

**INTERSECTIONS: LETHAL TARGETED  
KILLINGS AND THE RIGHT TO LIFE  
CASE STUDY OF KENYA, ISRAEL AND THE  
UNITED STATES OF AMERICA**

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Submitted to

Central European University

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*In partial fulfillment of the requirements for the degree of Masters of Laws*

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*Budapest, Hungary*

2015/2016

# ABSTRACT

Some States that are grappling with the ever-changing phenomenon of global terrorism, have gradually adopted targeted killing strategies as part of their counter-terrorism efforts, this has resulted in the death of suspected terrorists and innocent by-standers. The purpose of this thesis is to interrogate the legality of targeted killings in international law; and to assess whether targeted killings breach the international law protection of the right to life from arbitrary deprivation.

It is argued that although targeted killings can be legally justified, under the law enforcement and armed conflict paradigm, the danger with targeted killings lies in the threat that this practice poses to the right the right to life especially in non-international armed conflicts.

# Table of contents

ABSTRACT.....	i
Table of contents.....	ii
List of Abbreviations .....	iv
Introduction.....	1
Methodology .....	4
Thesis Preview and Road Map .....	4
Chapter 1: Defining Lethal Targeted Killings .....	7
1.1: Targeted Killings Defined .....	10
1.2: Targeting an Individual: The Procedure .....	11
1.3: State Practice of Targeted Killings .....	14
Chapter 2: The Legality of Targeted Killings Operations: Legal Framework.....	19
2.1: Determining the Applicable framework .....	20
2.2: The Law Enforcement Framework .....	21
2.3: The Armed Conflict Framework * .....	28
Chapter 3: The Right to Life and Targeted Killings: Extra Judicial Executions or Legitimate means of defense? .....	41
3.1: Law Enforcement, Targeted Killing, and the Right to Life .....	43

3.2: Targeted Killing, Armed Conflict, and the Right to Life .....	48
Conclusions and Recommendations .....	56
Recommendations .....	58
Bibliography .....	62

# List of Abbreviations

ATPU	Anti-Terrorism Police Unit of the Kenyan Police Forces
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
UN	United Nations
US	United States of America
UNSC	United Nations Security Council

# Introduction

The attacks on the United States and the subsequent re-orientation of strategies and approaches adopted by the United Nations Security Council on the prevention and counter-terrorism measures marked a turning point for the war against terror.<sup>1</sup>

The planned series of terrorist attacks, on 9<sup>th</sup> September 2001 (“9/11”), which claimed 2,974 lives served as an indication of the metamorphosis of the terrorism into a “global phenomenon” capable of causing mass destruction to human life and property,<sup>2</sup> therefore requiring a more direct strategy aimed at countering the terrorism threat both nationally and internationally.

Terrorism – the “perpetration of a criminal threat(s) or act(s) intended to spread fear or coerce a national or international authority to take or refrain from taking an action”;<sup>3</sup> classified by the United Nations Security Council (“UNSC”) as the “most serious threat against international peace and security in the twenty first century and a challenge to all states and to all of humanity,<sup>4</sup> is not a new phenomenon which has been in existence since the inception of nation states. However, the nature of terrorism has changed and keep changing fundamentally, thus taxing States to adopt innovative approaches of addressing transnational terrorism.

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<sup>1</sup> K. N. Trapp, *State Responsibility for International Terrorism: Problems and Prospects* (Oxford: Oxford University Press, 2011) pp 75 - 90

<sup>2</sup> M. Smith, “A Decade of Counter-Terrorism Strategies”, United Nations Chronicle No. 2 (2011) P. 15

<sup>3</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/1, Special Tribunal for Lebanon, 16 Feb 2011, pp. 2-3 available <http://www.refworld.org/docid/4d6280162.html> [accessed 25 October 2015]

<sup>4</sup> It is noted that one of the objectives for the establishment of the United Nations is – under the auspices of its Security Council – the maintenance of international peace and security through effective collective measures for the prevention and removal of threats to peace and suppression of any other breaches of the peace, See Article 1, UN, Charter of the United Nations, 24 October 1945,1 UNTS XVI available at <http://www.refworld.org/docid/3ae6b3930.html> [accessed on 6 December 2015]

also See United Nations, Declaration on the Global effort to Combat Terrorism, UN Doc S/RES/1377 (2011) 2<sup>nd</sup> Preambular paragraph; Declaration on Threats to International Peace and Security caused by Terrorist Acts, UN Doc S/RES/1988 (2011) 2<sup>nd</sup> Preambular Paragraph; and the World Summit Outcome UN Doc A/RES/6011(2005) Para. 81; see also J. Rhadika, Defining International Terrorism: Formulation of a Universal concept out of the Ideological and Overlapping Approaches.” J. Phil. Int’l L 4 (2013) pp 56 - 74 at p. 56

Prior to 9/11, the international community under the stewardship of the United Nations (“UN”) had condemned terrorists’ activities and adopted several international treaties aimed at addressing these terrorist activities including taking hostages;<sup>5</sup> manufacture and storage of unmarked plastic explosives;<sup>6</sup> hijacking planes;<sup>7</sup> and the threat of nuclear terrorism.<sup>8</sup> Additionally, the UNSC, in 1999, imposed selective travel bans, asset freezing and arms embargo on members of the Al-Qaeda and Taliban.<sup>9</sup>

Despite the existence of this array of measures adopted under the framework of the United Nations Security Council, the shock and horror of the events of 9/11 provided justification for states to openly adopt measures to address transnational terror that straddle the grey area between International Humanitarian Law, (“IHL”), and International Human Rights Law, (“IHRL”); as a means of protecting their citizens – one such measure was the adoption of the controversial policy of targeted killing of suspected terrorists.

Targeted killings, defined by the Special Rapporteur on extra-judicial, summary or arbitrary executions as the “intentional and deliberate use of lethal force, with a degree of pre-meditation against an individual(s) identified in advance, under the cover of law, by a state or its agents, or in armed conflict situations, by an organised armed group”,<sup>10</sup> are increasingly being used as justified responses to address the threat of terrorists and terrorist groups.

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<sup>5</sup> See the International Convention against the taking of Hostages, 1979

<sup>6</sup> See the Convention on the Marking of Plastic explosives, 1998

<sup>7</sup> See the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970

<sup>8</sup> See the International Convention for the Suppression of Acts of Nuclear Terrorism, 2005

<sup>9</sup> UNSC Res. 1267, (1999) [Afghanistan] October 15, 1999 S/RES/1267

<sup>10</sup> United Nations General Assembly, A/HRC/14/24/aAdd.6, 28 May 2010, Report of the Special Rapporteur on extra-judicial, summary or arbitrary execution, Philip Alston Addendum Study on Targeted Killings, P.3, Para 1-2

This counter-terrorism measure has been championed by Israel and the United States, with Kenya – an ally to both states – recently adopting a strategy is situated in the grey area between targeted killings and summary executions to fight terrorism on Kenyan soil – continues to be a subject of growing controversy, with proponents arguing that invoking due process proceeding are inadequate when dealing with terrorists, and opponents claiming that a more coordinated law enforcement is preferable to denying the suspect terrorists their right to a fair trial, and their right to life<sup>11</sup>

The challenges to the rule of law presented by targeted killing is further complicated by the fact that on the one hand States need to uphold their international obligations under IHRL and IHL; and on the other hand, they also need to maintain national peace and security.<sup>12</sup> With the not so favourable outcome of States reinterpreting rules and norms to meet their national security interest needs. A point that is reiterated by Rebecca Sanders who notes that, “States tend to eschew the rules that undermine their perceived national interests and interpret law to facilitate their agendas”.<sup>13</sup>

The research will critically analyse the legality of targeted killings under international humanitarian and international law. With a focus on the targeted killing strategy as adopted and used by Kenya, Israel, and the United States, the research will analyse whether targeted killings breach the threshold for protection of the right to life from arbitrary deprivation.

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<sup>11</sup> A. Altman, “Introduction” in C. Kinkelsten, J.D. Ohlin, and A. Altman (eds.) *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012) pp 1- 27 at 4

<sup>12</sup> *Ibid*

<sup>13</sup> R. Sanders, “Legal Frontiers: Targeted Killings at the Borders of War” J. Hum. Rights (2014) pp 512 – 536, at p. 512



In particular, the research will attempt to answer the following questions:

Are targeted killings of members of terrorist groups such as the Al-Qaeda, Al-Shabaab, and Hamas; who bear a dual personality of civilian or combatant,<sup>14</sup> legal under international humanitarian law and international human rights law? What implications does this have for the international law protection of the right to life from arbitrary deprivation?

## **Methodology**

The research will mainly use primary and secondary written sources in the Library and online databases. The information gathered through the research will be assessed using a comparative analysis of the legal framework and state practice.

The choice to use a desk research is guided by the fact that targeted killings are military strategies which is information that states do not share, therefore the research will focus on materials that have been produced in research papers, books, case records and documentaries.

Additionally, the research will, in as much as is practical, use information gained through international/ regional/ academic conferences and workshops directly related to the research area.

## **Thesis Preview and Road Map**

### **Chapter 1: Defining Targeted Killings**

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<sup>14</sup> M. Maxwell, “Rebutting the Civilian Presumption: Playing Whack-a-Mole without a Mallet”, in C. Kinkelsten, J.D. Ohlin, and A. Altman (eds.) *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012) pp. 31 – 59, at p.46

This part of the research will look at the definition of targeted killings. It will also provide an overview of the state's (United States and Israel) practice of targeted killings as a counter-terrorism measure.

## Chapter 2: The Legal framework

Bearing in mind that the countries considered in this research have different degrees of proximity<sup>15</sup> to terrorists and terrorist groups, this chapter will review the legal framework under which targeted killing policies are situated.

Therefore, the chapter will discuss the international legal framework governing armed conflict as it relates to counter-terrorism operations, that is to say, International Humanitarian Law, ("IHL"). The chapter will also discuss the counter-terrorism operation of targeted killings as situated in the International Human Rights Law framework human rights, ("IHRL"); and the national level legal frameworks within which the States get authority to implement targeted killing programs. The section will also look at the case studies and analysis of the legal framework as applied by Israel, Kenya, and the United States

## Chapter 3: The Right to Life and Targeted Killings: Extra Judicial Executions or Legitimate means of defense?

Reflecting on the intersection between international human rights and international humanitarian law the paper will analyse the legal challenges associated with and obstacles posed by targeted killings policies. Particularly, the chapter will discuss the challenge

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<sup>15</sup> Proximity in this context is looked at in relation to the casual link between terrorist activities and the resultant targeted killing operation. Therefore, proximity will refer to proximity in time and proximity in space.

presented by targeted killing policies and the right to life, that is to say, the challenge of distinguishing between targeted killings as extra-judicial killings or a killing falling within the ambit of the exceptions to the prohibition of the arbitrary deprivation of life.

#### Conclusion and recommendations

The final chapter will provide a conclusion and propose and develop policy recommendations aimed at creating a nuanced approach to targeted killings policies that address the challenges and obstacles the counter-terrorism measure creates for the principles of IHL and IHRL.

# Chapter 1: Defining Lethal Targeted Killings

The first decade of the 21<sup>st</sup> century witnessed the changing phenomenon of terrorism<sup>16</sup> which morphed from a national concept, into an international concept; with more aggressive tactics and an increase in the impact of such terroristic attacks.<sup>17</sup> Discussing the changing nature of terrorism and State responses to the same, Amichai Cohen and Tal Mimran observe that State responses to the challenge of terrorism have been two fold, namely: striking a balance between security interests and IHRL; and “defining” their anti-terrorists activities as falling within the ambit of armed conflict and thus situated under IHL.<sup>18</sup>

It should be noted that under the second response, States have essentially been able to find justification for countering terrorism using war-like measures including but not limited to lethal targeted killings of suspected terrorist leaders.<sup>19</sup>

Israel, Kenya, and the United States are faced with the challenge of fighting amorphous non-state actors in the form of ‘terrorists’ and ‘terrorist organisations’. Israel and the United States have openly used a policy of targeted killings as a counter-terrorism measure.

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<sup>16</sup> Terrorism in the context of this paper is defined as the “perpetration of a criminal threat(s) or act(s) intended to spread fear or coerce a national or international authority to take or refrain from taking an action” Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/1, Special Tribunal for Lebanon, 16 Feb 2011, pp. 2-3 available on [www.refworld.org/docid/3ae6b3930.html](http://www.refworld.org/docid/3ae6b3930.html) [accessed on 6/12/2015]

<sup>17</sup> M. Smith, “A Decade of Counter-Terrorism Strategies”, United Nations Chronicle No. 2 (2011) P. 15

<sup>18</sup> A. Cohen and T. Mimran, Response to Shiri Kerbs’ Don’t Ask, Don’t Tell: Secrecy, Security, and Oversight of Targeted Killing Operations, *The Israel Democracy Institute* (2015) p. 75

<sup>19</sup> *ibid* at p. 75 - 76

Israeli authorities openly acknowledged the use of the controversial targeted killing policy after the beginning of the second intifada in September 2000.<sup>20</sup> The Israel policy is aimed at “eliminating individuals who pose a serious threat to national security”.<sup>21</sup>

The United States also conducts targeted killing operations as a means of “protecting its citizens and preventing them from being victims of terrorist attacks”. And has a long history<sup>22</sup> of carrying out pre-emptive strikes against individuals it considers a serious threat to its national security.<sup>23</sup>

Kenya on the other hand has not pursued an open policy of targeted killings of terrorists, but has been implicated for extra-judicial killings of suspected criminals including Muslim clerics who are supporters of the Al Shabaab terrorist group.<sup>24</sup> Human Rights Watch notes that

“[...] The Anti-Terrorism Unit (“ATPU”), in particular, has been linked to enforced disappearances and extrajudicial killings in the context of counter terrorism operations and operations aimed at the Al Shabaab”

In a recent exclusive and investigative documentary aired on the 8<sup>th</sup> of December 2014,<sup>25</sup> Al Jazeera had anonymous interviews with members of the ATPU, who noted that one of the counter-terrorism programs of the Government of Kenya is the targeting of Muslim radicals, with the ATPU playing a central role of preventing terrorism and eliminating suspected terrorists.<sup>26</sup>

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<sup>20</sup> S. R. David, “Fatal Choices: Israel’s Policy of Targeted Killings”, *Mideast Security and Policy Studies*, no. 51 (Ramat, Israel: The Begin-Sadat Centre for Strategic Studies, Bar-Ilan University, 2002) p. 113

<sup>21</sup> J. D. Melamed Visbal, “Legal and Democratic Dilemma in the Counter-terrorism Struggle: The Targeted Killing Policy”, *Revisat De Derecho*, Universidad Notre 35 (2011) 290 – 312, at p. 294

<sup>22</sup> It is noted however, that a discussion of the history of the use of targeted killings by the United States and Israel, are outside the scope of this paper. For a detailed discussion of the same please see J. D. Melamed Visbal, “Legal and Democratic Dilemma in the Counter-terrorism Struggle: The Targeted Killing Policy”

<sup>23</sup> Human Rights Watch, Kenya: Security Bill Tramples Basic Human Rights – Law Makers Should Reject Amendments, December 13, 2014 available at [www.hrw.org/news/2014/12/13/kenya-security-bill-basic-rights](http://www.hrw.org/news/2014/12/13/kenya-security-bill-basic-rights)

<sup>24</sup> Ibid

<sup>25</sup> Aljazeera, Inside Kenya’s death Squads available at [interactive.ajazeera.com/aje/KenyaDeathSquads/#film](http://interactive.ajazeera.com/aje/KenyaDeathSquads/#film)

<sup>26</sup> ibid

Interestingly under the recent Security Laws (amendment) Act,<sup>27</sup> the government of Kenya seems to have taken a stand that gave security agencies wide and sweeping powers in their counter-terrorism activities.<sup>28</sup> These powers which are vague, can be interpreted on the basis of the conduct of the ATPU to include the use of lethal force to eliminate radical Muslim Clerics who are suspected terrorist leaders.<sup>29</sup>

In the three countries, the practice is referred to by different, ‘value laden’ terms including but not limited to ‘assassination policy’; ‘elimination policy’; ‘liquidation’; and ‘long range hot pursuit’.<sup>30</sup> It is noted that despite the variety of terms used to refer to targeted killings, ‘targeted killings’, is a term, does not have a universal definition.

Defining targeted killings as a counter-terrorism policy would play an important role in International Law, under which the legality of targeted killings can be determined.

It is reiterated that this paper intends to discuss the intersection between IHL and IHRL in relation to targeted killing operations and the right to life, it follows that the discussions will focus on the legality of targeted killing operations as a counter-terrorism measure used by Israel, Kenya and the United States.

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<sup>27</sup> Kenya: The Security Laws (Amendment) Act, 2014

<sup>28</sup> Section 30 and 30F (1) and (2) of the Prevention of Terrorism Act as amended by The Security Laws (Amendment) Act

<sup>29</sup> Supra note 25 mentions and contains the CID files on Muslim clerics killed in counter-terrorism framework

<sup>30</sup> R. Otto, *Targeted Killings and International Law: With special regard to Human Rights and International Humanitarian Law* (London: Springer Heidelberg Dordrecht, 2012) p. 9

## 1.1: Targeted Killings Defined

Different scholars have adopted different definitions to properly situate the practice of state sponsored targeted killings in international law. Some scholars have adopted, what Shiri Krebs refers to as, the “context-oriented” approach to defining targeted killings. Citing several authors, Krebs highlights that targeted killings can be defined as; “attacks on individual terrorists with a quality of premeditation; targeting of a suspected terrorist who is not in the territory of the state which carries out the attack”.<sup>31</sup>

Stressing the lack of a general definition of targeted killing Melamed Visbal also adopts a context-oriented approach to defining targeted killings, he proposes three context specific definitions thus; targeted killings is the “premeditated killing of an individual by a government or its agents; the intentional killing of an a specified civilian or unlawful combatant who cannot be reasonably be apprehended and who is taking direct part in hostilities; and the intentional slaying of a specific individual or group of individuals under taken with explicit governmental approval”.<sup>32</sup>

Despite the existence of these various definitions, in this context the term targeted killings shall have the same meaning as proposed by Philip Alston, that is to say, targeted killings are the “intentional and deliberate use of lethal force, with a degree of pre-meditation against an individual(s) identified in advance, under the cover of law, by a state or its agents, or in armed conflict situations by organized armed groups”.<sup>33</sup>

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<sup>31</sup> S. Krebs, “Don’t Ask, Don’t Tell: Secrecy, Security, and Oversight of Targeted Killing Operations”, *The Israel Democracy Institute, Policy Paper 9E*, August 2015, at p. 11

<sup>32</sup> J. Melamed Visbal, Legal and Democratic Dilemmas in the Counter-Terrorism Struggle: Targeted Killing Policy, *Revisita De Derechho, Universidad De Notre* 35 (2011) 290 – 312 at p. 293 - 294

<sup>33</sup> Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN HUMAN RIGHTS COUNCIL, A/HRC/14/24/Add.6*, 2010 p. 3, para 1 -2

According to Nils Melzer the constituent elements of targeted killings, are: use of lethal force; intent, premeditation and deliberation to kill (*dolus directus*); targeting of individually selected persons; lack of physical custody; and attributability to a subject of international law.<sup>34</sup>

On the intention or *dolus directus*, it is highlighted that state sponsored targeted killings are similar in nature and intention to capital punishment, targeted killings are different because they happen without a judicial sanction through a sentence of death.

## 1.2: Targeting an Individual: The Procedure

Having established what targeted killings entails, it is vital to briefly discuss the procedure for determining how individuals are identified for targeting within the counter-terrorism framework.

Targeted killings carried out during the course of an armed conflict situation has a fairly standard procedure guided by the rules of IHL, which dictate that a terrorist and or civilians taking direct part in hostilities can be lawfully targeted for killing if he or she carries his weapons openly, during the course of combat, and if targeted while in the terrorist training camp.<sup>35</sup>

As a starting point, it is recalled that individuals targeted under this counter-terrorism measure are usually known and or suspected terrorists who, per Michael Gross, act on behalf of known terrorists' organisations and groups<sup>36</sup> such as the Hamas, Hezbollah, Al Shabaab, and Al Qaeda.

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<sup>34</sup> N. Melzer, *Targeted Killings in International Law* (Oxford: Oxford University Press, 2008) 3 - 4

<sup>35</sup> M. Gross, "Assassination and Targeted Killing: Law Enforcement, Execution or Self-defense?", *Journal of Applied Philosophy* 3 (2006) 323 – 336 at p. 323

<sup>36</sup> *ibid*



According to Michael Gross, such targeting of suspected terrorists involves two simple steps, that is to say: compilation of a list of individuals who comprise specific threats to the targeting state(s); and killing them when the opportunity arises during armed conflict.<sup>37</sup>

The approach highlighted by Michael Gross although overly simplistic accurately summarises the procedures for identifying and targeting an individual within the law of war paradigm

Procedure however becomes an issue where individual is targeted on the basis of past conduct, and not in an armed conflict situation, that is to say when the individual targeted is not actively engaged in hostilities.

In this situation, where the targeted individual is not engaged in active combat, the procedure grounded squarely on intelligence gathered on a person believed to be a key member of a terroristic group and or organisation.

Jane Mayer in her piece about how the Pentagon chooses, vets and approved a target, describes how targets are identified and approved in non-armed conflict situations. She writes:

Some people are approved for killing on sight, others additional permission is needed. The target's location [is also considered] if a school, hospital, or mosque is within the likely blast radius of a missile, it is weighed by a computer algorithm before a lethal strike is authorised. [It should be noted that] a name does not get onto the target list until there are two verifiable human sources and substantial additional evidence that the person is an enemy<sup>38</sup>

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<sup>37</sup> M. Gross, "Assassination and Targeted Killing: Law enforcement, Execution or Self-defense?", *Journal of Applied Philosophy* 3 (2006) p. 323 – 336 at p. 324

<sup>38</sup> J. Mayer, "The Predator War, New Yorker (Oct. 26, 2009) quoted by J. C. Hardwood, "Knock, Knock: Who's There? Announcing Targeted Killing Procedures and the Law of Armed Conflict", *Syracuse Journal of International Law and Commerce* 40 (2012 2- 26 at p. 15

Further expounding on the procedure for deciding on targets, as practiced by the US, John Hardwood observes that:

Whether [an] individual [is] targeted in a particular location will depend upon considerations specific to each case including those related to the imminence of the threat, the sovereignty of other states involved, and the willingness and ability of those states to suppress the threat the target poses<sup>39</sup>

Despite this elaborate procedure adopted by States in identifying a target, the mere fact that the attacks are carried out remotely leaves room for the targeting an individual by mistake – mistaken identity.

David Kretzmer observes that some States, such as the United States, Kenya, and Israel; that deploy targeted killings as a counter-terrorism measure argue that the targeted killing of terrorists are “legitimate acts of war carried out as a part of the sates’ right to inherent self-defence”.<sup>40</sup> He further notes that although some scholars have opposed the justification of the use of targeted killings on the grounds given by these states;<sup>41</sup> some experts in the human rights field, such as Kenneth Roth the Executive Director of Human Rights Watch, have “conceded that there are incidences in which a targeted killing may be justified both legally and morally”.<sup>42</sup>

These concessions, writes Kretzmer, are founded on the fact the granting of a free reign to states to kill enemies of the State, including suspected terrorists; on the one hand, would be

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<sup>39</sup> J. C. Hardwood, *ibid* p. 17

<sup>40</sup> D. Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?”, *EJIL* 16 (2005) p. 171 – 212 at p. 173

<sup>41</sup> *ibid*

<sup>42</sup> *ibid*

cause for concern for abuse of State authority vis a vis individual rights and liberties; while dismissing the arguments made by States, such as Israel and the United States, for legitimately targeting suspected terrorists, on the other hand, would be counter-productive.<sup>43</sup>

In such situations where there are disagreements over morality and legality of targeted killings, Kretzmer calls for an analysis of the legal framework under which the legality of targeted killings can be determined<sup>44</sup> - a task taken up in the next section of this research.

### 1.3: State Practice of Targeted Killings

#### *The United States of America*

The US, according to Gabriella Blum and Philip Heymann,<sup>45</sup> is a more recent participant in the use of targeted killings, with the earliest reports of assassination attempt in 1975 against Fidel Castro, Ngo Dinh Diem, and General Rene Schneider. However these assassination plots were covered in a shroud of secrecy – they were never publicly acknowledged, justified or accounted for;<sup>46</sup> and in 1981 by virtue of Executive Order 12333 assassinations as part of the US international relations policy were banned – this ban remains in place to date.<sup>47</sup>

In 1998 there was a change in the US policy, following the twin bombings of the US embassies in Nairobi and Arusha – Bill Clinton issued what Blum and Heymann refer to as an Executive Order, authorizing the use of lethal force in self-defence against Al-Qaeda in Afghanistan.<sup>48</sup>

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<sup>43</sup> Ibid at p. 174

<sup>44</sup> Ibid

<sup>45</sup> G. Blum and P. Heymann, 'Law and Policy of Targeted Killings', Harvard National Security Journal 1 (2010) 145 – 170 at p. 150

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Ibid

This was followed by Executive Order on the Authorization of the Use of Military Force<sup>49</sup> promulgated immediately the 9/11 attacks on the US, by President George Bush. This is the primary domestic law governing U.S sponsored targeted killings which authorises “the use of United States Armed Forces against those responsible for the recent attacks launched against the United States”,<sup>50</sup> it further authorises the

President to

use all necessary and appropriate force against nations, organisations, or persons he determines planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations, and persons<sup>51</sup>

Following the 9/11 attacks the United States declared war with members of an organisation – Al Qaeda. According to Maxwell the United States justification for use of targeted killings against Al Qaeda, the Taliban, and associated forces is: The law of war; and self-defence.

Heymann and Kayyem in their assessment of the U.S sponsored targeted killing operations note that the United States in its war on terror has adopted approaches including cooperation with foreign governments; invasion of a country with a military force large enough to destroy the terrorists or change the regime as was the case in Afghanistan; occupation by military means as was the case in Iraq; and targeted killings.<sup>52</sup>

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<sup>49</sup> Pub. L 107 – 40, 115 Stat. 224(2001)

<sup>50</sup> Ibid preamble

<sup>51</sup> Section 2(a) of the Authorization of the Use of Military Force

<sup>52</sup> P. B. Heymann and J. N. Kayyem, Preserving Security and Democratic Freedoms in the war on Terrorism (Cambridge: Mass.) Belfer Centre for Science and International Affairs, November 12, 2004, p. 66 available at [www.belfercenter.hks.harvard.edu/files/ltls\\_final\\_5\\_3\\_05.pdf](http://www.belfercenter.hks.harvard.edu/files/ltls_final_5_3_05.pdf) [accessed on the 3/22/2016]

They highlight the challenges of the approaches including but not limited to diplomatic, legal and democracy challenges; they however note that of the various approaches used targeted killings “have become a real and accepted option within the United States as the only reasonable and effective way of reaching a hostile target”<sup>53</sup>

The US uses two types of targeted killings, personality strikes and signature strikes. Personality strikes target named, allegedly high-value leaders of armed, non-state groups like Salim Sinan al Harethi and Nek Mohammed; while Signature/ profile strikes – based on a pattern of life analysis. These strikes target groups of men who bear certain signatures/ defining characteristics associated with terrorist activity, but whose identities are not known.<sup>54</sup>

The final decision to undertake a personality targeted killing in the US rests with the President; however, there is no procedure on decision making in relation to signature strikes – which are particularly problematic and open to abuse and mistake.<sup>55</sup>

### *Targeted Killing Practice in Israel*

Israel adopted an open policy of targeted killings in 2000, this was after the declaration of the second intifada. Israel’s targeted killing operations have been mainly in Gaza and occasionally in the West Bank.

The procedure for approving targeted killing operations in Israel involves an intelligence “incrimination” of the target, which identifies the target as a person actively involved in acts of terrorism; a plan for the time, place and means of the attack; consideration of the danger of

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<sup>53</sup> *ibid*

<sup>54</sup> International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drones Practice in Pakistan*, (September, 2012) p. 13

<sup>55</sup> *ibid*

collateral damage; and a review of potential political ramifications. the complete plan must receive the approval of a top-level political official. There is no external review process, judicial or other

The Israeli policy is that only members of a terrorist organisation who are actively involved in an ongoing and direct manner in launching, planning, preparing, or executing terrorist attacks are lawful targets. In addition, targeted killing operations will not be carried out where there is a reasonable possibility of capturing the terrorist alive

### *Kenyan Targeted Killing Practice*

Kenya, considered a close ally to the United States in the fight against terrorism in Africa;<sup>56</sup> has suffer numerous terrorist attacks starting with the 1998 United States Embassy, in Nairobi, bombings by the Al Qaeda<sup>57</sup> to the most recent 2015 Al Shabaab<sup>58</sup> attack in Garissa University.<sup>59</sup> As a response to the increasingly violent terrorist attacks in Kenya, the Kenyan Government enacted the Anti-Terrorism Act,

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<sup>56</sup> J. Prestholdt, "Kenya, the United States, and Counter-Terrorism", *Africa Today* 4 (2011) p. 2 – 27 at p. 9

<sup>57</sup> The Al Qaeda operatives have attacked Kenya twice. The first Al Qaeda attack, which was the first major terrorist attack, was on November 7<sup>th</sup>, 1998; when operatives detonated a car bomb at the American Embassy in Nairobi resulting in 213 deaths and 4000 injuries; four years after this attack, Al Qaeda operative again two simultaneous attacks on an Israeli owned hotel in Mombasa and an Israeli Airline flying out of Moi Airport. This attack resulted in the death of 183 people and 80 injuries, all of which happened at the Paradise Hotel in Mombasa. The Missile attack on the Airline missed its target. No further reports have been made relating to Al Qaeda attacks in Kenya. See F. Nzes, "Terrorist Attacks in Kenya reveal Domestic Radicalisation", CTC Sentinel 5 (2012) pp.12 - 15

<sup>58</sup> Al Shabaab, an Al Qaeda affiliate, has since 2011 been carrying out series of attacks on Kenya. Operating in neighboring Somalia, the Al Shabaab, have claimed responsibility for numerous terrorist attacks including: several low-grade attacks on buses, police posts, pubs, villages, and shops. 2013 witnessed a change in the attacks used by the Al Shabaab, with a higher death toll recorded for the West Gate Mall, where Al Shabaab operatives entered the mall and indiscriminately shot at people, killing 59 and injuring 175. See C. Omar, "Timeline: Terrorist related events in Kenya since 1998", Africa News 2013-09-23 7:15:29 available on [news.xinhuanet.com/English/Africa/2013-09/23/C\\_132740938.html/](http://news.xinhuanet.com/English/Africa/2013-09/23/C_132740938.html/)

<sup>59</sup> On April 2<sup>nd</sup>, 2015, 4 Al Shabaab operatives entered Garissa University in North Eastern Kenya and opened fire killing 147 people and injured 79 <http://www.aljazeera.com/news/2015/04/kenya-garissa-university-attack-150402155656780.html>

Kenya does not have an openly acknowledged targeted killing of terrorists. However, an analysis of its practice point towards to the use of targeted killings of suspected terrorist leaders in its domestic law enforcement; and its armed conflict in Somalia.

According to some criminal investigation files leaked to Al Jazeera,<sup>60</sup> the procedure for selecting a person for targeting is similar to the personality strikes carried out by the United States. A target is investigated, put under surveillance, and when the opportunity arises the target is “eliminated”. Reading through the file of Makaburi points to the preference of the ATPU to eliminate its targets as opposed to arresting them.<sup>61</sup>

In addition to the personality strikes, the government in the course of its armed conflict with the Al Shabaab in Somalia pursued signature strikes with the most recent signature strike carried out in Somalia that resulted in the death of Mahad Karate, the Al Shabaab intelligence chief and another 10 of the armed groups’ commanders in an air strike.<sup>62</sup>

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<sup>60</sup> Inside Kenya’s Death Squad, Supra note. 25

<sup>61</sup> *ibid*

<sup>62</sup> Al Jazeera, ‘Al Shabaab Intelligence Chief Killed: Kenyan Army’, War and Conflict, February 18, 2016 available at [www.Aljazeera.com/new/2016/02/01/al-shabaab-intelligence-chief-killed-kenyan-army-160218092749014.html](http://www.Aljazeera.com/new/2016/02/01/al-shabaab-intelligence-chief-killed-kenyan-army-160218092749014.html)

## Chapter 2: The Legality of Targeted Killings Operations: Legal Framework

Targeted killing as a counter-terrorism measure often raise numerous questions as to the status of the persons targeted;<sup>63</sup> the purpose of targeted killings;<sup>64</sup> and the legal characterisation of targeted killings.<sup>65</sup> According to Michael Gross, answering these questions will depend largely the legal framework under which targeted killings are analysed.<sup>66</sup>

Three legal frameworks provide for a platform to analyse targeted killings, namely: the law enforcement;<sup>67</sup> the armed conflict;<sup>68</sup> and the law on the use of force in international relations under Article 2(4) and 51 of the United Nations Charter.<sup>69</sup>

Bearing in mind that the law on the use of force in international relations provides a very limited framework for states to use force, which may include targeted killings; this section will only focus on the question of targeted killings under the law enforcement and armed conflict frameworks.<sup>70</sup>

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<sup>63</sup> Whether they are combatants or non-combatants?

<sup>64</sup> Whether targeted killings are a means of seeking retribution, deterrence, or pre-emption?

<sup>65</sup> Can targeted killings be considered acts of self-defense or extra-judicial killings?

<sup>66</sup> M. Gross, "Assassinations and Targeted Killing: Law Enforcement, Execution or Self-Defence?", *Journal of Applied Philosophy*, 23 (2006) 323 – 335, at P. 323

<sup>67</sup> Law enforcement framework dictates how law enforcement operations are planned and implemented – thus providing controls to law enforcement

<sup>68</sup> Armed conflict framework (also known as the law of hostilities and self-defense) controls how military operations are conducted within the context of a specific conflict as classified by IHL

<sup>69</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 U.N.T.S XVI

<sup>70</sup> The decision not focus on the law on the use of force in international relations is found in the inherent checks placed on states in the exercise of the right to self-defence as discussed by the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* Merits, ICJ reports 19986 p.3; particular the requisite need for an armed attack on a state and the bar against belligerent reprisals which by nature constitute an international crime. It is further noted that although self-defence is an inherent right of a state under Article 51 of the Charter, Article 2(4) restrictions on the exercise of this right would limit the scope of this research.



## 2.1: Determining the Applicable framework

Discussions on the legality of targeted killings depends largely on the legal frameworks under which targeted killings are analysed. Mainly because the applicable legal framework to targeted killings is, according to Shiri Kerbs, the source of the controversy over targeted killings.<sup>71</sup>

This controversy arises from the fact that members of terrorist organisations and groups do not use traditional methods of war, but rather use tactics that make it very difficult to distinguish between terrorists and innocent civilians including using civilians as human shields, conducting their operations from within civilian settlements and hiding their weapons among civilian populations,<sup>72</sup> I will return to this later.

Despite the clear distinction between the legal paradigms relating to the use of lethal force, targeted killings pose challenges to the effective and efficient implementation of these frameworks. Discussing the challenges posed by targeted killings to the legal frameworks, Shiri Krebs observes that the core issues of contention are: the appropriateness of the legal frameworks to respond to the challenge of terrorism and the resultant ‘erosion of the core principles’ of the two legal paradigms because of the attempts to make these square pegs fit into the round hole of terrorism; and the proper characterisation of terrorism under these legal paradigms, terrorism as a criminal act or terrorism as an act of war.

Therefore, in order to reach the conclusion as to the most appropriate legal framework under which targeted killings can be analysed it imperatively the status of targeted individuals is established; are targets combatants? Illegal combatants? Or criminals?

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<sup>71</sup> S. Krebs, *supra* no 31 at p. 12

<sup>72</sup> *Ibid*

Under the armed conflict paradigm, it is permissible for combatants to target and kill enemy combatants under specified circumstances under the Geneva Conventions.<sup>73</sup> While under the law enforcement framework police although allowed to use legal force against suspected criminal, this paradigm has numerous restrictions that pre-empt the use of lethal force by police officers in routine law enforcement.<sup>74</sup>

Taking the second alternative, where terrorists are viewed as criminals, the next section will analyse targeted killings within the law enforcement framework. This will be followed with an analysis of targeted killings under the armed conflict framework, which will lead into a discussion on the legality of targeted killings as a counter-terrorism method.

## 2.2: The Law Enforcement Framework

Targeted killings outside an “active combat zone”,<sup>75</sup> is situated under the law enforcement model,<sup>76</sup> which is made up of the criminal law and the domestic and international human rights norms.<sup>77</sup>

Law enforcement, the framework for the control of law enforcement operations; is a term that does not have a universal definition. However, for purposes of this research, Nils Melzer’s definition is adopted. Accordingly, Nils Melzer defines law enforcement as the “generic concept comprising all measures taken by a state to maintain, restore, or otherwise impose public security, and law and order”.<sup>78</sup>

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<sup>73</sup> Under the Geneva Conventions a combatant may be targeted

<sup>74</sup> M. Gross Supra no 35 p. 323

<sup>75</sup> Targeting of non-legitimate military targets such as civilians and civilian objects, within the context of an armed conflict

<sup>76</sup> N. Melzer, Targeted Killings in International Law (Oxford: Oxford University Press, 2008) p. 223

<sup>77</sup> S. Krebs Supra no 31 at p. 18; *also, see* D. Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Execution or Legitimate Means of Defense?”, The European Journal of International law 16 (2005) 171 – 212 at p. 176

<sup>78</sup> Supra note 12 at p. 62

Under this paradigm, members of terrorist groups and their activities are viewed through the lenses of criminal law (domestic and or international); this therefore dictates that members of terrorist groups and organisations are treated like any other criminal suspect, hence, a preference for arrest; trial; and if found guilty sentence and imprisonment in accordance with the penal laws of the state.<sup>79</sup>

Similarly, Kretzmer observes that the law enforcement model is based on principles of due process, therefore, rules and principles of law enforcement must conform to principal requirements of fair trial and due process, namely; the presumption of innocence; a criminal suspect should be apprehended, detained and interrogated in accordance with the law.<sup>80</sup>

It should be noted that the effective implementation of this model within the counter-terrorism framework is dependent on the law enforcement jurisdiction<sup>81</sup> of a state; where jurisdiction is “not defined within the confines of the state’s territory, but is defined as existing to the extent that a state actually exercises power or authority over an individual(s)”,<sup>82</sup> which can be within the territory of state or extra-territorially.

Justice Guillaume, in his separate opinion in the *Arrest Warrant case*, explains that a state may exercise extra-territorial jurisdiction if the offender or at least the victim is a national of the state; the crime committed threatens internal or external security; and in case of piracy and or in a situation of subsidiary universal jurisdiction if the offender is present on their territory.<sup>83</sup>

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<sup>79</sup> Ibid at p. 36, *see also* S. Krebs Supra no 31 at p. 18

<sup>80</sup> Supra note 24 at p. 178

<sup>81</sup> Law enforcement jurisdiction applies to two areas, namely: Jurisdiction over an individual (s) and territorial jurisdiction. In the *Arrest Warrant Case* Justice Guillaume reiterated the rule that primarily states exercise jurisdiction on their territory. See the separate Opinion of Justice Guillaume in the *Arrest Warrant Case of 11 April 2000 (DRC v. Belgium)* ICJ Reports 2001 p. 3

<sup>82</sup> Supra note 12 at p. 39

<sup>83</sup> Separate Opinion of Justice Guillaume in the *Arrest Warrant Case of 11 April 2000 (DRC v. Belgium)* ICJ Reports 2001 p. 3

From the foregoing it can be stated that targeted killings under the law enforcement model are within the ambit of a state's exercise of jurisdiction and are permissible under a much stricter regime, than the more lax armed conflict regime. Therefore, any counter-terrorism measure under the law enforcement framework should conform to these paradigm constraints. Are targeted killings permissible under the law enforcement paradigm?

### 2.2.1: Law Enforcement Framework and Targeted Killings

As a starting point, the general rule is that police and or law enforcement officials do not have the authority to harm a criminal suspect in absence of due process.<sup>84</sup> Terrorism, which by its nature may present a threat to public safety does not give police the authority to deviate from this general rule. Not even a state of emergency declared in response to an extreme terrorist attack justifies the derogation from fair trial rights and the right to life.<sup>85</sup>

However, there is an exception to this general rule. Police and or a state's law enforcement personnel in the routine fulfilment of their law enforcement obligations can use lethal force against a criminal suspect, who is not in their custody, as a means of self defense "in unusually threatening and dangerous circumstances",<sup>86</sup> where the use of force is "necessary to prevent a threat of death or serious injury to others".<sup>87</sup>

Nils Melzer in his discussions on the permissibility of targeted killings in the law enforcement framework clearly articulates the circumstances under which lethal force may be used. He states that use of force within the law enforcement framework must

<sup>84</sup> M. Gross Supra no 35 at p. 323 ;

<sup>85</sup> S. Krebs Supra note 31 at P. 18

<sup>86</sup> M. Gross Supra note 35 at p. 324 -325; According to Nils Melzer, state agents under the law enforcement paradigm are not authorised to use lethal force for punitive purposes "without the previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples" is prohibited as a matter of *jus cogens*" see N. Melzer supra note 34.at p. 228

<sup>87</sup> S. Krebs Supra note 31 at p. 18; According to P. Alston, "the presumption is that intentional killing is unlawful by the state unless it was necessary for self-defence or defence of others", P. Alston supra note 10 at para 25

“have a sufficient legal basis in domestic law; not be of punitive but of exclusively preventive nature; aim exclusively at protecting human life from unlawful attack; be absolutely necessary in qualitative, quantitative and temporal terms for the achievement of this purpose; and be the undesired *ultima ration*, and not the actual aim, of an operation which is planned, prepared and conducted to minimize, to the greatest extent possible the recourse to lethal force”.<sup>88</sup>

According to Shiri Krebs the importance of a strict interpretation of the situations where lethal force can be used in the law enforcement framework cannot be overly emphasised because a “less restrictive interpretation of [the] law enforcement framework could seriously undermine basic values of law enforcement including presumption of innocence, the right to a fair trial, the protection of the right to life and ultimately – the rule of law”.<sup>89</sup>

Although the law enforcement allows police, within the prescribed restrictions; to use lethal force when handling situations involving members of terrorist organisations, States are further obliged to abide by the principles and norms of international human rights law which “protects the right to life with no derogations allowed during times of emergency”;<sup>90</sup> and is applicable territorially and extra territorially.<sup>91</sup>

International human rights principles, per Shiri Krebs, dictate that States ensure that the use of lethal force in law enforcement meets the “absolutely necessary standard”.<sup>92</sup>

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<sup>88</sup> N. Melzer *ibid* at p. 116 -117

<sup>89</sup> S. Krebs *supra* note 31 At p. 19

<sup>90</sup> *ibid*

<sup>91</sup> Discussing the applicability of the International Covenant on Civil and Political Rights extra-territorially the International Court of Justice in its advisory opinion in the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, concluded that the “International Covenant on Civil and Political Rights’ reach extends to acts done by a state in the exercise of its jurisdiction outside its own territory”. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C.J. Reports (2004), 136, para 109 -111 quoted in S. Krebs *ibid*

<sup>92</sup> S. Krebs *supra* note 31 at p. 20

The absolutely necessary standard requires, according to Kremnitzer, that a State that wishes to resort to targeted killings in domestic law enforcement, complies with the human rights standard of absolute necessity,<sup>93</sup> that is to say lethal force must only be used if there are no other means to achieve the legitimate purpose of the law enforcement operation (necessity test);<sup>94</sup> and does not exceed what is necessary to maintain, restore or otherwise impose law and order (proportionality test).<sup>95</sup>

To this end, police and other State law enforcement agents, when determining the necessity of the use of lethal force in law enforcement operations; are required to make an informed assessment of; whether the operating officers' subjectively honest belief was also objectively reasonable in the concrete circumstances; and (ii) whether the targeted killing of the suspected terrorist could have been prevented by precautionary measures.<sup>96</sup>

However, where the use of lethal force is unavoidable, Nils Melzer asserts that all precautions must be taken to ensure that human life is protected.<sup>97</sup> In a similar vein Kremnitzer argues that the use of lethal force in law enforcement, should aim at incapacitating the targeted individual; although in some instances the purpose of lethal force in law enforcement can be the to kill an

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<sup>93</sup> Citation quoted by Melzer at p. 62

<sup>94</sup> *Nachova and Others v. Bulgaria*, ECHR 43577/98, Strasbourg, July 6, 2005, para 108

<sup>95</sup> N. Melzer supra note 34 at p. 228; similarly, Geoff Corn in his discussion the absolutely necessary human rights standard, asserts that absolute necessity makes the assumption that "only the amount of force required to meet the threat and restore the *status quo ante* may be employed against the source of the threat, thereby limiting the force that may be lawfully applied by the state actor" G. Corn, "Mixing Apples and Hand Grenades: The Logical Limit to Applying Human Rights Norms to Armed Conflict", *Journal of International Humanitarian Legal Studies* 1 (2010) 52 at 85. Corn's position is reiterated in the *Tennessee v. Garner* case where the U.S Supreme Court held that the goal of using force against a fleeing felon is to protect citizens therefore the use of deadly force is constitutional only when necessary against a fleeing felon who poses a serious physical threat; see *Tennessee v. Garner* 471 US 1 (1985)

<sup>96</sup> *ibid*

<sup>97</sup> Melzer supra note 34 p. 228

individual where there is no other means of “preventing a concrete and immediate danger to life or a threat of serious physical injury”.<sup>98</sup>

Regarding the proportionality test, States are required to ensure that, “when state agents use lethal force they are obliged to ensure that the harm expected from (the use of lethal force) is not disproportionate compared to the gravity of the threat or offence to be removed”.<sup>99</sup>

According to Nils Melzer, the proportionality test means that any extra-custodial killing of criminal suspect is not the objective of a law enforcement operation.<sup>100</sup> This is because the requirement of proportionality prohibits “the resort by states to targeted killing as a method of law enforcement except where it is strictly indispensable to save human life from unlawful attack”,<sup>101</sup> thus requiring that each targeted killing of a criminal suspect is aimed at preventing a concrete, specific, and inevitable terrorist attack.<sup>102</sup>

From the foregoing, it can be stated that the law enforcement framework, with the numerous restrictions on the State and its agents on the use of lethal force; provides an ideal platform for ensuring that the State in its domestic counter-terrorism operations ensures that human rights are not sacrificed at the altar of national security.

Despite the advantages of the law enforcement framework as a paradigm for assessing the legality of targeted killings, this framework is criticised for its lack of capacity to efficiently deal with modern terrorist tactics. Central to the arguments against the law enforcement framework is the question of jurisdictional limitations to the enforcement powers of police.

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<sup>98</sup> Citation quoted by Melzer at p. 62

<sup>99</sup> N. Melzer *supra* note 34 at p. 234

<sup>100</sup> *ibid*

<sup>101</sup> *Ibid* at p. 235

<sup>102</sup> *ibid*

Discussing the issue of jurisdiction Kretzmer is of the opinion that the law enforcement model is inherently limited as a legal basis for dealing with ‘transnational terror’.<sup>103</sup> The main limitation for Kretzmer is the fact that implementation of the law enforcement model is centrally premised on the legal exercise of jurisdiction by state, which does not take into consideration the fact that in majority of the cases of terrorist activities are almost always perpetrated in a state separate from the country where the perpetrators are located.<sup>104</sup> For instance, Israel attacks are from external terrorist organisations including Hezbollah, and Hamas; in Kenya attacks have been perpetrated by the Al Shabaab operating out of Central and Southern Somalia; and the US counter-terrorism activities that span the globe.

The other concern raised against the law enforcement framework is its lack of capacity to handle the nature and tactics of modern terrorism. Shiri Krebs argues that because of the severity of modern terrorism States and decision making institutions have been forced to make compromises by reforming and stretching the borders of traditional law enforcement paradigms so as strengthen the enforcement powers of national authorities at the expense of human rights.

Krebs further highlights the fear that such reforms aimed at dealing with terrorism have the possibility of having a spill over effect into the principle branch of criminal law resulting in the breakdown of the core pillars and protections guaranteed criminal suspects including but not limited to the due process; freedom from torture; and the right to life.<sup>105</sup>

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<sup>103</sup> D. Kretzmer *supra* note 40 at p. 176 - 177

<sup>104</sup> *ibid*

<sup>105</sup> It is noted that although criminal suspects’ right to life is protected, this protection only applies in situation where their life is arbitrarily taken by state agents. This not extend to a death sentence, implemented in accordance with the ruling of an independent and competent court.



Similarly, Kent Roach in his discussions on the dangers of distorting the criminal law to deal with acts of terrorism highlights that there are two specific dangers to such distortions.<sup>106</sup> First is the spill over effect of extraordinary powers introduced and justified in the counter-terrorism context; and secondly, the potential of these changes to result in a “greater miscarriage of justice”.

The situation highlighted by the concerns raised by targeted killings within the law enforcement framework, per Krebs, calls for a more “nuanced approach to combating terrorism”<sup>107</sup> with law enforcement being applied to dealing with the threat of terrorism during times for peace and using the armed conflict framework to deal with threat of terrorism which qualify as “high scale hostilities”.<sup>108</sup>

### 2.3: The Armed Conflict Framework\*

Bearing in mind that laws of armed conflict were designed to deal with “situations of extreme violence [thus] establishes conditions and modalities for the use of lethal force”,<sup>109</sup> the discussions in this section will analyse the legality of targeted killing as a method of engaging in and or conducting hostilities under international humanitarian law.

To this end the discussions will, in relation to targeted killing as a counter-terrorism measure; discuss the concept of armed conflict; and the international law conditions for use of lethal

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<sup>106</sup> K. Roach, ‘The Criminal Law and Terrorism’, in V.V. Ramraji, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005) pp. 129 – 151, at p. 139

<sup>107</sup> S. Krebs *supra* note 31 at p. 20

<sup>108</sup> *ibid*

\* This section is an expansion of a final term paper for the Advanced Public International Law Class submitted to the Legal Studies Department of Central European University titled ‘Assessing the Legality of Targeted Killing Operations Under the International Humanitarian Law Framework’, 3<sup>rd</sup> March 2016

<sup>109</sup> *Supra* n. 9 at p. 243

force during armed conflict. This will be followed with an analysis of whether targeted killings are permitted if these norms and rules of armed conflict are met

### 2.3.1: Permissibility of Targeted Killings under international law

This therefore begs the question whether armed interventions between states and terrorist groups and organisations constitute an armed conflict? Answering this question will in aid in assessing the legality of targeted killings under IHL.

#### *A. Existence of an Armed Conflict*

Traditionally IHL regulated the conduct of wars between states. According to Melzer, “war was generally understood as formally declared, and mutually recognised state of hostility between sovereign states. An assertion that finds credence in Oppenheim’s classical definition of the term war as “a contention between two or more states through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases”.<sup>110</sup>

According to the International Law Association, (“ILA”), the declaration of war in the traditional understanding of the term armed conflict was important because a declaration of war activated the “application of IHL, the institution of neutrality and the validating the exercise of belligerent rights”<sup>111</sup>

However, after World War II there was a marked shift in the legal framework governing hostilities.<sup>112</sup> A shift which, according to the ILA, is attributable to the adoption of the United

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<sup>110</sup> L. Oppenheim, *International Law: A Treaties* 202 (H. Lauterpacht ed, London: Longsmans Green, 1952) p. 202

<sup>111</sup> International Law Association, *Report of The Hague Conference: Use of Force* (2010) p. 7

<sup>112</sup> *ibid*

Nations Charter which prohibits the use of force in international relations.<sup>113</sup> This provision therefore had the effect of reducing the importance attached to the term “war in international law.”<sup>114</sup>

As noted above the period following the World War II period saw a dynamic change in international law terminology and practices regarding hostilities. In particular, the adoption of the four Geneva conventions introduced the term “armed conflict” into the international law.

It is noted that the term ‘armed conflict’ although not defined in the Geneva conventions themselves, have been extensively discussed by the International Criminal Tribunal for the former Yugoslavia which has provided a constitutive definition of what is meant by the term armed conflict, in particular the Appeals Chamber of the ICTY in the *Tadić case* highlighted three constitutive elements for the existence of an armed conflict, namely:

There is a resort to armed forces between states or protracted violence between government authorities and organised groups or between such groups within a state; the hostilities exceed the intensity requirements applicable to both international and internal armed conflicts; and that there has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups<sup>115</sup>

It is important to note that the *Tadić case* highlights the Geneva Convention based differentiation of conflicts that to say; international and non-international armed conflicts. A

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<sup>113</sup> *ibid*

<sup>114</sup> *ibid*

<sup>115</sup> ICTY, *The Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1T-94-1-A, 2 October 1995, Para 70

classification which is very important in order to establish which norms and principles govern targeted killings.

Therefore, before discussing whether or not the “war on terror” can be classified as an armed conflict, therefore justifying the adoption of war like methods in counter-terrorism measures such as targeted killings, it would be important to briefly highlight the salient features of the two types of armed conflicts recognised under the Geneva Conventions, that is to say, international and non-international armed conflicts.

*i. What are International Armed Conflicts?*

According to Common Article 2 of the Geneva Conventions<sup>116</sup> an international armed conflict involves two or more states resulting in the intervention of members of the armed forces even if one of the parties denies the existence of a state of war.<sup>117</sup> This implies that two or more States’ armed forces or non-state actors acting on behalf of or under the control of a State (engaged in the conflict) engaged in hostilities with each other.

Under this categorization, activities of non-state actors must be attributable and or capable of attribution to the state. In principle this means that the terrorist activities must have been performed by person(s) who have the status of “state organ”,<sup>118</sup> or “person(s) or groups of people who while do not have the status of state organ are in fact under the strict control of the state”.<sup>119</sup>

Therefore, for state engagement with non-state actors within the “war on terror” paradigm to be classified as an international armed conflict, such a conflict should have an inter-state

<sup>116</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287

<sup>117</sup> *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) ICJ Judgement of 27 June 1986, para 14, 114

<sup>118</sup> Article 4 of the Articles on State Responsibility for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), Chp.IV.E.1

<sup>119</sup> *Application of the Genocide Convention (Bosnia & Herzegovina v. Serbia and Montenegro)* Judgement 26 Feb. 2007

character, or where terrorist activities are linked to a state and lead to “the conduct of hostilities between the armed forces of those states”.<sup>120</sup> An example where the “the war on terror” embodied the characteristics of an international armed conflict, were the US counter-terrorism military activities in Iraq and Afghanistan.

ii. *Is the inter-state character alone sufficient for classification of hostilities as an international armed conflict?*

Discussing the classification of state counter-terrorist activities within the international armed conflict framework the Israel Supreme Court in the Targeted Killings moved away from this classification based on attribution, in its reasoning the court highlighted the challenge of modern asymmetrical warfare and activities of non-state actors which may, in some instances, have a transnational effect – as is the case with terrorist activities. The Court therefore found that a state’s engagement with non-state actors in hostilities can amount to an international armed conflict by virtue of the transboundary nature of the conflict.

In this case the Supreme Court observed that:

In today’s reality, a terrorist organization is likely to have considerable military capabilities (that may at times) exceed those of states. (Therefore, confrontations between states and terrorists organisations) cannot be restricted within the state and its penal law (...) it constitutes a part of the international law dealing with armed conflicts of an international character<sup>121</sup>

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<sup>120</sup> S. Krebs, *supra* note 31 at p.21

<sup>121</sup> *Public Committee against Torture in Israel v. The Government of Israel et al*, HCJ 769/02 (2006) Isr. S.C. para 21

Andreas Paul and Mindia Vashakmadze however disagree with the Supreme Court's classification of state counter-terrorism measures against terrorist groups and organisations as international armed conflicts on the basis of their 'transboundary character'. They argue, rightly so, that IHL privileges granted to states during international armed conflicts are "not due to the transboundary character' of hostilities, but to the conformity in principle of the state's armed forces with IHL".<sup>122</sup>

Therefore, on the basis of Andreas and Mindia's arguments confrontations between states and terrorist's groups can only be classified as international armed conflicts if the terrorist's groups consent to be bound by the principles and standards of IHL.

Be that as it may, it should also be noted that since terrorist organisations are not bound by IHL principles and rules of engagement in hostilities, it follows that their members are also not granted the same privileges granted to states' forces during international armed conflicts. This is because, as was held by the Israeli High court in *Arad v. The Knesset*; terrorists groups do not conduct their operations in accordance with the laws and customs of war, members of such groups cannot be classified as combatants with privileges under IHL.<sup>123</sup>

### iii. *What are Non-International Armed Conflicts?*

Non-international armed conflicts are provided for under Common Article 3 of the Geneva Conventions<sup>124</sup> as well as Protocol II Additional to the 1949 Geneva Conventions.<sup>125</sup>

<sup>122</sup> A. Paulus & M. Vashakmadze, "Asymmetrical War and the notion of Armed Conflict: A Tentative Conceptualisation", *International review of the red Cross* 91 (2009) p. 102

<sup>123</sup> *Arad v. the Knesset*, HCJ 2967/00, p. 54 para 188 and 191

<sup>124</sup> Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135

<sup>125</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609

Article 1(2) of Protocol II provides that for a conflict to be classified as non-international it should be: protracted armed violence; and that the use of force must go beyond the level of intensity of internal disturbances and tensions.<sup>126</sup>

The conditions provided for under Article 1(2) have been termed vague and not providing much guidance on the thresholds that ought to be crossed for violence to be considered a non-international armed conflict. Therefore, for purposes of clarity on thresholds guidance can be sought from the ICTY and the International Criminal Tribunal for Rwanda, (“ICTR”). Both tribunals have discussed threshold set under Article 1(2) of the Protocol I, that is to say, “go beyond the level of intensity of internal disturbances and tensions”.; and held that the phrase sets two criteria relating to: the intensity of the conflict; and the organisation of the parties to the conflict.<sup>127</sup>

According to the ICTY this criteria in a non-international armed conflict are “used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”.<sup>128</sup> This therefore begs the question what are the constitutive elements of “intensity” and “organisation of parties” for an incident to be qualified as a non-international armed conflict?

Guidance as to what these two elements constitute is provided in the judgement of the ICTY in the case of the *Prosecutor v. Boskoski & Tarculovski*<sup>129</sup> and the case of the *Prosecutor v. Ramush Haradinaj*<sup>130</sup> respectively.

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<sup>126</sup> *ibid*

<sup>127</sup> From the ICTY see: *Prosecutor v. Zdravko Micić et al*, Case No. IT-96-21-T, Judgement (Trial Chamber) 16 November 1998, para 184; from the ICTR see: *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, judgement, 2 September 1998, para 620

<sup>128</sup> *Prosecutor v. Zdravko Micić et al*, Case No. IT-96-21-T, Judgement (Trial Chamber) 16 November 1998, para 184

<sup>129</sup> *Prosecutor v. Boskoski & Tarculovski*, case no. IT-04-82-T, Judgement (Trial Chamber) 10 July 2008

<sup>130</sup> *Prosecutor v. Ramush Haradinaj*, case no. IT-04-84-T, Judgement (Trial Chamber) 03 April 2008

In *Boskoski & Tarculovski* the ICTRY trial chamber provided guidance on the ‘indicative factors’ for determining the intensity of conflict. The court held *inter alia* that the following were the relevant indicative factors:

[S]eriousness of attacks and whether there has been an increase in armed clashes and spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict; the number of civilians forced to flee from the combat zones; the type of weapons used (that is to say) use of heavy weapons, and other military equipment; the blocking or besieging of towns and the heavy shelling of these towns; extent of destruction, and the number of casualties caused by shelling or fighting; existence and change of front lines between the parties; the deployment of government forces to the crisis area; and at a systemic level the way that organs of the State, such as the police and military, use force against armed groups<sup>131</sup>

With regard to the “organisation of parties” as an indicative factor of a non-international armed conflict the ICTY in the *Ramush Haradinaj* case held *inter alia* that the although there are several indicative factors alluding to the organisation of parties in an armed conflict, these elements are not “in themselves, essential to establish whether the “organization” criterion is fulfilled”, it concluded that “an armed conflict can only exist between parties that are sufficiently organised to confront each other with military means”.<sup>132</sup>

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<sup>131</sup> *Boskoski & Tarculovski* supra note 57 at Para 177 - 178

<sup>132</sup> *Prosecutor v. Ramush Haradinaj*, supra note 58 at para 60



In a similar vein the ICTR further expounded on the criteria of ‘organisation of the parties to the conflict’ in the *Akayesu* case where it held generally that “the term armed conflict in itself suggests the existence of hostilities between armed forces organised in a greater or lesser extent”.<sup>133</sup> In reaching this finding, the ILA suggests that, the ICTR in the *Akayesu* case used an objective evaluation test to assess both the intensity of and the organisation of the parties to the conflict.<sup>134</sup>

Bearing in mind the definition of a non-international armed conflict and the constitutive elements of a non-international armed conflict, and the fact that the majority of counter terrorism measures fall outside the scope of international armed conflicts, it is imperative to discuss whether in some situations counter-terrorism measures against terrorist organisations can be classified as non-international armed conflicts.

#### *B. Principle of distinction*

Distinction is a central feature of the laws of war requiring the distinction between combatants and civilians mainly because; combatants are lawful targets during hostilities;<sup>135</sup> and combatants are entitled to participate in hostilities and benefit from the protection of IHL.<sup>136</sup>

Article 44 of the Protocol I additional to the Geneva Conventions provides for both regular and irregular armies and requires combatants to distinguish themselves from civilians when

<sup>133</sup> *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, judgement, 2 September 1998, para 620

<sup>134</sup> ILA, Study Group on Due Diligence in International Law, Final Report, March 7, 2014 at p. 15

<sup>135</sup> Under international law combatants cease to be legitimate target while *hors de combat*, see Article 5(2) Protocol I Additional to the Geneva Conventions

<sup>136</sup> C. Greenwood, ‘The law of War (International Humanitarian law)’, in M. Evans (ed.) *International Law* (Oxford: Oxford University Press, 2006) pp. 783 – 801 at p. 787

“engaged in an attack or in a military operation preparatory to an attack”.<sup>137</sup> It also requires combatants to openly carry their arms “during each military engagement; and during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate”.<sup>138</sup>

The question therefore in relation to targeted killings is whether or not terrorists can be distinguished under IHL?

It is observed that terrorist groups present a challenge to the distinction principle because they are by definition “an asymmetrical enemy who do not wear uniforms or identifiable insignia to distinguish themselves from civilians, and in fact they eschew distinction between themselves and civilians”.<sup>139</sup>

This means that for purposes of IHL terrorists cannot be identified as lawful combatants and should be considered civilians taking part in hostilities, therefore, not entitled to the immunities accorded combatants under IHL,<sup>140</sup> and can be legitimately targeted during hostilities.

### *C. Military Necessity*

This section will analyse whether targeted killings are permissible under the doctrine of military necessity which is, according to Melzer, “one of the primary foundations of IHL”.<sup>141</sup>

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<sup>137</sup> Ibid p.789

<sup>138</sup> ibid

<sup>139</sup> M. Maxwell, ‘Rebutting the Civilian Presumption; Playing Whack-A-Mole without a Mallet?’, in C. Finkelstein, J.D. Ohlin and A. Altman, *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012) pp. 31 – 59 at p.32

<sup>140</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Public Committee Against Torture in Israel v. Government of Israel*, 157(6) Isr S C 285[2005]

<sup>141</sup> ibid

He further observes that as “early as Grotius ‘*necessaria ad finem belli*’ constituted the ultimate limit for the admissibility of force in times of war”.<sup>142</sup>

Founded in the definition of the Lieber Code<sup>143</sup> the purpose of military necessity is to determine the permissibility of force in situations of armed conflict.

Therefore the principle of military necessity “prohibits the employment of any kind or degree of force which is not indispensable for the achievement of the ends of war”<sup>144</sup> and “permits measures which are indispensable for securing the ends of war which are lawful according to the modern law and usages of war”.<sup>145</sup>

Therefore, direct attacks against members of terrorists’ organisations need to meet the military necessity criteria.

As highlighted above a combatant can be legitimately targeted, unless the said combatant is – *hors de combat* – and that would meet the requirement of military necessity.

This however places a responsibility on a state to distinguish between members of terrorist organisation taking active part in hostilities and those who are not. It is recalled that terrorists are an asymmetrical enemy, which would make it difficult to distinguish between those participating in hostilities, for purposes of permissible targeting.

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<sup>142</sup> *ibid*

<sup>143</sup> Article 14 of the Lieber Code of 1863 defined military necessity. it provides that  
Military necessity, as understood by modern civilized nations, consists in the necessity of 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

<sup>144</sup> *Supra* n. 7 at p. 289

<sup>145</sup> *ibid*

Addressing the challenge posed by the difficulty in distinguish between terrorists taking part in hostilities and those members who are not, Kerbs proposes that states adopt the “imminent threat” test when targeting members of terrorist groups.<sup>146</sup> She further observed that under this principle “the killing of a suspected terrorist [is only] deemed necessary if the threat they pose is concrete and imminent”.<sup>147</sup>

#### *D. Principle of Proportionality*

Directly linked to the principle of military necessity is the principle of proportionality. According to the Israeli High court observed that “proportionality is a general principle of international rule [requiring] belligerents not to inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the strength of the enemy”.<sup>148</sup>

In relation to targeted killings, it can be said that targeting and killings meet the proportionality test because they aim to destroy the strength of the enemy. This particularly true if it can be established that the terrorist group was in the process of planning an attack on a state.

Under the proportionality principle, states are also required to assess, in addition to injury and damages to civilian populations; the impact of the targeted killing operation will have on “other values protected by IHL” such as the environment.<sup>149</sup> This implies that a state cannot use a

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<sup>146</sup> Supra, n. 12, p. 27

<sup>147</sup> *ibid*

<sup>148</sup> Supra n. 27 at p. 62

<sup>149</sup> Article 8(2)(b) of the Rome Statute an International Criminal Court, 1998

targeted killing method that would result in the destruction of a world heritage site if a suspected terrorist was located within or in the vicinity of such a site.<sup>150</sup>

Gabriella Blum and Philip Heymann observe that treating terrorism as a crime, governed by domestic criminal law and IHRL, has the impact of limiting a States power to use deadly force – which needs to be balanced with the individual’s human rights including the right to life.<sup>151</sup> On the other hand, treating terrorism as a war, would lower the constraints on State’s power to use deadly force against enemy combatant within the constraints of IHL.<sup>152</sup>

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<sup>150</sup> Charges against Abu Tourab include a charge under Article 8(2)(b) for the causing damages to cultural sites. See *The Prosecutor v. Ahmad Al Faqi Mahdi*, ICC-01/12-01/15

<sup>151</sup> *ibid*

<sup>152</sup> *ibid*

## Chapter 3: The Right to Life and Targeted Killings: Extra Judicial Executions or Legitimate means of defense?

Targeted killing operations, in comparison with other counter-terrorism measures and or tactics such as interrogations<sup>153</sup> and detentions;<sup>154</sup> clearly shows the tension of addressing terrorism as a crime and addressing it as a war,<sup>155</sup> because of its implications on the State's right to use lethal force as one of the measures of fulfilling their positive duty to protect the life of the general public from threats such as terrorism. Such measures have the potential, as highlighted by the OSCE; of violating other human rights including the right to life.

Protected as a civil and political right, the right to life, is classified as a "supreme right"<sup>156</sup> and a non-derogable right<sup>157</sup> protection of which is framed in the negative.<sup>158</sup> This is reflected in the wording of three of the four major human rights treaties which prohibit the arbitrary deprivation of life.<sup>159</sup>

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<sup>153</sup> For detailed discussion on the use of interrogations as a counter-terrorism tactic *see*: The Commission of Inquiry into the Methods of Investigation of the General Security Service regarding Hostile Terrorist Activity, *Isr. L. Rev* 23 (1989) 146; and *The Public Committee Against Torture in Israel et al. v. The State of Israel et al.* HCJ 5100/94

<sup>154</sup> For detailed discussions on detentions as a counter-terrorism tactic *see*, *A (John Does) v. Minister for Defense* CrimFH 7048/97, ISCt CCA [2000]; *Toyoshum Korematsu v. the United States of America*, 323 U.S. 214 (1994)

<sup>155</sup> G. Blum and P. Heymann *supra* note 45 at p. 145

<sup>156</sup> The United Nations Human Rights Committee, ("HRC"), has described the right to life as the supreme right, observing that:

"[t]he right enshrined in [Article 6] is the supreme right of the human being. It follows that the deprivation of life by the authorities of the State is a matter of the utmost gravity"

*See* UN Human Rights Committee, *Guerrero v. Colombia*, Communication no. 45/1979, DOC.CCPR/C/15/D/45/1979,

<sup>157</sup> Article 4(2) the International Covenant on Civil and Political Rights, 1966 (ICCPR); Article 27(2) of the American Convention on Human Rights, 1969 (ACHR); Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR); the African Charter on Human and People's Rights, 1981 (ACHPR), does not have a derogation clause

<sup>158</sup> OSCE/ODIHR, *Countering Terrorism, Protecting Human Rights: A Manual* (Poland: OSCE Office for Democratic Institutions and Human Rights, 2007) p. 98.

<sup>159</sup> Article 6(1) ICCPR; Article 4(1) ACHR; Article 4 ACHPR: Amnesty International compared the right to life with the right to freedom from torture and observes that:

Unlike the torture which is absolutely prohibited in all circumstances, intentional killing by the state can sometimes be justified under international law, both in situations of armed conflict and in law enforcement situations

Article 6 of the International Covenant on Civil and Political Rights, reflected in the American Convention on Human Rights, and the African Charter on Human and People's Rights; states that everyone has the inherent right life which is protected from arbitrary deprivation.<sup>160</sup> However, no further explanation is reiterated in these three human rights treaties on what is meant by the term "arbitrary deprivation"; one can find guidance on the meaning of this term in the European Convention protection of the right to life, which according to Kretzmer, and I agree; "is widely accepted as providing a fair statement of cases in which [lethal] force may be regarded as non-arbitrary"<sup>161</sup>

Article 2(2) of the ECHR provides that, the right to life can be lawfully deprived in three circumstances including but not limited to the, the defence of any person from unlawful violence.<sup>162</sup>

Bearing in mind that the right to life is part of international customary law, and as such imposes both positive<sup>163</sup> and negative<sup>164</sup> obligations on all states irrespective of their ratification of

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P.B. House, *United States of America: Targeted Killing Policies Violate the Right to Life* (United Kingdom: Amnesty International Publications, 2012) 3

<sup>160</sup> Article 6(1)

<sup>161</sup> D. Kretzmer supra note 40At p. 1777

<sup>162</sup> Article 2(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that:

Deprivation of the right to life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) In defense of any person from unlawful violence
- (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained
- (c) In action lawfully taken for the purpose of quelling a riot or insurrection

<sup>163</sup> ensure the protection of the right to life, including but not limited to, not adopting draconian measures to protect life under all circumstances. The obligation to protect life imposes a duty to adopt reasonable measures to ensure that the right to life can be guaranteed

<sup>164</sup> states are obligated to refrain from taking life – death caused by a state agent (s), who uses unnecessary force, beyond the legitimate reasons, highlighted above; would be a violation of the right to life, thus unlawful

specific human rights treaties.<sup>165</sup> These obligations in turn give rise to the substantive and procedural obligation to guarantee life itself; and procedural obligation which dictates that where a life has been deprived by state agents to protect the general public from acts of terrorism; there should be a public and independent scrutiny of the killing. Therefore, do targeted killings breach the thresholds established under the major international human rights instruments and international humanitarian law?

### 3.1: Law Enforcement, Targeted Killing, and the Right to Life

As prior stated, States have the right to use lethal force, however, this power in relation to its own citizens, and or persons under their effective control,<sup>166</sup> is limited by both domestic criminal law and international human rights norms, that protect inter alia an individual's right to life. Criminal law, as discussed earlier, is grounded in principles of due process, it therefore follows that a person can be killed once these due process considerations have been fulfilled, such as when a state carries out a death sentence issued by an independent and competent court.<sup>167</sup>

However, the right to life can be taken away, under very limited conditions under international human rights law. In establishing whether the use of lethal force, falls within these acceptable situations, human rights bodies have through their ruling established as set of rules that States need to observe, namely: exhausting the option of arrest; proper planning to minimise resort to lethal force; proportionality (balancing between the use of lethal force and the aim to be achieved).

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<sup>165</sup> C. Heyns & S. Knuckey, 'The Long Term International Implications of Targeted Killing Practices', *Harvard International Law Journal* 54 (2013) 101 – 114 at p. 107

<sup>166</sup> The ECtHR has found that the State's convention obligations continued to apply extraterritorially because it exercised effective control over the inhabitants of South Iraq by virtue of the authority of the Coalition Provision Authority – which mandated United Kingdom and Northern Ireland, to exercise authority over the south. See: *Al-Skeini and others v. the United Kingdom*, ECtHR, Application no. 55721/07, Judgment, July 7, 2011

<sup>167</sup> G. Blum and P. Heymann Supra note 45 at p. 146



### A. Option of Arrest

The need to consider the option arrest was discussed by the United Nations Human Rights Committee, (“HRC”), in *Guerrero v. Colombia*, where it found that a police shooting of seven members of a rebel group, suspected of having kidnapped former ambassador Miguel de German Ribon; without considering the option of arrest – which was per the facts of the case a feasible option - violated the right to life.<sup>168</sup> In it opinion the HRC noted that:

The police action was (...) take without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned”.<sup>169</sup>

Similarly, the European Court of Human Rights, (“ECtHR”), in *McCann & Others v. United Kingdom*<sup>170</sup> has found the State to be in violation of its convention obligation to protect the right to life where it had “sufficient opportunity beforehand on the same day to arrest the persons” instead of using lethal force as the first option of action.<sup>171</sup>

<sup>168</sup> *Guerrero v. Colombia*, Human Rights Committee, Communication No. 45/1979: Colombia, 31/03/82, CCPR/C/15/D/45/1979 (Jurisprudence), 31 March 1982, available at, <http://www.ohchr.org>

<sup>169</sup> Ibid at para 13.2 quoted by L. Doswald-Beck, ‘The Right to Life in Armed Conflict: Does International Humanitarian Law provide all the Answers?’, *International Review of the Red Cross* 88 (2006) pp. 881 – 904 at p. 885

<sup>170</sup> *McCann & Others v. United Kingdom*, ECHR, Judgement of September 5, 1995

<sup>171</sup> *ibid*

*B. The need to minimise resort to Lethal Force*

Directly linked to the need to explore the option of arrest as the first option of action, is the need for States to plan their law-enforcement counter-terrorism operations to minimise resort to the use of lethal force. The ECtHR discussed this requirement in the *McCann case* where it noted that the use of force by the UK was indicative of the fact that the government did not plan its law enforcement operation to “minimise to the greatest extent possible recourse to lethal force” against the members of the Irish Republican Army, (“IRA”).<sup>172</sup>

Further in *Güleç v. Turkey*<sup>173</sup> the ECtHR found that the use of lethal force during a demonstration, despite the existence of a state of emergency; was poor planning on the part of the respondent state. The Court reasoned that since Turkey had declared a State of emergency it should have anticipated the outbreak of riots, thus procured, and deployed the relevant equipment such as truncheons, riot shields, water cannon, rubber bullets or tear gas.<sup>174</sup>

*C. Proportionality*

Under the proportionality requirement of Article 2(2) of the ECHR, there is need for balancing between the aim pursued and the means employed to achieve it. Therefore, during law enforcement counter-terrorism operations, the State is obliged to ensure that the use of lethal force is proportionate to the legitimate aim, including but not limited to the aims of use of force articulated under Article 2(2) of the ECHR,<sup>175</sup> and reflected in Article 9 of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,<sup>176</sup> which

<sup>172</sup> Ibid at para. 194 and Para 201

<sup>173</sup> *Güleç v. Turkey*, ECtHR (54/1997/838/1044) 27 July 1998

<sup>174</sup> Ibid at para. 71 - 73

<sup>175</sup> Supra note 162

<sup>176</sup> Adopted by the UN General Assembly Resolution 45/166, 18 December 1999

states that law enforcement can legitimately resort to the use of lethal force in law enforcement operations in:

[S]elf-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person present such a danger and resisting their authority or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives<sup>177</sup>

The need for balancing was discussed in *Nachova & Others v. Bulgaria*,<sup>178</sup> where the court found that the use of lethal force against individuals escaping from the military, with previous criminal convictions for theft; were excessive and disproportionate. Louise Doswald-Beck discussing the *Nachova case* highlights the court's reasoning and notes that:

There can be no necessity to put human life at risk where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost<sup>179</sup>

Doswald-Beck notes that an alternative reading of the ECtHR reasoning in the *Nachova case* would be that where individuals, such as terrorist actors, posed a threat to life or limb, or suspected of having committed terroristic acts, then the use of lethal force would not result in

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<sup>177</sup> Ibid; it is noted that in addition to the obligations set out under Article 9, The UN Principles on Use of Lethal Force in Law Enforcement provides further requirements that must be observed by law enforcement officials (police; and military when exercising police powers) before lethal force can be used. To this end, Article 10 provides that:

In the circumstances provided for under Article 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident

<sup>178</sup> *Nachova & Others v. Bulgaria*, ECtHR, Application No. 43577/98 and 43579/98, Judgement July 6. 2005

<sup>179</sup> L. Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law provide all the answers?', *International Review of the red Cross* 88(2006) 881 – 904 at p. 886

an arbitrary deprivation of the right to life especially where “the opportunity of arrest would be lost without such use of force”.<sup>180</sup> This alternative reading of the *Nachova case* aptly states the exception to the use of lethal force in law enforcement, and provides an entry point for the rationalisation of the use of lethal force during law enforcement counter-terrorism operations.

Bearing in mind the situations under which lethal force can be legally used in law enforcement paradigm, as highlighted above, the question that remains unanswered is whether targeted killings fall within the international exceptions on arbitrary deprivation of the right to life? or if it should be considered “an inadmissible crime outside the realm of the legality”<sup>181</sup> – extra-judicial or summary execution?

Answering this question would require consideration of the aim of targeted killing as a counter-terrorism tactic, in contrast to the aim of an extra-judicial or summary execution.

As highlighted in chapter 2, the aim of a targeted killing is the elimination of the target. The aim of an extra-judicial execution is

Under IHRL – the bedrock of the law enforcement model, terrorist acts once categorised as crimes need to be processed through the criminal justice processes. This means that once a person is suspected of terroristic acts, the State should ensure that the individual is arrested, put on trial before competent and impartial court; and then convicted and sentenced.

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<sup>180</sup> *ibid*

<sup>181</sup> A. Leander, ‘Technological Agency in the Co-Constitution of Legal Expertise and the US Drone Program’, *Leiden Journal of International Law* 26 (2013) pp. 811 – 813 at p. 813

Targeted killings, however, do not allow for the observance of due process, because the operation is designed for elimination of the target *ab initio*. Targeted killings by virtue of its nature, have been condemned by human rights actors including P.B. House, an Amnesty International researcher; who observes that “a person may have been responsible for murder, even mass murder, or is planning such crimes, does not in itself legally justify his or her killing at the hands of state authorities without a criminal trial”,<sup>182</sup> because such killings without due process are nothing but extra judicial executions and murder”.<sup>183</sup>

To ensure that such killings attain a level of legality under the law enforcement paradigm, Michael Gross proposes that States, such as Israel and the United States, that practice targeted killings must “preserve due process either by maintaining judicial review or conducting trials in absentia”.<sup>184</sup>

### 3.2: Targeted Killing, Armed Conflict, and the Right to Life

Rowland Otto states that “killing a man is murder unless you do it to the sound of trumpets”.<sup>185</sup> However, not all killings during armed conflict are lawful, because IHL a set of rules and

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<sup>182</sup> P. B. House, *United States of America: Targeted Killing Policies Violate the Right to Life* (United Kingdom: Amnesty International Publications, 2012) p. 5

<sup>183</sup> M. Gross, *supra* note 35 at p. 325

<sup>184</sup> *ibid*

<sup>185</sup> R. Otto, *Targeted Killings, and International law: With Special regards to Human Rights and International Humanitarian law* (Berlin, Heidelberg: Springer-Verlag, 2012) p. 106

regulations that, prohibit “acts that abuse the protections that the laws of armed conflict guarantee”,<sup>186</sup> including but not limited to: wilful killings;<sup>187</sup> killings that result from military operations that breach the IHL principles of distinction;<sup>188</sup> military necessity<sup>189</sup>; and proportionality.<sup>190</sup>

It therefore follows that, where military operations breach IHL protection guarantees resulting in the deprivation of life, whether such deprivation is reached the Article 6 threshold of arbitrariness, is assessed under the standards of IHL, as was confirmed by the ICJ which found, *inter alia*, that IHL formed the *lex specialis* for interpretation of the term “arbitrary” in Article 6 of the ICCPR.<sup>191</sup>

Highlighting the rules and regulations of IHL that limit a state’s power to kill during times of conflict i.e. principles of proportionality and civilian casualties – the next section will interrogate whether targeted killing, of suspected terrorists, as a counter-terrorism tactic in armed conflict situations, breach the rules of IHL on lawful killing and thus qualify as an arbitrary deprivation of the right to life?

#### A. *Targeting suspected terrorists and the right to life*

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<sup>186</sup> C. E. Faria Coracini, ‘Targeted Killing of Suspected Terrorist During Armed Conflict: Compatibility with the Rights to life and to a Due Process, *III Anuário Brasileiro De Direito Internacional* v. 2, 35 – 45 at p. 35

<sup>187</sup> Under international criminal law, wilful killing in international armed conflicts and murder in non-international armed conflicts – are components of war crimes *see* Art. 8 (2) (a) (i) Rome Statute of the International Criminal Court [‘Rome Statute’]; Art. 2 (a), (5) (a) Statute of the International Criminal Tribunal for the former Yugoslavia [‘ICTY Statute’];

<sup>188</sup> Additional Protocol 1 to the Geneva Conventions

<sup>189</sup> *Ibid*

<sup>190</sup> *Ibid*

<sup>191</sup> International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of July 8, 1996, I.C.J. Reports 1996, p. 226 - 593, at p. 240 para 5

Targeting of a person classified as a combatant or civilian taking direct part in hostilities is a lawful act of war. The challenge with targeted killings however, according to Michael Gross, is the fact that the rationale for targeting an individual is not their combat activities but their past behaviour.<sup>192</sup> This according to him imputes criminal guilt on combatants.<sup>193</sup>

Gross notes that under the laws of armed conflict there is absence of criminal culpability, because soldiers (even enemy soldiers) are innocent and not criminal, but agents of the state who defend the states' interests. He then notes that naming names of individuals to be targeted during conflict, has the effect of writing names on bullets and placing combatants outside the realm of the law i.e. outlaws.<sup>194</sup> Killing of combatants in this manner would therefore amount to perfidy.<sup>195</sup>

Michael Gross's argument returns the spot light on the status of terroristic actors. As discussed earlier in Chapter 3, terrorists are not combatants, however, they are categorised as civilian's takings direct part in hostilities, therefore Michael Gross's concerns do not apply to terrorists. Would the killing of a suspected terrorist during armed conflict amount to an arbitrary deprivation of the right to life?

Targeting terrorists, although deviating from the standards of armed conflict as highlighted by Michael Gross do not result in an arbitrary deprivation of the right to life. This however, does not mean that States should have free reign to kill suspected terrorists even where they can be

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<sup>192</sup> M. Gross supra note...at p. 326

<sup>193</sup> *ibid*

<sup>194</sup> *ibid*

<sup>195</sup> *Ibid* at p. 325

arrested and brought to book, as was stated by the Israeli Supreme Court in the *Targeted Killings* Case. The Supreme court noted, and I agree, that prior to resorting to targeted killings, priority consideration must be given to tactics that result in lesser harm such as arrest, interrogation and trial of the terrorist<sup>196</sup> and in cases where such it is impracticable to apply these guarantees, the Court noted that IHL could apply and so the State could, resort to targeted killings as long as the attacks did not disproportionately harm other civilians.<sup>197</sup>

### *B. Collateral Damage and the Right to Life*

Two incidences come to mind when discussing the issue of collateral damage in the context of targeted killing as a counter-terrorism tactic – the US targeted killing of US and Yemeni dual citizenship Anwar al-Awlaki, believed to have been an Al Qaeda propagandist;<sup>198</sup> and the Israeli targeted killing of Salah Shedaddeh, the Commander of the Hamas military wing in Gaza.<sup>199</sup>

Although the Commission of inquiry ruled that the killing of the other civilians with Shedaddeh was disproportionate; these two incidences are particularly interesting because they set out a blue print of what happens – to innocent bystanders, when States such as Israel and the US use targeted killing of suspected terrorists as a counter-terrorism tactic, which is said to claim more lives than terrorism itself.<sup>200</sup>

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<sup>196</sup> *The Public Committee against Torture in Israel et al v. The Government of Israel et al*, para 40

<sup>197</sup> *ibid*

<sup>198</sup> A Hell-fire missile was fired, by an unmanned aerial vehicle, at 2 unarmored vehicles that were believed to be carrying Anwar al-Awlaki, resulting in the death of Awlaki, his aid and five other people

<sup>199</sup> During the targeted killing operation that killed Salah Shedaddeh, on the night of July 22, 2002, an Israeli F-16 aircraft dropped a single one-tone bomb Shedaddeh's house, located in a densely-populated neighborhood in Gaza city, one of the most densely populated areas on the globe. Because of the operation Shedaddeh and his assistant were killed, together with Shedaddeh's wife, three of his children, and eleven other civilians – majority of whom were children. Additionally, one hundred and fifty people were injured" *see* Krebs *supra* note 31 at p. 9; and G. Blum and P. Heymann *supra* note 45 at p. 152 - 153

<sup>200</sup> L. Canaan, 'Fighting Terrorism without Violating Human Rights', Huffington Post, March 21, 2016 available at [http://www.huffingtonpost.com/lydia-canaan/fighting-terrorism-without\\_b\\_9513034.html](http://www.huffingtonpost.com/lydia-canaan/fighting-terrorism-without_b_9513034.html)



The numbers are best portrayed by the Bureau of Investigative Journalism, who note that in the span of 8 years<sup>201</sup> the US sponsored drone strikes have killed approximately 2,593 – 3,387, of whom 472 – 885 were civilians, including 176 children.<sup>202</sup> It should be noted that most media reports on targeted killings are based on a combination of intelligence and military leaks, unofficial government sources; and sometimes local correspondents – which has the potential of making the data available on targeted killing related civilian casualties unreliable.

Regardless of the unreliability of the sources on statistics of civilian casualties of targeted killings, Blum and Heymann note that there are growing concerns about the use of targeted killings reports of a growing number of civilian casualties – targeted killing collateral damage – has the correlating effect of increased concerns by human rights practitioners and the public about the targeted killings as a counter-terrorism tactic. Which begs the question, targeted killings civilian collateral damage/ harm arbitrarily deprive the right to life of innocent bystanders?

As prior noted in chapter 3, in armed conflict situations where the principles of proportionality are followed collateral damage to civilians is a legitimate consequence of war. So, taking the example of the targeted killing of Salah Shehadeh, who for purposes of clarity can be categorized as a civilian taking part in hostilities<sup>203</sup> - and therefore a legitimate target; would the 17 people

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<sup>201</sup> Between June 2004 and mid-September 2012

<sup>202</sup> C. Woods, Get the Data: Obama's Terror Drones, Bureau of Investigative Journalism (Feb 4, 2012) available at <http://www.thebureauinvestigates.com/2012/02/04/get-the-data-obamas-terror-drones/>; See also International Human Rights And Conflict Resolution Clinic (Stanford Law School) And Global Justice Clinic (NYU School Of Law), Living Under Drones: Death, Injury, And Trauma to Civilians From US Drone Practices In Pakistan (September, 2012) p. vi

<sup>203</sup> For discussion on direct participation in hostilities, see *supra* chapter 3

who were killed along with him be proportionate collateral damage? How about the cumulative totals of 885 civilians killed by the US drone strikes in Pakistan?

The Committee, that reviewed the North Atlantic Treaty Organisation, (“NATO”), bombing campaign in the former Yugoslavia; discussed the question of civilian collateral damage. In its analysis of the NATO bombing of the of the Serbian Television and Radio Station, (“RTS”) in Belgrade, in which 10 – 17 civilians were killed, the Committee found that 10 – 17 civilian casualties were not disproportionate to the military advantage gained by the NATO.<sup>204</sup>

The Committee’s position, compared to the decision of the Commission of inquiry – which found the civilian casualties to be disproportionate to the benefit of killing one high-risk target. These contradicting conclusions bring into sharp focus the inherent challenges with the IHL principle of proportionality – its lack of content.<sup>205</sup>

As stated by Amichai Cohen and Tal Mimran, the main problem with the principle of proportionality is the lack of clarity in its content. They note that, IHL under the principle of proportionality does not provide “variants required in formula to calculate the value of human lives”;<sup>206</sup> it leaves unanswered questions of how to “measure the excessiveness of civilian casualties against possible danger to lives of soldiers; and how to measure the importance of the lives of state civilians as against the lives of enemy civilian populations”.<sup>207</sup>

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<sup>204</sup> ICTY, Final Report to the Prosecutor by the Committee Established to review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M 1257 (2000) Para 71 – 79

<sup>205</sup> A. Cohen and T. Mimran, *supra* note 18 At page 103

<sup>206</sup> *ibid*

<sup>207</sup> *ibid*

Cohen and Mimran further observe that despite the challenges with the content of the principle of proportionality, it does provide clear guidance for planning purposes. If a State can clearly show that in its preparations of an attack it was informed by a “verification process regarding the extent of potential harm to civilians” – then the principle of proportionality would have served its purpose.

On the question cumulative numbers of collateral damage on civilians, guidance is found in the ruling of the Trial Chamber of the ICTY in the case of *Prosecutor v. Zoran Kupreskic et al.*<sup>208</sup> The Trial Chamber discussing the issue of proportionality in relation to collateral damage found that civilian casualties from one military operation are not unlawful *per se*; however, repeated operations resulting in civilian casualties are on the slippery slope of illegality under international law. The Trial Chamber stated that:

As an example of the way in which the Martens Clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescription of Article 57 and 58 (of which law?) or the corresponding customary rules. However, in the case of repeated attacks, all or most of

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<sup>208</sup> *Prosecutor v. Kupreskic et al. (Trial Judgement)*, IT-95-16-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 January 2000

them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians' contrary to the demands of humanity<sup>209</sup>

It can therefore be stated that while individual military attacks that cause civilian casualties that meet the proportionality standards are lawful, repeated military operations by the same State on the same population as is the case of the US counter-terrorism campaign in Pakistan; can to the extent that a pattern can be established, amount to arbitrary deprivation of the right to life.

Reintegrating the fact that international law protections against arbitrary deprivation of the right to life does not unequivocally prohibit targeted killings, but places restrictions on targeted killings as a tactic by putting in place conditions and modalities that determine the lawfulness of a targeted killing operation, either in the law enforcement or armed conflict paradigm; on a case by case basis.

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<sup>209</sup> Ibid at para 526

# Conclusions and Recommendations

Transnational terror, since the attacks on the United States on 9/11; has been the subject of discussion State, Regional, and International level. These discussions that are often shrouded in secrecy and fuelled by the fluid nature international terror, have given birth to differing perceptions and attitudes towards the issue of terror.

The appalling wreckage of lives and assets that result from terrorism, coupled with the lack of universal standards of response to terrorism; has given decision makers, in states that have been victims of terrorist attacks such as the US and Israel, a misguided perception that, to address the challenge of terrorism, they can adopt measures such as targeted killings – a practice that sits in the grey area between the law enforcement paradigm and armed conflict paradigm. Often, these decision makers have settled on a one size – targeted killing – fits all cases where there are suspected terrorists if they can justify it under the “global war on terror” paradigm.

Targeted Killing as a counter-terrorism measure is the most coercive and irreversible tactic adopted openly by some States such as Israel and the United States in the “global war on terror”. Unlike detention or interrogations, it is not designed to capture the terrorist, or extract information; simply put, it is designed to eliminate the terrorist.

As highlighted above, targeted killings although legally justifiable, presents systematic challenges to protection of the right to life under international law, especially when it comes to the protection of the right to life of innocent by-standers such as the civilians in Gaza, Yemen, Somalia, Afghanistan, Iraq, and any other location where suspected terrorists are targeted and

killed by States; and the protection of the right to life of suspected terrorists who are targeted for killing in situations where the option of arrest can be successfully exercised.

It is undisputed that the right to life forms part of customary law, and it is the right from which all other rights are grounded – without life, other human rights cannot be enjoyed. Therefore, justification for any intentional taking of life should conform to the exceptions to the basic right. And as is appropriate, these justifications to the taking of life in peace time and in war situation; should be strictly and narrowly interpreted.

This therefore requires that targeted killing as a counter-terrorism measure must be controlled and contained with the law enforcement paradigm that requires that the use of force is a last resort where it is absolutely necessary to save lives and avert injury to self; and in the armed conflict paradigm that dictates that killings are grounded in the norms and principles of IHL which require that the person killed is a combatant or civilian taking direct part in hostilities; and that the principles of distinction and proportionality are met.

Targeted killing provides a final solution, by taking out the leader of a terrorist group, is a very seductive counter terrorism strategy. However, to allow targeted into state practice without any controls as highlighted above, would open the doors for serious human rights violations of the right to life, especially in non-international armed conflicts.

Therefore, to ensure that States that practice targeted killings – and those States considering the adoption of targeted killing policies in their counter-terrorism endeavour – adopt alternatives that allow them defend their residents against terrorist attacks without abandoning commitment

to standards of human rights and humanitarian law relating to the protection of the right to life; the following recommendations are made.

## Recommendations

- *Targeted Killing as a last resort*

US and Israel and other states practicing targeted killings should ensure that targeted killing is a last adopted as a last resort and not the first choice of action. In this regard, all efforts should be made to ensure that methods adopted in counter-terrorism use the least force, such as arrest and detention. The use of lethal force should be limited to situations where it is absolutely necessary. Lastly targeted killings should only be used in areas where a state does not have effective territorial control.

- *Targeted Killing Decisions*

Targeted killings should only be used against persons who commit acts of terrorism or leaders of groups and or organisations that commit terrorism. This obliges states to take all necessary measures to ensure that accurate and reliable information is gathered about the identity of the individual targeted, this would allow for their proper classification as civilians taking direct part in hostilities.

Additionally, it is important that a decision to order a targeted killing operation is based on: “solid, accurate, and reliable intelligence that indicates that the target directly take part in terror attacks and will continue to take part in these terror acts unless neutralised”.<sup>210</sup>

Lastly all precaution should be taken before a decision for targeted killing can be made. This would oblige states to ensure that before a targeting killing operation all relevant information, including information on potential collateral damage; is gathered and analysed and conclusive results of a planned targeted killing reached before an operation is undertaken

- *Regulation of Targeted Killings outside combat Zones*

As noted above, majority of the targeted killing counter-terrorism operations are conducted in the grey area between armed conflict and law enforcement, this in turn has an implication on the effectiveness of the standards set by both legal frameworks to appropriately regulate the counter-terrorism measure of targeted killing. This situation as highlighted by Heymann and Kayyem call for the need for clear rules and standards to govern targeted killing operations,<sup>211</sup> they propose that:

[An] adequately define the appropriate use of targeted killings ...outside zones of active combat, (which) should be in accordance with procedures, rules and standards contained in legislation. It is proposed that the:

- Legislation should specifically provide for oversight by an independent quasi-judicial or judicial body guided by the principles of justice

<sup>210</sup> S. Krebs *supra* note...at p. 60

<sup>211</sup> P. B. Heymann and J. N. Kayyem, Preserving Security and Democratic Freedoms in the war on Terrorism (Cambridge: Mass.) Belfer Centre for Science and International Affairs, November 12, 2004, p. 60 available at [www.belfercenter.hks.harvard.edu/files/ltls\\_final\\_5\\_3\\_05.pdf](http://www.belfercenter.hks.harvard.edu/files/ltls_final_5_3_05.pdf) [accessed on the 3/22/2016]



- Authorisation of an individual outside active hostilities should be justified as necessary to prevent greater, reasonably imminent harm or in defence against a reasonably imminent threat to the life of one or more persons
- Action must be proportionate to the objective to be obtained, and the selection of time, place and means employed must avoid to the extent reasonably possible harm to innocent persons, and
- There can be no justification for targeting a person who is within the territorial jurisdiction of a state unless they meet the law enforcement requirements for use of lethal force<sup>212</sup>

- *The need for Review of Targeted Killing operations*

States that practice targeted killings need to put in place a body to review each targeted killing operations. This body which should be autonomous and capable of challenging security agencies should be mandated to conduct a review of targeted killing, after the fact. It should look at the decision to target an individual; the processes undergone to (to identify the individual, and collateral damage assessments); and the planning and execution of the targeted killing.

The body which should be established by law, should not be a temporal body that is convened when targeted killing takes place, but should be permanent body, whose composition and

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<sup>212</sup> *ibid*

tenure of office should be determined by the law, which should limit executive interference in the work of the review body.

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