

## NOTE & COMMENT

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# Smiting Spell: The Legality of Targeted Killings in the War against Terrorism

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*Resorting to targeted killings as a measure of counterterrorism spawned a debate on their legality under both international human rights law and humanitarian law. This article attempts to justify the measure under the current body of international humanitarian law. It also claims that discrete acts of targeted killings may be legal provided the existence of specific circumstances and conditions. These conditions, however, make it extremely difficult for a State to legally pursue a 'policy' of targeted killings against alleged terrorists, unless they are considered 'legal combatants.' The article criticizes the practice of labelling terrorists as 'unlawful combatants' unworthy of protections afforded by both international human rights law and international humanitarian law, and argues the lack of compelling legal arguments that would prevent terrorists from being considered as lawful combatants in an armed conflict. Light is also shed on the United States' recent expansion of the drone program in a way that might indicate a gradual acceptance of the terrorist-as-combatant theory.*

### Keywords

Targeted Killings, Drone Strike, Al-Qaeda, War against Terrorism, Unlawful Combatant, Third Geneva Convention

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## 1. Introduction

Targeted Killings have been considered “the most coercive tactic” employed in counterterrorism because, unlike other measures, they do not aim to neutralize, contain, or incarcerate individual suspects or perpetrators of terrorist acts. Rather, they aim at eliminating them completely.<sup>1</sup> Targeted Killings may be defined as “the intentional slaying of a specific individual or group of individuals ... with explicit governmental approval.”<sup>2</sup> The most prominent examples of their use have been operations conducted by Israeli forces against members of Palestinian and Lebanese factions, and by the U.S. Forces against members of Al-Qaeda in Afghanistan, Pakistan and Yemen.

The killing of both Osama Bin Laden by U.S. Special Forces in Pakistan in May 2011 and Anwar Al-Awlaki by a drone attack in Yemen in September of the same year played a significant role in reigniting the debate on the legality of this particular measure of counterterrorism.<sup>3</sup> Despite this debate, targeted killings have continued unabated and are likely to increase in future. They indeed extend to other parts of the world where Al-Qaeda offshoots become precariously active.

Traditionally, proponents of targeted killings have pointed towards their utility and effectiveness in counterterrorism to justify their legitimacy despite their questionable legality under international law.<sup>4</sup> Daniel Byman asserts that Israel’s targeted killings of Hamas leaders during the second Palestinian intifada led directly to a decrease in Israeli civilian and military casualties caused by Hamas-led terrorism, claiming that: “Something more than correlation was at work here.”<sup>5</sup> He also mentions how this policy led to a decrease in Hamas’s repertoire of able and inspiring leaders, while at the same time helped boost Israel’s national morale.<sup>6</sup>

As for targeted killings against members of Al-Qaeda, the United States has claimed that they led to the elimination of scores of the organization’s top echelons, thus severely limiting the ability to plan and execute terrorist attacks against the United States and its allies, and that the policy has had a deterrent effect by which Al-Qaeda

<sup>1</sup> G. BLUM & P. HEYMANN, *LAW, OUTLAWS, AND TERRORISTS* 71 (2010).

<sup>2</sup> S. David, *Israel’s Policy of Targeted Killing*, 17 *ETHICS & INT’L AFF.* 112 (2003).

<sup>3</sup> See, e.g., P. Goodenough, *Some Foreign Pundits, International Organizations, Question Propriety of Killing Bin Laden*, CNSNEWS, May 5, 2011, available at <http://www.cnsnews.com/news/article/legality-morality-killing-terrorist-lead>; M. Crowley, *Was Killing al Qaeda Cleric Anwar al-awlaki Legal?*, TIME, Sept. 30, 2011, available at <http://swampland.time.com/2011/09/30/was-killing-american-al-qaeda-cleric-anwar-al-awlaki-legal> (last visited on Oct. 26, 2012).

<sup>4</sup> *Supra* note 2. See also D. Statman, *Targeted Killing*, 5 *THEORETICAL INQUIRIES IN L.* 179-198 (2004).

<sup>5</sup> D. Bymann, *Do Targeted Killings Work?*, 85 *FOREIGN AFF.* 103 (2006).

<sup>6</sup> *Id.* at 102-104.

members have become more reluctant to assume high-level command positions within the organization, for fear of being included on the terrorist hit list of the U.S. drone program.<sup>7</sup> More recently, President Obama's top Counter Terrorism advisor John Brennan openly defended targeted killings, disregarding arguments that they cause arbitrarily or unwarranted civilian deaths. He claimed that the process by which targets are chosen is detailed and judicious.<sup>8</sup>

While Israeli and the U.S. assertions on the correlation between such killings and the decrease in terrorist attacks cannot be taken for granted as a verification of a direct causal link between policy and observation, the logic behind the conjectured causality is nevertheless sound, especially when coupled with the highly-probable deterrent effect such a policy might have on members of terrorist organizations.

The primary purpose of this paper is to address the legality of targeted killings under international humanitarian law. The paper is composed of five parts including Introduction and Conclusion. Part two will examine the legal and policy characteristics of targeted killings within a law enforcement model of counterterrorism. Part three will discuss targeted killings in an armed conflict model of counterterrorism, and will assess whether terrorists can be regarded as legal combatants in an armed conflict. Part four will discuss the viewpoint of terrorists as civilians engaged in Hostilities. Part five will claim that there is a shift in U.S. attitudes towards the legal conditioning of targeted killings.

## 2. Targeted Killings and the Law Enforcement Model of Counterterrorism

The legality of targeted killings is related to the choice of a legal framework that is best suited to tackle the issue of international terrorism. Those who believe that terrorism is but a crime find it difficult to reconcile targeted killings with their chosen paradigm.<sup>9</sup> This paradigm upholds to applying domestic criminal laws and international human rights law to suspects of terrorism. The latter renders the right to life as 'inherent'

<sup>7</sup> H. Cooper & M. Landler, *Targeted Killing is New U.S. Focus in Afghanistan*, N.Y. TIMES, July 31, 2010, available at <http://www.nytimes.com/2010/08/01/world/asia/01afghan.html> (last visited on Oct. 26, 2012).

<sup>8</sup> B. Bennett & D. Cloud, *Obama's counter-terrorism advisor defends drone strikes*, L. A. TIMES, Apr. 30, 2012, available at <http://articles.latimes.com/2012/apr/30/world/la-fg-brennan-drones-20120501> (last visited on Oct 26, 2012).

<sup>9</sup> See, e.g., Y. Stein, *By Any Name Illegal and Immoral*, 17 ETHICS & INT'L REL. (2006); INTERNATIONAL COMMISSION OF JURISTS, ASSESSING DAMAGE, URGING ACTION 9 (2009), available at <http://ejp.icj.org/IMG/EJP-Report.pdf> (last visited on Oct. 26, 2012).

under Article 6 of the International Covenant on Civil and Political Rights (“ICCPR”). This right is further reiterated in all regional human rights conventions.<sup>10</sup> Under this body of law, the use of lethal force against alleged terrorists can only be justified under specific circumstances which were incidentally delineated in the European Convention for the Protection of Human Rights (“ECPHR”). Article 2 of the ECPHR lays down that the use of lethal force will not be deemed illegal if used in self-defence from unlawful violence, in preventing the escape of a lawfully detained suspect, or during the lawful suppression of riots or insurrections, and only when absolutely necessary.<sup>11</sup>

The European Court of Human Rights upheld these precepts in *McCann v. UK* in which the Court did not find soldiers who had carried out a lethal attack against three terrorist suspects guilty of breaching the right to life, because the soldiers had acted within the parameters of necessity and under the assumption of the accuracy of intelligence handed to them by the UK authorities.<sup>12</sup> However, the Court did find the UK Government at fault for its flawed planning of the mission to apprehend the three suspects which resulted in the ‘unnecessary’ use of lethal force against them.<sup>13</sup> This meant that there were less coercive measures that could have been taken to secure the arrest of the suspects. The Court in this case reaffirmed the principles of necessity, proportionality and imminence of threat which must all be present in order to justify lethal force against terrorist suspects under human rights law.<sup>14</sup> It follows from this that while the use of lethal force may be condoned in discrete cases under international human rights law, this body of law disallows adopting targeted killings as an unremitting policy.

Human rights law, furthermore, establishes the right to a fair trial and due process of the law to all individuals.<sup>15</sup> However, even if a court is hypothetically afforded the *ex ante* function of reviewing executive death orders, judges would have to consider the legal opinion which argues that only a limited number of terrorist crimes can be said to merit a death penalty. This is mainly because a broad definition of terrorism can come in conflict with Article 6(2) of the ICCPR which limits death sentences to those who have committed “the most serious crimes.”<sup>16</sup> This might raise the problem of how to decide

<sup>10</sup> European Convention for the Protection of Human Rights and Freedoms (“ECPHR”) art. 2(1); African Charter on Human and Peoples’ Rights (“Banjul Charter”) art. 4; American Convention on Human Rights (“ACHR”) art. 4.

<sup>11</sup> ECPHR art. 2(2).

<sup>12</sup> *McCann v. The United Kingdom*, 21 Eur. Ct. H.R. 200 (1997).

<sup>13</sup> *Id.* at 213-214.

<sup>14</sup> M. Ramsden, *Targeted Killings and International Human Rights Law: The case of Anwar Al-Awlaki*, 16 J. CONFLICT & SECURITY L. 397-405 (2011).

<sup>15</sup> ICCPR art. 14; ECPHR art. 6; Banjul Charter art. 7; ACHR art. 8.

<sup>16</sup> A. Siebert-Fohr, *The Relevance of International Human Rights Standards for Prosecuting Terrorists*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW* 136 (C. Walter et al. eds., 2004).

on what sort of activities can be considered 'serious' enough to deserve a death penalty.

Nonetheless, attempts have been made to justify the killing of terrorists under a "law enforcement model." One argument is that terrorists should be regarded as "common enemies of humankind" who, like pirates and other "poisoners and incendiaries," may be killed under customary international law by anyone with the ability to do so.<sup>17</sup> This is arguably a radical extrapolation of obsolete customary law that has been overrun by advances in international human rights law.

Another argument to justify targeted killings within the law enforcement model was based on a presumably narrow reading of international human rights conventions supporting the claim that States were only obliged to uphold the rights embodied in these instruments within their own territories, and in areas falling under their jurisdiction.<sup>18</sup> This argument was adopted by the European Court of Human Rights ("ECHR") in the *Bankovic Case*. There, the Court exonerated European States from any responsibility for the loss of lives resulting from the NATO's aerial bombing of Belgrade, because the territory where the bombings were committed fell beyond the Court's 'primarily territorial' definition of 'jurisdiction' which was assumed to be manifested by 'effective control' that can only be exercised on a State's own territory or on a territory it physically occupies.<sup>19</sup> The issue of 'jurisdiction' raises important questions on how to reach an acceptable legal definition of the term without this amounting to an open right to governments to kill citizens of other States at will.<sup>20</sup> It is worthy to note that the ECHR's ruling on the *Bankovic Case* was heavily criticized for appearing to provide States with such a *carte blanche*, and for applying double standards of human rights that distinguished between European citizens and others.<sup>21</sup> The ECHR was also criticized for disregarding the presence of varying degrees of "control," such as limited control of airspace, which can entail a certain amount of responsibility under human rights law.<sup>22</sup>

To conclude the issue of the legality of targeted killings under the law enforcement paradigm, it can be said that human rights law can only offer an excuse for killing a

<sup>17</sup> L. Beres, *Assassination of Terrorists May Be Law-Enforcing, Professors for a Strong Israel* (Oct. 31, 1995) available at [http://www.freeman.org/m\\_online/nov97/beres2.htm](http://www.freeman.org/m_online/nov97/beres2.htm) (last visited on Oct. 26, 2012).

<sup>18</sup> ICCPR art. 2(1); ECPHR art. 1.

<sup>19</sup> *Bankovic v. Belgium et al.*, App. No. 52207/99, Eur. Ct. H.R. (2001), available at 41 I.L.M. 517

<sup>20</sup> D. Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. OF INT'L L. 185. (2005).

<sup>21</sup> E. Roxtrom, M. Gibney & T. Einarsen, *The NATO Bombing Case and the Limits of Western Human Rights Protection*, 23 B. U. INT'L L. J. 131-134 (2005); K. Altiparmak, *Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq?*, 9 J. CONFLICT & SECURITY L. 213-251 (2004).

<sup>22</sup> O. Ben-Naftali & Y. Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 82 (2003-2004).

terrorist suspect when the use of force is absolutely necessary; when there is strong evidence that the attempted arrest of a suspect is unfeasible, and that he or she is on the verge of committing an attack that cannot be averted by other means of prevention.<sup>23</sup> The application of a law enforcement model as such precludes the ability of States to adopt a policy of targeted killings and certainly limits their ability to conduct selective targeted killing operations. Moreover, the argument that States are not obliged to uphold human rights conventions beyond their jurisdictions is hardly justifiable from a moral perspective and goes against the central tenet of the universality of international human rights law.

### 3. Targeted Killings and an Armed Conflict Model of Counterterrorism

The Israeli government argued that the wave of terrorist attacks against its citizens and infrastructure constituted an 'armed attack' against it and thus the laws applicable in this case were "the law of armed conflict."<sup>24</sup> The United States also invoked the same argument in its response to queries by the UN Special Rapporteur regarding targeted killings of terrorists. It asserted that members of Al-Qaeda constitute legitimate military targets; their military operations against the organization are "governed by the international law of armed conflict."<sup>25</sup> Under the Obama Administration, the legal adviser for the U.S. Department of State justified attacks by Unmanned Aerial Vehicles ("UAVs") against terrorists as acts of self-defence subject to international humanitarian law. He argued that: "Terrorists were legitimate military targets because they were members of an organization 'at war' with the United States."<sup>26</sup>

The application of international humanitarian law to efforts of international counterterrorism allows a number of advantages to State authorities. It not only decreases the limitations human rights law places on victim-states when using targeted killings, but also renders the issue of defining 'jurisdiction' irrelevant. Nevertheless, in order to say that the law of armed conflict justifies targeted killings it must be first established

<sup>23</sup> *Supra* note 20, at 183.

<sup>24</sup> Public Committee against Torture in Israel v. The Government of Israel, HCJ 769/02 10 (2006).

<sup>25</sup> P. Alston, J. Morgan-Foster, & W. Abresch, *The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror,"* 19 EUR. J. INT'L L. 186 (2008).

<sup>26</sup> M. Lewis & V. Vitovsky, *The Use of Drones and Targeted Killings in Counterterrorism* (Dec. 13, 2010), available at <http://www.fed-soc.org/publications/detail/the-use-of-drones-and-targeted-killing-in-counterterrorism> (last visited on Oct 26, 2012).

whether a State of armed conflict actually exists, and whether ‘self-defence’ can be used as a cause for *jus ad bellum*. Subsequently, questions of *jus in bello* should be considered to determine the legality of targeted killings as a weapon of war.

The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) set an acceptable definition of armed conflict in *the Prosecutor v. Tadic*. The ICTY took into account the rising incidence of intra-State conflicts following the end of the Cold War. According to the Tribunal, an armed conflict under international humanitarian law “exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups.”<sup>27</sup> The second half of the definition applies in reference to certain terrorist outfits that have acquired advanced military capabilities whether through personal patronage or State support. The Tribunal in the *Prosecutor v. Limaj* further established the difference between armed conflict and other internal forms of violence of less intensity such as disturbances, riots or criminal activity. A situation involving a State and a non-state actor (“NSA”) is deemed to have risen to the level of an armed conflict when: (1) a government is obliged to use military force instead of mere police forces to counter the threat; and (2) the adversary NSA possesses organized command forces under a certain command structure with an ability to wage military operations.<sup>28</sup> The two criteria were found by the Tribunal to merit the application of international humanitarian law. It can be said that both exist within the “War on Terrorism.” But is the existence of an armed conflict enough to allow a State to evoke the “principle of self-defence” against an NSA?

The International Court of Justice, in its advisory opinion regarding the legal consequences of establishing the Israeli security wall in the West Bank, came to the conclusion that States cannot invoke Article 51 of the UN Charter against the NSAs because that Article “recognizes the existence of an inherent right of self-defence in the case of armed attack *by one State against another State*.”<sup>29</sup> [Emphasis added] However, the wording of Article 51 does not support this narrow interpretation of self-defence. Indeed the Article speaks only of an inherent right to self-defence “if an armed attack occurs against a member of the United Nations” without reference to the source of the attack. Furthermore, Article 39 of the Charter gives the Security Council the right to determine whether or not an “act of aggression” has occurred, while Articles 41 and 42, regarding measures to restore international peace and security, are devoid of any explicit reference that the actions listed by them can only be performed against States. It

<sup>27</sup> *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T 561 (May 7, 1997).

<sup>28</sup> *Prosecutor v. Fatmir Limaj*, Case No. IT-03-66-T 94-170 (Nov. 30, 2005).

<sup>29</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. (July 9), available at <http://www.icj-cij.org/docket/index.php?pr=71&code=mwp&p1=3&p2=4&p3=6&ca> (last visited on Oct. 21, 2012).

could be thus argued that the legal opinion which precludes the applicability of Article 51 to the NSAs has no grounds within the wording of the Charter. Such an opinion would also provide a narrow reading of the Charter that does not consider the recent scourge of transnational terrorism.

It has also been argued that developing State-practice towards terrorism since the 1990s witnessed an increase in States' use of force extraterritorially against terrorist or rebel groups and a parallel decrease in international objections towards this exhibition of force.<sup>30</sup> Examples of such practices include not only "Operation Enduring Freedom" against Al-Qaeda and Taliban, but also the Turkish reprisals against Kurdistan Workers' Party ("PKK") bases in northern Iraq from 1991 onwards, Russian bombing of Chechen rebel stationed in Georgia in 2007, and other incidences involving Rwandese, Tajik and Colombian armed responses to cross-border insurgent attacks which could not be unequivocally imputable to other States.<sup>31</sup> The rising prevalence of these actions indicates that the international debate has shifted from questioning the principle of invoking self-defence against terrorist groups to merely questioning what constitutes a proportional military response and whether victim-States have a right to infringe on the sovereignty of other States when carrying out such a response.<sup>32</sup> This can be taken as a sign that the debate surrounding counterterrorism has moved on some time ago from a discussion of *jus ad bellum* to etching out the various *jus in bello* issues that arise from an internationally acceptable military response to terrorist attacks.

Another important question related to *jus ad bellum* is whether terrorist attacks can be construed as 'armed attacks.' Antonio Cassese believed that: "A very serious attack either on the territory of the injured State or on its agents or citizens," which is not sporadic but rather forms "part of a consistent pattern of violent terrorist action," can be said to constitute an 'armed attack.'<sup>33</sup> He, nevertheless, stressed the importance of the imputableness of this attack to a State in order for it to be legally countered by force, meaning that if State responsibility cannot be established then only peaceful coercive actions (such as sanctions) can be legally justified in response to a terrorist 'armed attack.'<sup>34</sup> This opinion is a reiteration of the ICJ's ruling in *Nicaragua v. the United States* which linked the right of self-defence to the presence of sufficient evidence of State involvement in, or support of, rebel or insurgent activities.<sup>35</sup> The ICJ further reinforced

<sup>30</sup> C. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT'L L. 378-381 (2009).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 385.

<sup>33</sup> A. Cassese, *International Community's Legal Response to Terrorism*, 38 INT'L & COMP. L.Q. 596 (1989).

<sup>34</sup> *Id.* at 597.

<sup>35</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 392 (June 27). (Jurisdiction and Admissibility).



this ruling in *DRC v. Uganda*. In this case, the Court adjudicated that an armed attack by non-State forces cannot give rise to a right of self-defence if such attacks were not imputable to another State.<sup>36</sup> However, this is again based on the notion that ‘self-defence’ can only be enforced against States which we believe has no explicit foundation within the UN Charter.

Following the reasoning of the ICJ, whenever it is difficult to impute the acts of a particular terrorist organization to any State, no measures of force could be taken against it, even if this organization has effectively acquired State-like military capabilities. Such an attitude would enable the existence of terrorist safe-havens within States which are either incapable or unwilling to bring terrorists to justice. However, it is believed that the international community has a responsibility to deny the creation of such safe-havens as per Security Council Resolution 1373.<sup>37</sup> Even if the ICJ’s reasoning is accepted – that actions taken in self-defence against a certain State are not allowed if a connection cannot be established between that State and terrorist organizations actively within its territory – this cannot be taken as a denial of the inherent right of self-defence against the actual organizations.

The responsibility to dismantle the terrorist’s safe-havens, however, brings forward the question of sovereignty. Can a State commit an act of targeted killing within the territory of another without being in violation of Article 2(4) of the UN Charter? A number of legal opinions tied this issue to State consent. They claim that if a state consents to the perpetration of a targeted killing on its territory by another State, then no breach of territorial integrity can be said to have occurred.<sup>38</sup> Critics of this argument claim that States cannot give consent to a right they do not have; the right to take away the life of an individual.<sup>39</sup> However, this latter claim is only valid if the conflict against terrorism is looked at from a law enforcement perspective, or if the terrorist suspect is regarded as a non-combatant with protections under international human rights law.

Another point at issue is to identify the threshold of aggressiveness that would transform a terrorist attack from a criminal act to an “act of war.” It would be probably too difficult to come up with a universally accepted threshold that would fit all cases. Realistic expectations dictate that each incident should be assessed according to its own merits.<sup>40</sup> Concerning the specific case of Al-Qaeda, however, the Security Council has

<sup>36</sup> Armed Activities on the Territory of the Congo (Dem. Rep. of Congo v. Uganda), 45 I.L.M. 271. 146-147 (2006).

<sup>37</sup> S.C. Res. 1373, ¶ 2(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>38</sup> *Supra* note 20, at 205; N. Ronzitti, *The Legality of Covert Operations against Terrorism in Foreign States*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 17-24 (Bianchi ed., 2004).

<sup>39</sup> M. E. O’Connell, ‘Lawful Use of Combat Drones,’ Testimony delivered before the United States House of Representatives, Subcommittee on National Security and Foreign Affairs, Apr. 28, 2010, available at [http://www.fas.org/irp/congress/2010\\_hr/042810oconnell.pdf](http://www.fas.org/irp/congress/2010_hr/042810oconnell.pdf) (last visited May 7, 2011).

<sup>40</sup> O. GROSS & F. NÍ AOLÁIN, LAW IN TIME OF CRISIS 386-388 (2006)

asserted that its actions are a threat to international peace and security.<sup>41</sup> In Resolution 1368(2001), the Security Council affirmed that the principle of self-defence is applicable *vis-à-vis* Al-Qaeda,<sup>42</sup> and also expressed its readiness to respond to the threat posed by this organization by “all necessary steps.”<sup>43</sup> This should be understood as an international acknowledgement of the armed conflict status of the war against Al-Qaeda. Moreover, Al-Qaeda itself acknowledged its responsibility for “acts of arms aggression” such as the bombing of the USS Cole in 2000. It continuously referred to a ‘war’ with the United States and other countries.<sup>44</sup> Also, Al-Qaeda clearly met the aforementioned criteria set out by the ICTY, exhibiting signs of a clear hierarchical structure and an ability to wage military-like operations that drove several States to employ their armed forces against it.<sup>45</sup>

Assuming that terrorist attacks are in fact ‘armed attacks’ instigating an armed conflict between States and the NSAs, how would terrorists be classified, then? International humanitarian law as it stands only recognizes two categories of people who may be targeted by the State in an armed conflict: combatants, and civilians engaging in hostilities. However, both the United States and Israel have attempted to introduce a third category of legally targetable individuals dubbed ‘unlawful combatants’ who have forfeited any claims for protection under international humanitarian law.<sup>46</sup> This argument is based on the definition of a combatant in Article 4(A.2) of the Third Geneva Convention which states that the protection provided by the Convention covers members of militias or volunteer groups that are not part of the official armed forces of a state if they follow certain conditions. In order to meet these conditions, it is necessary to exhibit a hierarchical command structure, distinctive signs, openly carry arms, and conduct operations in accordance with the laws of war.<sup>47</sup> Dinstein stresses that terrorist organizations meet the first condition, seldom meet the second and third, and never meet the fourth. Hence they must not be afforded the status of combatants.<sup>48</sup> However, the second and third conditions mentioned above are hardly

<sup>41</sup> S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

<sup>42</sup> *Id.* pmb. ¶ 3.

<sup>43</sup> *Id.* ¶ 5.

<sup>44</sup> For a list of Al-Qaeda’s pronouncements and *Fatwas* calling for war against the United States and other countries, see United States Action, Al-Qaeda’s Declaration of War on the U.S. and the West, available at <http://www.unitedstatesaction.com/war-declaration2.htm> (last visited on Oct. 26, 2012).

<sup>45</sup> *Supra* note 28.

<sup>46</sup> A. Etzioni, Terrorists, Neither Soldiers nor Criminals, *MILITARY REV.* 108-118 (July-Aug. 2009); P. BOBBIT, TERROR AND CONSENT 265-266 (2008); S. David, *If Not Combatants, Certainly not Civilians*, 17 *ETHICS & INT’L AFF.* 138-140 (2006).

<sup>47</sup> Third Geneva Convention art. 4(A.2), available at [http://www.worldpress.org/specials/justice/Article\\_4.htm](http://www.worldpress.org/specials/justice/Article_4.htm) (last visited on Oct. 25, 2012).

<sup>48</sup> Y. DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 35-39 (2010).

relevant in the case of targeted killings because these operations are conducted against specific, identifiable individuals. In other cases, they are conducted against individuals who have publicly announced their enmity towards the victim-State. The insistence that these particular individuals bear distinctive insignias or openly carry arms therefore should not be an issue.

The final condition, adherence to the law of war, remains a legal matter which should be addressed by a competent tribunal established as per Article 5 of the Third Geneva Convention. This Article asserts that all belligerents detained in an armed conflict should be allowed the protections offered by the Convention until a tribunal determines their status. Eventually, the treatment of terrorists as legal combatants affords the executive authority the powers to detain suspected terrorists until the cessation of hostilities and it does not prevent them from trying these suspects for any crimes punishable under domestic or international law.

In light of this we find deplorable all previous attempts by the executive authorities in the United States and Israel to classify terrorists as ‘unlawful combatants,’ thereby ridding them of the protection of both international human rights and humanitarian law. In one sense, a certain body of law needs to be reformed in order to accommodate new developments in international relations. In the other, it is necessary to circumvent the law entirely by claiming that none of its established canons are capable of addressing the current state of affairs. Here, the Israeli High Court of Justice (“HCJ”) is commendable for pointing out that: (1) the current body of international law of armed conflict does not recognize such a third category of individuals;<sup>49</sup> and (2) even if individuals fell under this label they would still be entitled to protection, “even if most minimal, by customary international law.”<sup>50</sup> This includes Common Article 3 of the Geneva Conventions, as well as Article 75 of Additional Protocol I which prevents all kinds of physical and mental torture or other forms of degrading and inhumane treatment.<sup>51</sup> A similar position was finally adopted by the United States under the Obama administration. Executive Order 13491 signed on January 22, 2009 stressed that Common Article 3 of the Geneva Conventions provided the ‘minimum baseline’ for treating all individuals detained in an armed conflict including those apprehended in relation to the “War against Terrorism.”<sup>52</sup> The order revoked the “enhanced interrogation techniques” issued by President Bush in 2007 including waterboarding, shellacking and other degrading or humiliating treatments.<sup>53</sup>

<sup>49</sup> *The Public Committee against Torture v. Government of Israel*, HCJ 769/02 28 (2007).

<sup>50</sup> *Id.* at 25.

<sup>51</sup> J. Pejic, *Terrorists Acts and Groups: A Role for International Law?*, BRIT. Y.B. INT’L L. 79 (2004).

<sup>52</sup> See Executive Order 13491 - Ensuring Lawful Interrogations, available at [http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations) (last visited on Oct. 26, 2012).

The term ‘unlawful combatant,’ therefore, may be easily regarded as a legal deviation that has been used to justify the suspension of the law *vis-à-vis* the “War against Terrorism”; it would derogate established universal principles of international human rights and humanitarian law. Nevertheless, while that label can be indubitably rejected based on normative arguments, it is still understandable why governments are wary of equating ‘terrorists’ with ‘combatants’ as this may confer on the former a semblance of unwarranted legitimacy and stature. This has left States with a Hobson’s choice by which to pigeonhole terrorists within international law.

#### 4. Terrorists as Civilians Engaged in Hostilities

In its judgement on the legality of targeted killings, Israel’s HCJ found that terrorists could not be regarded as combatants for the same reasons provided by Dinstein and enumerated above.<sup>54</sup> The Court found them by exclusion to be civilians engaging in hostilities. Under the provisions of Article 51(3) of Additional Protocol I, these civilians may lose the protection afforded to them only when taking ‘direct part’ in hostilities, and for such a time in which they do.<sup>55</sup> The Court took an extra step and attempted to delineate the types of activities which can be regarded as “directly taking part in hostilities,” differentiating, *e.g.*, between moving combatants to and from areas of operations. In the Court’s opinion, it constituted an active engagement and justified loss of protection under the Geneva Conventions. And, merely providing monetary assistance to belligerents or selling them food and medicine would not qualify as directly taking part in hostilities.<sup>56</sup> Thereby, the Court attempted to mitigate the ambiguity of Article 5 of the Fourth Geneva Convention which did not clarify the types of actions that could be regarded as “hostile to the security of the State.”

While this approach was commendable for its attempt to outline certain operational and definitional guidelines for the State in carrying out its counterterrorism efforts, the Court still managed to elicit certain criticisms for its implicit toleration of what is known as the ‘revolving door’ phenomenon,<sup>57</sup> whereby terrorists can be combatants by night and civilians by day, thus providing them with “the best of both worlds,”<sup>58</sup> whereas the

<sup>53</sup> *Id.*

<sup>54</sup> *Supra* note 49, at 24-25.

<sup>55</sup> *Id.* at 30.

<sup>56</sup> *Id.* at 35.

<sup>57</sup> K. Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 17 (2004).

State is only provided a narrow time-window to target terrorists. This criticism, however, misses the point that the judgment actually managed to justify targeted killings in certain circumstances without affording terrorists the title of ‘combatants’ and without providing the State with its own version of “the best of both worlds.” Here, the State is allowed not only to use lethal force to eliminate terrorists, but also to strip detained terrorist suspects of their rights under international humanitarian law.

Based on the law of armed conflict applicable to the conflict in the Palestinian territories, the judgement of Israel’s HCJ went on to provide certain conditions for the legality of targeting killings. These conditions included: (1) the availability of accurate and verifiable information about the proposed targets to ensure that they are directly engaged in hostilities; (2) the adherence to the principles of necessity and minimizing collateral damage; and (3) undertaking an *ex post* independent investigation to ensure that these conditions have been met.<sup>59</sup>

The Israeli HCJ may thus have recognized the State’s imperative need to occasionally carry out targeted killings providing guidelines to do so within parameters of the law of armed conflict. However, it also laid down numerous conditions that effectively prevented the government from implementing a ‘policy’ of targeted killings, at the fore of which is the certified unfeasibility of capture and detainment.<sup>60</sup> Moreover, the Court also cautioned the government about the fact that certain acts which may be criminalized under anti-terrorism laws cannot be used as a justification for targeted killings within international humanitarian law because they do not amount to a direct participation in hostilities.<sup>61</sup> This means that an armed conflict model in which terrorists are regarded as civilians engaging in hostilities placed restrictions on adopting a policy of targeted killings almost as tight as those placed by the law-enforcement model.

## 5. Shifting Legal Interpretations in the United States: A Drone Program

In the beginning of his term, President Obama personally took the responsibility of approving every UAV operation after meticulously debating with members of his national security team the pros and cons of each attack and the legal merits which

<sup>58</sup> *Supra* note 20, at 193.

<sup>59</sup> *Supra* note 49, at 40.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 35.

would vindicate the use of lethal force against each target. Questions were raised about the value of a target and his position within the hierarchy of Al-Qaeda. Other questions revolved around the target's level of involvement in plots against the United States, and whether or not the apprehension of the target is possible without the use of lethal force. These questions were exhaustively deliberated before the go-ahead was signalled.<sup>62</sup> They coincided with a perception that targeted killings were either a "law enforcement measure," or being conducted against civilians engaging in hostilities within an armed conflict. Recently, however, the Obama administration apparently took some significant decisions that signal a shift in the course of the "War against Terrorism" is legally perceived in the White House Situation Room. In April 2012, President Obama authorized what is known as 'signature attacks' against suspected terrorists in Yemen.<sup>63</sup> This meant that drone attacks were authorized not necessarily against known terrorists, but rather against anonymous targets based on their 'intelligence signatures' or their different behavioural patterns as picked up by human and signal intelligence sources and data from aerial surveillance.<sup>64</sup> Moreover, in order to minimize the civilian casualties, the U.S. government began regarding all military age males within a strike zone as legitimate targets.<sup>65</sup> This is seemingly based on the logic that the mere proximity to a terrorist indicates an engagement in terrorist, or terrorist-abetting, activities. Based on the abovementioned arguments in this paper, it is my belief that the blanket authorization of lethal force against 'suspected' terrorists, without the presence of hard evidence of their partake in hostilities or the verification of their identities, can only be legally justified under an armed conflict paradigm in which terrorists are equated with combatants.

These developments in the U.S. drone program should be considered in tandem with President Obama's views on enhanced interrogation techniques. His views as manifested in Executive Order 13491 acknowledge the rights of detained terrorist suspects to the protections afforded not only by Common Article 3 of the Geneva Conventions, but also by those within the Convention against Torture, and the Standard Army Regulations on Intelligence Collection and Interrogation which are

<sup>62</sup> J. Becker & S. Shane, *A Measure of Change: Secret "Kill List" Proves a Test of Obama's Principles and Will*, N. Y. TIMES, May 29, 2012, available at <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&r=0> (last visited on Oct. 26, 2012).

<sup>63</sup> G. Miller, *White House approves broader Yemen drone campaign*, WASH. POST, Apr. 26, 2012, available at [http://www.washingtonpost.com/world/national-security/white-house-approves-broader-yemen-drone-campaign/2012/04/25/gIQA82U6hT\\_print.html](http://www.washingtonpost.com/world/national-security/white-house-approves-broader-yemen-drone-campaign/2012/04/25/gIQA82U6hT_print.html) (last visited on Oct. 26, 2012).

<sup>64</sup> *Id.*

<sup>65</sup> G. Miller, *U.S. drone targets in Yemen raise questions*, WASH. POST, June 3, 2012, available at [http://www.washingtonpost.com/world/national-security/us-drone-targets-in-yemen-raise-questions/2012/06/02/gJQAP0jz9U\\_story.html](http://www.washingtonpost.com/world/national-security/us-drone-targets-in-yemen-raise-questions/2012/06/02/gJQAP0jz9U_story.html) (last visited on Oct. 21, 2012).

inherently compliant with international humanitarian law.<sup>66</sup> The author opines that this conception of the rights of terrorist detainees, coupled with the precepts upon which the drone program was extended, indicates that the current U.S. approach to trans-national terrorism is in practice, gradually aligning with an armed-conflict perception of a War on Terror in which suspected terrorists are surreptitiously treated as combatants.

The case of Anwar al-Awlaki is another indication to this shift. The operation against al-Awlaki in September 2011 raised controversy due to the fact that he was a U.S. citizen entitled to protection under the Fifth Amendment of the US constitution which prohibits the deprivation of life “without due process of the law.” However, a legal memorandum drafted by lawyers in the Office of the Legal Counsel justified the use of lethal force against al-Awlaki on the grounds that he was “taking part in the war between the United States and Al Qaeda” and therefore was “a lawful target in the armed conflict” against the organization.<sup>67</sup> Drafters of this memo also asserted the irrelevance of U.S. executive orders banning assassinations to the case of al-Awlaki.<sup>68</sup> These executive orders, the memo claimed, only proscribed killings of political leaders in times of peace.<sup>69</sup> By accepting these legal arguments, the Obama administration is thus not only reiterating the armed conflict paradigm of counterterrorism, but is also establishing the trend of equating terrorists with combatants in an armed conflict. This gives the United States leeway to conduct a sustainable policy of targeted killings against terrorist suspects without the arduous legal constraints of a ‘law enforcement’ model, or a “civilians engaging in hostilities” model.

## 6. Conclusion

In this article, it was argued that targeted killings were not necessarily illegal. Subsequently, an attempt was made to flesh out the conditions under which these killings can be acceptable within international law. It was found that an armed conflict model of counterterrorism gives greater leeway to States in carrying out targeted killings. In addition, it was claimed that both law and State-practice do not prohibit the application of international humanitarian law to the “War against Terrorism.”

<sup>66</sup> *Supra* note 52.

<sup>67</sup> C. Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N. Y. TIMES, Oct. 8, 2011, available at <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all> (last visited on Oct. 26, 2012).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

However, the law still places a number of limitations which inhibit States from adopting targeted killings as an everlasting policy. A policy as such can only be justified if the “War against Terrorism” is viewed from the prism of an armed conflict in which terrorists take on the label of combatants. It was opined that international humanitarian law does not place substantial restrictions against accepting terrorists as legal combatants. The main reasons behind disregarding this interpretation are political in nature. States confronting terrorists would be averse to promote them to an exalted status. They would also have to abide by the legal implications of this designation which would entail affording detained terrorist suspects with the protections inherent in international humanitarian law proscribing torture and inhumane treatment.

Nonetheless, the United States is seemingly adopting the legal interpretation of the terrorist-as-combatant; and it appears that the drone program has been expanded and justified based on that interpretation.

Considering that few questioned the legitimacy of the operation to eliminate Osama Bin Laden, the global attitudes towards targeted killings are rapidly shifting. These operations can no longer be condemned *prima facie* as extrajudicial killings without first assessing the nature of the wider conflict in which these operations take place. International law should catch up with these shifting attitudes in order to avoid the repetition of another Kosovo-like situation where certain instances of the use of force are deemed legitimate albeit illegal. It must be reiterated that finding legal justifications for targeted killings neither require a radical upheaval in the existing body of international humanitarian law, nor necessitate creating an image of a demonic ‘unlawful combatant’ stripped of any rights or protections against torture or ill-treatment. Interpretations of the law within the context of the “War against Terrorism” should not be inconsistent with established gains made by international law in the area of human rights.