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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston\***

**Addendum**

**Study on targeted killings\*\***

### *Summary*

In recent years, a few States have adopted policies that permit the use of targeted killings, including in the territories of other States. Such policies are often justified as a necessary and legitimate response to “terrorism” and “asymmetric warfare”, but have had the very problematic effect of blurring and expanding the boundaries of the applicable legal frameworks. This report describes the new targeted killing policies and addresses the main legal issues that have arisen.

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\* Late submission.

\*\* Owing to time constraints, the present report is circulated as received, in the language of submission only.

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## I. Introduction

1. A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator. In recent years, a few States have adopted policies, either openly or implicitly, of using targeted killings, including in the territories of other States.

2. Such policies have been justified both as a legitimate response to “terrorist” threats and as a necessary response to the challenges of “asymmetric warfare.” In the legitimate struggle against terrorism, too many criminal acts have been re-characterized so as to justify addressing them within the framework of the law of armed conflict. New technologies, and especially unarmed combat aerial vehicles or “drones”, have been added into this mix, by making it easier to kill targets, with fewer risks to the targeting State.

3. The result of this mix has been a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks – human rights law, the laws of war, and the law applicable to the use of inter-state force. Even where the laws of war are clearly applicable, there has been a tendency to expand who may permissibly be targeted and under what conditions. Moreover, the States concerned have often failed to specify the legal justification for their policies, to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, or to provide accountability mechanisms for violations. Most troublingly, they have refused to disclose who has been killed, for what reason, and with what collateral consequences. The result has been the displacement of clear legal standards with a vaguely defined licence to kill, and the creation of a major accountability vacuum.

4. In terms of the legal framework, many of these practices violate straightforward applicable legal rules. To the extent that customary law is invoked to justify a particular interpretation of an international norm, the starting point must be the policies and practice of the vast majority of States and not those of the handful which have conveniently sought to create their own personalized normative frameworks. It should be added that many of the justifications for targeted killings offered by one or other of the relevant States in particular current contexts would in all likelihood not gain their endorsement if they were to be asserted by other States in the future.

5. This report describes the publicly available information about new targeted killing policies and addresses the main legal issues that have arisen. It identifies areas in which legal frameworks have been clearly violated or expanded beyond their permissible limits; where legal issues are unclear, it suggests approaches which would enable the international community to return to a normative framework that is consistent with its deep commitment to protection of the right to life, and the minimization of exceptions to that constitutive principle.

6. The Special Rapporteur is grateful to Hina Shamsi of the Project on Extrajudicial Executions at the Center for Human Rights and Global Justice, New York University School of Law, for her superb assistance in the preparation of this report. He is also grateful to Sarah Knuckey for her comments, and Nishant Kumar and Anna De Courcy Wheeler for research assistance.

## II. Background

### A. Definition of “targeted killing”

7. Despite the frequency with which it is invoked, “targeted killing” is not a term defined under international law. Nor does it fit neatly into any particular legal framework. It came into common usage in 2000, after Israel made public a policy of “targeted killings” of alleged terrorists in the Occupied Palestinian Territories.<sup>1</sup> The term has also been used in other situations, such as:

- The April 2002 killing, allegedly by Russian armed forces, of “rebel warlord” Omar Ibn al Khattab in Chechnya.<sup>2</sup>
- The November 2002 killing of alleged al Qaeda leader Ali Qaed Senyan al-Harithi and five other men in Yemen, reportedly by a CIA-operated Predator drone using a Hellfire missile.<sup>3</sup>
- Killings in 2005 – 2008 by both Sri Lankan government forces and the opposition LTTE group of individuals identified by each side as collaborating with the other.<sup>4</sup>
- The January 2010 killing, in an operation allegedly carried out by 18 Israeli Mossad intelligence agents, of Mahmoud al-Mahboubh, a Hamas leader, at a Dubai hotel.<sup>5</sup> According to Dubai officials, al-Mahboubh was suffocated with a pillow; officials released videotapes of those responsible, whom they alleged to be Mossad agents.<sup>6</sup>

8. Targeted killings thus take place in a variety of contexts and may be committed by governments and their agents in times of peace as well as armed conflict, or by organized armed groups in armed conflict.<sup>7</sup> The means and methods of killing vary, and include sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison.<sup>8</sup>

<sup>1</sup> Infra, section II.B. Orna Ben-Naftali & Keren Michaeli, We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell Int’l L.J. 233, 234 (2003). Although this report uses the common terms “terrorism” and “terrorist”, I agree with the Special Rapporteur on the promotion and protection of human rights while countering terrorism that the continuing lack of a “universal, comprehensive and precise” definition of these terms hampers the protection of human rights, E/CN.4/2006/98, para. 50, and in particular, the right to life. The work of the Ad Hoc Committee established under GA Res. 51/210 to work on a draft convention on international terrorism is critical and urgent.

<sup>2</sup> BBC, Russia ‘Kills’ Chechen Warlord, 25 April 2002.

<sup>3</sup> Jane Mayer, The Predator War, The New Yorker, 26 Oct. 2009; Greg Miller, C.I.A. Said to Use Outsiders to Put Bombs on Drones, LA Times, 13 Feb. 2009.

<sup>4</sup> A/HRC/8/3/Add.3, para. 12.

<sup>5</sup> Targeted Killing in Dubai: A Mossad Operation Gone Awry?, Der Spiegel, 23 Feb. 2010; Ilene Prusher, Was Mossad Behind Dubai Assassination? Israel Foreign Minister Isn’t Saying, Christian Science Monitor, 17 Feb. 2010.

<sup>6</sup> Targeted Killing in Dubai: A Mossad Operation Gone Awry?, Der Spiegel, 23 Feb. 2010. Other examples of Israeli targeted killings include: Crimes of War Project, Case Study: The Israeli Strike Against Hamas Leader Salah Shehadeh. available at: <http://www.crimesofwar.org/print/onnews/Shehadeh-print.html>.

<sup>7</sup> This report focuses only on killings by States and their agents because, as yet, no non-state actors have sought to justify specific “targeted killings.”

<sup>8</sup> See, fns. 2-6; B’Tselem, Statistics: Fatalities, available at <http://www.btselem.org/English/Statistics/Casualties.asp>; Simon Saradzhyan, Russia’s System to Combat Terrorism and Its Application in Chechnya, in R.W. Orttung and A. Makarychev, National

9. The common element in all these contexts is that lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator.<sup>9</sup> In a targeted killing, the specific goal of the operation is to use lethal force. This distinguishes targeted killings from unintentional, accidental, or reckless killings, or killings made without conscious choice. It also distinguishes them from law enforcement operations, e.g., against a suspected suicide bomber. Under such circumstances, it may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill.

10. Although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal.<sup>10</sup> This is in contrast to other terms with which “targeted killing” has sometimes been interchangeably used, such as “extrajudicial execution”, “summary execution”, and “assassination”, all of which are, by definition, illegal.<sup>11</sup>

## B. New targeted killing policies

11. The phenomenon of targeted killing has been present throughout history.<sup>12</sup> In modern times, targeted killings by States have been very restricted or, to the extent that they are not, any *de facto* policy has been unofficial and usually denied, and both the justification and the killings themselves have been cloaked in secrecy.<sup>13</sup> When responsibility for illegal targeted killings could be credibly assigned, such killings have been condemned by the international community – including by other States alleged to practice them.<sup>14</sup>

12. More recently, however, a few States have either openly adopted policies that permit targeted killings, or have formally adopted such a policy while refusing to acknowledge its existence.

### Israel

13. In the 1990s, Israel categorically refused to admit to targeted killings, stating, when accused, that “the [Israeli Defense Force] wholeheartedly rejects this accusation. There is no policy and there never will be a policy or a reality of willful killing of suspects . . . the

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Counter-terrorism Strategies (2006) at 185; BBC, Chechens ‘Confirm’ Warlord’s Death, 29 April 2002.

<sup>9</sup> Nils Melzer, Targeted Killing in International Law (2008) at 4-5.

<sup>10</sup> *Infra*, section II.A.

<sup>11</sup> Michael N. Schmitt, State Sponsored Assassination in International and Domestic Law, 17 Yale J. Int’l L. 609, 611-12 (1992); W. Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination, 1989 Army Lawyer 4, 7-8 (1989).

<sup>12</sup> Melzer, *supra* note 9 at 1.

<sup>13</sup> According to Amnesty International, between 1976 and 1992, an elite unit of the British army killed 37 reported members of the Irish Republican Army in Northern Ireland; the United Kingdom has consistently denied conducting targeted killings. Amnesty International, Political Killings in Northern Ireland (1994) at 4.

<sup>14</sup> E.g., Press Release of the Council of the European Union, 7373/04 of March 2004 available at: <http://www.consilium.europa.eu/App/NewsRoom/loadBook.aspx?target=2004&infotarget=&max=15&bid=78&lang=EN&id=1850>; Record of Security Meeting (S/PV.4945) 19 April 2004 (condemnation of Israeli killing of Hamas leader by Russia, Pakistan, United Kingdom, Germany and Spain); Brian Whittaker & Oliver Burkeman, Killing Probes the Frontiers of Robotics and Legality, Guardian, 6 Nov. 2002 (Swedish Foreign Minister on US targeting of al-Harithi).

principle of the sanctity of life is a fundamental principle of the I.D.F.”<sup>15</sup> In November 2000, however, the Israeli Government confirmed the existence of a policy pursuant to which it justified targeted killings in self-defence and under international humanitarian law (IHL) because the Palestinian Authority was failing to prevent, investigate and prosecute terrorism and, especially, suicide attacks directed at Israel.<sup>16</sup> This was reinforced by the issuance, in 2002, of a legal opinion (only part was published) by the Israeli Defense Force Judge Advocate General on the conditions under which Israel considered targeted killings to be legal.<sup>17</sup>

14. The majority of Israeli targeted killings have reportedly taken place in “Area A”, a part of the West Bank under the control of the Palestinian Authority.<sup>18</sup> The targets have included members of various groups, including Fatah, Hamas, and Islamic Jihad, who, Israeli authorities claimed, were involved in planning and carrying out attacks against Israeli civilians.<sup>19</sup> Means used for targeted killings include drones, snipers, missiles shooting from helicopters, killings at close range, and artillery.<sup>20</sup> One study by a human rights group found that between 2002 and May 2008 at least 387 Palestinians were killed as a result of targeted killing operations. Of these, 234 were the targets, while the remainder were collateral casualties.<sup>21</sup>

15. The legal underpinnings of these policies were subsequently adjudicated by the Israeli Supreme Court in December 2006.<sup>22</sup> The court did not as a general matter either prohibit or permit targeted killings by Israeli forces, holding instead that the lawfulness of each killing must be determined individually. It found without detailed discussion that the customary law of international armed conflict was the applicable law, and did not consider the application of either human rights law or the IHL of non-international armed conflict. It rejected the Government’s contention that terrorists were “unlawful combatants” subject to attack at all times. Instead, it held that the applicable law permitted the targeted killing of civilians for such time as they “directly participated in hostilities”<sup>23</sup> as long as four cumulative conditions were met:

- Targeting forces carried the burden of verifying the identity of the target as well as the factual basis for meeting the “direct participation” standard.
- Even if the target was legally and factually identified by the Government as legitimate, State forces could not kill the person if less harmful means were available.
- After each targeted killing, there must be a retroactive and independent investigation of the “identification of the target and the circumstances of the attack”; and

<sup>15</sup> Na’ama Yashuvi, *Activity of the Undercover Units in the Occupied Territories*, B’Tselem (1992).

<sup>16</sup> E.g., Press Briefing by Colonel Daniel Reisner, IDF Legal Division, 15 Nov. 2000, available at [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2000/11/Press%20Briefing%20by%20Colonel%20Daniel%20Reisner-%20Head%20of](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/11/Press%20Briefing%20by%20Colonel%20Daniel%20Reisner-%20Head%20of).

<sup>17</sup> Gideon Alon & Amos Harel, *IDF Lawyers Set ‘Conditions’ for Assassination Policy*, Haaretz, 2 Feb. 2002.

<sup>18</sup> K.A. Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories*, 26 *Fordham Int’l L. J.* 934, 960 (2003).

<sup>19</sup> Naftali & Michaeli, *supra* note 1 at 247-50.

<sup>20</sup> B’Tselem, *Statistics related to Israel-Palestinian conflict post-2000*, available at: <http://www.btselem.org/english/statistics/Casualties.asp>.

<sup>21</sup> *Id.*

<sup>22</sup> *Israel High Court of Justice, The Public Committee Against Torture et al. v. The Government of Israel, et al. HCJ 769/02, Judgment of 14 Dec. 2006 (PCATI).*

<sup>23</sup> *Id.* at paras. 31-40.

- Any collateral harm to civilians must meet the IHL requirement of proportionality.<sup>24</sup>

16. Subsequently, it has been reported that Israeli forces have conducted targeted killings in violation of the Supreme Court's requirements.<sup>25</sup> The reports, denied by Israeli officials, were allegedly based on classified documents taken by an IDF soldier during her military service; the soldier has been charged with espionage.<sup>26</sup>

17. Israel has not disclosed the basis for its legal conclusions, and has not disclosed in detail the guidelines it uses to make its targeted killings decisions, the evidentiary or other intelligence requirements that would justify any killing, or the results of any after-action review of the conformity of the operation with the legal requirements.

### The USA

18. The United States has used drones and airstrikes for targeted killings in the armed conflicts in Afghanistan and Iraq, where the operations are conducted (to the extent publicly known) by the armed forces.<sup>27</sup> The US also reportedly adopted a secret policy of targeted killings soon after the attacks of 11 September 2001,<sup>28</sup> pursuant to which the Government has credibly been alleged to have engaged in targeted killings in the territory of other States.<sup>29</sup> The secret targeted killing program is reportedly conducted by the Central Intelligence Agency (CIA) using "Predator" or "Reaper" drones, although there have been reports of involvement by special operations forces, and of the assistance of civilian contractors with the implementation of the program.<sup>30</sup>

19. The first credibly reported CIA drone killing occurred on 3 November 2002, when a Predator drone fired a missile at a car in Yemen, killing Qaed Senyan al-Harithi, an al-Qaeda leader allegedly responsible for the *USS Cole* bombing.<sup>31</sup> Since then, there have reportedly been over 120 drone strikes, although it is not possible to verify this number.<sup>32</sup> The accuracy of drone strikes is heavily contested and also impossible for outsiders to verify. Reports of civilian casualties in Pakistan range from approximately 20 (according to anonymous US Government officials quoted in the media) to many hundreds.<sup>33</sup>

20. The CIA reportedly controls its fleet of drones from its headquarters in Langley, Virginia, in coordination with pilots near hidden airfields in Afghanistan and Pakistan who handle takeoffs and landings.<sup>34</sup> The CIA's fleet is reportedly flown by civilians, including both intelligence officers and private contractors (often retired military personnel).<sup>35</sup>

<sup>24</sup> Id. at paras. 39, 40 and 60.

<sup>25</sup> Uri Blau, *IDF Rejects Claims it Killed Palestinians in Defiance of Court*, Haaretz, 27 Nov. 2008.

<sup>26</sup> Ofra Edelman, *Ex-Soldier Charged with Espionage for Leaking Documents to Haaretz*, Haaretz, 9 April 2010.

<sup>27</sup> BBC, *US Drones Take Combat Role*, 5 Nov. 2002.

<sup>28</sup> Council of Europe, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States*, report submitted by Mr. Dick Marty, Doc. 11302 Rev. (7 June 2007), paras. 58-64.

<sup>29</sup> Greg Miller, *Feinstein Comment on US Drones Likely to Embarrass Pakistan*, LA Times, 13 Feb. 2009.

<sup>30</sup> Jane Perlez, *Pakistan Rehearses Its Two-Step on Airstrikes*, NY Times, 15 April 2009; Mayer, *supra* note 3; James Risen & Mark Mazzetti, *CIA Said to Use Outsiders to Put Bombs on Drones*, NY Times, 21 Aug. 2009.

<sup>31</sup> Jane's, *Yemen Drone Strike: Just the Start?* 8 Nov. 2002, available at [http://www.janes.com/aerospace/military/news/jdw/jdw021108\\_1\\_n.shtml](http://www.janes.com/aerospace/military/news/jdw/jdw021108_1_n.shtml).

<sup>32</sup> New America Foundation, *Analysis of US Drone Strikes in Pakistan 2004-2010*, available at <http://counterterrorism.newamerica.net/drones#2010chart>.

<sup>33</sup> Id.; *US Drone Attacks in Pakistan 'Backfiring, Congress Told'*, LA Times, 3 May 2009.

<sup>34</sup> Mayer, *supra* note 3.

<sup>35</sup> Id.

According to media accounts, the head of the CIA's clandestine services, or his deputy, generally gives the final approval for a strike.<sup>36</sup> There is reportedly a list of targets approved by senior Government personnel, although the criteria for inclusion and all other aspects of the program are unknown.<sup>37</sup> The CIA is not required to identify its target by name; rather, targeting decisions may be based on surveillance and "pattern of life" assessments.<sup>38</sup>

21. The military also has a target list for Afghanistan. A Senate Foreign Relations Committee Report released on 10 August 2009 disclosed that the military's list included drug lords suspected of giving money to help finance the Taliban.<sup>39</sup> According to the report, "[t]he military places no restrictions on the use of force with these selected targets, which means they can be killed or captured on the battlefield . . . standards for getting on the list require two verifiable human sources and substantial additional evidence."<sup>40</sup>

22. The Legal Adviser to the Department of State recently outlined the Government's legal justifications for targeted killings. They were said to be based on its asserted right to self-defence, as well as on IHL, on the basis that the US is "in an armed conflict with Al Qaeda, as well as the Taliban and associated forces."<sup>41</sup> While this statement is an important starting point, it does not address some of the most central legal issues including: the scope of the armed conflict in which the US asserts it is engaged, the criteria for individuals who may be targeted and killed, the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings, and the existence of accountability mechanisms.

### Russia

23. Russia has described its military operations in Chechnya, launched in 1999, as a counter-terrorism operation. During the course of the conflict, Russia has reportedly deployed "seek and destroy" groups of army commandoes to "hunt down groups of insurgents"<sup>42</sup> and has justified reported targeted killings in Chechnya as necessitated by Russia's fight against terrorism.<sup>43</sup> This justification is especially problematic in so far as large parts of the population have been labeled as terrorists.<sup>44</sup> Although there are credible reports of targeted killings conducted outside of Chechnya, Russia has refused to acknowledge responsibility or otherwise justify the killing, and also refused to cooperate with any investigation or prosecution.<sup>45</sup>

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> US Senate Foreign Relations Committee, *Afghanistan's Narco War: Breaking the Link Between Drug Traffickers and Insurgents: Report to the Senate Committee on Foreign Relations*, S. Rep. No. 111-29, at 16 (2009).

<sup>40</sup> Id. at 15-16.

<sup>41</sup> Harold Koh, Legal Adviser, Department of State, *The Obama Administration and International Law*, Keynote Address at the Annual Meeting of the American Soc'y of Int'l Law (25 Mar. 2010).

<sup>42</sup> Saradzhyan, *supra* note 8 at 183.

<sup>43</sup> E.g., BBC, *Chechen Rebel Basayev Dies*, 10 July 2006 (alleged killing by Russian special forces of Chechen rebel leader Shamil Basayev).

<sup>44</sup> E.g., Anna Le Huerou and Amandine Regamey, *Russia's War in Chechnya*, in Samy Cohen, *Democracies at War Against Terrorism* at 222 (2008).

<sup>45</sup> Andrew McGregor, *The Assassination Of Zelimkhan Yandarbiyev: Implications For The War On Terrorism* *Terrorism Monitor*, 2:14, 14 July 2004.

24. In summer 2006, the Russian Parliament passed a law permitting the Russian security services to kill alleged terrorists overseas, if authorized to do so by the President.<sup>46</sup> The law defines terrorism and terrorist activity extremely broadly, including “practices of influencing the decisions of government, local self-government or international organizations by terrorizing the population or through other forms of illegal violent action,” and also any “ideology of violence.”<sup>47</sup>

25. Under the law, there appears to be no restriction on the use of military force “to suppress international terrorist activity outside the Russian Federation.”<sup>48</sup> The law requires the President to seek the endorsement of the Federation Council to use regular armed forces outside Russia, but the President may deploy FSB security forces at his own discretion. According to press accounts, at the time of the law’s passage, “Russian legislators stressed that the law was designed to target terrorists hiding in failed States and that in other situations the security services would work with foreign intelligence services to pursue their goals.”<sup>49</sup> Legislators also “insisted that they were emulating Israeli and US actions in adopting a law allowing the use of military and special forces outside the country’s borders against external threats.”<sup>50</sup>

26. There is no publicly available information about any procedural safeguards to ensure Russian targeted killings are lawful, the criteria for those who may be targeted, or accountability mechanisms for review of targeting operations.

### C. New technology

27. Drones were originally developed to gather intelligence and conduct surveillance and reconnaissance. More than 40 countries now have such technology. Some, including Israel, Russia, Turkey, China, India, Iran, the United Kingdom and France either have or are seeking drones that also have the capability to shoot laser-guided missiles ranging in weight from 35 pounds to more than 100 pounds. The appeal of armed drones is clear: especially in hostile terrain, they permit targeted killings at little to no risk to the State personnel carrying them out, and they can be operated remotely from the home State. It is also conceivable that non-state armed groups could obtain this technology.<sup>51</sup>

## III. Legal issues

### A. The applicable legal frameworks and basic rules

28. Whether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the inter-state use of force.<sup>52</sup> The basic legal rules applicable to targeted killings in each of these contexts are laid out briefly below.

<sup>46</sup> Federal Law No. 35-FZ on Counteracting Terrorism (2006) available at: <http://www.legislationline.org/topics/country/7/topic/5..>

<sup>47</sup> Id. art. 3.

<sup>48</sup> Id. art. 6.

<sup>49</sup> Peter Finn, In Russia, A Secretive Force Widens, Washington Post, 12 Dec. 2006.

<sup>50</sup> Steven Eke, Russia Law on Killing Extremists Abroad, BBC, 27 Nov. 2006.

<sup>51</sup> Dan Efron, Hizbullah’s Worrisome Weapon, Newsweek, 11 Sept. 2006 (reporting that Iran has provided weaponized drones to Hezbollah).

<sup>52</sup> A/61/311, paras. 33-45 (detailed discussion of “arbitrary” deprivation of life under human rights law).

### In the context of armed conflict

29. **The legal framework:** Both IHL and human rights law apply in the context of armed conflict; whether a particular killing is legal is determined by the applicable *lex specialis*.<sup>53</sup> To the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law.<sup>54</sup>

30. **Under the rules of IHL:** Targeted killing is only lawful when the target is a “combatant” or “fighter”<sup>55</sup> or, in the case of a civilian, only for such time as the person “directly participates in hostilities.”<sup>56</sup> In addition, the killing must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity,<sup>57</sup> and everything feasible must be done to prevent mistakes and minimize harm to civilians.<sup>58</sup> These standards apply regardless of whether the armed conflict is between States (an international armed conflict) or between a State and a non-state armed group (non-international armed conflict), including alleged terrorists. Reprisal or punitive attacks on civilians are prohibited.<sup>59</sup>

### Outside the context of armed conflict

31. **The legal framework:** The legality of a killing outside the context of armed conflict is governed by human rights standards, especially those concerning the use of lethal force. Although these standards are sometimes referred to as the “law enforcement” model, they do not in fact apply only to police forces or in times of peace. The “law enforcement officials” who may use lethal force include all government officials who exercise police

<sup>53</sup> Human rights law and IHL apply coextensively and simultaneously unless there is a conflict between them. E/CN.4/2005/7, paras. 46-53; A/HRC/4/20, paras. 18-19; A/HRC/11/2/Add.5, paras. 71-73, 83; A/HRC/4/20/Add.1, pp. 342-58; E/CN.4/2006/53/Add.1, pp. 264-65; A/HRC/4/20/Add.1, pp. 358-61. In situations that do not involve the conduct of hostilities – e.g., law enforcement operations during non-international armed conflict – the *lex generalis* of human rights law would apply.

<sup>54</sup> ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ rep. 226, para 25 (Nuclear Weapons); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] I.C.J. Rep. (Wall Opinion) para. 106; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), [2005] I.C.J. Rep., para. 216 (Armed Activities).

<sup>55</sup> International Institute of Humanitarian Law, The Manual on the Law of Non-International Armed Conflict, March 2006.

<sup>56</sup> Geneva Conventions Common Article 3, AP I, art. 52(1) and (2); AP I, art. 50(1); International Humanitarian Law Research Initiative, HPCR Manual and Commentary on International Law Applicable to Air and Missile Warfare, Harvard University Program on Humanitarian Policy and Conflict Research, 15 May 2009, available at <http://www.ihlresearch.org/amw/manual> (HPCR Commentary), section C.12.(a).

<sup>57</sup> Proportionality requires an assessment whether an attack that is expected to cause incidental loss of civilian life or injury to civilians would be excessive in relation to the anticipated concrete and direct military advantage. AP I, arts. 51(5)(b) and 57; Henckaerts & Oswald-Beck, Customary International Humanitarian Law Rules, ICRC (2005) (ICRC Rules) Rule 14.

<sup>58</sup> Precaution requires that, before every attack, armed forces must do everything feasible to: i) verify the target is legitimate, (ii) determine what the collateral damage would be and assess necessity and proportionality, and (iii) minimize the collateral loss of lives and/or property. AP I, art. 57; ICRC Rules 15-21. “Everything feasible” means precautions that are “practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.” Melzer, *supra* note 9 at 365.

<sup>59</sup> AP I, art. 51 (2); HPCR Commentary section C.18.

powers, including a State's military and security forces, operating in contexts where violence exists, but falls short of the threshold for armed conflict.<sup>60</sup>

32. **Under human rights law:** A State killing is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life (making lethal force *necessary*).<sup>61</sup> The proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others.<sup>62</sup> The necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate, through, for example, the use of warnings, restraint and capture.<sup>63</sup>

33. This means that under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation. Thus, for example, a "shoot-to-kill" policy violates human rights law.<sup>64</sup> This is not to imply, as some erroneously do, that law enforcement is incapable of meeting the threats posed by terrorists and, in particular, suicide bombers. Such an argument is predicated on a misconception of human rights law, which does not require States to choose between letting people be killed and letting their law enforcement officials use lethal force to prevent such killings. In fact, under human rights law, States' duty to respect and to ensure the right to life<sup>65</sup> entails an obligation to exercise "due diligence" to protect the lives of individuals from attacks by criminals, including terrorists.<sup>66</sup> Lethal force under human rights law is legal if it is strictly and directly necessary to save life.

#### The use of inter-state force

34. **The legal framework:** Targeted killings conducted in the territory of other States raise sovereignty concerns.<sup>67</sup> Under Article 2(4) of the UN Charter, States are forbidden from using force in the territory of another State.<sup>68</sup> When a State conducts a targeted killing in the territory of another State with which it is not in armed conflict, whether the first State violates the sovereignty of the second is determined by the law applicable to the use of inter-state force, while the question of whether the specific killing of the particular individual(s) is legal is governed by IHL and/or human rights law.

35. **Under the law of inter-state force:** A targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty if either (a) the second State consents, or (b) the first, targeting, State has a right under international law to

<sup>60</sup> Code of Conduct for Law Enforcement Officials, GA Res. 34/169 of 17 December 1979 (Code of Conduct), art. 1, commentary (a) and (b); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth U.N. Congress on Prevention of Crime and Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, (Basic Principles), preamble, note.

<sup>61</sup> A/61/311, paras. 33-45; Human Rights Committee, General Comment No. 6, HRI/GEN/1/Rev.6 (1982), para. 3; Inter-American Commission of Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002).

<sup>62</sup> A/61/311, paras. 42-44.

<sup>63</sup> A/61/311, para. 41.

<sup>64</sup> E/CN.4/2006/53, paras. 44-54.

<sup>65</sup> ICCPR, Art. (2)(1).

<sup>66</sup> E/CN.4/2005/7, paras. 71-74.

<sup>67</sup> Sec. Co. Res. 611 of 25 April 1988 (condemning as an act of illegal aggression Israel's killing in Tunisia of Khalil al-Wazir for violating Tunisian territory); Robert Pear, US Assails P.L.O. Aide's Killing As 'Act of Political Assassination', NY Times, 18 April 1988 (condemned by US State Department as "political assassination").

<sup>68</sup> UN Charter, art. 51.

use force in self-defence under Article 51 of the UN Charter,<sup>69</sup> because (i) the second State is responsible for an armed attack against the first State, or (ii) the second State is unwilling or unable to stop armed attacks against the first State launched from its territory. International law permits the use of lethal force in self-defence in response to an “armed attack” as long as that force is necessary and proportionate.<sup>70</sup>

36. While the basic rules are not controversial, the question of which framework applies, and the interpretation of aspects of the rules, have been the subject of significant debate. Both issues are addressed in greater detail below.

## B. Sovereignty issues and States’ invocation of the right to self-defence

### Consent

37. The proposition that a State may consent to the use of force on its territory by another State is not legally controversial.<sup>71</sup> But while consent may permit the use of force, it does not absolve either of the concerned States from their obligations to abide by human rights law and IHL with respect to the use of lethal force against a specific person. The consenting State’s responsibility to protect those on its territory from arbitrary deprivation of the right to life applies at all times.<sup>72</sup> A consenting State may only lawfully authorize a killing by the targeting State to the extent that the killing is carried out in accordance with applicable IHL or human rights law.

38. To meet its legal obligations, therefore, the consenting State should, at a minimum, require the targeting State to demonstrate verifiably that the person against whom lethal force is to be used can be lawfully targeted and that the targeting State will comply with the applicable law.<sup>73</sup> After any targeted killing, the consenting State should ensure that it was legal. In case of doubt, the consenting State must investigate the killing and, upon a finding of wrongdoing, seek prosecution of the offenders and compensation for the victims.

### The right to self-defence

39. In the absence of consent, or in addition to it, States may invoke the right to self-defence as justification for the extraterritorial use of force involving targeted killings.<sup>74</sup> As noted above, international law permits the use of lethal force in self-defence in response to an “armed attack” as long as that force is necessary and proportionate.<sup>75</sup> Controversy has arisen, however, in three main areas: whether the self-defence justification applies to the

<sup>69</sup> UN Charter, art. 2(4).

<sup>70</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicar. vs. US)* [1986] ICJ Rep., para. 194 (Military and Paramilitary Activities); O. Schachter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1633-34 (1984). In the context of self-defence, force is proportionate only if it is used defensively and if it is confined to the objective.

<sup>71</sup> *Military and Paramilitary Activities*, para. 246. Pakistan and Yemen may have consented to targeted drone killings by the US in their territory. Eric Schmitt and Mark Mazzetti, *In a First, US Provides Pakistan with Drone Data*, NY Times, 13 May 2009; Joby Warrick and Peter Finn, *CIA director says secret attacks in Pakistan have hobbled al-Qaeda*, Wash. Post., Mar. 18, 2010.

<sup>72</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 6 (ICCPR); UN General Assembly, *Resolution on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, A/Res/51/191, 10 Mar. 2005, para. 1.

<sup>73</sup> E/CN.4/2005/7, at para. 41.

<sup>74</sup> E.g., PCATI, *supra* note 22, para. 10; Koh, *supra* note 41; Abraham D. Sofaer, *Terrorism, The Law, and the National Defense*, 126 Military Law Review 89, 103 (1989).

<sup>75</sup> U.N. Charter art. 51; Schachter, *supra* note 70 at 1633-34.

use of force against non-state actors and what constitutes an armed attack by such actors; the extent to which self-defence alone is a justification for targeted killings; and, the extent to which States have a right to “anticipatory” or “pre-emptive” self-defence.

### **Self-defence and non-state actors**

40. It has been a matter of debate whether Article 51 permits States to use force against non-state actors. The argument that it does not finds support in judgments of the International Court of Justice (ICJ) holding that States cannot invoke Article 51 against armed attacks by non-state actors that are not imputable to another State.<sup>76</sup> On the other hand, some States, including the US, argue that Article 51 does not displace the customary international law right to act in self-defence, including against non-state actors, and that State practice supports that position.<sup>77</sup> Commentators find support for that argument in Security Council Resolutions 1368 and 1373 issued in the wake of the September 11 attacks,<sup>78</sup> as well as NATO’s invocation of the North Atlantic Treaty’s Article 5 collective self-defence provision.<sup>79</sup> But even if it were to be accepted that Article 51 has not displaced customary law, the reality is that it will only be in very rare circumstances that a non-state actor whose activities do not engage the responsibility of any State will be able to conduct the kind of armed attack that would give rise to the right to use extraterritorial force. In such exceptional circumstances, the UN Charter would require that Security Council approval should be sought.

41. A more difficult question concerns the extent to which persistent but discrete attacks, including by a non-state actor, would constitute an “armed attack” under Article 51. In a series of decisions, the ICJ has established a high threshold for the kinds of attacks that would justify the extraterritorial use of force in self-defence.<sup>80</sup> In its view, sporadic, low-intensity attacks do not rise to the level of armed attack that would permit the right to use extraterritorial force in self-defence, and the legality of a defensive response must be judged in light of each armed attack, rather than by considering occasional, although perhaps successive, armed attacks in the aggregate. While this approach has been criticized,<sup>81</sup> few commentators have supported an approach that would accommodate the invocation of the right to self-defence in response to most of the types of attack that have been at issue in relation to the extraterritorial targeted killings discussed here. Any such approach would diminish hugely the value of the foundational prohibition contained in Article 51.

### **The relationship between self-defence and IHL and human rights law**

42. The second area of controversy arises particularly in the context of the use of force by the US against alleged terrorists in other countries, especially Pakistan. Some US scholars and commentators advocate a “robust” form of self-defence in which, once the doctrine is invoked, no other legal frameworks or limiting principles – such as IHL – would

<sup>76</sup> *Wall Opinion; Armed Activities*, para. 216.

<sup>77</sup> Sofaer, *supra* note 74 at 107.

<sup>78</sup> Sec. Co. Res. 1368 (2001) 12 Sept. 2001; Sec. Co. Res. 1372 (2001) 28 Sept. 2001.

<sup>79</sup> Press Release, North Atlantic Council, 12 Sept. 2001, *available at* <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

<sup>80</sup> *Military and Paramilitary Activities* 1986 I.C.J. 14; ICJ, *Oil Platforms* (Iran v. US), 2003 I.C.J. 161, 6 Nov. 2003; *Armed Activities*, 2005 I.C.J. 116, 19 Dec. 2005; *Wall Opinion*, 2004 I.C.J. 136.

<sup>81</sup> *Armed Activities* (separate opinion of Judge Simma), paras. 8 and 15; Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 *Yale J. Int’l Law* 82 (2010); Christine Gray, *International Law and the Use of Force* (2004) 133.

apply to targeted killings.<sup>82</sup> Under this view, once it is justified to use force in self-defence, IHL and human rights law would not be applicable to that use of force. This approach reflects an unlawful and disturbing tendency in recent times to permit violations of IHL based on whether the broader cause in which the right to use force is invoked is “just,”<sup>83</sup> and impermissibly conflates *jus ad bellum* and *jus in bello*.<sup>84</sup> Proponents of a “robust” right to self-defence cite to the ICJ’s Nuclear Weapons Advisory Opinion, in which the court found that “the threat or use of nuclear weapons would generally” violate IHL, but held that it could not conclude that such threat or use “would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”<sup>85</sup> While this aspect of the opinion has been criticized as being vague and confusing,<sup>86</sup> it seeks to address only the most extreme situation involving a State’s very survival. Invoking such an extreme exception to permit the violation of IHL on self-defence grounds in the type of situations under consideration here would be tantamount to abandoning IHL.

43. The “robust” self-defence approach also ignores the very real differences between the law of inter-state force and the law applicable to the conduct of hostilities. Whether the use of force is legal is a question that usually arises at the start of an armed conflict, while the law applicable to the conduct of that armed conflict applies throughout it.<sup>87</sup> The limitations on each are distinct. Proportionality under self-defence requires States to use force only defensively and to the extent necessary to meet defensive objectives,<sup>88</sup> whereas the test for proportionality under IHL requires States to balance the incidental harm or death of civilians caused by an operation to the military advantage that would result. Necessity in under self-defence requires a State to assess whether it has means to defend itself other than through armed force, while necessity in IHL requires it to evaluate whether an operation will achieve the goals of the military operation and is consistent with the other rules of IHL. Finally, the “robust” self-defence approach fails to take into account the existence of two levels of responsibility in the event that a targeted killing for which self-defence is invoked is found to be unlawful. Violation of the limitations on the right to self-defence results in State and individual criminal responsibility for aggression. There is also liability for the unlawful killing itself – if it violates IHL, it may be a war crime. The Articles on State Responsibility make abundantly clear that States may not invoke self-defence as justification for their violations of IHL.<sup>89</sup>

<sup>82</sup> E.g., Kenneth Anderson, Targeted Killing in US Counterterrorism Strategy and Law, available at [http://www.brookings.edu/papers/2009/0511\\_counterterrorism\\_anderson.aspx](http://www.brookings.edu/papers/2009/0511_counterterrorism_anderson.aspx); Kenneth Anderson, Predators over Pakistan, *The Weekly Standard*, 8 March 2010; Parks, *supra* note 11. Recently, the State Department Legal Adviser appeared to acknowledge that self-defence is an additional, not alternative, source of authority. Koh, *supra* note 41.

<sup>83</sup> IACHR, *Tablada*, Report No. 55/97, Argentina, Doc. 38, 1997, paras. 173-74.

<sup>84</sup> Robert Kolb, *Origin of the Twin Terms Jus ad Bellum and Jus in Bello*, 320 *Int’l Rev. Red Cross* 554 (1997); Judith Gardam, *Proportionality and Force in International Law*, 87 *American Journal of International Law* 391 (1993).

<sup>85</sup> *Nuclear Weapons*, para 25.

<sup>86</sup> E.g., *Dissenting Opinion of Judge Higgins, Dissenting Opinion of Judge Koroma; Dapo Akande, Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court*, 68 *Brit. Yearbook of Int’l Law* 209 (1997); Christopher Greenwood, *The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law*, *Int’l Rev. Red Cross*, No. 316, p. 65 (1997); Jasmine Moussa, *Can Jus Ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, *Int’l Rev. Red Cross*, No. 872, p. 963 (2008).

<sup>87</sup> Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 *Review of International Studies* 221, 222-23 (1983).

<sup>88</sup> *Nuclear Weapons, Dissenting Opinion of Judge Higgins*, para. 5.

<sup>89</sup> ILC, *Articles on State Responsibility* at 166-67.

44. In sum, even if the use of inter-state force is offered as justification for a targeted killing, it does not dispose of the further question of whether the killing of the particular targeted individual or individuals is lawful. The legality of a specific killing depends on whether it meets the requirements of IHL and human rights law (in the context of armed conflict) or human rights law alone (in all other contexts).

#### **Anticipatory and pre-emptive self-defence**

45. The third key area of controversy is the extent to which States seek to invoke the right to self-defence not just in response to an armed attack, but in anticipatory self-defence, or alternatively, as a pre-emptive measure in response to a threat that is persistent and may take place in the future, but is not likely to take place imminently.<sup>90</sup> Under a restrictive view of Article 51, the right to self-defence may only be invoked after an attack has taken place.<sup>91</sup> In contrast, under a more permissive view that more accurately reflects State practice and the weight of scholarship, self-defence also includes the right to use force against a real and imminent threat when “the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”<sup>92</sup> A third view, invoked exceptionally by the US Bush administration, but which apparently may still reflect US policy, would permit “pre-emptive self-defence”, the use of force even when a threat is not imminent and “uncertainty remains as to the time and place of the enemy’s attack.”<sup>93</sup> This view is deeply contested and lacks support under international law.<sup>94</sup>

### **C. The existence and scope of armed conflict**

46. Whether an armed conflict exists is a question that must be answered with reference to objective criteria, which depend on the facts on the ground, and not only on the subjective declarations either of States (which can often be influenced by political considerations rather than legal ones) or, if applicable, of non-state actors, including alleged terrorists (which may also have political reasons for seeking recognition as a belligerent party). Traditionally, States have refused to acknowledge the existence of an armed conflict with non-state groups. The reasons include not wanting to accord such groups recognition as “belligerents” or “warriors”, and instead being able to insist that they remain common criminals subject to domestic law. States also do not want to appear “weak” by acknowledging that they are unable to stop large scale violence, and/or that rebels or insurgent groups have control over State territory. In recent times, for example, the United Kingdom (with respect to Northern Ireland) and Russia (with respect to Chechnya) have refused to acknowledge the existence of internal armed conflicts.

<sup>90</sup> US National Security Strategy 2002 (2006 rev’n) at 6; W. Taft and A. Buchwald, Pre-emption, Iraq and International Law, 97 AJIL 557 (2003).

<sup>91</sup> Yoram Dinstein, War, Aggression and Self-Defence, Cambridge (2001) at 167 (describing the restrictive approach).

<sup>92</sup> R.Y. Jennings, The Caroline and McLeod Cases, 32 Am. J. Int’l L. 82, 92 (1938); Thomas M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks (2002) 107; Thomas M. Franck, What Happens Now? The United Nations After Iraq, 97 Am. J. Int’l L. 607, 619 (2003); Christian J. Tams, The Use of Force Against Terrorists, 20 Eur. J. Int’l Law, 359, 378-83 (2009).

<sup>93</sup> US National Security Strategy 2002 (2006 rev’n) at 15.

<sup>94</sup> Lord Goldsmith, ‘Iraq: Resolution 1441’, Memo to the Prime Minister, Mar. 7, 2002, available at <http://image.guardian.co.uk/sys-files/Guardian/documents/2005/04/28/legal.pdf>; Franck, What Happens Now? at 619 (2003).

47. On the other hand, both the US and Israel have invoked the existence of an armed conflict against alleged terrorists (“non-state armed groups”).<sup>95</sup> The appeal is obvious: the IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State’s domestic law, and generally provides immunity to State armed forces.<sup>96</sup> Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. IHL is not, in fact, more permissive than human rights law because of the strict IHL requirement that lethal force be necessary. But labeling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support.

48. Although the appeal of an armed conflict paradigm to address terrorism is obvious, so too is the significant potential for abuse. Internal unrest as a result of insurgency or other violence by non-state armed groups, and even terrorism, are common in many parts of the world. If States unilaterally extend the law of armed conflict to situations that are essentially matters of law enforcement that must, under international law, be dealt with under the framework of human rights, they are not only effectively declaring war against a particular group, but eviscerating key and necessary distinctions between international law frameworks that restricts States’ ability to kill arbitrarily.

49. The IHL applicable to non-international armed conflict is not as well-developed as that applicable to international armed conflict. Since 11 September 2001, this fact has often been cited either to criticize IHL in general or as a justification for innovative interpretations which go well beyond generally accepted approaches. It is true that non-international armed conflict rules would benefit from development, but the rules as they currently exist offer more than sufficient guidance to the existence and scope of an armed conflict. The key is for States to approach them with good faith intent to apply the rules as they exist and have been interpreted by international bodies, rather than to seek ever-expanding flexibility.

50. There are essentially four possibilities under international law for the existence of an armed conflict:

- (i) The conflict is an international armed conflict.
- (ii) The conflict is a non-international armed conflict meeting the threshold of Common Article 3 to the Geneva Conventions.
- (iii) The conflict is a non-international armed conflict meeting the threshold of both Common Article 3 to the Geneva Conventions and Additional Protocol II to the Geneva Conventions
- (iv) The level of violence does not rise to the level of an armed conflict, but is instead isolated and sporadic and human rights law determines the legality of the use of lethal force.

51. The test for the existence of an *international* armed conflict is clear under IHL: “Any difference arising between two States and leading to the intervention of armed forces” qualifies as armed conflict, regardless of its intensity, duration or scale.<sup>97</sup> The IHL of

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<sup>95</sup> Koh, *supra* note 41; PCATI *supra* note 22.

<sup>96</sup> Adjutant General’s Office, General Orders No. 100, Instructions for the Government of Armies of the US in the Field (Lieber Code), 24 April 1863, art 14; Nuclear Weapons, para. 78.

<sup>97</sup> Geneva Conventions I to IV, Common Art. 2(1); ICRC, Commentary on the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field 32 (Jean S. Pictet ed., 1952);

international armed conflict applies also to “all cases of total or partial occupation of the territory of a High Contracting Party” to the Geneva Conventions.<sup>98</sup> Following these criteria, an international armed conflict cannot exist between a State and a non-state group.<sup>99</sup>

52. The tests for the existence of a *non-international* armed conflict are not as categorical as those for international armed conflict. This recognizes the fact that there may be various types of non-international armed conflicts. The applicable test may also depend on whether a State is party to Additional Protocol II to the Geneva Conventions.<sup>100</sup> Under treaty and customary international law, the elements which would point to the existence of a non-international armed conflict against a non-state armed group are:

(i) The non-state armed group must be identifiable as such, based on criteria that are objective and verifiable. This is necessary for IHL to apply meaningfully, and so that States may comply with their obligation to distinguish between lawful targets and civilians.<sup>101</sup> The criteria include:<sup>102</sup>

- Minimal level of organization of the group such that armed forces are able to identify an adversary (GC Art. 3; AP II).
- Capability of the group to apply the Geneva Conventions (i.e., adequate command structure, and separation of military and political command) (GC Art. 3; AP II).
- Engagement of the group in collective, armed, anti-government action (GC Art. 3).
- For a conflict involving a State, the State uses its regular military forces against the group (GC Art. 3).
- Admission of the conflict against the group to the agenda of the UN Security Council or the General Assembly (GC Art. 3).

(ii) There must be a minimal threshold of intensity and duration. The threshold of violence is higher than required for the existence of an international armed conflict. To meet the minimum threshold, violence must be:<sup>103</sup>

- “Beyond the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” (AP II).
- “[P]rotracted armed violence” among non-state armed groups or between a non-state armed group and a State;<sup>104</sup>

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*Prosecutor v. Tadic*, [Appeal on Jurisdiction] Case No. IT-94-I-AR72 (2 Oct. 1995), 35 I.L.M. 32, 54, para. 70 (1996)

<sup>98</sup> Geneva Conventions I to IV, Common Art. 2(2); AP I, art. 1(4).

<sup>99</sup> Thus, it was legally incorrect for the US Bush Administration to claim that its right to conduct targeted killings anywhere in the world was part of its “war on terror”, which it classified as an “international armed conflict” against al Qaeda. Communication of the US regarding the Killing of Harithi al-Yemeni, 4 May 2006, A/HRC/4/20/Add.1, p. 344.

<sup>100</sup> AP II, Art. 1(1).

<sup>101</sup> Lindsay Moir, *The Law of Internal Armed Conflict*, 2002.

<sup>102</sup> ICRC Commentary *supra* note 97, 49-50 (Common Article 3); ICTY, *Delalic Judgment*, 16 Nov. 1998, para. 184; ICTR, *Musema*, Judgment, 27 Jan. 2000, para. 248; IACHR, *Tablada*, Report No. 55/97, Argentina, Doc. 38, 1997, para. 152.

<sup>103</sup> The tests listed are independent of one another and for each threshold a different set of IHL rules might apply, but such distinctions are not crucial to the present analysis.

- If an isolated incident, the incident itself should be of a high degree of intensity, with a high level of organization on the part of the non-state armed group;<sup>105</sup>

(iii) The territorial confines can be:

- Restricted to the territory of a State and between the State's own armed forces and the non-state group (AP II); or
- A transnational conflict, i.e., one that crosses State borders (GC Art. 3).<sup>106</sup>  
This does not mean, however, that there is no territorial nexus requirement.

53. Taken cumulatively, these factors make it problematic for the US to show that – outside the context of the armed conflicts in Afghanistan or Iraq – it is in a transnational non-international armed conflict against “al Qaeda, the Taliban, and other associated forces”<sup>107</sup> without further explanation of how those entities constitute a “party” under the IHL of non-international armed conflict, and whether and how any violence by any such group rises to the level necessary for an armed conflict to exist.

54. The focus, instead, appears to be on the “transnational” nature of the terrorist threat. Al-Qaeda and entities with various degrees of “association” with it are indeed known to have operated in numerous countries around the world including in Saudi Arabia, Indonesia, Pakistan, Germany, the United Kingdom and Spain, among others, where they have conducted terrorist attacks. Yet none of these States, with the possible exception of Pakistan, recognize themselves as being part of an armed conflict against al-Qaeda or its “associates” in their territory. Indeed, in each of those States, even when there have been terrorist attacks by al-Qaeda or other groups claiming affiliation with it, the duration and intensity of such attacks has not risen to the level of an armed conflict. Thus, while it is true that non-international armed conflict can exist across State borders, and indeed often does, that is only one of a number of cumulative factors that must be considered for the objective existence of an armed conflict.

55. With respect to the existence of a non-state group as a “party”, al-Qaeda and other alleged “associated” groups are often only loosely linked, if at all. Sometimes they appear to be not even groups, but a few individuals who take “inspiration” from al Qaeda. The idea that, instead, they are part of continuing hostilities that spread to new territories as new alliances form or are claimed may be superficially appealing but such “associates” cannot constitute a “party” as required by IHL – although they can be criminals, if their conduct violates US law, or the law of the State in which they are located.

56. To ignore these minimum requirements, as well as the object and purpose of IHL, would be to undermine IHL safeguards against the use of violence against groups that are not the equivalent of an organized armed group capable of being a party to a conflict – whether because it lacks organization, the ability to engage in armed attacks, or because it does not have a connection or belligerent nexus to actual hostilities. It is also salutary to recognize that whatever rules the US seeks to invoke or apply to al Qaeda and any “affiliates” could be invoked by other States to apply to other non-state armed groups. To expand the notion of non-international armed conflict to groups that are essentially drug

<sup>104</sup> *Tadic*, *supra* note 97, para. 70

<sup>105</sup> IACHR, *Juan Carlos Abella v. Argentina*, Report No. 55/97, OEA/Ser.L./V./II.95, doc. 7 rev. 271 para. 151 (1997).

<sup>106</sup> Common Article 3 is universally applicable and not limited to internal conflicts. *Nuclear Weapons*, paras. 79-82.

<sup>107</sup> *Koh*, *supra* note 41; *Hamdan v. Rumsfeld*, 548 US 547 (2006).

cartels, criminal gangs or other groups that should be dealt with under the law enforcement framework would be to do deep damage to the IHL and human rights frameworks.

#### **D. Who may lawfully be targeted, when, and on what basis**

57. The greatest source of the lack of clarity with respect to targeted killings in the context of armed conflict is who qualifies as a lawful target, and where and when the person may be targeted.

58. In international armed conflict, combatants may be targeted at any time and any place (subject to the other requirements of IHL).<sup>108</sup> Under the IHL applicable to non-international armed conflict, the rules are less clear. In non-international armed conflict, there is no such thing as a “combatant.”<sup>109</sup> Instead – as in international armed conflict – States are permitted to directly attack only civilians who “directly participate in hostilities” (DPH).<sup>110</sup> Because there is no commonly accepted definition of DPH, it has been left open to States’ own interpretation – which States have preferred not to make public – to determine what constitutes DPH.

59. There are three key controversies over DPH. First, there is dispute over the kind of conduct that constitutes “direct participation” and makes an individual subject to attack. Second, there is disagreement over the extent to which “membership” in an organized armed group may be used as a factor in determining whether a person is directly participating in hostilities. Third, there is controversy over how long direct participation lasts.

60. It is not easy to arrive at a definition of direct participation that protects civilians and at the same time does not “reward” an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities.<sup>111</sup> The key, however, is to recognize that regardless of the enemy’s tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does not constitute direct participation.

61. Some types of conduct have long been understood to constitute direct participation, such as civilians who shoot at State forces or commit acts of violence in the context of hostilities that would cause death or injury to civilians. Other conduct has traditionally been excluded from direct participation, even if it supports the general war effort; such conduct includes political advocacy, supplying food or shelter, or economic support and propaganda (all also protected under other human rights standards). Even if these activities ultimately impact hostilities, they are not considered “direct participation.” But there is a middle

<sup>108</sup> AP I, art. 48; AP I, art. 51(2) (defining lawful targets); HPCR Commentary section A.1.(y)(1). The term “combatant” is not defined in IHL, but may be extrapolated from Geneva Convention III, art. 4(A); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 *Am. J. Int’l L.* 48 (2009).

<sup>109</sup> Marco Sassoli & Laura M Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 *Int’l Rev. Red Cross*, 599, 611 (Sept. 2008); Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law*, HPCR Paper Series, Winter 2006.

<sup>110</sup> AP I, art. 51(3); AP I, art. 50(1) (defining civilian). AP I, arts. 13(3) and 51(3); Geneva Conventions III and IV, art. 3; AP II, arts. 4 and 13(3).

<sup>111</sup> For this reason I have criticized non-state armed groups for using civilians as human shields and locating their military operations in areas heavily populated by civilians. A/HRC/11/2/Add.4, paras. 9, 23, 24.

ground, such as for the proverbial “farmer by day, fighter by night”, that has remained unclear and subject to uncertainty.

62. In 2009, the ICRC issued its Interpretive Guidance on DPH, which provides a useful starting point for discussion. In non-international armed conflict, according to the ICRC Guidance, civilians who participate directly in hostilities and are members of an armed group who have a “continuous combat function” may be targeted at all times and in all places.<sup>112</sup> With respect to the temporal duration of DPH for all other civilians, the ICRC Guidance takes the view that direct participation for civilians is limited to each single act: the earliest point of direct participation would be the concrete preparatory measures for that specific act (e.g., loading bombs onto a plane), and participation terminates when the activity ends.<sup>113</sup>

63. Under the ICRC’s Guidance, each specific act by the civilian must meet three cumulative requirements to constitute DPH:

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

64. These criteria generally exclude conduct that is clearly indirect, including general support for the war effort through preparation or capacity building (such as the production of weapons and military equipment).<sup>114</sup> They also exclude conduct that is protected by other human rights standards, including political support for a belligerent party or an organized armed group. Importantly, the ICRC’s Guidance makes clear that the lawfulness of an act under domestic or international law is not at issue, rather, the sole concern of the direct participation inquiry is whether the conduct “constitute[s] an integral part of armed confrontations occurring between belligerents.”<sup>115</sup> Thus, although illegal activities, e.g., terrorism, may cause harm, if they do not meet the criteria for direct participation *in hostilities*,<sup>116</sup> then States’ response must conform to the lethal force standards applicable to self-defence and law enforcement.<sup>117</sup> In general, the ICRC’s approach is correct, and comports both with human rights law and IHL.

65. Nevertheless, the ICRC’s Guidance raises concern from a human rights perspective because of the “continuous combat function” (CCF) category of armed group members who may be targeted anywhere, at any time.<sup>118</sup> In its general approach to DPH, the ICRC is correct to focus on function (the kind of act) rather than status (combatant vs. unprivileged belligerent), but the creation of CCF category is, *de facto*, a status determination that is

<sup>112</sup> ICRC Guidance at 66.

<sup>113</sup> ICRC Guidance at 66-68

<sup>114</sup> HPCR Commentary section C.28(2), n. 278; Nils Melzer, Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities, 42 NYU J. Int’l L. and Politics, 829, 858 (2010).

<sup>115</sup> Id. at 859.

<sup>116</sup> Hague Regulations IV, art. 22; AP I, arts. 35(1) and 51 (discussing hostilities).

<sup>117</sup> Melzer, *supra* note 114 at 861.

<sup>118</sup> ICRC Guidance at 66.

questionable given the specific treaty language that limits direct participation to “for such time” as opposed to “all the time.”

66. Creation of the CCF category also raises the risk of erroneous targeting of someone who, for example, may have disengaged from their function. If States are to accept this category, the onus will be on them to show that the evidentiary basis is strong. In addition, States must adhere to the careful distinction the ICRC draws between continuous combatants who may always be subject to direct attack and civilians who (i) engage in sporadic or episodic direct participation (and may only be attacked during their participation), or (ii) have a general war support function (“recruiters, trainers, financiers and propagandists”) or form the political wing of an organized armed group (neither of which is a basis for attack).<sup>119</sup>

67. Especially given the ICRC’s membership approach to CCF, it is imperative that the other constituent parts of the Guidance (threshold of harm, causation and belligerent nexus) not be diluted. It is also critical that DPH not include combat service support functions (selling food, providing supplies). While this may, in the view of some, create inequity between State forces and non-state actors, that inequity is built into IHL in order to protect civilians.

68. The failure of States to disclose their criteria for DPH is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing. It also leaves open the likelihood that States will unilaterally expand their concept of direct participation beyond permissible boundaries. Thus, although the US has not made public its definition of DPH, it is clear that it is more expansive than that set out by the ICRC; in Afghanistan, the US has said that drug traffickers on the “battlefield” who have links to the insurgency may be targeted and killed.<sup>120</sup> This is not consistent with the traditionally understood concepts under IHL – drug trafficking is understood as criminal conduct, not an activity that would subject someone to a targeted killing. And generating profits that might be used to fund hostile actions does not constitute DPH.

69. Given the ICRC’s promulgation of its Guidance, and the hesitant or uncertain response of some States to date, in order for the issues to be addressed comprehensively, it would be very timely for there to be a convening of State representatives, including particularly those from key military powers, together with the ICRC and experts in human rights and IHL. Such a convening would perhaps be most useful if held under the auspices of a neutral body, such as the High Commissioner for Human Rights. The group could discuss and revise (if necessary) the ICRC’s Guidance after a careful review of best practices.

## **E. Who may conduct a targeted killing**

70. Reported targeted killings by the CIA have given rise to a debate over whether it is a violation of IHL for such killings to be committed by State agents who are not members of its armed forces. Some commentators have argued that CIA personnel who conduct targeted drone killings are committing war crimes because they, unlike the military, are “unlawful combatants”, and unable to participate in hostilities. This argument is not supported by IHL. As a threshold matter, the argument assumes that targeted killings by the CIA are committed in the context of armed conflict, which may not be the case. Outside of armed conflict, killings by the CIA would constitute extrajudicial executions assuming that

<sup>119</sup> ICRC Guidance at 31-36.

<sup>120</sup> Afghanistan’s Narco War supra note 39 at 16 (2009).

they do not comply with human rights law. If so, they must be investigated and prosecuted both by the US and the State in which the wrongful killing occurred. The following discussion assumes, without accepting, that CIA killings are being conducted in the context of armed conflict.

71. Under IHL, civilians, including intelligence agents, are not prohibited from participating in hostilities. Rather, the consequence of participation is two-fold. First, because they are “directly participating in hostilities” by conducting targeted killings, intelligence personnel may themselves be targeted and killed. Second, intelligence personnel do not have immunity from prosecution under domestic law for their conduct. They are thus unlike State armed forces which would generally be immune from prosecution for the same conduct (assuming they complied with IHL requirements). Thus, CIA personnel could be prosecuted for murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law.

72. It is important to note that if a targeted killing violates IHL (by, for example, targeting civilians who were not “directly participating in hostilities”), then regardless of who conducts it – intelligence personnel or State armed forces – the author, as well as those who authorized it, can be prosecuted for war crimes.

73. Additionally, unlike a State’s armed forces, its intelligence agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL, rendering violations more likely and causing a higher risk of prosecution both for war crimes and for violations of the laws of the State in which any killing occurs. To the extent a State uses intelligence agents for targeted killing to shield its operations from IHL and human rights law transparency and accountability requirements, it could also incur State responsibility for violating those requirements.<sup>121</sup>

## **F. The use of less-than-lethal measures**

74. As discussed above, the intentional use of lethal force in the context of law enforcement is only permitted in defence of life. Thus, outside the context of armed conflict, law enforcement officials are required to be trained in, to plan for, and to take, less-than-lethal measures – including restraint, capture, and the graduated use of force – and it is only if these measures are not possible that a law enforcement killing will be legal.<sup>122</sup> States should ensure public disclosure of the measures taken to “strictly control and limit the circumstances” in which law enforcement officers may resort to lethal force, including the level of force used at each stage.<sup>123</sup> The legal framework must take into account the possibility that the threat is so imminent that graduated use of force is not possible, and ensure appropriate safeguards are in place so that the assessment of imminence is reliably made.<sup>124</sup>

75. Although IHL does not expressly regulate the kind and degree of force that may be used against legitimate targets, it does envisage the use of less-than-lethal measures: in

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<sup>121</sup> In response to Freedom of Information Act litigation seeking the legal basis for alleged CIA targeted killings, the CIA has said that it cannot even confirm or deny the existence of any records because that information is classified and protected from disclosure. See Letter from CIA Information and Privacy Coordinator, 9 March 2010, available at <http://www.aclu.org/national-security/predator-drone-foia-cia-letter-refusing-confirm-or-deny-existence-records>.

<sup>122</sup> A/61/311, paras. 33-45; E/CN.4/2006/53, paras. 44-54.

<sup>123</sup> Human Rights Committee, *Suarez de Guerrero v. Colombia*, 1982, para. 13.

<sup>124</sup> A/61/311, paras. 49-51.

armed conflict, the “right of belligerents to adopt means of injuring the enemy is not unlimited”<sup>125</sup> and States must not inflict “harm greater than that unavoidable to achieve legitimate military objectives.”<sup>126</sup> The limiting principles are not controversial – States may only exercise force that is militarily necessary and consistent with the principle of humanity.<sup>127</sup> As the ICRC Guidance recognizes “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.”<sup>128</sup>

76. The position taken by the ICRC in its Guidance has been the subject of controversy. The Guidance states that, “the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”<sup>129</sup> Some critics interpret this statement as requiring the use of a law enforcement paradigm in the context of armed conflict.<sup>130</sup> However, as the Guidance makes clear, it states only the uncontroversial IHL requirement that the kind and amount of force used in a military operation be limited to what is “actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”<sup>131</sup> Especially in the context of targeted killings of civilians who directly participate in hostilities, and given that IHL does not create an unrestrained right to kill,<sup>132</sup> the better approach is for State forces to minimize the use of lethal force to the extent feasible in the circumstances.

77. Less-than-lethal measures are especially appropriate when a State has control over the area in which a military operation is taking place,<sup>133</sup> when “armed forces operate against selected individuals in situations comparable to peacetime policing,”<sup>134</sup> and in the context of non-international armed conflict, in which rules are less clear.<sup>135</sup> In these situations, States should use graduated force and, where possible, capture rather than kill. Thus, rather than using drone strikes, US forces should, wherever and whenever possible, conduct arrests, or use less-than-lethal force to restrain. As the ICRC’s Guidance intended to make clear, “the international lawfulness of a particular operation involving the use of force may not always depend exclusively on IHL but, depending on the circumstances, may potentially be influenced by other applicable legal frameworks, such as human rights law and the *jus ad bellum*.”<sup>136</sup>

78. In addition, precautionary measures that States should take in armed conflict to reduce casualties include:

<sup>125</sup> Convention (IV) respecting the Laws and Customs of War on Land, adopted on 18 Oct. 1907, entered into force, 26 Jan. 1910 (Hague IV Regulation); AP I, art. 35(1)

<sup>126</sup> Nuclear Weapons, para. 78.

<sup>127</sup> AP I, art. 1(2); Hague IV Regulations, preamble; Geneva Convention III, art. 142; Geneva Convention IV, art. 158.

<sup>128</sup> ICRC Guidance at 82.

<sup>129</sup> ICRC Guidance at 17 and 77.

<sup>130</sup> W. Hays Parks, Part IX of the ICRC’s “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect, 42 NYU J. Int’l L. and Politics 767 (2010).

<sup>131</sup> ICRC Guidance at 77.

<sup>132</sup> Hague IV Regulations, art. 22.

<sup>133</sup> Univ. Ctr. For Int’l Humanitarian Law, Report on the Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, 1-2 Sept. 2005; at 36; Sassoli & Olson, *supra* note 109, at 614.

<sup>134</sup> ICRC Guidance at 80-81.

<sup>135</sup> Sassoli & Olson, *supra* note 109, at 611.

<sup>136</sup> Nils Melzer, Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities, 42 NYU J. Int’l L. and Politics, 829, 897 (2010).

- Provide effective advance warning to the civilian population, through leaflets, broadcast warnings, etc. in the areas in which targeted killings may take place.<sup>137</sup> The warnings must be as specific as possible.<sup>138</sup>
- Any such warning does not, however, discharge the obligation to distinguish between lawful targets and civilians. “Warnings are required for the benefit of civilians, but civilians are not obligated to comply with them. A decision to stay put — freely taken or due to limited options — in no way diminishes a civilian’s legal protections.”<sup>139</sup>
- The use of civilians as “shields” is strictly prohibited.<sup>140</sup> But one side’s unlawful use of civilian shields does not affect the other side’s obligation to ensure that attacks do not kill civilians in excess of the military advantage of killing the targeted fighter.<sup>141</sup>

## G. The use of drones for targeted killing

79. The use of drones for targeted killings has generated significant controversy. Some have suggested that drones as such are prohibited weapons under IHL because they cause, or have the effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person.<sup>142</sup> It is true that IHL places limits on the weapons States may use, and weapons that are, for example, inherently indiscriminate (such as biological weapons) are prohibited.<sup>143</sup> However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.

80. The greater concern with drones is that because they make it easier to kill without risk to a State’s forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively. States must ensure that the criteria they apply to determine who can be targeted and killed — i.e., who is a lawful combatant, or what constitutes “direct participation in hostilities” that would subject civilians to direct attack — do not differ based on the choice of weapon.

81. Drones’ proponents argue that since drones have greater surveillance capability and afford greater precision than other weapons, they can better prevent collateral civilian casualties and injuries. This may well be true to an extent, but it presents an incomplete picture. The precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based.

82. Drones may provide the ability to conduct aerial surveillance and to gather “pattern of life” information that would allow their human operators to distinguish between peaceful civilians and those engaged in direct hostilities. Indeed, advanced surveillance capability

<sup>137</sup> 1907 Hague Regulations, art. 26; AP I, art. 57.

<sup>138</sup> Thus, I, together with three other Special Rapporteurs, previously criticized Israel for overly broad warnings. A/HRC/2/7, ¶ 41.

<sup>139</sup> A/HRC/2/7, para. 41.

<sup>140</sup> AP I, art. 51(7); AP I, art. 50(3); HPCR Commentary section G.45; A/HRC/2/7; A/HRC/11/2/Add.4.

<sup>141</sup> AP I, art. 58; A/HRC/2/7, paras. 30, 68-70 (Israel and Lebanon); A/HRC/11/2/Add.4, paras. 9, 23-24 (Afghanistan).

<sup>142</sup> Murray Wardrop, *Unmanned Drones Could be Banned, Says Senior Judge*, *The Telegraph*, 6 July 2009.

<sup>143</sup> The general prohibition under IHL is against weapons that violate the principle of distinction or cause unnecessary suffering. See HPCR Commentary, section C.

enhances the ability of a State's forces to undertake precautions in attack.<sup>144</sup> But these optimal conditions may not exist in every case. More importantly, a drone operation team sitting thousands of miles away from the environment in which a potential target is located may well be at an even greater human intelligence gathering disadvantage than ground forces, who themselves are often unable to collect reliable intelligence.

83. It was clear during my mission to Afghanistan how hard it is even for forces on the ground to obtain accurate information. Testimony from witnesses and victims' family members, showed that international forces were often too uninformed of local practices, or too credulous in interpreting information, to be able to arrive at a reliable understanding of a situation.<sup>145</sup> International forces all too often based manned airstrikes and raids that resulted in killings on faulty intelligence. Multiple other examples show that the legality of a targeted killing operation is heavily dependent upon the reliability of the intelligence on which it is based.<sup>146</sup> States must, therefore, ensure that they have in place the procedural safeguards necessary to ensure that intelligence on which targeting decisions are made is accurate and verifiable.

84. Furthermore, because operators are based thousands of miles away from the battlefield, and undertake operations entirely through computer screens and remote audio-feed, there is a risk of developing a "Playstation" mentality to killing. States must ensure that training programs for drone operators who have never been subjected to the risks and rigors of battle instill respect for IHL and adequate safeguards for compliance with it.

85. Outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a State's own territory, over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force.

86. Outside its own territory (or in territory over which it lacked control) and where the situation on the ground did not rise to the level of armed conflict in which IHL would apply, a State could theoretically seek to justify the use of drones by invoking the right to anticipatory self-defence against a non-state actor.<sup>147</sup> It could also theoretically claim that human rights law's requirement of first employing less-than-lethal means would not be possible if the State has no means of capturing or causing the other State to capture the target. As a practical matter, there are very few situations outside the context of active hostilities in which the test for anticipatory self-defence – necessity that is "instant, overwhelming, and leaving no choice of means, and no moment of deliberation"<sup>148</sup> – would be met. This hypothetical presents the same danger as the "ticking-time bomb" scenario does in the context of the use of torture and coercion during interrogations: a thought experiment that posits a rare emergency exception to an absolute prohibition can effectively institutionalize that exception. Applying such a scenario to targeted killings threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life. In addition, drone killing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability.

<sup>144</sup> Michael N. Schmitt, Precision Attack and International Humanitarian Law, 87 Int'l Rev. Red Cross 445 (Sept. 2005).

<sup>145</sup> A/HRC/11/2/Add.4, paras. 14-18, 70.

<sup>146</sup> See, e.g., Israel Ministry of Foreign Affairs Website, "Findings of the inquiry into the death of Salah Shehadeh" <http://www.mfa.gov.il/MFA/Government/Communiques/2002/Findings%20of%20the%20inquiry%20into%20the%20death%20of%20Salah%20Sh>.

<sup>147</sup> *Infra* III.B.

<sup>148</sup> See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l L. 82, 92 (1938).

## H. The requirements of transparency and accountability

87. The failure of States to comply with their human rights law and IHL obligations to provide transparency and accountability for targeted killings is a matter of deep concern. To date, no State has disclosed the full legal basis for targeted killings, including its interpretation of the legal issues discussed above. Nor has any State disclosed the procedural and other safeguards in place to ensure that killings are lawful and justified, and the accountability mechanisms that ensure wrongful killings are investigated, prosecuted and punished. The refusal by States who conduct targeted killings to provide transparency about their policies violates the international legal framework that limits the unlawful use of lethal force against individuals.<sup>149</sup>

88. Transparency is required by both IHL<sup>150</sup> and human rights law.<sup>151</sup> A lack of disclosure gives States a virtual and impermissible license to kill.

89. Among the procedural safeguards States must take (and disclose) with respect to targeted killings in armed conflict are:

- Ensure that forces and agents have access to reliable information to support the targeting decision.<sup>152</sup> These include an appropriate command and control structure,<sup>153</sup> as well as safeguards against faulty or unverifiable evidence.<sup>154</sup>
- Ensure adequate intelligence on “the effects of the weapons that are to be used ... the number of civilians that are likely to be present in the target area at the particular time; and whether they have any possibility to take cover before the attack takes place.”<sup>155</sup>
- The proportionality of an attack must be assessed for each individual strike.<sup>156</sup>
- Ensure that when an error is apparent, those conducting a targeted killing are able to abort or suspend the attack.<sup>157</sup>

90. In order to ensure that accountability is meaningful, States must specifically disclose the measures in place to investigate alleged unlawful targeted killings and either to identify

<sup>149</sup> Human Rights Committee, General Comment No. 6 (1982), Doc. CCPR/C/21/Rev.1; *Neira Alegria Case*, Judgment of 19 January 1995, Inter-Am.Ct.H.R. (Ser. C) No. 20 (1995); *McCann and others v. UK*, ECHR, Judgment of 27 September 1995, Series A, No. 324, 140; *Kaya v. Turkey*, Judgment of 19 February 1998, 1998-I R.J.D. 297, 140; *Husband of Maria Fanny Suarez de Guerrero v. Colombia*, Communication No. R.11/45 (5 February 1979), UN Doc. Supp. No. 40 (A/37/40) at 137 (1982); E/CN.4/2006/53, para. 35. States party to the ICCPR can be held responsible for violations of the rights under the Covenant when the violations are perpetrated by authorized agents of the State, including on foreign territory. *Lopez v. Uruguay*, Communication No. 52/1979, CCPR/C/OP/1 at 88 (1984), paras. 12.1-12.3; *Wall Opinoin*, paras. 108-111 (ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”).

<sup>150</sup> Geneva Conventions, art. 1; AP I, arts. 11, 85 (grave breaches), 87(3); Geneva Conventions I-IV, articles 50/51/130/147;

<sup>151</sup> Economic and Social Council Resolution 1989/65 of 24 May 1989.

<sup>152</sup> HPCR Commentary section G.32(a).

<sup>153</sup> *Id.*

<sup>154</sup> HPCR Commentary section G.32(a)-(c) and 39.

<sup>155</sup> HPCR Commentary section g.32(c).

<sup>156</sup> *Sandoz*, AP Commentary, AP 1, art. 57, section 2207.

<sup>157</sup> Helpful in this regard: UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), para. 5.32.9.

and prosecute perpetrators, or to extradite them to another State that has made out a prima facie case for the unlawfulness of a targeted killing.<sup>158</sup>

91. States have also refused to provide factual information about who has been targeted under their policies and with what outcome, including whether innocent civilians have been collaterally killed or injured. In some instances, targeted killings take place in easily accessible urban areas, and human rights monitors and civil society are able to document the outcome. In others, because of remoteness or security concerns, it has been impossible for independent observers and the international community to judge whether killings were lawful or not.

92. Transparency and accountability in the context of armed conflict or other situations that raise security concerns may not be easy. States may have tactical or security reasons not to disclose criteria for selecting specific targets (e.g. public release of intelligence source information could cause harm to the source). But without disclosure of the legal rationale as well as the bases for the selection of specific targets (consistent with genuine security needs), States are operating in an accountability vacuum. It is not possible for the international community to verify the legality of a killing, to confirm the authenticity or otherwise of intelligence relied upon, or to ensure that unlawful targeted killings do not result in impunity. The fact that there is no one-size-fits-all formula for such disclosure does not absolve States of the need to adopt explicit policies.

## IV. Conclusions and recommendations

### General

93. **States should publicly identify the rules of international law they consider to provide a basis for any targeted killings they undertake. They should specify the bases for decisions to kill rather than capture. They should specify the procedural safeguards in place to ensure in advance of targeted killings that they comply with international law, and the measures taken after any such killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures they would take. If a State commits a targeted killing in the territory of another State, the second State should publicly indicate whether it gave consent, and on what basis.**

- **States should make public the number of civilians collaterally killed in a targeted killing operation, and the measures in place to prevent such casualties.**
- **The High Commissioner for Human Rights should convene a meeting of States, including representatives of key military powers, the ICRC and human rights and IHL experts to arrive at a broadly accepted definition of “direct participation in hostilities.”**

**Specific requirements under human rights law, applicable in and outside armed conflict, include:**

- **States should disclose the measures taken to control and limit the circumstances in which law enforcement officers may resort to lethal force. These include:**
  - **Permissible objectives (which may not include retaliation or punishment but must be strictly to prevent the imminent loss of life);**

<sup>158</sup> Geneva Conventions (I-IV), arts. 49/50/129/146; Geneva Convention (IV), arts. 3 and 4. AP I, art 75.

- the non-lethal tactics for capture or incapacitation that must be attempted if feasible;
  - the efforts that must be made to minimize lethal force, including specifying the level of force that must be used at each stage;
  - the legal framework should take into account the possibility that a threat may be so imminent that a warning and the graduated use of force are too risky or futile (e.g., the suspect is about to use a weapon or blow himself up). At the same time, it must put in place safeguards to ensure that the evidence of imminence is reliable, based on a high degree of certainty, and does not circumvent the requirements of necessity and proportionality.
- Disclosure of the measures in place to provide prompt, thorough, effective, independent and public investigations of alleged violations of law.
    - The appropriate measures have been endorsed in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. These should guide States whenever they carry out law enforcement operations, including during armed conflicts and occupations. The State's duty to investigate and prosecute human rights abuses also applies in the context of armed conflict and occupation.

Specific requirements under IHL, applicable in armed conflict, include:

- Disclosure of the measures in place to investigate alleged unlawful targeted killings and either to identify and prosecute perpetrators, or to extradite them to another State that has made a prima facie case for the unlawfulness of a killing.
- Ensure that State armed forces and agents use all reasonably available sources (including technological ones such as intelligence and surveillance) to obtain reliable information to verify that the target is lawful. These measures, which should be publicly disclosed to the extent consistent with genuine security needs, include:
  - State armed forces should have a command and control system that collects, analyzes and disseminates information necessary for armed forces or operators to make legal and accurate targeting decisions.
  - Targeted killings should never be based solely on "suspicious" conduct or unverified – or unverifiable – information. Intelligence gathering and sharing arrangements must include procedures for reliably vetting targets, and adequately verifying information.
  - State forces should ensure adequate intelligence on the effects of weapons to be used, the presence of civilians in the targeted area, and whether civilians have the ability to protect themselves from attack. It bears emphasis that State forces violate the IHL requirements of proportionality and precaution if they do not do everything feasible to determine who else is, or will be, in the vicinity of a target – and thus how many other lives will be lost or people injured – before conducting a targeted killing.
  - In the context of drone attacks and airstrikes, commanders on the ground and remote pilots may have access to different information (e.g. based on human intelligence, or visuals from satellites); it is incumbent

on pilots, whether remote or not, to ensure that a commander's assessment of the legality of a proposed strike is borne out by visual confirmation that the target is in fact lawful, and that the requirements of necessity, proportionality and discrimination are met. If the facts on the ground change in substantive respects, those responsible must do everything feasible to abort or suspend the attack.

- Ensure that compliance with the IHL proportionality principle is assessed for each attack individually, and not for an overall military operation.
  - Ensure that even after a targeting operation is under way, if it appears that the target is not lawful, or that the collateral loss of life or property damage is in excess of the original determination, targeting forces have the ability and discretion to cancel or postpone an attack.
  - Ensure procedures are in place to verify that no targeted killing is taken in revenge, or primarily to cause terror or to intimidate, or to gain political advantage.
  - Especially in heavily populated urban areas, if it appears that a targeted killing will risk harm to civilians, State forces must provide effective advance warning, as specifically as possible, to the population.
    - Warning does not, however, discharge the obligation to distinguish between lawful targets and civilians.
    - Although the use of civilians as “shields” is prohibited, one side's unlawful use of civilian shields does not affect the other side's obligation to ensure that attacks do not kill civilians in excess of the military advantage of killing the targeted fighter.
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