLETCHER FORUM OF WORLD AFFAIRS 60 Vol 27:2 Summer/Fall 2003.

⁵⁰ Melzer, *supra* note 1 at 267.

⁵¹ 548 U.S. 557, 630-631 (2006). See also Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 416 (2009).

undertaken in the absence of an armed conflict must be analyzed under another paradigm (perhaps the “law enforcement” paradigm suggested by Melzer and Kretzmer).⁵² But each case must be examined individually to determine whether the law of armed conflict applies. Thus, targeted killings conducted by the US can only be justified under LOAC if the military operation is part of an armed conflict to which the United States is a party.

C. Binding Effect

The use of force by States or against States is generally prohibited under international law. However, the legality or illegality of the use of force does not affect the IHL responsibilities of parties to an armed conflict. IHL is “binding on all parties to an armed conflict regardless of the lawfulness or unlawfulness of the resort to armed violence by the party which initiated the conflict.”⁵³

For international humanitarian law, the guilt or innocence of the parties to an armed conflict in the initiation of the conflict is irrelevant. Thus, the alleged violations of international humanitarian law must only be analyzed in light of the standards embraced by it. The principle that all parties to an armed conflict are equal before international humanitarian law is closely related to its ultimate goal, which consists of limiting as much as possible the death, suffering and destruction caused by armed conflicts.⁵⁴

In other words, States cannot use the fact that terrorists or insurgents do not comply with IHL as an excuse for their own disregard of IHL. States cannot point to the fact that terrorists initiated the conflict treacherously to justify responding in violence. What is involved here is not akin to a contract wherein a breach by one party gives the other party an excuse not to comply with his obligations. Conventional and customary IHL are obligations that a State owes to the international community, and these obligations exist not because of reciprocity, but because States are bound by international law. Contrary to the hubris of some political leaders, obligations under international law cannot be suspended on the basis of presidential whim.

⁵² NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 9 (2008) 83; David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 EUR. J. OF INT'L L. 2, 171, 176 (2005).

⁵³ Olasolo, *supra* note 18 at 2.

⁵⁴ *Id.* at 3.

III. Targeted Killing

A. The Concept of Targeted Killing

In *PCATI v. Govt. of Israel*, Chief Justice Ehud Barak defined targeted killing as “the preventive strike causing the deaths of terrorists, and at times also of innocent civilians.”⁵⁵ This definition is based on the *jus ad bellum* concept of self-defense. It disregards the “targeting” aspect which is a *jus in bello* issue. It is therefore not very useful for the current analysis which analyzes targeted killing from the *jus in bello* paradigm. It is also strange that the death of civilians is an element of the definition because it would mean that a targeted killing that did not involve a civilian casualty would not be considered a targeted killing. Perhaps what the court wanted to establish is a description of Israel’s practice and not necessarily a legal definition of targeted killing.

Authors who have written about targeted killing in the context of IHL have offered a number of different definitions for targeted killing. The problem with some definitions, however, is that they limit the scope of the term too much.

For instance, Solis defines targeted killing as “the intentional killing of a specific civilian who cannot reasonably be apprehended, and who is taking a direct part in hostilities, the targeting done at the direction and authorization of the State in the context of an international or non-international armed conflict.”⁵⁶ This definition correctly limits the use of the term targeted killing to situations involving armed conflict.

The problem with the Solis definition is that it excludes targeting of combatants under all circumstances. It assumes that combatants may be targeted at any time even if they are away from the conduct of hostilities and in the absence of military necessity. In his view, “targeted killing is not the battlefield killing of combatants by opposing combatants.”⁵⁷ This is true but combatants are not always on the battlefield.

Furthermore, as will be discussed in Part IV A, some members of terrorist groups could qualify as “combatants”⁵⁸ even in NIAC and are in fact subject to targeted killing.

⁵⁵ *Public Committee Against Torture in Israel et al. Government of Israel et al.* 13 December 2006 HCJ 769/02, par 60.

⁵⁶ Gary Solis, *Targeted killing and the law of armed conflict*, NAVAL WAR COLLEGE REVIEW, available at <http://www.thefreelibrary.com/Targeted+killing+and+the+law+of+armed+conflict.-a0167029847> (March 22, 2007).

⁵⁷ *Id.* at 3.

⁵⁸ That is, combatants in the NIAC sense, hence in quotes.

The Solis definition also excludes civilians who are not taking a direct part in the hostilities. In Solis's view, targeting a head of state who "exercises no command of armed forces and has no say in the tactical or strategic disposition of forces" is an assassination because that head of state is a civilian.⁵⁹ Solis believes that the target must be an "unlawful combatant"⁶⁰ who is "beyond possible arrest by the targeting State."⁶¹ As will be discussed in further detail in Part IV, an unlawful combatant is simply a civilian who directly participates in the hostilities.

Also, why is the inability of the State to arrest an element? If the State could have arrested but killed him instead, would that not be targeted killing? The fact that arrest was possible would go into the validity of the targeted killing but not deprive it of its nature as a targeted killing.

Similarly, Osiel equates targeted killing with extrajudicial killing and defines it as "a lethal attack on someone thought to pose serious violent threat, but who is not at the moment necessarily engaged in hostilities and who is not a 'combatant', because he is part of neither a State's 'armed force' nor its associated militias."⁶² The problem with equating targeted killing with extrajudicial killing is that it means targeted killing would also include killing a person while he is in the custody of the State. Similar to the Solis definition, Osiel's definition would exclude all combatants and would severely limit the term's application. But Osiel's definition is different from the Solis definition because it would limit targeted killing to civilians who are not taking direct part in the hostilities.

Fisher defines targeted killing as "the intentional slaying of a specific alleged terrorist or group of alleged terrorists undertaken with explicit governmental approval when they cannot be arrested using reasonable means."⁶³ The Fisher definition is perhaps designed to disarm objections to targeted killing by limiting its application to targeting of terrorists. While targeting terrorists may seem morally acceptable to some, this is problematic because of the debates regarding the definition of the term "terrorist." Who is a terrorist, and who determines who is a terrorist? If a terrorist is simply a person who attacks innocent civilians to

⁵⁹ Solis, *supra* note 57 at 2. In his view, targeting a President who acts Commander-in-Chief is a combatant and targeting such president would not be an assassination.

⁶⁰ He defines unlawful combatant as a civilian who takes direct part in the hostilities.

⁶¹ Solis, *supra* note 57 at 8. In the same paragraph Solis adds: "Since the focus of U.S. targeted killing is on noncitizens abroad, where the United States has no arrest authority, the issue does not arise." It seems he believes that the U.S. cannot arrest people where they have not arrest authority but the U.S. can go ahead and kill them. He does add however that, "If capture is possible, however, that option must be exercised." How this is reconciled with the absence of arrest authority is unclear.

⁶² MARK OSIEL, *THE END OF RECIPROCITY, TERROR, TORTURE AND THE LAW OF WAR* 24 (2009).

⁶³ W. Jason Fisher, *Targeted Killing, Norms and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 715 (2007).

achieve political ends, who is to say that a U.S. or Israeli military officer who orders the bombing of a community resulting in civilian casualties is not a terrorist? Until a universally accepted definition of “terrorist” and an objective process of identifying terrorists is established, the Fisher definition remains problematic.

Similar to the Osiel definition, the Fisher definition is also unclear as to whether the inability to arrest using reasonable means is a condition or a description. If it is a condition, a military action despite the possibility of arrest would not constitute a targeted killing.

On the other hand, other definitions are too broad.

Hunter defines targeted killing as the “pre-meditated, pre-emptive and deliberate killing of an individual or individuals known to represent a clear and present threat to the safety and security of a State through affiliation with terrorist groups or individuals.”⁶⁴ Because of the “pre-emptive” element, this definition will not cover targeted killings after a prior attack. For example, if Party A launches a missile attack against Party B, Party B cannot engage in targeted killing even if the opportunity presented itself. The Hunter definition is also similar to Chief Justice Barak’s definition in that looks at targeted killing as a *jus ad bellum* concept.

What is unsettling about this definition however is that it allows the targeting of individuals and groups by mere affiliation with terrorist groups. Individuals would be deemed to represent a clear and present threat to the safety and security of the State because of their affiliation with terrorist groups and individuals. Does affiliation pertain to active membership or any current or prior connection? It seems the net may be cast too broadly.

David simply defines targeted killing as the “intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval”⁶⁵ This definition is too broad that it covers everything from legitimate military operations in times of war to genocide. It can also cover the administration of the death penalty or even abortion or euthanasia provided such procedures are valid under domestic law.

⁶⁴ Thomas B. Hunter, *Targeted Killing: Self-defense, Preemption and the War on Terrorism*, available at <http://www.operationalstudies.com/mootw/Targeted%20Killing%20Research%20PaperOS.pdf>.

⁶⁵ STEPHEN R. DAVID, FATAL CHOICES: ISRAEL’S POLICY OF TARGETED KILLINGS, Mideast Security And Policy Studies No. 51, The Begin-Sadat Center For Strategic Studies Bar-Ilan University available at <http://www.biu.ac.il/Besa/david.pdf> (September 2002).

Ruys prefers to use the term *State-sponsored assassination* and defines it as the “willful killing of a specific individual that is attributable to a State in the sense of the Draft Articles of State Responsibility regardless of the motives involved (political, military necessity or law enforcement).”⁶⁶ This definition is broad enough to cover any military action conducted by the government against any individual.

Murphy and Radsan define targeted killing as “extra-judicial, pre-meditated killing by a State of a specifically identified person not in its custody.”⁶⁷ This definition is similar to Melzer’s definition.

Melzer defines targeted killing 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.”⁶⁸

Melzer further explains that targeted killing has five elements:

1. *Use of lethal force*

This element includes “any forcible measure, regardless of the means employed, which is capable of causing death of a human being.”⁶⁹ This implies that it is not required that the object used to kill the subject is by nature lethal, but that objects are used in a lethal manner.

2. *Intent, premeditation, and deliberation to kill*

Melzer explains that *intent* means that the operation “be carried out with the intent to kill the targeted person, as opposed to unintentional, accidental, negligent or reckless use of force”⁷⁰ and that *premeditation* means that “this intent be based on a conscious choice, as opposed to acts driven by impulse or passion.”⁷¹ These elements seem to limit targeted killings to “cold-blooded” kills where the perpetrator is not driven by emotion.

⁶⁶ Tom Ruys, *License to Kill? State-Sponsored Assassination Under International Law*, Institute for International Law Working paper No. 76 – May 2005 available at <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP76e.pdf> (May 2005).

⁶⁷ Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 406 (2009).

⁶⁸ Melzer, *supra* note 1 at 5.

⁶⁹ *Id.* at 3.

⁷⁰ *Id.*

⁷¹ *Id.*

As for *deliberation*, Melzer means that “the death of the targeted person be the actual aim of the operation, as opposed to deprivations of life, although intentional and premeditated, remain the incidental result of an operation pursuing other aims.”⁷² However, it is not clear how *deliberation* is different from the third element discussed below.

3. *Targeting of individually selected persons*

The target must be “individually selected persons”⁷³ and not “collective, unspecified or random targets.”⁷⁴

4. *Lack of physical custody*

The target must not be in the physical custody of the party targeting it, otherwise it would be a *judicial or extrajudicial execution*. Melzer explains that:

A judicial authorization for extra-custodial killing of a selected individual would have no influence on the qualification of that operation as a ‘targeted killing.’ In other words, according to the present definition, a targeted killing is an extra-custodial, but not necessarily an extrajudicial, deprivation of life.⁷⁵

It means that as contemplated by Melzer, a targeted kill may be judicially authorized provided that the target is not in the physical custody of those targeting them. Considering however the role of a court in this kind of targeted killing, the killing here is most likely in the context of what Melzer calls the *law enforcement* paradigm rather than in the context of an armed conflict.

5. *Attributability to a subject of international law*

This element would generally limit targeted killings to actions attributable to States. However, “in certain situations and for limited purposes”⁷⁶, actions of non-State actors may be considered “to the extent that international law regulates, prohibits or penalizes the use of lethal force by them.”⁷⁷ Melzer’s analysis is limited to State-sponsored targeted killings or “targeted killings which are legally attributable to States in accordance with the rules of

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

general international law governing the responsibility of States for the conduct of their agents.”⁷⁸ However, he believes that non-State actors to a certain extent “are bound by the same normative standards as States.”⁷⁹

Melzer’s definition breaks down targeted killing to its elements. However, some of the elements are redundant. Also, Melzer’s definition is intended to apply to both LOAC and the law enforcement paradigm.

For purposes of this paper, targeted killing is defined simply as the intentional use of lethal force by a party to an armed conflict against a specific individual while the latter is not in the physical custody of the former. Under this definition, targeted killing would have the following elements:

1. Intentional

The attack on the individual must be deliberate and not accidental. There must be a clear intent to kill the target. If the intention was to capture but death results, it is not a targeted killing. The attack must still be governed by the law of armed conflict but not as a targeted killing.

2. Use of lethal force

The attack must employ means and methods that would be sufficient to kill the target. If the attacker commits all the acts of execution but the target survives (e.g. forced to give an antidote), it would still be a case of targeted killing albeit a frustrated one.

3. Attack by a party to an armed conflict

This definition limits targeted killing in the context of an armed conflict where valid use of lethal force properly belongs.⁸⁰ Current practice of targeted killing appears to be limited to states although some may argue that suicide bombers are another form of “smart bombs” and would also constitute targeted killings. To the extent that these suicide bombers target specific individuals, qualifying them as targeted killing is theoretically

⁷⁸ *Id.* at 5.

⁷⁹ *Id.* at 5.

⁸⁰ While the use of lethal force may be necessary in law enforcement it is not targeted killing. It is a “killing”, but it is not targeted in the sense that the primary intention is to kill. In law enforcement the primary intention is to apprehend.

possible. This definition leaves open the possibility for the targeted killing concept to be applied to actions undertaken by armed groups and not just States. However, these actions must be undertaken in the context of an armed conflict.

4. Specific Individual

The identity of the target must be known. Otherwise it would not be possible to determine whether the principles of distinction, military necessity, and proportionality are complied with.

5. Not in the physical custody of the attacker

This element differentiates targeted killing from extra-judicial executions.

B. The Practice of Targeted Killing

The following discussion summarizes chronologically the practice of targeted killing of certain States based on publicly available information.

Israel

- 16 April 1988 – Khalil al-Wazir was shot in Tunisia allegedly by an Israeli commando team.⁸¹ The UN Security Council issued a resolution condemning the aggression “against the sovereignty and territorial integrity of Tunisia.”⁸²
- 5 January 1996 – Yahya Ayyash (a.k.a. “The Engineer”) was killed in the Gaza strip through the use of a booby-trapped mobile phone.⁸³ He was believed to be the mastermind of suicide bombings targeting Israelis.⁸⁴ The Israeli secret service is believed to be responsible.⁸⁵

⁸¹ Melzer, *supra* note 1 at 437.

⁸² UN Security Council Resolution No. 611.

⁸³ Serge Schemann, *Palestinian believed to be bombing mastermind is killed*, New York Times, available at <http://www.nytimes.com/1996/01/06/world/palestinian-believed-to-be-bombing-mastermind-is-killed.html> (January 6, 1996).

⁸⁴ *Id.*

⁸⁵ *Id.*

- September 25, 1997 – Mossad agents tried to kill Khaled Meshal in Jordan by poisoning him but Israel was forced to provide the antidote.⁸⁶ Meshal is a senior Hamas official.
- July, 22, 2002 – Israeli planes bombed the house of Salah Shehadeh, the military commander of Hamas, killing him and at least 11 others, seven of whom were children, and wounding 120 others.⁸⁷
- March 22, 2004 - Sheik Ahmed Yassin, the spiritual leader and founder of the militant Palestinian group Hamas, was killed by an Israeli missile as he left a mosque in Gaza City.⁸⁸
- April 17, 2004 - Dr. Abdel Aziz Rantisi, who assumed the post of Hamas leader after a similar Israeli attack that killed the group's founder, Sheik Ahmed Yassin, was killed by an Israeli helicopter strike.
- February 12, 2008 – A car bomb killed Imad Mughnieh, a senior Hezbollah commander who is ranked second only to Osama bin Laden on Washington's most-wanted list.⁸⁹ Israel denied responsibility.

According to statistics, between September 29, 2000 and February 28, 2007, 338 Palestinians died during the course of targeted killings, and of this number only 210 were targeted, and 128 were innocent bystanders.⁹⁰ This means that 38% of those who perished were not supposed to die.⁹¹

Pakistan

- June 18, 2004 – Nek Muhammad a Taliban fighter was killed by a missile strike after being tracked by the Pakistani forces. Pakistan claims

⁸⁶ Medish & McCleary, *supra* note 9.

⁸⁷ Suzanne Goldenberg, *12 dead in attack on Hamas*, The Guardian, available at <http://www.guardian.co.uk/world/2002/jul/23/israel1> (July 23, 2002).

⁸⁸ James Bennet, *Leader of Hamas killed by missile in Israeli strike*, New York Times, available at <http://www.nytimes.com/2004/03/22/world/leader-of-hamas-killed-by-missile-in-israeli-strike.html> (March 2, 2004).

⁸⁹ Nicolas Blanford, *Terrorist mastermind with \$25m price on his head, Imad Mughnieh, dies in car blast*, available at http://www.timesonline.co.uk/tol/news/world/middle_east/article3362293.ece (February 14, 2008).

⁹⁰ Keller & Forowicz, *supra* note 35 at 186.

⁹¹ *Id.*

responsibility, although local residents claim the missile was launched from a U.S. drone.⁹²

Russia

- March 19, 2002 – The Chechen warlord Khattab was killed by the Russian secret service by means of a poisoned letter delivered by a messenger.
- February 13, 2004 – Zelimkhan Yandarbiyev of Chechnya, a former president and a separatist guerrilla leader linked by Moscow to Al-Qaeda, was killed when his car exploded in Qatar.⁹³ The Russian government denied involvement, but two Russian agents were arrested, tried, and sentenced to life in prison.⁹⁴

Syria

- On February 14, 2004 – Former Lebanese Prime Minister Rafik Hariri was killed by a bomb placed along the path of his convoy, and Syrian officials were implicated in a UN Report.⁹⁵ Approximately nine other people were killed with 100 people injured.⁹⁶

United States

Even before 9/11, “the United States was no stranger to the use of targeted killing.”⁹⁷ It was resorted to during the Vietnam War.⁹⁸ The US Senate’s Church

⁹² David Rohde & Mohammed Khan, *The Reach Of War: Militants; Ex-Fighter For Taliban Dies in Strike In Pakistan*, New York Times, available at <http://www.nytimes.com/2004/06/19/world/the-reach-of-war-militants-ex-fighter-for-taliban-dies-in-strike-in-pakistan.html?pagewanted=1> (June 19, 2004).

⁹³ *Ex-President of Chechnya Killed in Blast in Qatar*, New York Times, available at <http://www.nytimes.com/2004/02/14/world/ex-president-of-chechnya-killed-in-blast-in-qatar.html> (February 14, 2004).

⁹⁴ Steven Lee Myers, *Qatar Court Convicts 2 Russians in Top Chechen's Death*, New York Times, available at <http://www.nytimes.com/2004/07/01/world/qatar-court-convicts-2-russians-in-top-chechen-s-death.html> (July 1, 2004).

⁹⁵ John Kifner, *In Chilling U.N. Assassination Report, Fake Assassin and Intricate Plot by Top Syrians*, New York Times, available at <http://www.nytimes.com/2005/10/23/international/middleeast/23lebanon.html?pagewanted=1&r=1> (October 23, 2005).

⁹⁶ *Explosion kills former Lebanon PM*, BBC News, available at http://news.bbc.co.uk/2/hi/middle_east/4263893.stm.

⁹⁷ Melzer, *supra* note 1 at 37.

Committee Report of 1975 stated that in the 1970's, "the CIA had been involved in several plots to assassinate foreign leaders."⁹⁹ As a result of the report, government agents were banned from engaging in assassination.¹⁰⁰ Despite this ban, the US has targeted Muammar Qadhafi, Osama bin Laden, and Saddam Hussein.¹⁰¹

Since 9/11 the U.S. has used the Predator drone, "an unmanned aircraft...equipped with anti-tank missiles that can be fired against targets on the ground."¹⁰² On other occasions "targeted killings appeared to have been carried out by way of precision bombs or missiles launched from fighter aircraft."¹⁰³

- November 3, 2002 - A Hellfire missile launched from a "CIA drone" hits a car carrying six suspected Al-Qaeda members in Yemen. US officials admitted that "an 'agency drone' carried out the attack in which Qaed Senyan al-Harithi, a suspect in the attack on the USS Cole in Aden...was killed."¹⁰⁴
- 7 May 2005 - Haitham al-Yemeni, a suspected Al-Qaeda operative, was killed by a missile fired from a Predator aircraft controlled by the CIA.¹⁰⁵
- December 2005 - Hamza Rabia, an alleged Al-Qaeda operations commander, was killed by a missile in North Waziristan.¹⁰⁶
- 7 June 2006 - F-16s dropped 500 bombs in a house where Abu Musab al-Zarqawi was staying.¹⁰⁷ He survived the bombing and was placed by Iraqi police on a stretcher. The U.S. forces arrived later, and he died soon thereafter.¹⁰⁸ He was believed to be the leader of a group behind bombings and beheadings in Iraq.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 37-38.

¹⁰² *Id.* at 41.

¹⁰³ *Id.*

¹⁰⁴ Brian Whitaker & Duncan Campbell, *CIA Missile Kills al-Qaeda suspects*, The Guardian, available at <http://www.guardian.co.uk/world/2002/nov/05/alqaida.terrorism> (November 5, 2002).

¹⁰⁵ Douglas Jehl, *Remotely Controlled Craft Part of U.S.-Pakistan Drive Against Al Qaeda*, *Ex-Officials Say* New York Times, available at <http://www.nytimes.com/2005/05/16/politics/16qaeda.html> (May 16, 2005).

¹⁰⁶ Carlota Gall et al, *Airstrike by U.S. draws protests from Pakistanis*, New York Times, available at <http://query.nytimes.com/gst/fullpage.html?res=9e07e5dd143ff936a25752c0a9609c8b63&sec=&spoon=&pagewanted=3> (June 15, 2006).

¹⁰⁷ U.S. military: *Al-Zarqawi was alive after bombing* CNN.com, available at <http://www.cnn.com/2006/WORLD/meast/06/08/iraq.al.zarqawi/index.html> (June 9, 2006).

¹⁰⁸ *Id.*

- February 25, 2010 - A CIA missile strike in northwest Pakistan killed Mohammed Qari Zafar, a Pakistani Taliban commander. According to Pakistani officials “three missiles slammed into a compound and a vehicle in the Dargah Mandi area of the North Waziristan tribal region on the border with Afghanistan.”¹⁰⁹
- March 8, 2010 - A “drone missile struck in Miram Shah in North Waziristan”¹¹⁰ in Pakistan, killing Hussein al-Yemeni.

In 2009 there was an estimated “55 drone attacks in Pakistan against Al-Qaeda and the Taliban.”¹¹¹ US officials claim the “the raids target militants in Pakistan, but hundreds of civilians have fallen victim to the US drone attacks since 2008.”¹¹²

According to one report:

The attacks have picked up since seven Americans were killed in a December 30 suicide attack at a CIA base in eastern Afghanistan.

There were 45 such attacks during President George W. Bush's two terms, said Peter Bergen, a fellow at the New America Foundation, a public policy institute.

Since President Barack Obama took office, more than 64 attacks have taken place, a study by the foundation said.¹¹³

IV. The Rules of Armed Conflict

Even though killing an enemy may be lawful during armed conflict, IHL requires the application of certain principles. As Melzer puts it, “targeted killings require a ‘microscopic’ interpretation of the law governing the conduct of hostilities.”¹¹⁴

¹⁰⁹ Rohan Sullivan, *CIA Missile Kills Pakistani Taliban Leader*, Desert Morning News, available at <http://www.allbusiness.com/government/government-bodies-offices-government/14002779-1.html> (February 26, 2010).

¹¹⁰ David E. Sanger, *Drone Strike Said to Kill a Leader of Al Qaeda*, New York Times, available at <http://www.nytimes.com/2010/03/18/world/asia/18terror.html> (March 17, 2010).

¹¹¹ *Id.*

¹¹² *In Pakistan, Death Toll from Drone Attack Reaches 8*, Press TV, available at <http://www.presstv.ir/detail.aspx?id=121372§ionid=351020401> (March 21, 2010).

¹¹³ *Drone Attack Kills 2 in Pakistan*, CNN World, available at <http://www.cnn.com/2010/WORLD/asiapcf/02/17/pakistan.drone.attack/index.html> (February 17, 2010).

¹¹⁴ Melzer, *supra* note 1 at xiii.

A. The Principle of Distinction

1. *The Rule*

The *principle of distinction* is widely held to be the most important principle of the law of armed conflict. Boivin argues that “[t]he principle of distinction lies at the heart of the entire legal edifice governing the conduct of hostilities”¹¹⁵, while Olásolo describes it as “the cornerstone of the set of rules of international humanitarian law regulating the manner in which hostilities must be conducted.”¹¹⁶ The International Court of Justice, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, stated that:

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 and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.¹¹⁷

In the *Tadić* case, the court considered the principle of distinction one of the “basic core of principles and norms of international humanitarian law...that is applicable to international and non-international armed conflicts.”¹¹⁸

The principle of distinction as formulated by the ICRC study states:

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.

Cassese notes that the purpose of the principle is “to reduce as much as possible the adverse consequences of the war for the civilian population, it is essential that combatants distinguish themselves from civilians.”¹¹⁹

However, the *civilian protection*¹²⁰ from attack is not absolute. Under

¹¹⁵ ALEXANDRA BOIVIN, THE LEGAL REGIME APPLICABLE TO TARGETING MILITARY OBJECTIVES IN THE CONTEXT OF MILITARY WARFARE 8 (2006).

¹¹⁶ Olásolo, *supra* note 18 at 13.

¹¹⁷ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* 8 July 1996 par. 78.

¹¹⁸ Olásolo, *supra* note 18 at 22.

¹¹⁹ Antonio Cassese, *Expert Opinion On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law 2*, available at <http://www.stoptorture.org.il/files/cassese.pdf>.

customary and conventional IHL, civilians are protected against attack, “unless and for such time as they take a direct part in hostilities.”¹²¹ In addition, civilians directly participating in the hostilities “must abide by the law of hostilities and, if they fail to do so, are liable for prosecution for war crimes.”¹²² In addition, “lacking combatant privilege, civilians remain subject to prosecution for acts which although not prohibited under IHL, amount to crimes under domestic law.”¹²³

Under the Rome Statute, both in the case of IAC and NIAC, “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”¹²⁴ constitutes a war crime.

2. *Is there a third kind of “status” under LOAC?*

There are two types of *status* under LOAC: combatant and civilian.

However, Solis argues:

a civilian who injects himself directly into ongoing hostilities violates the basic concept of distinction and **becomes something other than a noncombatant**. He forfeits civilian immunity and becomes a lawful target.¹²⁵ (Emphasis supplied)

The problem with this view is that conventional and customary IHL does not recognize the status of “something other than a noncombatant.”

The confusion is perhaps due to the failure to recognize the difference between civilian *status* on the one hand and civilian *protection* on the other. Except for exceptional cases,¹²⁶ a civilian does not lose his status regardless of what he does. A civilian however loses his civilian *protection* if he participates directly in the hostilities. He becomes a lawful target, but he does not lose his status as a civilian.

¹²⁰ In this paper, the privilege given to civilians not to be attacked is referred to as *civilian protection* which may be gained or lost. This is in contrast to *civilian status* which cannot be lost unless the civilian joins the armed forces of a party to a conflict.

¹²¹ Jean-Marie Henckaertz, *Study on Customary International Humanitarian Law*, INTERNATIONAL REVIEW OF THE RED CROSS, Rule 15, Volume 87, Number 857, p. 199, available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0860/\\$File/ICRC_002_0850.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0860/$File/ICRC_002_0850.PDF) (March 2005); Additional Protocol I, art. 51 (3), Additional Protocol II, art. 13(3).

¹²² Melzer, *supra* note 1 at 329.

¹²³ *Id.*

¹²⁴ Art. 8 (2) (b) (i), art. 8 (2) (e) (i).

¹²⁵ Solis, *supra* note 57 at 7.

¹²⁶ A civilian becomes a combatant if he formally joins the armed forces.

Cassese argues that civilians who take a direct part in hostilities are still 'protected persons' under GC IV "but forfeit immunity from attack and become lawful targets for the duration of their engagement in hostilities."¹²⁷ He adds:

These civilians retain the same protection as combatants during the conduct of hostilities (e.g. protection from attack if *hors de combat*) except for immunity from prosecution. They are referred to in some judicial decisions and in the legal literature as "unlawful combatants", namely combatants who fight outside the laws of war. However the term 'unlawful combatant' is merely descriptive and is by no means intended to create a third status between those of combatant and civilian. Most importantly, when civilians taking a direct part in hostilities lay down their arms, they re-acquire non-combatant immunity and may not be made object of attack although they are amenable to prosecution for unlawfully participating in hostilities (war crimes).¹²⁸ (Citations omitted)

The *unlawful combatant* is simply a person with civilian status who by directly participating in the hostilities loses his civilian protection. It is not a separate status under LOAC, but is merely descriptive.

Cassese stresses that there is no "intermediate status" between that of combatant and that of civilian:¹²⁹

A civilian who takes a direct part in hostilities does not forfeit his or her civilian status but may become the lawful object of attack for the duration of his or her participation in combat. The term 'unlawful combatant' is a shorthand expression useful for describing those civilians who take up arms without being authorized to do so by international law. It has an exclusively descriptive character. It may not be used as proving or corroborating the existence of a third category of persons: in wartime a person is either a combatant or a civilian; *tertium non datur*.¹³⁰

The term *unlawful combatant* is simply shorthand for "civilian directly participating in the hostilities." The civilian status is not forfeited by directly participating in the hostilities, but the civilian protection against direct attack is suspended for the duration of his participation in the hostilities.

The unlawful combatant tag is often attached to terrorists and may have been created just for them. The idea is perhaps to allow governments to attack

¹²⁷ Cassese, *supra* note 121 at 5.

¹²⁸ *Id.*

¹²⁹ *Id.* at 14.

¹³⁰ *Id.* at 14-15.

terrorists as combatants without affording them the combatant *privilege* or the civilian *protection*. It may also be to allow suspected terrorists to be detained without the usual judicial guarantees afforded to civilians or privileges given to POWs. However, despite the visceral instinct to treat suspected terrorists in this manner, there is no basis for this in law. Even more appalling is that individuals who are merely suspected of being terrorists are stripped of their civilian protection.

3. *Meaning of "Attack"*

The principle of distinction provides the rule on who may be attacked. An attack is defined under LOAC as "acts of violence against the adversary, whether in offence or in defence."¹³¹ More specifically,

The term 'attack' includes not only open combat, but also the placing of explosive devices, sabotage and probably even the transmission of orders directing ongoing combat. There appears to be no threshold requirement with regard to the nature or the intensity of the violence sufficient to qualify as an attack within the meaning of the law of hostilities. A single shot from a firearm or any other means required to carry out a targeted killing would, therefore, be sufficient to qualify as an attack.¹³²

Regardless of the means and methods employed, any targeted killing is an attack. Whether the method employed is a missile, a bomb, a poisoned letter or a booby-trapped mobile phone, these are all attacks subject to regulation by LOAC.

4. *Meaning of "hostilities"*

The concept of hostilities is not equivalent to that of armed conflict or that of attack.¹³³ It "comprises all violent and non-violent activities specifically designed to support one party to an armed conflict by *directly* causing harm of a quantitative degree to the military operations or military capacity of another party."¹³⁴ Melzer argues that "even power-cuts, interference with communications and erection of roadblocks may be part of hostilities."¹³⁵ However, if the acts only *indirectly* harm the adversary these "may be part of the general war effort and may build up the military capacity of the party to the conflict, but do not constitute 'hostilities' within the meaning of IHL."¹³⁶

¹³¹ Additional Protocol I, art. 49 (1).

¹³² Melzer, *supra* note 1 at 270.

¹³³ *Id.* at 275.

¹³⁴ *Id.*

¹³⁵ *Id.* at 276.

¹³⁶ Melzer, *supra* note 1 at 276.

5. *Meaning of “directly participating in the hostilities”*

Conventional IHL does not provide for an express definition of directly participating in the hostilities (“DPH”). There are actually two issues involved in DPH: the nature of the conduct and the suspension of the duration the civilian protection.

a. Nature of the Conduct

i. Cassese’s Factual Test

Cassese proposes a *factual test* to determine whether a person is taking direct part in combat.¹³⁷ In his view, a civilian is taking direct part if:

- he is engaged in armed action;¹³⁸ or
- he carries arms openly during a military deployment in which he is to participate.¹³⁹

Cassese also argues that:

a civilian suspected of directly preparing an attack, or somehow participating in the planning and preparation of an attack or an hostile act, may not be attacked and killed if: (1) he is not operating within a legitimate military objective (for instance, barracks or other military installations), or (2) he is not carrying arms openly while in the process of engaging in a military operation or in an action preceding a military operation.¹⁴⁰

Thus, under this view, being suspected of directly preparing an attack or participating in the planning and preparation of an attack is not enough. Such preparation or planning by the target must be within a legitimate military objective¹⁴¹ or the target must openly carry arms.

Concerning suicide bombers, Cassese concedes that it would be preposterous to require that they can only be fired upon if they carry their explosives openly.¹⁴² In these cases, he suggests that when a civilian is suspected

¹³⁷ Cassese, *supra* note 121 at 7.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 8.

¹⁴¹ It is unclear if Cassese would consider a house where targets and non-targets sleep and that also serves as a headquarters for planning attacks a legitimate military objective.

¹⁴² Cassese, *supra* note 121 at 9.

of carrying explosives, the civilian may be summoned to show that he is not carrying explosives. It is only if the civilian refuses to comply may the military open fire against him.¹⁴³ If there is no time for summons, the civilian may be targeted provided:

- it is manifest that the civilian is concealing explosives on his or her body; and
- there is absolutely no time for issuing a summons, for it is most likely that the civilian will use the explosives forthwith to attack enemy civilians or combatants.¹⁴⁴

Cassese's factual test is a very conservative view of DPH and may find best application in IAC where armed forces of two States are involved. However, applying it in NIAC where "combatants" and civilians directly participating in the hostilities may not be openly carrying arms can be difficult. However, his factual test offers the best protection to civilians.

ii. Kretzmer's Individual Examination

Kretzmer argues that the determination of whether a civilian is taking a direct part in hostilities requires examination at the individual level.¹⁴⁵

In other words, as opposed to targeting of combatants, which is based on their status, civilians may only be targeted because of their individual actions. The mere fact that a person belongs to a group, which promotes or carries out terrorist attacks, does not imply that he or she takes a direct part in hostilities. This would seem to imply that a state may never attack members of a terrorist group, as such, but would always have to concentrate on targeting specific terrorists.¹⁴⁶

Under this view, mere membership in an armed group is not sufficient for an individual to be targeted. The actions of the target must be examined. This appears to be consistent with Cassese's *factual test*.

iii. Melzer's Combatant Privilege Approach

Melzer discusses several approaches to a proper understanding of DPH.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 9-10.

¹⁴⁵ Kretzmer, *supra* note 13 at 192.

¹⁴⁶ *Id.*

The *restrictive* approach “tends to equate direct participation on hostilities with actual combat operations”¹⁴⁷ such that “civilian conduct should entail loss of protection only for such time as it actually represents an immediate military threat to a party to the conflict.”¹⁴⁸ It requires “a direct causal link between such conduct and the ensuing harm for the adversary.”¹⁴⁹ Under this view, DPH:

is restricted to the **actual conduct of military operations**, which includes deployment to and return from specific military engagements, but not ‘peaceful’ interval between specific engagements. Also excluded are support activities, which do not directly cause harm to the adversary.¹⁵⁰

This approach corresponds with Cassese’s *factual test* and therefore suffers from the same difficulty in application in NIAC.

The *liberal* approach defines direct participation as encompassing “all conduct that functionally corresponds to that of governmental armed forces.”¹⁵¹ This includes “not only actual conduct of hostilities, but also activities such as planning, organizing, recruiting and assuming logistical functions.”¹⁵²

Unlike the restrictive approach, the liberal approach does not distinguish between DPH and participation in the general war effort. As such, workers in an arms factory and “workers in potential military objectives”¹⁵³ become fair game. Clearly, this approach is not consistent with the protection the law affords civilians.

The *functional* approach argues that civilians are directly participating in the hostilities “when they are performing the function of combatants.”¹⁵⁴ The idea is perhaps to look at the military staff structure. But this view is rather ambiguous because members of an armed forces perform many functions apart from participating in hostilities.

Melzer argues that “civilians are directly participating in hostilities when they do what only combatants are privileged to do with immunity from domestic prosecution, namely to intervene in armed conflict by resorting to means and

¹⁴⁷ Melzer, *supra* note 1 at 335.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 337.

¹⁵⁰ *Id.*

¹⁵¹ Melzer, *supra* note 1 at 338.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 340.

methods of warfare as regulated in the law of hostilities.”¹⁵⁵ In other words, a civilian is directly participating in hostilities if he takes upon himself the combatant privilege of attacking the combatants of the adversary. This *combatant privilege* approach appears to be the most ideal interpretation of DPH.

He adds that “the notion of direct participation in hostilities does not include activities that merely build-up military capacity, but are not designed to directly cause harm to the adversary, such as production of weapons by the armament industry in support of the general war effort.”¹⁵⁶ He therefore also differentiates DPH from participation in the general war effort.

Melzer further argues that “it is important to distinguish direct participation in the hostilities from the resort by civilians to armed force in individual self-defence.”¹⁵⁷

The use of armed force by civilians in self-defence against direct attacks on the civilian population or to prevent marauding soldiers from looting, burning and raping in conquered territory would not...deprive civilians of their protection against direct attack.¹⁵⁸

Thus, if a village is attacked, the civilians of that village may repel the attack. and their actions may not necessarily be considered as DPH.

b. Duration of the Suspension

The concept of DPH raises not only the question of what acts constitute it but also how long the suspension of the civilian protection lasts.

Melzer notes that there are three approaches. The *specific acts* approach provides that the suspension “lasts exactly as long as each specific hostile act amounting to direct participation in hostilities.”¹⁵⁹ This is a necessary implication of Cassese’s *factual test*.

Kretzmer is critical of this narrow interpretation of “direct participation in hostilities” as referring to the time “while the persons are actually engaged in carrying out their hostile acts.”¹⁶⁰ In his view, this *revolving door theory* allows

¹⁵⁵ *Id.* at 341.

¹⁵⁶ *Id.* at 342.

¹⁵⁷ *Id.* at 343.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 348.

¹⁶⁰ Kretzmer, *supra* note 13 at 193.

terrorists to “enjoy the best of both worlds – they can remain civilians most of the time and only endanger their protection as civilians while actually in the process of carrying out a terrorist act.”¹⁶¹ However, the narrow interpretation of the *specific acts* approach may not be as objectionable as Kretzmer points it out to be because terrorists do not shed their status but merely suspend their civilian protection during the time they directly participate in the hostilities. Also, civilians who repeatedly participate directly in the hostilities may qualify as “combatants” under NIAC.¹⁶²

Kretzmer’s other argument against the narrow interpretation is that it will make the right of self-defense under Article 51 of the UN Charter meaningless because targeting the terrorists regarded as responsible for the attack will not be lawful unless they are targeted while carrying out an attack.¹⁶³ However, this argument is based on the premise that “any action carried out in self-defense must comply with *jus in bello*.”¹⁶⁴ This is not accurate because whether or not the use of force is valid under the UN Charter is completely independent of *jus in bello* considerations.

The validity or invalidity of the action under *jus ad bellum* does not in any way affect the application of *jus in bello* and vice versa. The issue as to whether or not a State may take a pre-emptive strike on a terrorist under Article 51 of the UN Charter is a separate issue from the rule on the conduct of hostilities. The fact that a State can only attack civilians directly participating in the hostilities does not affect the right of a State to self-defense under Article 51. The same requirements of imminence, necessity, and proportionality apply whether or not the targets are civilians or combatants.

Melzer also notes that another approach is the *affirmative disengagement* approach which provides that civilians lose protection “from the time they engage in direct participation in hostilities and remain subject to direct attack until they ‘affirmatively disengage’ from such activities in a manner objectively recognizable by the adversary.”¹⁶⁵ Thus, individuals may disengage but it must be in a manner recognizable by the adversary. If the adversary does not recognize or acknowledge the disengagement, the individual is still targetable. This is problematic because it places the “targetability” of civilians at the mercy of their adversaries. Thus a teenager who joins a terrorist group in his youth may forever be targeted by a State even if he has long since disassociated himself from the group.

¹⁶¹ *Id.*

¹⁶² See discussion below.

¹⁶³ Kretzmer, *supra* note 13 at 193.

¹⁶⁴ *Id.*

¹⁶⁵ Melzer, *supra* note 1 at 348.

The *functional membership approach* “combines the two other approaches in that it applies the “affirmative disengagement’ approach to members of organized armed groups and the ‘specific acts’ approach to unorganized civilians.”¹⁶⁶ Thus, under this view, a member of an armed group loses his civilian protection until his adversary considers him no longer a member of that group. Melzer subscribes to this view. However, this approach is only necessary if members of organized armed groups engaged in NIAC are considered as civilians. As discussed later, members of organized armed groups engaged in an NIAC may qualify as “combatants” for purposes of the principle of distinction.

6. *The corollary rule against indiscriminate attacks*

Not only does the principle of distinction prohibit direct attacks on civilians, it also prohibits *indiscriminate attacks* or “attacks of a nature to strike military objectives and protected persons without distinction.”¹⁶⁷ The customary norm on indiscriminate attacks applicable to both IAC and NIAC states:

Rule 12. Indiscriminate attacks are those:

- (a) which are not directed at a specific military objective;
- (b) which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.¹⁶⁸

Means of combat refers to the weapons, while *methods of combat* refers to the way the weapons are used.¹⁶⁹

As Melzer puts it, “it is the *lacking focus* on the legitimate target or the *lacking capability* of means and methods to respect the principle of distinction which makes an attack indiscriminate.”¹⁷⁰ Whether or not an attack is indiscriminate is distinguished from the principle of proportionality and precautions in that these

¹⁶⁶ *Id.* at 350.

¹⁶⁷ *Id.* at 355.

¹⁶⁸ Henckaertz, *supra* note 122 at 199.

¹⁶⁹ Melzer, *supra* note 1 at 356.

¹⁷⁰ *Id.* at 355.

two principles consider the actual effects of the attack.

Thus, the targeting of entire communities or the use of carpet bombs that can level entire neighborhoods would be a violation of the rule against indiscriminate attacks.

7. *The Principle of Distinction Applied in IAC*

In an IAC, the basic rule regarding the principle of distinction is found in Article 48 of AP I which provides that, “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.” The fact that some States are not parties to AP I does not exempt them from the rule, as customary IHL provides for a rule applicable in both IAC and NIAC: 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.¹⁷¹

However, Article 48 of AP I and the customary rule do not comprehensively cover who may or may not be directly attacked. Thus this rule must be “read in conjunction with other provisions of conventional and customary IHL applicable in armed conflict.”¹⁷² Aside from the general category of civilians, medical and religious personnel, members of the armed forces and military units assigned to civil defence organizations¹⁷³ and *hors de combat* may not be attacked. Therefore, it is more accurate to say that the principle of distinction requires participants in armed conflict to attack only combatants and not civilians and the other categories of persons protected by conventional and customary IHL.

In connection with targeted killing, the application of the rule requires a proper understanding of the distinction between combatant and civilian, and that between civilian objects and military objectives.

a. The Combatant and the Civilian

The Hague Regulations of 1907 “do not sufficiently elucidate the criteria based on which a person can be objectively defined as belonging to combatant or

¹⁷¹ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 3 (2005).

¹⁷² Melzer, *supra* note 1 at 301.

¹⁷³ Additional Protocol I, art. 67 (1).

non-combatant armed forces of a belligerent or respectively, to the civilian population.”¹⁷⁴ The Geneva Conventions also do not define the terms combatant or civilian.

AP I provided for the first conventional definition for “armed forces”¹⁷⁵ and linked it to the concept of combatants.

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct 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 disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.¹⁷⁶

Thus, a combatant is one who as a member of the armed forces of a party to a conflict is entitled to participate in the hostilities and is not liable for their attacks that are lawful under international humanitarian law.¹⁷⁷

It is also generally accepted that “combatant status is given to participants in a *levée en masse*, provided that they carry their arms openly and respect the laws and customs of war.”¹⁷⁸

The Hague Regulations and GC III define a *levée en masse* as the inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves. Under GC III they are given prisoner of war (POW) status.

The first codified definition of “civilian” is also found in Additional Protocol I:

¹⁷⁴ Melzer, *supra* note 1 at 304.

¹⁷⁵ Melzer, *supra* note 1 at 306.

¹⁷⁶ Additional Protocol I, art.43(1).

¹⁷⁷ See HECTOR OLASOLO, UNLAWFUL ATTACKS IN COMBAT SITUATIONS: FROM THE ICTY’S CASE LAW TO THE ROME STATUTE 105 (Martinus Nijhoff 2008); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 309 (2008); Gabor Rona, *An Appraisal of US Practice Relating to Enemy Combatants*, VOLUME 10 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 240 (2007).

¹⁷⁸ Melzer, *supra* note 1 at 309.

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.¹⁷⁹

Article 4 (A) (1), (2), (3), and (6) of GC III refer to categories of persons who qualify as prisoners of war, while Article 43 defines “armed forces.” Conventional IHL of an IAC “assigns each individual to one of two mutually exclusive categories.”¹⁸⁰ Thus, by implication because everyone outside of those covered by the said provisions is a civilian, then everyone included must be a combatant. This is consistent with the Geneva Conventions’ tendency to define something by defining what it is not.

In summary, an IAC combatant status is given to everyone covered by Article 4 (A) (1), (2), (3) and (6) of GC III and Article 43 AP I. Everyone else is a civilian. If there is a doubt, the person will be presumed a civilian.

However, Melzer argues that participants in a *levée en masse* do not fall neatly under this dichotomy because although recognized as combatants they do not qualify as armed forces or civilians.¹⁸¹ It is submitted, however, that such participants are civilians who are participating directly in the hostilities. As Melzer himself states, “civilians taking direct part in the hostilities without becoming members of the armed forces of a party to a conflict must remain civilians.”¹⁸²

c. Military objectives and Civilian objects

Military objectives are defined by AP I as those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹⁸³ Thus, when conventional IHL speaks of military objectives, it is only referring to objects. It would also not be accurate to say that all combatants are military objectives.¹⁸⁴

¹⁷⁹ Additional Protocol 1, art. 50 (1).

¹⁸⁰ Melzer, *supra* note 1 at 310.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Additional Protocol I, art. 52 (2).

¹⁸⁴ Melzer, *supra* note 1 at 302. See also discussion on military necessity below.

Civilian objects are all objects which are not military objectives.¹⁸⁵ If there is a doubt, whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used.¹⁸⁶

8. *The Principle of Distinction in an NIAC*

The conventional IHL of NIAC “do not elaborate on the principles of distinction as much as those regulating international armed conflicts.”¹⁸⁷

Sassoli and Bouvier point out that “the law of non-international armed conflicts contains no definition of military objectives or that of the civilian population” which is “necessary to apply the principle of distinction.”¹⁸⁸ However they argue that there is “[n]o fundamental difference between the regimes applicable to the two situations [that] prohibits the application of those same definitions.”¹⁸⁹ Melzer notes that, “the most important rules and principles applicable in situations of international armed conflict are today recognized as having also attained customary nature in non-international armed conflict.”¹⁹⁰

The customary rule on the principle of distinction which is applicable in an NIAC is that: 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.¹⁹¹

a. Combatants

According to the ICRC study on the customary rules on IHL, the term combatant is used in this rule in its generic sense “indicating persons who do not enjoy the protection against attack accorded to civilians, but does not imply a right to combatant status or prisoner-of-war status.”¹⁹²

Kretzmer argues that the reason for the absence of a definition of *combatant* in AP II is that:

¹⁸⁵ Additional Protocol I, art. 52 (1).

¹⁸⁶ Additional Protocol I, art. 52 (3).

¹⁸⁷ Olasolo, *supra* note 18 at 21.

¹⁸⁸ SASSOLI AND BOUVIER, 1 HOW DOES THE LAW PROTECT IN WAR 258 (ICRC 2006)

¹⁸⁹ *Id.*

¹⁹⁰ Melzer, *supra* note 1 at 311.

¹⁹¹ Henckaerts & Doswald-Beck, *supra* note 173 at 3.

¹⁹² *Id.*

States were, and still are, unwilling to grant the status of combatants to insurgents and other non-state actors who take part in non-international conflicts, as doing so would not only afford them an element of legitimacy, but would mean that they enjoy the two 'privileges' of combatants – immunity from criminal liability for fighting, and prisoner-of-war status when apprehended.¹⁹³

As he further points out, "the use of the term 'civilians' in AP II is based on the assumption that there must also be 'non-civilians' or combatants."¹⁹⁴

Therefore the absence of "combatants" in conventional IHL of NIAC does not mean that there are no combatants in an NIAC. The armed forces of a State involved in an NIAC would certainly be combatants. Arguably, the members of armed groups who are engaged in hostilities also constitute "armed forces".

Melzer argues that under Common Article 3, the term *armed forces* "refers to the fighting forces of both State and non-State parties to the conflict."¹⁹⁵ In addition, despite the ambiguity created by Article 1(1) of AP II Melzer argues that, "members of organized armed groups belonging to a non-State party to the conflict are not regarded as civilians, but as approximately equivalent to State armed forces."¹⁹⁶

Fisher notes that "non-international armed conflict combatants consist of the State's armed forces and the organized armed groups they oppose"¹⁹⁷, and that "terrorist organizations, such as Al-Qaeda, Tanzim, Islamic Jihad, and Hamas, qualify as organized armed groups and that, therefore, their members may be targeted with lethal force as combatants."¹⁹⁸

Kretzmer argues that:

When the armed conflict is essentially between a State and the terrorist group, the theory that the terrorists are civilians simply does not make sense. An armed conflict model of law (as opposed to a law-enforcement model) cannot be applicable if only one party to the conflict has combatants. If we concede, as many do, that protracted violence between an organized terrorist group and a state may

¹⁹³ Kretzmer, *supra* note 13 at 197.

¹⁹⁴ *Id.*

¹⁹⁵ Melzer, *supra* note 1 at 315.

¹⁹⁶ *Id.* at 317.

¹⁹⁷ Fisher, *supra* note 65 at 727.

¹⁹⁸ *Id.*

constitute an armed conflict ruled by international humanitarian law, we have to find another, more feasible theory.¹⁹⁹

In sum, the fighting forces of armed groups (like terrorist groups) are equivalent to the armed forces of a State party to an NIAC and are considered combatants. Thus, there is no need to determine if they are directly participating in the hostilities because they are not civilians. These “combatants” do not enjoy the combatant privilege under IAC, and they may legally be attacked by the other party to the conflict.²⁰⁰

The difficulty here is that there are members of armed groups who may not at all be involved in actual combat. Examples would include those members of armed groups who correspond to the medical or religious personnel of armed forces of States or who simply do not fight at all but are members of the organization. May these individuals also be attacked by virtue of their membership in the armed group whereas their counterparts in the State’s armed forces are protected from attack? One solution is to make members of armed groups targetable only when they are actively engaged in hostilities. But to do so would be to treat all members of armed groups like civilians. Kretzmer proposes that members of armed groups who take an active part in the hostilities are “combatants”, and they may be targeted not only when they are directly participating in the hostilities. Those who do not take an active part in the hostilities are civilians and can only be targeted while they are taking a direct part in the hostilities.²⁰¹ This means that within an armed group there are “combatants” and civilians. Of course this is problematic for the person making the distinction. One may have to make a distinction between the political and military branches of the armed group. But regardless of the difficulty, the principle of distinction must be upheld.

b. Civilians and others not subject to direct attack

Civilians and other persons not subject to attack under NIAC rules (i.e. medical and religious personnel and all persons *hors de combat*) are not defined in AP II.

Conventional IHL rules on NIAC seem to imply that a civilian in an NIAC “is anyone not belonging to the ‘armed forces’ of a party to the conflict...or

¹⁹⁹ Kretzmer, *supra* note 13 at 194.

²⁰⁰ *Id.* at 197.

²⁰¹ *Id.* at 198.

respectively, to State 'armed forces', dissident armed forces' or other organized armed groups' of a party to a conflict."²⁰²

The lack of clear-cut definitions notwithstanding the rules governing non-international armed conflict offers protection to these categories of persons. AP II provides that the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.²⁰³ It prohibits making the civilian population as well as individual civilians the object of attack and committing acts or threats of violence the primary purpose of which is to spread terror among the civilian population.²⁰⁴ Because AP II prohibits starvation of civilians as a method of combat, parties to a conflict cannot attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works.²⁰⁵ Certain military objectives such as dams, dykes, nuclear electrical generating station, and other works or installations containing dangerous forces, cannot be the object of attack, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.²⁰⁶

B. The Principle of Military Necessity

The principle of military necessity is "one of the primary foundations of IHL."²⁰⁷ Melzer argues that "without an adequate understanding of the concept of military necessity, modern IHL cannot be properly interpreted and applied to current challenges, such as the increasing resort by States to the method of targeted killing."²⁰⁸

The *St. Petersburg Declaration* stated that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."²⁰⁹ The Lieber Code defined military necessity as "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."²¹⁰

²⁰² Melzer, *supra* note 1 at 322.

²⁰³ Additional Protocol II, art. 13(1).

²⁰⁴ Additional Protocol II, art. 13 (2)

²⁰⁵ Additional Protocol II, art. 14

²⁰⁶ Additional Protocol II, art. 15.

²⁰⁷ Melzer, *supra* note 1 at 279.

²⁰⁸ *Id.*

²⁰⁹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November / 11 December 1868 available at <http://www.icrc.org/IHLNSF/FULL/130?OpenDocument>.

²¹⁰ Lieber Code, art. 14.

The *Lieber Code* definition encompasses the St Petersburg definition and provides for two requirements for any measure to comply with the principle:

1. indispensable for securing the ends of war; and
2. lawful according to the modern law and usages of war.

To comply with the principle, any military action must be indispensable for securing the ends of war, which as defined by the St Petersburg declaration is “to weaken the forces of the enemy.” The lawful aim of a party to any armed conflict is not to completely annihilate the enemy but only to weaken him. In addition, the nature of the military action itself must not be forbidden by law (e.g. the use of poison). The principle therefore limits the degree and kind of force that may be employed.

Melzer believes that the principle has become “increasingly disreputable”²¹¹ because it has been used “as an excuse for conduct in deviation of the laws and customs of war.”²¹² However, properly understood, the purpose of military necessity is “to provide a realistic standard of conduct by permitting those measures of warfare that are reasonably required for the effective conduct of hostilities, while at the same time prohibiting the infliction of unnecessary suffering, injury and destruction.”²¹³

Applied to targeted killing, the principle “prohibits the targeted killing of an individual combatant (or civilian directly participating in the hostilities) in a situation where such killing is militarily unnecessary, either because it offers no military advantage or because the targeted person could have been captured without unreasonable risk to the operating forces.”²¹⁴ Thus, Solis’s assertion that “combatants may be targeted wherever found, armed or unarmed, awake or asleep, on a front line or a hundred miles behind the lines”²¹⁵ is not accurate in view of the principle of military necessity. It can be said that it is the application of the principle of military necessity which differentiates military action from terrorism. If military operations are conducted simply because the military can and not because it must, if soldiers kill because they enjoy it and not because it is necessary, if homes of militants are bombed to set an example and not because it is a military objective, then how can this be not terrorism?

²¹¹ Melzer, *supra* note 1 at 280.

²¹² Melzer, *supra* note 1 at 280.

²¹³ *Id.*

²¹⁴ *Id.* at 57.

²¹⁵ Solis, *supra* note 57 at 3.

C. The Principle of Proportionality

The customary rule on the principle of proportionality applicable to IAC and NIAC is as follows:

Rule 14. 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.²¹⁶

The rule as codified in AP I states:

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;

and

(b) 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.²¹⁷

The ICRC study states that *military advantage* “refers to the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack.”²¹⁸

Melzer points out that “while the requirement of proportionality is absolute, the standard of excessiveness is relative.”²¹⁹ He explains:

the excessiveness of collateral damage never depends on the extent of the collateral damage alone, but always on whether, in the concrete circumstances, the **expected** collateral damage is outweighed by the importance of the ‘concrete and direct military damage anticipated.’²²⁰ (Emphasis supplied)

The principle requires balancing two interests: the anticipated concrete and direct military advantage and the anticipated collateral damage.²²¹ Melzer argues

²¹⁶ Henckaertz, *supra* note 122 at 199.

²¹⁷ Additional Protocol I, art. 51 (5).

²¹⁸ Henckaerts & Doswald-Beck, *supra* note 173 at 49.

²¹⁹ Melzer, *supra* note 1 at 360.

²²⁰ Melzer, *supra* note 1 at 360.

²²¹ *Id.* at 361.

that “[a] military operation becomes unlawful once the expected collateral damage is deemed excessive in relation to the expected military advantage.”²²² This formulation by Melzer is problematic because what if the anticipated collateral damage was minimal but the actual collateral damage is excessive? Also, what if the anticipated military advantage was substantial but the actual military advantage was minimal? It would be more compatible with the humanitarian aims of the law to apply the principle of proportionality to compare the actual military advantage and actual collateral damage.

Kretzmer would probably disagree with this because he argues that “[p]roportionality must be judged on the basis of the information available at the time of the attack, and not on actual results.”²²³ If it turns out that more civilians die than anticipated, “a heavy burden rests on the state to show either that this could not reasonably been foreseen, or that if it could be foreseen, the necessity of the attack was great enough to justify the risk.”²²⁴ This view seems fair but in a world where militarily strong States are rarely held accountable for the collateral damage they cause, it would be unjust. The view is akin to a “shoot now, explain later” policy and explanations are meaningless to the dead and those they leave behind.

Furthermore, if the anticipated collateral damage was excessive and action was taken anyway, regardless of whether or not the actual collateral damage was excessive, there is a violation of the principle. Because there is a deliberate intent to violate the principle it does not matter if for some reason the collateral damage turned out not to be excessive. Applying the principle in this manner, would serve as a better deterrent to reckless military action.

The idea behind establishing principles that should be taken into account prior to and during military operations is to serve as a deterrent for reckless action. Therefore a strict interpretation and implementation of the principles would best serve this purpose. It should not be forgotten that these principles are for armed conflicts where human lives are at stake.

Admittedly, as Kretzmer points out, the principle of proportionality is “notoriously difficult to apply.”²²⁵ How does one value military advantage and human life? How can the values be compared? Again, regardless of the difficulty, the principle must be upheld.

²²² *Id.*

²²³ Kretzmer, *supra* note 13 at 201.

²²⁴ *Id.*

²²⁵ *Id.* at 200.

Applied to targeted killing, the principle of proportionality calls into question the practice of attacking communities or villages to kill one or two targets. Of course it is not a simple manner of counting how many combatants are killed compared to civilians. It has been pointed out that “the decisive criterion in the proportionality assessment is not the achievement of a strict numerical balance of some sort, but the relative military importance of a target, its military target value.”²²⁶ Thus, “high value targets will justify greater collateral damage than low value targets.”²²⁷ Whether or not the combatant in the village is worth destroying a substantial part of the village or a number of civilians depends on the military value of that combatant which depends on the circumstances. It has also been argued that a number of civilian deaths resulting from a single targeted combatant may be justifiable in exceptional cases but would be excessive “if hostilities were generally conducted on the basis of such an abhorrent ratio.”²²⁸

D. The Principle of Precaution

The principle is codified in AP I, as follows:

Art 57. Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

²²⁶ Melzer, *supra* note 1 at 362.

²²⁷ *Id.*

²²⁸ *Id.* at 363.

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.²²⁹

The ICRC study points out that the “requirement to take precautions in attack was included in the draft of Additional Protocol II but was dropped at the last moment as part of a package aimed at the adoption of simplified text.”²³⁰

Despite the absence of a specific provision in AP II, it is believed that the principle of precautions is a customary norm. In *Kupreskic*, the trial chamber ruled:

In the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness.... In addition, attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians. These principles have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977. Such provisions, it would seem, **are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol.**²³¹ (Emphasis supplied)

The customary international law on Precautions in Attack applicable to both IAC and NIAC state:

Rule 15. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.²³²

The ICRC study notes that “[t]he obligation to take all ‘feasible’ precautions has been interpreted by many States as being limited to those precautions which

²²⁹ Additional Protocol I, art. 57.

²³⁰ Henckaerts & Doswald-Beck, *supra* note 173 at 52.

²³¹ Prosecutor v. Zoran Kupre [KI] (Judgment by Trial Chamber January 14 2000) available at <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

²³² Henckaerts & Doswald-Beck, *supra* note 173 at 51.

are practicable or practically possible, taking into account all circumstances ruling at that time, including humanitarian and military considerations.”²³³

Rule 15 is supplemented by Rules 16-19 which provide for more specific obligations in connection with the principle. These obligations include:

- doing everything feasible:
 - o to verify the target are military objectives;²³⁴
 - o to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;²³⁵ and if so, to cancel or suspend an attack;²³⁶
- taking all feasible precautions in the choice of means and methods of warfare with a view of avoiding, and in any event minimizing, incidental loss to civilian life, injury to civilians and damage to civilian objects.²³⁷

In connection with targeted killing, “serious concerns are voiced with regard to the high probability of erroneous targeting and of incidental death and injury among the civilian population.”²³⁸ In addition, the U.S. has a practice of using Predator drones to launch missiles against their targets. It would seem that in choosing this weapon, the primary concern was to keep casualties from U.S. forces to a minimum and not to keep civilian casualties to a minimum.

Unfortunately, whether or not all feasible precautions have been taken to minimize civilian harm is difficult to determine as States may not admit to be responsible for targeted killing or when they do information regarding the manner the targeting operation was planned and carried out may not be disclosed. Therefore, as Murphy and Radsan propose, the practice of carrying targeted killing should be subject to heightened accountability such that the executive must require an independent, intra-executive investigation.²³⁹

²³³ Henckaerts & Doswald-Beck, *supra* note 173 at 54. See also NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 356 (2008).

²³⁴ Henckaerts, *supra* note 123, Rule 16.

²³⁵ *Id.* Rule 18.

²³⁶ *Id.* Rule 19.

²³⁷ *Id.* Rule 17.

²³⁸ Melzer, *supra* note 1 at 57.

²³⁹ Murphy & Radsan, *supra* note 69 at 450.

E. Means and Methods of Combat

In addition to the principles, parties to an armed conflict must also abide by LOAC's rule of the acceptable means and methods of combat. The customary rule is that "the use of means and methods of warfare which are of a nature to cause superfluous or unnecessary suffering is prohibited."²⁴⁰ To this end there are a number of conventions banning particular kinds of weapons. The discussion below is limited to an analysis of the weapons currently used in practice.

1. *Predator missiles*

The use of Hellfire missiles from Predator drones are not by itself prohibited unless the use of such weapon is by nature indiscriminate.²⁴¹ For instance the use of a missile against a lone target in the desert may be acceptable, while its use against an apartment building filled with occupants may not.

2. *Poison*

In the examples of targeted killing discussed in Part III, there were two instances where poison was used. Customary IHL prohibits "the use of poison or poisoned weapons."²⁴² This is a long-standing prohibition dating from the *Lieber Code* and the *Hague Regulations*.²⁴³

3. *Booby-traps*

There was one instance of a booby-trapped phone mentioned in Part III. While this method seems creative, customary IHL provides:

The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited.²⁴⁴

Thus, whether or not booby-trapped objects are prohibited depends on the person or object to which they are attached.

²⁴⁰ Henckaerts, *supra* note 123 at 237, Rule 70.

²⁴¹ *Id.* at 244, Rule 71.

²⁴² *Id.* at 251, Rule 72.

²⁴³ *Id.*

²⁴⁴ *Id.* at 278, Rule 80.

V. Conclusion

A. Reiterating the Principles

Targeted killing can only be justified in the context of an armed conflict and is governed by the rules of LOAC. There are no combatants or civilians directly participating in the hostilities if there is no armed conflict. States who want to engage in targeted killing have the burden of proving the existence of an armed conflict.

1. *Entering the Threshold*

As discussed, there is an *international armed conflict* when there is “any difference arising between two States that leads to an intervention of their armed forces, even if one of the parties denies the existence of a state of war.”²⁴⁵ On the other hand, there is a *non-international armed conflict* in “situations of sufficiently intense or protracted armed violence between identifiable and organized armed forces or groups regardless of where they occur, as long as they are not of an inter-State character.”²⁴⁶ There is no other type of armed conflict covered by IHL except these two. Thus the “war against terror” is not an armed conflict under IHL but a State may be in armed conflict with specific armed groups provided the conditions for a NIAC are met. A State may also be in armed conflict with another State which harbors terrorists. In such cases, LOAC may apply. But simply labeling the target as “terrorist” or “insurgent” is not sufficient to justify the application of LOAC.

2. *Applying the Principles*

If a State is engaged in armed conflict as defined under LOAC, it may engage in targeted killing. If it decides to do so, it must comply strictly with the principles of LOAC.

The first to be applied is the *principle of distinction*. Is the target a civilian or a combatant? Is the object a military objective or a civilian object? Only

²⁴⁵ Melzer, *supra* note 1 at 394.

²⁴⁶ *Id.* at 395.

combatants, civilians directly participating in hostilities and military objectives may be targeted.

Upon determining that the target is a combatant or a civilian directly participating in the hostilities or is a military objective, *the principle of military necessity* must be applied. Does the killing contribute effectively to the achievement of a concrete and direct military advantage? Can the same objective be accomplished by apprehension rather than killing?

Upon determining there is a military necessity, the *principle of proportionality* must then be applied. Will the collateral damage be excessive compared to the concrete and direct military advantage?

Upon determining that the collateral damage is not excessive, the *principle of precaution* must then be applied. Have all feasible precautions to avoid or minimize “incidental loss of civilian life, injury to civilians, and damage to civilian objects”²⁴⁷ been taken?

Aside from these principles, the means and methods employed must not violate any of the prohibitions of customary and conventional IHL. Poison is absolutely prohibited and the use of booby traps under certain conditions is not allowed. The use of weapons which by their nature will indiscriminately kill or cause excessive civilian casualties are also not allowed.

Indeed there are a lot of rules that must be complied with. The procedure cannot be circumvented on the basis that the target is an alleged terrorist. LOAC applies regardless of who the target is, and States are bound to compel even if their adversaries do not.

Despite its permissibility under IHL, “targeted killings must be located at the extreme end of the scale of methods permitted under the normative paradigm of hostilities.”²⁴⁸ Some may argue that requiring the strict application of LOAC principles and rules would severely hamper the governments’ ability to neutralize the terrorist threat. However, as Rona argues, “limiting the circumstances in which targeted killing is lawful, even in war, is a valid trade-off when the alternative is a permanent, global free-fire zone against an amorphous enemy.”²⁴⁹

²⁴⁷ *Id.* at 407.

²⁴⁸ *Id.* at xiii.

²⁴⁹ Rona, *supra* note 16 at 505.

The international community has an interest in limiting the application of targeted killing only to those instances where all the principles of LOAC are complied with.

B. Evaluation of the Current Practices

The practice of targeted killing has caused many civilian deaths. If one includes the death, injuries, and property damage resulting from the riots and reprisals which normally follow such targeted killings, the toll is staggering. A practice that routinely results in more civilian rather than combatant deaths should seriously be reconsidered.

A regular practice of targeted killings would seem to resurrect the doctrine of *Kriegsraison* with its basic maxim stating that “the requirements of war prevail over the manners of war.”²⁵⁰ It is a return to the Machiavellian doctrine of the ends justifying the means. Although terrorism is despicable and must be stopped, does it mean that States must stop at nothing to eradicate it? Targeted killing feeds on contempt and generates more hatred. Terrorism thrives on hatred. For every terrorist killed, how many rise up to take their place?

But like armed conflict, targeted killing appears to be a reality that the world must accept, at least for now. As IHL was designed to ameliorate the effects of war which cannot be avoided, then the LOAC principles governing targeted killing are necessary to diminish human suffering resulting from the practice. If certain States insist on practicing targeted killing then the international community must insist on strict compliance with LOAC principles.

Stressing the principles that need to be complied with in targeted killing is not an endorsement of the practice. As Fisher argues:

an international norm permitting the use of targeted killing as a counter-terrorism tactic is likely to emerge and that, recognizing such, the international legal community should react to protect the strength of the legal rules and norms prohibiting assassination and extrajudicial execution, and to define the bounds of targeted killing's legitimate use.²⁵¹

Fisher believes that a norm will emerge because “targeted killing's environmental fit, prominence, and coherence favor such a development.”²⁵² If an emerging norm legalizing targeted killing as a counter-terrorist strategy is

²⁵⁰ Melzer, *supra* note 1 at 280.

²⁵¹ Fisher, *supra* note 65 at 714.

²⁵² *Id.* at 717.

imminent, then the international community has more reason to strengthen the principles required for its use.

Terrorism is lawlessness. A counter-terrorism strategy that disregards the law will only stoke the fire and not put it out.

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