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# The legality of Targeted Killings in the “War on Terror”

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# 1 Introduction

## 1.1 The Topic

Throughout the last decade, the use of targeted killings as part of States' counterterrorism strategy has increased heavily. Today, numerous Governments have acknowledged, either implicit or explicit, that they have resorted to targeted killings as a method of counterterrorism.<sup>1</sup> The United States (hereinafter: US) has frequently used this tactic to fight terrorism in Afghanistan, Iraq, Pakistan, Yemen, and Somalia.<sup>2</sup> After the attacks of 9/11, targeted killings became one of the US' main countermeasure strategies. Under the Obama Administration, the use of targeted killings has further expanded, mostly through the increase of unmanned drone strikes against Al Qaeda and the Taliban.<sup>3</sup> Some examples on this tendency are the killings of Osama bin Laden in a US Navy SEAL raid and the drone strike on Anwar al-Awlaki, both in 2011.<sup>4</sup> Furthermore, Israel has openly employed this strategy to terrorist threats and has exercised targeted killings both in its operations against Palestinian suicide bombers and against missile launchers.<sup>5</sup> In addition, other nations such as Russia and Sri Lanka have also employed this practice during the last decade.<sup>6</sup>

Even though the use of targeted killings has become a widespread tactic, despite the frequency in which it is invoked, it is still a controversial topic and the legality of these targeted killings remain disputed.<sup>7</sup> In addition, this counterterrorism-strategy does not fit comfortably into any particular legal regime<sup>8</sup>, as will be shown in this thesis. Hence, the criteria for the permissibility of targeted killings are vague and still in question.<sup>9</sup> Some academics, military personnel and officials view targeted killings as permissible within a situation of self-defense, when employed against terrorists or combatants engaged in asymmetrical warfare.<sup>10</sup> While other academics, twenty-six members of the US Congress<sup>11</sup> and civil rights groups like the

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<sup>1</sup> Melzer (2008), p. 9

<sup>2</sup> Masters (2013)

<sup>3</sup> Masters (2013)

<sup>4</sup> Masters (2013)

<sup>5</sup> Falk (2014), p. 295

<sup>6</sup> Falk (2014), p. 295

<sup>7</sup> Perdikaris (2014), p. 113

<sup>8</sup> UN Human Rights Council (2010), para. 7

<sup>9</sup> Perisic (2014), p. 100

<sup>10</sup> Perdikaris (2014), p. 113

<sup>11</sup> Glaser (2012)

American Civil Liberties Union (ACLU)<sup>12</sup> have criticized targeted killings as similar to assassinations or extrajudicial killings, which are illegal under international law.<sup>13</sup>

Whether a specific targeted killing is lawful depends on the circumstances in which the operation is carried out. In other words, the legality depends on the legal regime applicable to the targeted killing, which again depends on the context in which a targeted killing takes place. Is it a matter of international human rights law or is it an act of war, triggering the rules of international humanitarian law? If the targeted killing is an act of war, the question is whether the targeted killing is considered as an act of self-defense from the *jus ad bellum* perspective, and, more importantly from the *jus in bello* perspective, is the targeted individual (the terrorist) considered to be a combatant, a civilian, or neither?<sup>14</sup> This thesis will attempt to identify under which conditions targeted killings are considered legally permissible, not whether a specific targeted killing is lawful. The latter would require more space and time than what available.

## 1.2 Defining the Term “Targeted Killing”

The term “targeted killing” does not have a formal definition under international law. According to the UN Human Rights Council report on the study of targeted killings dated May 28, 2010, 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 group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”<sup>15</sup>

Dr. Nils Melzer, a Legal Advisor for the International Committee of the Red Cross, agrees with the definition set out in the UN Special Report in his book “Targeted Killing in International Law”<sup>16</sup>. According to Melzer, there are five cumulative requirements to what is understood as a “targeted killing”.<sup>17</sup> First, there must be use of lethal force. The particular act of lethal force varies widely, from drone strikes to special operation raids. Secondly, a targeted killing includes the elements of intent, premeditation and deliberation to kill. These elements require that the operation is carried out with the intent to kill the targeted individual, that this intent is based on a conscious choice, and that the deprivation of the targeted persons life is

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<sup>12</sup> Shamsi (2014)

<sup>13</sup> Perdikaris (2014), p. 113

<sup>14</sup> Perisic (2014), p. 100

<sup>15</sup> UN Human Rights Council (2010), para. 1

<sup>16</sup> Melzer (2008)

<sup>17</sup> Melzer (2008), p. 3

the aim of the operation. Thirdly, there is a requirement of targeting individually selected persons. Fourthly, the person targeted is not in physical custody of those targeting him. Lastly, targeted killings must be attributable to a subject of international law. Such subjects are mainly States, but may also include non-State actors.<sup>18</sup> In sum:

“The term ‘targeted killing’ denotes the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them”.<sup>19</sup>

### **1.3 Legal Sources**

#### **1.3.1 In the Context of Armed Conflict**

International humanitarian law (IHL), also known as the Law of Armed Conflict (LOAC), is a body of international law, which regulates the conduct of belligerents during armed conflict. These rules, also called the *jus in bello*, applies with equal force to all belligerents and is irrespective of whether the resort to use of force itself is lawful according to the *jus ad bellum*.<sup>20</sup> International humanitarian law comprises those rules of international law that regulate the treatment of mainly persons and objects within the context of armed conflicts.<sup>21</sup> The main legal instruments dealing with the conduct of hostilities are the four Geneva Conventions of 1949 (GCs) and the Additional Protocols to the Geneva Conventions adopted in 1977 (API and APII). The four Geneva Conventions have been universally ratified and are thus internationally binding upon all states.<sup>22</sup> In addition, international human rights law protects all human beings at all times, including in a situation of armed conflict.<sup>23</sup> Hence, in the context of an armed conflict, both international humanitarian law and human rights law apply, see chapter 2.1.

IHL’s objective is to limit the effects of armed conflict, through rules that protect persons who do not participate or are no longer participating in the hostilities and through rules limiting the means and methods of conducting hostilities.<sup>24</sup> In addition, customary international law plays an important role in the formation of IHL. Not all major treaties in this area of law enjoy universal adherence, and in those situations where treaties or other provisions does not apply to a

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<sup>18</sup> Melzer (2008), pp. 3-5

<sup>19</sup> Melzer (2008), p. 5.

<sup>20</sup> Duffy (2005), p. 217

<sup>21</sup> Fleck (2013), p. 11

<sup>22</sup> Fleck (2013), p. 26

<sup>23</sup> Melzer (2008), p. 58

<sup>24</sup> MacLaren (2005), p. 1218

conflict or leaves gaps in the application, customary law may meddle.<sup>25</sup> Customary international law is especially significant when the parties to the conflict have not ratified the particular treaty or if the customary rule is wider and more comprehensive than the conventional rule. The customary rule is binding in both these situations.

The greater part of the provisions found in the four Geneva Conventions, including Common Article 3, are considered customary international law.<sup>26</sup> Additional Protocol I, applicable in international armed conflicts, both codified existing customary international law and laid the groundwork for new customary rules to arise.<sup>27</sup> The ICRC Study on Customary International Law found that the key principles of API have been broadly accepted, and that API have had an extensive effect on the practice of States in both international and non-international armed conflicts.<sup>28</sup> In addition, APII, applicable in non-international armed conflicts, influenced this practice, and several of its provisions are today considered customary rules of international law.<sup>29</sup> Nevertheless, the customary rules applicable to non-international armed conflicts are far more detailed than the rather basic provisions of APII. In order to fill the many gaps in the regulation of hostilities in NIACs, State practice has led to the creation of rules similar to those found in API, thus expanding the rules applicable to non-international armed conflicts as customary international law.<sup>30</sup> Furthermore, these customary rules of IHL binds not only States but also non-State actors (armed groups), who cannot be party to the IHL treaties.<sup>31</sup> Hence, members of non-State organized armed groups must obey the customary rules applicable in non-international armed conflicts.<sup>32</sup>

In contrast to treaties, which are always binding on the parties to a treaty, non-legally binding soft law instruments used in contemporary international relations by States and international organizations may be evidence of existing law or it may be decisive of the *opinio juris* and/or State practice, which creates customary law.<sup>33</sup> The legal effect of such non-binding declarations, resolutions, studies, and guidelines, etc., is not automatically the same even though they

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<sup>25</sup> MacLaren (2005), p. 1220

<sup>26</sup> Henckaerts, *ICRC Study on customary international law: A contribution to the understanding and respect for the rule of law in armed conflict* (2005), p. 187

<sup>27</sup> Fleck (2013), pp. 28 and 29

<sup>28</sup> Henckaerts, *ICRC Study on customary international law: A contribution to the understanding and respect for the rule of law in armed conflict* (2005), p. 187

<sup>29</sup> Henckaerts, *ICRC Study on customary international law: A contribution to the understanding and respect for the rule of law in armed conflict* (2005), p. 188

<sup>30</sup> Henckaerts, *ICRC Study on customary international law: A contribution to the understanding and respect for the rule of law in armed conflict* (2005), p. 189

<sup>31</sup> MacLaren (2005), p. 1221

<sup>32</sup> Fleck (2013), p. 30

<sup>33</sup> Evans (2014), p. 118

are considered soft law. Nevertheless, these are more often than not carefully negotiated and drafted statements, often with the ambition to have normative significance and with an aspiration to influence States practice or to communicate a law-making intention and continuous development.<sup>34</sup>

The International Committee of the Red Cross's (ICRC) study on Customary International Humanitarian Law<sup>35</sup> by Jean-Marie Henckaerts and Louise Doswald-Beck in 2005 contains an exceptionally thorough study on the practice of States and non-State actors within the context of IHL. The authors have assembled and analyzed a substantial amount of material, and the Study presents a collection of customary rules of IHL. Hence, the objective of ICRC's Study is to identify those rules that are already binding on all States within the notion of an armed conflict.

Even though the Study defines and documents customary IHL in a comprehensive manner, it has been subject to criticism, mostly by the US. The US states that the Study frequently fails to apply an appropriate approach to assessing State practice.<sup>36</sup> However, in this area of international law, States practice and opinion may be challenging to ascertain. Further, the US holds that the basis for the Study is inadequate and that it relies in too large extent on military manuals and non-binding resolutions by the UN General Assembly, as well as statements by other NGOs and by ICRC itself, giving them undue legal weight.<sup>37</sup> Even further, the US shows concern about the approach to the requirement of *opinio juris* and, in addition, the US holds that the Study have a tendency to simplify complex and nuanced rules.<sup>38</sup>

Nevertheless, the ICRC is a neutral and independent institution with a strict policy on objectivity and discretion.<sup>39</sup> Hence, the ICRC Study contains a systematic, detailed and impartial analysis of the conventional rules of IHL combined with States practice, which is in no doubt relevant when assessing the customary rules of IHL. Further, ICRC has an authoritative status in international humanitarian law due to the prerogatives given them in GCIII art. 126 and GCIV art. 143. Article 142 of GCIV also strengthens this view by recognizing ICRC's special position. Even further, the ICRC was granted observer status<sup>40</sup> at the United Nations in Octo-

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<sup>34</sup> Evans (2014), p. 120

<sup>35</sup> Henckaerts, *Customary International Humanitarian Law* (2005)

<sup>36</sup> U.S. Department of State (2006), para. *State Practice*

<sup>37</sup> U.S. Department of State (2006), para. *Opinio juris*

<sup>38</sup> U.S. Department of State (2006), para. *Formation of rules*

<sup>39</sup> ICRC, *Mandate and Mission*

<sup>40</sup> UN Charter art. 71



ber 1990.<sup>41</sup> This shows that the ICRC has gained a substantial amount of significant knowledge and authority within the field of international humanitarian law. Governments, the United Nations and other organizations extensively recognize the privileges and immunities of the ICRC, hence, acknowledging their respect for the key principles of the ICRC; impartiality, independence and neutrality.<sup>42</sup> Therefore, although the Study is not binding, the Study is directly relevant and provides a broad and objective analysis on the customary rules of armed conflict.

### 1.3.2 Outside the Context of Armed Conflict

Targeted killings conducted for purposes other than the conduct of hostilities or occurring outside the context of an armed conflict, are governed by human rights law, in particular those rules governing the use of lethal force.<sup>43</sup> These human rights standards may also be known as the “law enforcement” paradigm.<sup>44</sup> The main legal instruments in this regard are the International Covenant on Civil and Political Rights of 1966 (ICCPR) and the European Convention on Human Rights of 1950 (ECHR).

International Human Rights Law (IHRL) protects all human beings at all times.<sup>45</sup> Outside the scope of armed conflict, IHL is not engaged and the permissibility of a targeted killing is thus narrower than in an armed conflict.<sup>46</sup>

Whilst IHL is only applicable in the existence of an armed conflict, human rights treaties require the existence of jurisdiction.<sup>47</sup> The territorial scope of application of the ECHR is governed by its Article 1, which reads: “The [...] Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” The applicability therefore depends on the interpretation on the notion “jurisdiction”. The UN Human Rights Committee (UNHRC) specified in the Burgos Case that the term “jurisdiction” in ICCPR does not refer to the place a violation takes places, “but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred”.<sup>48</sup> This approach was confirmed by the UNHRC in its General

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<sup>41</sup> Koenig (1991)

<sup>42</sup> Gabor (2004)

<sup>43</sup> UN Human Rights Council (2010), para. 31

<sup>44</sup> UN Human Rights Council (2010), para. 31

<sup>45</sup> Melzer (2008), p. 58

<sup>46</sup> MacDonald (2011), p. 128

<sup>47</sup> Melzer (2008), p. 76

<sup>48</sup> UNHRC, Burgos Case, para 12; Melzer (2008) p. 124

Comment No. 31: "...a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. [...] This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained...".<sup>49</sup> In this Comment the Human Rights Committee focus on the relationship between the individual and the State, confirming the potential of extraterritorial application of the conventional obligations.<sup>50</sup>

There has been conflicting case law on the issue of extraterritorial jurisdiction of ECHR. There are two main elements of jurisprudence on the interpretation of "extraterritorial jurisdiction".<sup>51</sup> The European Court of Human Rights (ECtHR) have decided their cases based on the model of "effective control"; a state possesses jurisdiction whenever it has effective overall control of an area, and on the personal model of jurisdiction ("state agent authority"); a state has jurisdiction whenever it exercises authority or control over an individual.<sup>52</sup>

In light of the limited jurisdictional scope of application in Article 1, the ECtHR attempted to provide clarification in *Bankovic and Others v. Belgium and Others*, in 2001. In the *Bankovic Case* the Court found that the notion of "jurisdiction" under the ECHR is "essentially" territorial, thus within the State's own territory.<sup>53</sup> Any extension of jurisdiction beyond the State's territory is "exceptional" and requires "special justification" in the particular circumstances of each case.<sup>54</sup> ECtHR clarified that the Courts "recognition of the existence of extraterritorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government."<sup>55</sup>

In *Bankovic*, the Court found that individuals killed outside an area under the effective overall control of a state by missiles or bombs fired from an aircraft were not within the state's juris-

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<sup>49</sup> UNHRC, General Comment No. 31 (2004), para. 10

<sup>50</sup> Melzer (2008), p. 125

<sup>51</sup> Milanovic (2012), p. 122

<sup>52</sup> Milanovic (2012), p. 122

<sup>53</sup> *Bankovic and Others v. Belgium and Others*, para. 59-61

<sup>54</sup> *Bankovic and Others v. Belgium and Others*, para. 59-61

<sup>55</sup> *Bankovic and Others v. Belgium and Others*, para. 71

diction, and that such control generally requires troops on the ground.<sup>56</sup> Hence, control over airspace and a ‘mere’ power to kill were not sufficient to extend the jurisdiction.<sup>57</sup> The Court essentially ignored the personal model in the Bankovic case, and ultimately, “*any* act capable of violating a person’s human rights would seem to amount to an exercise of ‘authority and control’ over that individual”.<sup>58</sup> However, the necessary implication of its ruling was that the power to kill alone could not constitute ‘authority and control’.

On July 7 2011, the ECtHR issued a judgment on the extraterritorial application of the ECHR in the case of *Al-Skeini v. United Kingdom*. The Court first outlined the two main strands of the case law, one based on a personal and the other on a spatial notion of jurisdiction. First, the Court “recognized the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government. [...] Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.”<sup>59</sup>

Further, the Court recalls that case law have demonstrated that, in certain circumstances, the use of force by a State’s agents operating outside its territory may bring the individual thereby brought under the control of the State’s authorities and hence, into the State’s jurisdiction within the meaning of Article 1.<sup>60</sup> The Court then emphasizes that the decisive point in such cases is the exercise of physical power and control over the person in question.<sup>61</sup> Whenever the State through its agents exercises such control and authority over an individual, Article 1 requires the State to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.<sup>62</sup> However, as pointed out by Milanovic, having the power to kill a person, whether by a drone or rifle, is indeed an exercise of “physical power” over that individual.<sup>63</sup> This contradicts the statement made by the Court in *Bankovic*, namely that the ‘mere’ power to kill does not equate jurisdiction.<sup>64</sup> Nevertheless,

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<sup>56</sup> Milanovic (2012), p. 123

<sup>57</sup> Milanovic (2012), p. 123

<sup>58</sup> Milanovic (2012), p. 123

<sup>59</sup> *Al-Skeini v. United Kingdom*, para. 135

<sup>60</sup> *Al-Skeini v. United Kingdom*, para. 136

<sup>61</sup> *Al-Skeini v. United Kingdom*, para. 136

<sup>62</sup> *Al-Skeini v. United Kingdom*, para. 137

<sup>63</sup> Milanovic (2012), p. 129

<sup>64</sup> Milanovic (2012), p. 129

the foundation remains, namely that the extraterritorial application of ECHR can only be exceptional and needs to be justified by reference to general international law.<sup>65</sup>

Hence, the notion of “jurisdiction” has both a territorial and personal dimension, and the application of IHRL is in fact subject to restrictions.<sup>66</sup> As to targeted killings taking place outside the targeting State’s territory, the targeted person is brought within the jurisdiction of the operating State, if that State exercises sufficient factual control. More precisely, in Melzer’s words: “a State exercising sufficient factual control or power to carry out a targeted killing will also exercise sufficient factual control to assume legal responsibility for its failure to ‘respect’ the right to life of the targeted person under conventional human rights law”.<sup>67</sup>

In conclusion, when a State executes a targeted killing of an individual, e.g. drops a bomb on the targeted person, it may not have “effective control” over that area. However, it will most likely have “state agent authority and control”, bringing the individual into the jurisdiction of the targeting State. The result is that the targeting State is required secure to that individual the rights and freedoms provided under Section 1 of ECHR, comprising the right to not be arbitrarily deprived of life.

## **1.4 Outline**

This thesis will attempt to address the legal questions regarding the use of targeted killing as part of States counterterrorism strategy. I will first address the question concerning the applicable law and look closer at the relationship between the two bodies of law and between the rules applicable in NIAC/IAC (chapter 2). Chapter 3 addresses the legality of targeted killings under international humanitarian law (IHL). In chapter 4 I will look at the permissibility of targeted killings as part of self-defense. Finally, chapter 5 addresses the legality of targeted killings under international human rights law (IHRL). Chapter 6 provides a conclusion.

## **2 Which Legal Regime Properly Applies to Targeted Killings?**

### **2.1 Introduction: Two International Bodies of Law**

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<sup>65</sup> Milanovic (2012), p. 129

<sup>66</sup> Melzer (2008), p. 135

<sup>67</sup> Melzer (2008), pp. 138-139

Two branches of international law govern States use of deadly force, namely human rights law and international humanitarian law.<sup>68</sup> The application of IHL relies on the existence of an armed conflict, while IHRL is applicable at all times, both in an armed conflict and in times of peace. Hence, the relationship between these two legal regimes is complicated and complex.<sup>69</sup>

The ICJ has recognized three circumstances in which the two bodies of law interact. In the 2004 Wall Advisory Opinion, paragraph 106, the Court states the following: “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”<sup>70</sup> However, the Court did not specify how they interact when applied simultaneously.<sup>71</sup>

The applicability of international human rights law during armed conflicts was addressed by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.<sup>72</sup> In the Advisory Opinion paragraph 25 the Court states that “the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”<sup>73</sup> The Court further states that “the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*.”<sup>74</sup> Hence, the individual’s right to life continues to be protected even in the context of an armed conflict, but the *lex specialis* of IHL is triggered and the lawfulness of the targeted killing must be assessed against that body of law.<sup>75</sup> However, in the event that IHL does not provide a rule, or the rule is ambiguous, it may be appropriate to draw guidance from human rights law.<sup>76</sup> Hence, the view today is that human rights law is applicable at all times everywhere and that humanitarian law is *lex specialis* applying only in time of war and thus partially supersedes human rights law in the event of an armed conflict.<sup>77</sup>

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<sup>68</sup> MacDonald (2011)

<sup>69</sup> Siatitsa (2011)

<sup>70</sup> ICJ Wall, Advisory Opinion (2004), para. 106

<sup>71</sup> Siatitsa (2011)

<sup>72</sup> ICJ Nuclear Weapons, Advisory Opinion (1996)

<sup>73</sup> ICJ Nuclear Weapons, Advisory Opinion (1996), para. 25

<sup>74</sup> ICJ Nuclear Weapons, Advisory Opinion (1996), para. 25

<sup>75</sup> MacDonald (2011), p. 128

<sup>76</sup> UN Human Rights Council (2010), para. 29

<sup>77</sup> Brennan (2013)

In the Wall Advisory Opinion, the ICJ affirms this view and holds that “the protection offered by human rights conventions does not cease in case of armed conflict”<sup>78</sup> and further, that “the Court will have to take into consideration both these branches of international law.”<sup>79</sup> In other words, unless there is a conflict between them, these two branches of law apply coextensively and simultaneously. Hence, in situations of conflicting provisions, the specific rules of IHL prevail over the general rules of IHRL.

The International Commission of Inquiry on Darfur followed this approach in a report to the United Nations Secretary-General: “For example, they both aim to protect human life and dignity, prohibit discrimination on various grounds, and protect against torture or other cruel, inhuman and degrading treatment. ...The difference lies in that whilst human rights law protects the individual at all times, international humanitarian law is the *lex specialis* which applies only in situations of armed conflict.”<sup>80</sup>

The UN Human Rights Committee has a somewhat different approach to the relationship between IHL and IHRL, avoiding the term *lex specialis*. According to their complementary and harmonious approach, the two branches of law, with the common objective of protecting persons, should be interpreted in a way that seek compliance and harmony, rather than choosing one branch.<sup>81</sup>

The question at hand is which law properly applies to the targeted killings of suspected terrorists. The problem with the dispute over the legality of targeted killings is that it does not fit into either of the two models.<sup>82</sup> At the time the Geneva Conventions were written, the drafters did not take into consideration the new challenges that the modern world would bring upon us.<sup>83</sup> Contemporary conflicts are very different from the conflicts and hostilities envisioned at that time. Modern day hostilities have resulted in new military tactics to address the new complications. Hence, these modern conflicts, like the “War on Terror” between states and non-state actors, have resulted in the controversial use of targeted killings and following legal challenges. Nevertheless, until new international norms are developed to address the challenges of the modern world, the legality of targeted killings must be assessed against the ex-

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<sup>78</sup> ICJ Wall, Advisory Opinion, para. 106

<sup>79</sup> ICJ Wall, Advisory Opinion, para. 106

<sup>80</sup> International Commission of Inquiry on Darfu (2005), para. 143

<sup>81</sup> Siatitsa (2011)

<sup>82</sup> MacDonald (2011), para. II

<sup>83</sup> Brennan (2013), pp. 1-2

isting legal regimes.<sup>84</sup> Furthermore, within IHL, a distinction is made between two types of armed conflict, with a somewhat different set of rules applicable, see chapter 2.2 below.

In conclusion, the answer to which legal regime applies to targeted killings depends on the circumstances and the conditions in which it takes place. More precisely, the rules of IHRL are applicable at all times; the question is whether the rules of IHL come into play. Hence, the answer to which body of law applies to a certain targeted killing depends on whether it takes place within an armed conflict or whether the killing is committed in peacetime.

Is the War on Terror an “armed conflict”, which must be addressed primarily by International Humanitarian Law, or does it not constitute an “armed conflict” rendering the legality of targeted killings to be addressed solely by International Human Rights Law?

## **2.2 Classification of Conflicts; IACs and NIACs**

IHL applies in time of armed conflict, and, irrespective of the legality of the conflict (*jus ad bellum*), regulates what the parties to an armed conflict may and may not do.<sup>85</sup> The rules of IHL distinguish between two categories of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC).<sup>86</sup> The distinction is based on the parties to the conflict.<sup>87</sup> Even though the legal body governing the rules of armed conflict has evolved, with a considerable body of both treaty rules and customary rules now applicable in both types of armed conflict, essential differences remain.<sup>88</sup> In this chapter, I will address the criteria for the existence of an armed conflict, the difference between the two generic types of armed conflict and which rules are applicable to them, and lastly, which rules of IHL applies to the “War on Terror”.

### **2.2.1 “Armed Conflict”**

The term “armed conflict” is not defined in any IHL treaties, thus it remains to determine what is meant by “armed conflict”.<sup>89</sup> The former term “war” was deliberately substituted by “armed conflict” in order to prevent States from resorting to force without recognizing the

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<sup>84</sup> MacDonald (2011)

<sup>85</sup> Fleck (2013), p. 43

<sup>86</sup> Fleck (2013), p. 44

<sup>87</sup> Fleck (2013), p. 44

<sup>88</sup> Fleck (2013), p. 51

<sup>89</sup> Duffy (2005), p. 219

hostilities as “war”.<sup>90</sup> However, the International Criminal Tribunal for the former Yugoslavia (ICTY), a court of law established by the United Nations for dealing with war crimes that occur during the conflicts in the Balkans in the 1990’s<sup>91</sup>, has provided a definition. The Tribunal formulated the following definition in the Tadic case: “An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state”.<sup>92</sup>

There are two types of armed conflict within the meaning of the Geneva Conventions; international and non-international armed conflicts. An international armed conflict exists when one State resorts to the use of force against another State, irrespective of duration or intensity.<sup>93</sup> According to the ICRC Commentary to Common Article 2 of the Geneva Conventions, the occurrence of de facto hostilities between States is sufficient for the establishment of an international armed conflict.<sup>94</sup> A non-international armed conflict exists when there is a situation of protracted armed violence between a State and organized armed groups or between such groups within a state.<sup>95</sup> Two basic criteria must be met in order to characterize a situation as a non-international armed conflict. The first requirement is that the violence must be of sufficient intensity. As opposed to international armed conflicts, the armed violence in a non-international armed conflict must reach a certain threshold to exclude other situations of internal disturbances and tensions or sporadic violence, which fall outside the scope of IHL and are governed by law enforcement. The second requirement is that the parties to the non-international armed conflict must be sufficiently organized.<sup>96</sup>

Hence, the question of whether or not an armed conflict is established will depend on a factual assessment and, in case of a non-international armed conflict, whether or not these facts satisfy the threshold. The vital characteristic of any armed conflict, international or non-international, is the resort to force by two or more identifiable parties<sup>97</sup>.

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<sup>90</sup> ICRC *Commentary - Art. 2. Part I: General provisions*

<sup>91</sup> ICTY, *About the ICTY*

<sup>92</sup> Prosecutor v. Tadic, para. 70

<sup>93</sup> Duffy (2005), p. 219

<sup>94</sup> ICRC *Commentary - Art. 2. Part I: General provisions*

<sup>95</sup> Fleck (2013), p. 49

<sup>96</sup> Fleck (2013), p. 49

<sup>97</sup> Duffy (2005), p. 219



## 2.2.2 International Armed Conflict (IAC)

In this chapter I will discuss the definition of the term “international armed conflict”. The International Committee of the Red Cross (ICRC) presented in an opinion paper in March 2008, “How is the term “armed conflict” defined in international humanitarian law?”, the prevailing legal opinion on the definition of “international armed conflict” (IAC) under international humanitarian law. In the Opinion Paper the ICRC interpret Common Article 2 (1), which reads:

“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>98</sup>

IACs are conflicts between states. The existence of an IAC depends on what actually happens on the ground, and there is no requirement to formally declare war.<sup>99</sup> Hence, when deciding whether International Humanitarian law shall apply to a situation, one has to base the assessment on the factual conditions independent of the subjective view of the parties. In the Commentary to Common Article 2 of the Geneva Convention, the ICRC holds that “any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existence of a state of war.”<sup>100</sup> Hence, rules of IHL may apply even in the absence of open hostilities, as the existence of an IAC is regardless of the reasons or the intensity of the confrontation. In the words of the ICRC: “It makes no difference how long the conflict lasts, or how much slaughter takes place.”<sup>101</sup> The International Criminal Tribunal of Yugoslavia (ICTY) proposed a general definition of the term international armed conflict in the Tadic case. ICTYs definition in that case, which later has been adopted by several other international bodies, is that “an armed conflict exists whenever there is a resort to armed force between States”.<sup>102</sup>

Based on the analysis set out in the Opinion Paper, ICRCs proposes a definition of an international armed conflict, which reflect the strong prevailing legal opinion: “International armed conflicts exist whenever there is resort to armed force between two or more states”.<sup>103</sup>

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<sup>98</sup> Common Article 2 (1) of the Geneva Conventions of 1949

<sup>99</sup> Duffy (2005), p. 219; and Fleck (2013), p. 45

<sup>100</sup> ICRC *Commentary - Art. 2. Part I: General provisions*

<sup>101</sup> ICRC *Commentary - Art. 2. Part I: General provisions*

<sup>102</sup> ICTY *Prosecutor v. Tadic*, para. 70

<sup>103</sup> ICRC Opinion Paper (2008)

### 2.2.3 Non-International Armed Conflict (NIAC)

In the following I will discuss the term “non-international armed conflict”. The parties to a non-international armed conflict may either be governmental authorities and organized non-governmental armed groups, or two or more such armed groups. The non-State actors party to a NIAC must be capable of identification as a party and must attain a certain extent of internal organization.<sup>104</sup> Further, the hostilities must reach a certain threshold. Some relevant factors to the factual assessment of a NIAC are “the nature, intensity and duration of the violence, and the nature and organization of the parties.”<sup>105</sup>

#### 2.2.3.1 *Application of Common Article 3 to the Geneva Conventions of 1949*

Common Article 3 applies to “the case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties”. This definition does not require that armed groups are fighting against a government, rather the hostilities may occur either between governmental armed forces and non-governmental armed forces, or it may occur between two or more non-governmental armed groups.<sup>106</sup> Today the Geneva Conventions have all been ratified universally. Hence, there is no longer need for the requirement that the armed conflict must take place “in the territory of one of the High Contracting Parties”, as this will always be the case. The threshold for the scope of application of Common Article 3 is not further specified in the provision. The current understanding of this threshold is that it might be lower today than what was intended during the negotiations of the Geneva Conventions in 1949. Due to the purpose of the article it was deliberately limited to contain a few minimum rules, which should receive the widest scope of application.<sup>107</sup>

For the classification of a situation as a non-international armed conflict, the conflict must reach a certain threshold of confrontation. As opposed to international armed conflicts where the existence is irrespective of duration or intensity, factors relevant when assessing the factual determination of a non-international armed conflict include the nature, intensity and duration of the violence, and also the nature and organization of the parties<sup>108</sup>. With this threshold, the existence of an armed conflict is distinguished from lesser forms of violence, such as in-

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<sup>104</sup> Duffy (2005), p. 222

<sup>105</sup> Duffy (2005), p. 221

<sup>106</sup> ICRC Opinion Paper, p. 3

<sup>107</sup> Fleck (2013), p. 587

<sup>108</sup> Duffy (2005), p. 221

ternal disturbances and tensions, riots or acts of banditry. The ICRC states in its Opinion Paper that it has been “generally accepted that the lower threshold found in art. 1 (2) of APII, which excludes internal disturbances and tensions from the definition of NIAC, also applies to common article 3.”<sup>109</sup>

Thus, there are two criteria that must be met in this regard.<sup>110</sup> The first criterion is that the hostilities must reach a minimum level of intensity. The second criterion that must be met in order to consider the situation as a NIAC is that the non-governmental groups involved in the conflict must be considered as “parties to the conflict”. The non-state groups that may constitute parties have to be capable of identification as a party and have attained a certain degree of internal organization. This legally means that the group must possess organized armed forces, which are under a certain command structure and has the capacity to sustain military operations. Further, the party to a conflict must be able to observe the rules of IHL, but it is not a criterion that the armed group complies with the rules.<sup>111</sup> With regard to common article 3, control of territory is not a requirement for an armed group to be constituted as a party to a non-international armed conflict.

### *2.2.3.2 Application of Additional Protocol II Article 1*

Additional Protocol II applies to armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>112</sup> As to the interpretation of the text, this provision clearly has a more limited scope of application than Common Article 3. The definition in APII is more restrictive and narrow in two aspects. First, it introduces a criterion of control over territory as a jurisdictional threshold for application. Non-governmental parties must exercise such territorial control “as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. Second, as opposed to the definition of NIAC in Common Article 3, APII does not apply to armed conflicts occurring between two or more non-governmental armed groups.

This narrow definition is only relevant for the application of APII as this instrument only “develops and supplements” common article 3 “without modifying its existing conditions of ap-

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<sup>109</sup> ICRC Opinion Paper (2008), p. 3

<sup>110</sup> ICRC Opinion Paper (2008), p. 3; and Tadic

<sup>111</sup> Duffy (2005), p. 222

<sup>112</sup> APII art. 1

plication”. Thus, the law of NIACs has not adopted the restrictive definition found in APII in general.

The ICRC’s proposal for definition of NIAC on the basis of the analysis set out in the Opinion Paper which reflect the current legal view, is as follows: “Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a state. The armed confrontations must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization.”<sup>113</sup>

## **2.3 Classifying the “War on Terror”**

### **2.3.1 Introduction**

Whether or not a specific targeted killing is legal depends on the circumstances in which it is conducted.<sup>114</sup> The international humanitarian law paradigm provides a legal framework to targeted killings if the state employing this strategy is considered to be in a state of an armed conflict with the targeted person. The law of armed conflict distinguishes targeted killing attacks from acts of assassinations or extra-judicial executions.<sup>115</sup> Nonetheless, in the new un-traditional conflicts, the enemy does not always represent a state and categorizing the involved actors and actions have thus proven to be challenging.

### **2.3.2 The “War on Terror”: An “Armed Conflict”?**

After the attacks of 9/11, the US claimed to be engaged in a “War on Terror”. The use of targeted killings of suspected terrorists has become an important and controversial part of the US counter-terrorism strategy and has been an officially authorized means of action by the United States.<sup>116</sup> The 2001 Authorization for the Use of Military Force (AUMF) gave the president of the United States the power to use “all necessary and appropriate force” against those responsible for the terrorist attacks that occurred on September 11, 2001.<sup>117</sup> The US has based the justification for its targeted killing attacks essentially on the assertion that the United States is

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<sup>113</sup> ICRC Opinion Paper (2008), p. 5

<sup>114</sup> UN Human Rights Council (2010), para. 28

<sup>115</sup> Falk (2014), p. 299

<sup>116</sup> Falk (2014), p. 299

<sup>117</sup> U.S. Government Publishing Office (2001)

engaged in an armed conflict with Al Qaeda and its associated forces, triggering the rules of IHL.<sup>118</sup>

Today there is no doubt that armed groups such as Al Qaeda resort to hostilities across international frontiers. Hence, the first criterion for being an international armed conflict is satisfied.<sup>119</sup> According to current IHL, in order to constitute an international armed conflict, the conflict must occur between two or more entities that meet the criteria of being a “party” to an international armed conflict, thus in principle between States.<sup>120</sup>

The US holds, under the Obama administration, that they have remained in a state of non-international armed conflict with Al Qaeda and its associates since the attacks of 9/11.<sup>121</sup> All three branches of the US government have embraced this view.<sup>122</sup> In addition, legal advisors and the judicial system in both the US and Israel have concluded that IHL is the international body of law most applicable to assessing the permissibility of targeted killings. This supports the view that the “War on Terror” is in fact an armed conflict triggering the rules of IHL, as both US and Israel assert their compliance with international standards.<sup>123</sup> However, the US Government have also emphasized that although the laws of armed conflict govern this war, it does not constitute either an international or non-international armed conflict within the meaning of the Geneva Conventions, and further that “any customary rules of international law that apply to armed conflict does not bind the President or the US armed forces”.<sup>124</sup> Several legal documents support this view.<sup>125</sup> A memorandum by the Office of Legal Counsel of the US Department of Justice argues that the qualification of the war against Al Qaeda and its affiliates is not an international armed conflict.<sup>126</sup> The US Department of Justice holds that “Non-governmental organizations cannot be parties to any of the international agreements here governing the laws of war”<sup>127</sup> and that Common Article 2 is limited to situations of armed conflict “between two or more of the High Contracting Parties”<sup>128</sup>.

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<sup>118</sup> Falk (2014), p. 299

<sup>119</sup> Duffy (2005)

<sup>120</sup> Melzer (2008), p. 248

<sup>121</sup> Falk (2014), p. 299; and Salinas de Frías (2012), p. 546

<sup>122</sup> Salinas de Frías (2012), p. 546

<sup>123</sup> Falk (2014), p. 299

<sup>124</sup> Melzer (2008), p. 263

<sup>125</sup> Melzer (2008), p. 263

<sup>126</sup> US Department of Justice (2002), p. 9

<sup>127</sup> US Department of Justice (2002), p. 9

<sup>128</sup> GC Common Article 2

Al Qaeda, as a non-State actor, cannot be a party to an international armed conflict. Nevertheless, there is no requirement that the conflict is triggered by the members of the State's own armed forces. Other armed groups may execute the hostilities, provided that their use of force is legally attributable to the State party to the international armed conflict.<sup>129</sup> Hence, armed groups or individuals cannot themselves constitute a party to an international conflict if they are not acting under the authority of a State.

Following the attacks of 9/11, The US invaded Afghanistan as part of their counter-terrorism strategy. The attacks on the US carried out by Al Qaeda, a non-State armed group, were considered attributable to the Taliban government of Afghanistan. The invasion of Afghanistan then gave rise to an international armed conflict between the US and the Taliban government of Afghanistan (and its affiliates) until US-led forces overthrew the Taliban regime in 2001.<sup>130</sup>

Without such State responsibility, it must be assessed whether the conflict reaches the threshold of violence required to constitute a non-international armed conflict. Hence, Even though the US counter-terrorism strategy has lead to interstate conflicts and attacks, the “War on Terror” does not necessarily constitute an international armed conflict in the meaning of the Geneva Conventions. In order for a conflict to be fall within the term “non-international armed conflict”, the parties to the conflict must be sufficiently identifiable and the violence must reach a certain threshold of intensity and duration which separates the situation from other forms of violence governed by the law enforcement regime.<sup>131</sup>

The US Department of Defense identifies its enemy as “Al Qaeda and its affiliates” numerous times, e.g. in a statement by the White House regarding the legal basis for detaining Al Qaeda and Taliban Combatants: “The United States and its coalition partners are engaged in a war against Al Qaeda, the Taliban and their affiliates and supporters”.<sup>132</sup> The US Government has further stated that there will be made no distinction between the terrorists and those who knowingly harbor or provide aid to them.<sup>133</sup> Even further, the US Government holds that even though the “war” is in fact regulated by the rules of IHL, the conflict constitutes neither an international or a non-international armed conflict, and customary rules of IHL are not binding either.<sup>134</sup>

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<sup>129</sup> Nicaragua v. United States of America, para. 195

<sup>130</sup> Laub (2014)

<sup>131</sup> UN Human Rights Council (2010), para. 52

<sup>132</sup> U.S. Department of Defense (2007)

<sup>133</sup> Melzer (2008), p. 262

<sup>134</sup> Melzer (2008), p. 263

A “party” to a conflict must be identifiable based on objective criteria, and must thus entail a minimum level of organization. Hence, the concept of armed conflict must be limited to those situations of hostilities between sufficiently identifiable organized groups. Despite the difficulties in identifying the often loosely organized armed groups in an asymmetrical conflict, this minimum requirement of identification must be upheld in order to avoid total arbitrariness in the use of force. No social phenomenon, like poverty, drug abuse and terrorism, can constitute a party to an armed conflict.<sup>135</sup>

### 2.3.3 The “War on Terror”: A Third Concept of Armed Conflict?

In light of the new legal challenges in modern warfare, a subject to question is whether a new branch of armed conflict should arise, with new legal norms applying to the challenges of today. The described categories of armed conflict mentioned above are the only ones that legally exist today.<sup>136</sup> Following the 9/11 attacks, the US claimed to be engaged in a “War on Terror”. This challenged the abovementioned categories and evoked a controversial debate on whether a new kind of “transnational” armed conflict could evolve. The US Government asserted that the “war” is in fact governed by the rules of international humanitarian law, however it does not constitute either an IAC or a NIAC, as concluded in a memorandum by the Office of Legal Counsel of the US Department of Justice in 2002<sup>137</sup>. The memorandum is basing its conclusions on a tremendously narrow concept of NIAC, thus creating a wide gap between the legal concepts of international and non-international armed conflicts. Further, the memorandum tries to introduce a third concept: “international conflict where one of the parties is not a Nation State”.<sup>138</sup> Neither humanitarian law applicable in international armed conflicts, nor human rights law, nor or customary international law governs this new concept of armed conflict. Not even the minimum standards of humanitarian protection recognized universally as customary international law are applicable in this third type of armed conflict. However, it must be emphasized that, as stated by Dr. Melzer, “no conceivable cause or situation, not even an alleged “just war” against “evildoers”, could allow for an exemption from the peremptory norms established in humanitarian law”.<sup>139</sup> This leads to the unconditional rejection of the new concept of armed conflict, brought forth by the US Government.

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<sup>135</sup> Melzer (2008), p. 262-263

<sup>136</sup> Melzer (2008), p. 269

<sup>137</sup> US Department of Justice (2002), p. 9

<sup>138</sup> Melzer (2008), p. 265

<sup>139</sup> Melzer (2008), pp. 265-266

### 2.3.4 Conclusion

The “first” armed conflict between the Coalition forces and Taliban and its affiliates constituted an international armed conflict within the meaning of the Geneva Conventions. In international armed conflicts, there is no requirement as to the threshold. Hence, the attacks of 9/11, attributable to the Taliban government, gave rise to an IAC between the Coalition forces and Taliban and its affiliates, until the Taliban regime was overthrown. The application of the Geneva Conventions to this IAC, was not disputed.<sup>140</sup> The same was the case for Iraq. However, the “war on terror” extends beyond the conflicts in Afghanistan and Iraq comprising all measures of counterterrorism following the attacks of 9/11.<sup>141</sup> Many of the counterterrorism operations took place within the territory of the States involved and by agents of those, like the CIA, as part of an armed conflict. However, a number of operations have been carried out in a transnational character, with the involvement of law enforcement agencies and military forces of several States.<sup>142</sup>

A conflict between a State and a non-State organized armed group may amount to a non-international armed conflict, given that the criteria are met.<sup>143</sup> The criteria set forth by Common Article 3 to the Geneva Conventions and Additional Protocol II renders the qualification of the “war on terror” challenging. Special Rapporteur Philip Alston applied these criteria to the conflict between the US and Al Qaeda, the Taliban and other associated forces. He concludes, and I agree, that it is problematic for the US to argue that “it is in a transnational non-international armed conflict [...] 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.”<sup>144</sup> International terrorist organizations, such as Al Qaeda, are known to spread fear with terrorist attacks around the world.<sup>145</sup> Non-international armed conflict can exist across national borders, but the requirements need to be fulfilled in order to give rise to a NIAC.<sup>146</sup> In each of those States who have faced the reality of terrorist attacks, the duration and intensity of such attacks must be assessed, and according to Alston, they have not reached the threshold of armed conflict.<sup>147</sup> In a large number of these situations, the terrorist attack is an isolated incident. In such cases,

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<sup>140</sup> Melzer (2008), p. 47

<sup>141</sup> Borelli (2005), p. 46

<sup>142</sup> Borelli (2005), p. 46

<sup>143</sup> UN Human Rights Council (2010), para. 52

<sup>144</sup> UN Human Rights Council (2010), para. 53

<sup>145</sup> UN Human Rights Council (2010), para. 54

<sup>146</sup> Perisic (2014), p. 106

<sup>147</sup> UN Human Rights Council (2010), para. 54



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>148</sup>

The particular conflict between the US and its allies and the Al Qaeda constitutes a non-international armed conflict. As shown, the armed group of Al Qaeda has attained a minimal level of organization and the US has been able to identify its adversary as “Al Qaeda and its affiliates”.<sup>149</sup> The intensity of the armed violence has indeed reached beyond the level of intensity of internal disturbances and tensions.<sup>150</sup> However, Al Qaeda and other armed groups with various degrees of association with it are more often than not loosely linked.<sup>151</sup> Some terrorist attacks have even been carried out by a few individuals simply taking inspiration from Al Qaeda.<sup>152</sup> Such “associates” of Al Qaeda cannot constitute a party to a NIAC due to the requirements of IHL.<sup>153</sup>

A specific conflict between a State and a non-State terrorist organization may fulfill the necessary criteria to constitute a non-international armed conflict, engaging the rules of IHL. The minimum requirements cannot be ignored. If disregarded, the safeguards of IHL against the use of violence against groups not equated with organized armed groups capable of being party to a conflict will be undermined.<sup>154</sup> This is regardless of whether the group lacks organization, the ability to engage in armed attack, and so on. The criteria of identification and threshold are cumulative and both must be met in order to give rise to the existence of a NIAC.<sup>155</sup>

In conclusion, the “war on terror” cannot constitute *one* transnational non-international armed conflict. The various situations, attacks and conflicts within “war on terror” must be assessed separately, and all situations will not necessarily satisfy the threshold for constituting a NIAC.

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<sup>148</sup> UN Human Rights Council (2010), para. 52

<sup>149</sup> U.S. Department of Defense (2007)

<sup>150</sup> APII art. 1 (2)

<sup>151</sup> UN Human Rights Council (2010), para. 55

<sup>152</sup> UN Human Rights Council (2010), para. 55

<sup>153</sup> UN Human Rights Council (2010), para. 55

<sup>154</sup> UN Human Rights Council (2010), para. 56

<sup>155</sup> UN Human Rights Council (2010), para. 53

## 3 Legality under International Humanitarian Law

### 3.1 Introduction

The first prerequisite for the application of International Humanitarian Law (IHL) is that the targeted killing takes place within the context of an armed conflict. This chapter concentrates on the law applicable once an armed conflict has arisen. Both IHL and IHRL apply to an armed conflict. However, the legality of a targeted killing depends on the applicable *lex specialis*.<sup>156</sup> The focus in this chapter will therefore be the rules of IHL. The objective of IHL is to protect persons who are not participating in the hostilities and to limit the methods and means of warfare. Hence, IHL imposes constraints on how an armed conflict may be conducted. Among the fundamental principles of IHL that apply to an armed conflict are the opposing considerations of humanity and military necessity, reflected throughout the IHL. From these competing considerations, the principle of distinction and the principle of proportionality derive, along with the prohibition on causing superfluous injury or unnecessary suffering. These principles reflect customary international law, which are applicable to all armed conflicts and are binding on all states without regard as to whether or not they are parties to the treaties<sup>157</sup>.

The focus in this provision is on the law applicable once an armed conflict has arisen. With regard to targeted killings of individuals, the rules of IHL determines whether the targeted individual is lawfully subject to direct attack, and if so, IHL provides the standards that must be respected when conducting such operations.<sup>158</sup> However, there are many difficulties surrounding the application of international humanitarian law to the special tactic of targeted killings.

Targeted killings are lawful in certain circumstances. Just as with any conduct of hostilities in armed conflict, the legality of targeted killings depends on whether or not it is in conformity with the essential principles of international law governing the use of force.<sup>159</sup> These principles are fundamental principles of customary international law. Under this legal regime, a state may lawfully take lives, provided that the killing is not arbitrary.

Targeted killings are only legally permissible under international law when the targeted person constitute a legal military objective; either a combatant, or a civilian “for such time as

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<sup>156</sup> UN Human Rights Council (2010), p. 10

<sup>157</sup> Henckaerts, *Customary International Humanitarian Law* (2005), p. xvi

<sup>158</sup> Melzer (2008), p. 395

<sup>159</sup> MacDonald (2011)

they take direct part in hostilities.”<sup>160</sup> Further, the lawfulness of targeted killings is subject to the requirement of military necessity (see chapter 3.4). Even further, the use of force is required to be proportionate in that sense that any military advantage anticipated as a result of the operation, must be weighed against any expected harm to civilians in the surrounding area, and everything feasible must be done to diminish harm to civilians (see chapter 3.5). These standards of the legality of targeted killings in hostilities are applicable regardless of whether the conflict is between States or between a State and a non-State armed group, including alleged terrorist.<sup>161</sup>

## **3.2 The Principle of Distinction**

### **3.2.1 Who is a Legitimate Target?**

Under IHL, the lawfulness of the deliberate deprivation of life depends mainly on whether or not the targeted person meets the criteria of a legitimate military objective. The decision of whether a targeted person may be legitimately attacked is governed by the principle of distinction.<sup>162</sup> This is a fundamental principle of IHL and constitutes the basis for the rules governing armed conflict.

The principle of distinction obliges belligerents to distinguish between different categories of persons. The primary distinction is between combatants and civilians. Combatants take part in the hostilities and are thus legitimate targets, as opposed to civilians not participating who are considered protected persons. Both conventional IHL<sup>163</sup> and State practice is clear as to the rule that civilians may not be the object of direct attack, unless and for such time as they directly participate in the hostilities. API art. 51 (2) codifies the customary international law principle that the “civilian population as such, as well as individual civilians, shall not be the object of attack”.

The two categories of individuals are mutually exclusive, which means that in an armed conflict, every individual is either a legitimate military objective or a protected person. Combatants have the right to take part in hostilities; in other words, they cannot be prosecuted for their legal acts of war. Further, the adversary grants combatants prisoner of war (POW) status upon capture.<sup>164</sup> On the other hand, civilians not participating in the hostilities are afforded

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<sup>160</sup> API art. 51(3)

<sup>161</sup> UN Human Rights Council (2010), p. 10

<sup>162</sup> Melzer (2008), p. 300; and APII art. 13 (2)

<sup>163</sup> API art. 51 (2)

<sup>164</sup> API art. 44 (1)

civilian protection, which mainly consists of protection from being directly targeted.<sup>165</sup> Hence, the protection entitles civilians is not unconditional. Civilians who take a direct part in the hostilities will become legitimate military targets for the duration of their participation.<sup>166</sup>

In both IACs and NIACs, IHL distinguishes between the same categories of individuals. The protected persons are peaceful civilians, medical and religious personnel and persons hors de combat. A persons recognized as hors de combat comprises anyone who is in the power of an adverse party, anyone who is defenseless due to unconsciousness, shipwreck, wounds or sickness, and anyone who clearly expresses an intention to surrender, provided that the person refrain from any hostile acts and does not try to escape.<sup>167</sup> On the contrary, persons not protected against direct attack comprise members of the armed forces of a party to a conflict, civilians for such time as they directly participate in the hostilities, and other protected persons who commit hostile acts notwithstanding the special protection granted them.

Additional Protocol I protects the principle of distinction in international armed conflicts in its art. 48: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>168</sup> Furthermore, both of the Additional Protocols to the Geneva Conventions states: “The civilian population as such, as well as individual civilians, shall not be the object of attack”.<sup>169</sup>

As for the non-international conflicts, API does not apply. Conventional IHL conducting the rules in a non-international armed conflict contains few provisions on the conduct of hostilities, but the main rules and principles of international armed conflict are recognized as having attained the status of customary international law also applicable in situations of non-international armed conflicts. The principle of distinction is recognized as customary international law, binding on all states<sup>170</sup>. The customary rule has been formulated by the ICRC as follows: “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed

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<sup>165</sup> API art. 51 (2), APII art. 13 (2)

<sup>166</sup> API art. 51(3)

<sup>167</sup> Henckaerts, *Customary International Humanitarian Law* (2005), rule 47, p. 164

<sup>168</sup> API art. 48

<sup>169</sup> API art. 51(2), APII art. 13(2)

<sup>170</sup> Henckaerts, *Customary International Humanitarian Law* (2005), rule 1

against civilians.”<sup>171</sup> This definition operates with a wide concept of combatants, including all those who are not entitled special protection.

Hence, targeted killings are only lawful when employed against suspected terrorists if they are either deemed combatants, or civilians during “such time” as they take “direct part in hostilities”.<sup>172</sup> The notion “direct participation in hostilities” is not defined in IHL, nor is State practice clear on the subject.<sup>173</sup> There are two elements to the notion of direct participation in hostilities; “hostilities” and “direct participation”. “Hostilities” refers to the resort to force by the parties to a conflict, while “direct participation” refers to the individual involvement of a civilian in these collective hostilities.<sup>174</sup> The individual participation may be categorized as direct or indirect depending on the quality and degree of the involvement in the hostilities. More precisely, “direct participation in hostilities” refers to specific acts carried out by individuals (civilians) as a part of the conduct of hostilities between parties to an armed conflict.

When assessing whether a particular civilian is directly participating, hence a legitimate military objective, the determination must be based on the person’s behavior, location, attire, and other relevant information available at the time.<sup>175</sup> The ICTY stated in the Tadic case that it is “unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and the ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time.”<sup>176</sup>

Simply participating in hostilities does not necessarily constitute as direct participation.<sup>177</sup> In order for a specific act to qualify as “direct participation in hostilities”, rendering the individual targetable, three cumulative criteria must be met.<sup>178</sup> Firstly the act must be likely to adversely affect the military operations or military capacity of a party to the armed conflict, or the act must be likely to inflict death, injury, or destruction on protected persons or objects (threshold of harm).<sup>179</sup> Secondly, there must be a direct causal link between the act and the harm likely to result either from that specific act, or from a military operation in which the

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<sup>171</sup> Melzer (2008), p. 311; and Henckaerts, *Customary International Humanitarian Law* (2005), rule 1, p. 3

<sup>172</sup> API art. 51(3); and MacDonald (2011)

<sup>173</sup> Melzer (2009), p. 41

<sup>174</sup> Melzer (2009), p. 41

<sup>175</sup> Schmitt (2010), p. 25

<sup>176</sup> Prosecutor v. Tadic, para. 616

<sup>177</sup> Schmitt (2010), p. 25

<sup>178</sup> Melzer (2009), p. 46

<sup>179</sup> Melzer (2009), p. 46

specific act is considered an integral part (direct causation).<sup>180</sup> Lastly, there must be belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict (belligerent nexus).<sup>181</sup> In other words, the act must be designed to directly cause the required threshold of harm in support a party to the conflict and to the detriment of another. Only when all three elements are satisfied may an act be rendered as “direct participation”.

When in doubt as to whether an individual is a civilian or a combatant, art. 50 (1) of API states that the person “shall be considered to be a civilian”.<sup>182</sup>

### 3.2.2 Organized Armed Groups in NIACs

There are two main categories of individuals in armed conflict, namely combatants and civilians. Even though the treaty law governing the rules of NIAC contains only a few rules on the conduct of hostilities, many of the key rules and principles applicable in IACs have attained customary status, also applicable in NIACs.<sup>183</sup>

For the purposes of the principle of distinction in IACs, the concept of combatants is defined in API art. 43 and 50 and GCIII art. 4 as all persons who are members of armed forces party to the conflict.<sup>184</sup> The ICRC has formulated the customary rule defining “civilians” in its rule 5: “Civilians are persons who are not members of the armed forces.”<sup>185</sup> Hence, all other persons are considered civilians entitled to protection against direct attack, unless they take part in the hostilities rendering them targetable for such time as they directly participate.

Due to the lack of definitions of the terms “civilian”, “armed forces” and “organized armed groups” in treaty law governing NIACs, they must be “interpreted in good faith in accordance with the ordinary meaning to be given to them in their context and in the light of the object and purpose of IHL”.<sup>186</sup> It is generally recognized that members of State armed forces are combatants. The ICRC Study on Customary IHL confirms this view.<sup>187</sup> The organized armed groups of a non-State party, however, do not qualify as regular armed forces. The notion “armed forces” appears frequently in conventional IHL. A question that arises is whether this

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<sup>180</sup> Melzer (2009), p. 46

<sup>181</sup> Melzer (2009), p. 46

<sup>182</sup> API art. 50 (1)

<sup>183</sup> Henckaerts, *Customary International Humanitarian Law* (2005)

<sup>184</sup> API art. 43 and 50; GCIII art. 4

<sup>185</sup> Henckaerts, *Customary International Humanitarian Law* (2005), rule 5, p. 17

<sup>186</sup> Melzer (2009), p. 27; and VCLT art. 31

<sup>187</sup> Henckaerts, *Customary International Humanitarian Law* (2005), p. 19

concept includes only State armed forces or if the functional organized armed groups who conduct hostilities on behalf of a party in a NIAC are also covered by the notion. Within the meaning of Common Article 3, the ICRC Commentary states: “Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with ‘armed forces’ in either side engaged in ‘hostilities’”.<sup>188</sup> Furthermore, a NIAC within the meaning of this provision can occur between opposing non-State parties, as it has no requirement of the involvement of a State. Hence, the conclusion is that the notion of “armed forces” in Common Article 3 comprises armed forces of both State and non-State parties to a NIAC.

APII art. 1 (1) is applicable only to conflicts arising between the armed forces of a “High Contracting Party” on one side, and “dissident armed forces” or “other organized armed groups” on the other.<sup>189</sup> This article does not differentiate between the parties to the conflict and its armed forces. However, when otherwise referred to throughout IHL, it seems that “organized armed group” is equated with “armed forces”, not with a party to the conflict as a whole. Hence, in line with the terminological and conceptual approach of both conventional and customary IHL, the notion of “organized armed groups” in Article 1 (1) should be equated with the fighting forces of a non-State actor party to the conflict.<sup>190</sup> The categorization of the individuals and the consequences for membership in each category is the same in both Common Article 3 and APII art. 1 (1), despite the narrow scope of application of APII.

Common article 3 to the Geneva Conventions obliges “each Party to the conflict” to grant protection against arbitrary exercise of power to “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat”.<sup>191</sup> According to this passage, both State and non-State parties to a NIAC must distinguish between members of the armed forces and civilians not participating. The persons afforded protection thus comprises all persons who do not directly participate in the hostilities on behalf of a party.

The ICRC Study on customary IHL states that “practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians” and emphasizes that “most manuals define civilian negatively with respect to combatants and armed forces, and are silent on the status of armed opposition groups”.<sup>192</sup> According to the ICRC Interpretive Guidance on the notion of direct participation in hostilities under international

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<sup>188</sup> ICRC Commentary to the GCIII, p. 37

<sup>189</sup> Melzer (2008), p. 315

<sup>190</sup> Melzer (2008), pp. 315-316

<sup>191</sup> Common Article 3 to the GCs

<sup>192</sup> Melzer (2008), p. 316; and ICRC (2005), pp. 17 and 19

humanitarian law, organized armed groups constitute the armed forces of a non-State party and thus consists of individuals whose continuous function is to take direct part in the hostilities; “continuous combat function”.<sup>193</sup> A question that needs to be answered is whether the members of such non-State armed groups are considered civilians continuously participating directly in the hostilities, or whether they are considered combatants.

The terms “combatants” and “civilians” are not clearly defined in the regulations of the conduct of hostilities in non-international armed conflicts, and according to the ICRC Study practice is vague as to characterizing the members of armed groups as either combatants or civilians.<sup>194</sup> More precisely, the practice is not clear on whether the members of organized armed groups are considered civilians who directly participate in the hostilities, rendering them targetable only for such time as they are directly participating, or whether these members are combatants (and thus continuously liable to attack). An additional possibility is that such membership alone in an organized armed group is enough to constitute “direct participation”.

However, according to Melzer, and I agree with his point of view, the ambiguous practice submitted in the ICRC Study is not in fact reflected in State practice.<sup>195</sup> It is highly unlikely that a State engaged in a non-international armed conflict against a non-State actor would give any kind of recognition of such armed groups or give any kind of statement that could be interpreted in that way.<sup>196</sup> Hence, the status of the individual members of organized armed groups is not expressly regulated in military manuals, as well as in conventional IHL, but this lack of formal regulation does not equate vague practice. Therefore, the relevant State practice as to the qualification of armed groups as civilians or combatants must therefore be interpreted through operational conduct, indirect statements and absence of condemnation.<sup>197</sup> If States were to consider the members of organized armed groups as civilians, they would have to express, through statements and general conduct, that organized armed groups cannot be attacked unless and for such time as they directly participate in the hostilities.<sup>198</sup> If States then attacked such armed groups outside a military operation, it would be considered unlawful. However, in both past and current non-international armed conflicts, States armed forces have not been reluctant to directly attack the opposing armed group also when it is not engaged in a

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<sup>193</sup> Melzer (2009), p. 27

<sup>194</sup> Henckaerts, *Customary International Humanitarian Law* (2005), p. 17

<sup>195</sup> Melzer (2008), p. 316

<sup>196</sup> Melzer (2008), p. 316

<sup>197</sup> Melzer (2008), p. 316

<sup>198</sup> Melzer (2008), p. 317



specific military operation.<sup>199</sup> Such attacks are normally not denied by the attacking State nor has other States or expressed disapproval of them. There is little or no doubt as to the permissibility of such attacks. In the event an attack has been internationally condemned it is based on different allegations, either that it has caused too extensive collateral damage, or that the attacked individuals was not part of the fighting forces of the non-State party to the conflict. In conclusion, members of organized armed groups are not considered civilians.

When implementing the fundamental principle, the distinction must be based on the reasonably dependable information available at the time.<sup>200</sup> When determining whether an individual constitutes a lawful military objective in a specific situation in a NIAC, it must first be made clear whether the person is a civilian, a combatant, or an individual otherwise afforded special protection against direct attack. Secondly, if the individual is a protected person, it must be assessed whether this individual does not directly participate in the hostilities, or if he or she does so sporadically on an unorganized, spontaneous basis, leaving him/her unprotected for such time as the hostile act takes place.<sup>201</sup>

Organized armed groups mostly recruit their members from the civilian population, but they have reached certain a level of military organization enabling them to conduct hostilities on behalf of a party to a conflict. These armed groups make up the functional armed forces of a non-State actor party to a non-international armed conflict. This distinction is significant due to the consequences of membership in such an armed group, in contrast to other types of association with a non-State party.<sup>202</sup>

The determination of membership in organized armed groups is complicated, as it has no basis in domestic law.<sup>203</sup> Membership in these informally structured armed groups is hardly ever formalized and membership is seldom expressed through uniforms or other forms of identification. Affiliation with a non-State party to a conflict, especially with regard to terrorist organizations, may also depend on abstract affiliation, e.g. family ties, that do not automatically lead to membership within the meaning of IHL.<sup>204</sup> Under IHL, the significant criterion for membership in such organized armed groups is that the membership must derive from an individual taking up a continuous function in the group and whether or not this function includes activities amounting to direct participation in the conduct of hostilities on behalf of a

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<sup>199</sup> Melzer (2008), p. 317

<sup>200</sup> Melzer (2009), p. 35

<sup>201</sup> Melzer (2008), p. 314

<sup>202</sup> Melzer (2009), p. 32

<sup>203</sup> Melzer (2009), p. 32

<sup>204</sup> Melzer (2009), p. 33

non-State actor.<sup>205</sup> In the ICRC's Interpretive guidance it is stated that this continuous combat function does not entitle the fighters to combatant privilege, but that it distinguishes members of the organized armed forces of a non-State party from those civilians who spontaneously and sporadically directly participate in the hostilities, and from those who assume non-combat functions.<sup>206</sup> Hence, according to the Interpretive Guidance, the members of the organized group in question are required to perform a "continuous combat function" before they qualify as individuals who may be attacked on the basis of membership.<sup>207</sup> The Interpretive Guidance holds that this function is synonymous with direct participation, which means that the persons subject to attack are those members whose function is to engage in the hostilities in a way that would rise to the level of direct participation, however, they do not have to be engaged in these activities at the time of attack.<sup>208</sup>

Further, a terrorist organization that constitutes a non-State party to a conflict operates not only through military operations, but they are often active in cultural, political and religious contexts as well. This, together with the informal structure and the vague, ambiguous membership, makes it exceptionally difficult to make a clear distinction between the non-State party to the non-international armed conflict and its functional armed forces. Those individuals affiliated with an organized armed group, who may accompany them and provide support to a party to the conflict, do not obtain membership of the armed group without assuming functions that amount to direct participation in the hostilities.<sup>209</sup> These individuals do not assume "continuous combat function" and will benefit from the protection granted them as civilians.<sup>210</sup>

The ICRC Interpretive Guidance concludes that all persons not members of State armed forces or organized armed groups of a party to the conflict are civilians.<sup>211</sup> Further, organized armed groups constitute the armed forces of a non-State party to the NIAC and consist of individuals whose continuous function is to take direct part in hostilities ("continuous combat function").

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<sup>205</sup> Melzer (2009), p. 33

<sup>206</sup> Melzer (2009), p. 33-34

<sup>207</sup> Schmitt (2010), p. 21

<sup>208</sup> Schmitt (2010), p. 21

<sup>209</sup> Melzer (2009), p. 35

<sup>210</sup> Melzer (2009), p. 35

<sup>211</sup> Melzer (2009), p. 36

However, Akande<sup>212</sup> and Schmitt<sup>213</sup> both criticize the term “continuous combat function” brought forth by the ICRC Interpretive Guidance, and I agree with their criticism. According to the Interpretive Guidance, the members of an organized armed group who have a continuous combat function may be attacked at any time, while those who only periodically and sporadically directly participate, must be treated as civilians rendered targetable only for such time as they actually directly participate in the hostilities. Schmitt holds that this distinction will be impractical and difficult in practice.<sup>214</sup> As addressed above, the determination of whether an individual is a legal target or not depends on the reliable information available. Hence, if a specific individual is identified once as having engaged in hostilities, how may the targeting State know whether this participation was merely periodic when carrying out a subsequent operation against the organized armed group?<sup>215</sup>

Further, applying the requirement of “continuous combat function” is not in compliance with the military necessity-humanitarian balance of IHL.<sup>216</sup> While membership in regular armed forces alone is sufficient to render the members as permissible targets at all times, even when the targeted person has no functions that could rise to the level of direct participation, this is not the case for members of organized armed groups. When applying the criterion of “continuous combat function” to the members of organized armed groups, the result is the preclusion of targeting and attacking these members, despite the certainty as to membership.<sup>217</sup> Hence, this distinction between the members of the armed forces of a State and of the armed forces of non-State groups results in a lack of equality.<sup>218</sup> In regular armed forces, all members are legitimate military targets, regardless of their functions, while in organized armed forces, those who assume non-combat functions does not constitute a legitimate military objective and cannot be targeted. Schmitt provides a good illustration on this point: “a cook in the regular armed forces may be lawfully attacked at any time; his or her counterpart in an organized armed group may be attacked only if he or she directly participates and then only for such time as the participation occurs”.<sup>219</sup>

The ICRC base the justification for the application of the criterion “continuous combat function” on a concern about the inability to make a distinction between members of an armed

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<sup>212</sup> Akande (2009)

<sup>213</sup> Schmitt (2010)

<sup>214</sup> Schmitt (2010), p. 23

<sup>215</sup> Schmitt (2010), p. 23

<sup>216</sup> Schmitt (2010), p. 23

<sup>217</sup> Schmitt (2010), p. 23

<sup>218</sup> Akande (2009), para. *Who is a civilian?*

<sup>219</sup> Schmitt (2010), p. 23

group and civilians and/or civilians with an affiliation to the group.<sup>220</sup> However, when in doubt as to whether an individual is a civilian or a combatant, art. 50 (1) of API states that the person “shall be considered to be a civilian”.<sup>221</sup> I agree with Akande and Schmitt in their criticism. In addition, the fact that the rules of IHL apply with equal force to all belligerents<sup>222</sup> is an argument as to why the rules of targeting should also be similar, irrespective of whether the armed forces are State’s armed forces or non-State armed forces.

In modern wars, which no longer stay within the boundaries of a battlefield, often with both civilians and combatants on the ground, the classification of individuals is not always an easy task. The main question at hand is whether the terrorists, as individuals being part of a non-State armed group in a non-international armed conflict, are considered as civilians or combatants. As the preceding analysis has shown, the categorization of the functional armed forces of a party to the conflict as “State armed forces” or “organized armed groups” is ultimately irrelevant.

In conclusion, with regard to the classification of individuals in the war on terror, the legality of targeting the individual terrorist depend in a large scale on whether or not he or she is a member of an organized armed group to the conflict. As addressed above, members of the armed forces of a non-State party to a NIAC are combatants, regardless of their function within the armed force. Hence, if the targeted person is member of the armed forces of a party to the conflict, he or she constitutes a legitimate military target. Terrorists outside such organized armed groups, who operate alone or not under a command in sufficiently organized forms, are considered civilians. Hence, it must be assessed whether the person fulfills the criteria of direct participation in the hostilities, and if so, the individual may be lawfully targeted for such time as he or she directly participates.

### **3.3 The Principle of Necessity**

The targeted killings carried out under the paradigm of hostilities must be in accordance with the requirement of necessity.<sup>223</sup> The principle of necessity constitutes a core principle in IHL, and it is considered customary international law.<sup>224</sup> This long-established principle of IHL requires that the military action, including the type and degree of used force, must be necessary for the achievement of a legitimate military purpose. In other words, belligerent may

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<sup>220</sup> Melzer (2009) pp. 32-33

<sup>221</sup> API art. 50 (1)

<sup>222</sup> Fleck (2013), p. 1

<sup>223</sup> Melzer (2008), p. 397

<sup>224</sup> Henckaerts, *Customary International Humanitarian Law* (2005)

only apply the amount and type of force necessary to defeat the enemy.<sup>225</sup> An act of war is only lawful when directed against military objectives, as addressed above in chapter 3.2, provided that the operation is not likely to cause unnecessary suffering (see chapter 3.6) and that it is not perfidious (the use of treacherous means and methods).<sup>226</sup>

IHL is a compromise between military and humanitarian requirements and its rules thus comply with both military necessity and the considerations of humanity.<sup>227</sup> Hence, the principle of necessity has two aspects: the permissive aspect and the restrictive aspect.<sup>228</sup> The first permits States to employ the kind and degree of force necessary to defeat the opposing belligerent with a minimum expenditure of time, life and physical resources, which is not otherwise prohibited by the rules of IHL. The latter restrain the sum total of lawful military actions by prohibiting acts which are not otherwise unlawful, as long as they are not necessary for the achievement of a legitimate military goal.<sup>229</sup> With regard to targeted killings, a targeted killing that is illegal under IHL cannot be defended by considerations of military necessity.<sup>230</sup> In other words, military necessity can never justify departing from the rules of IHL to gain a military advantage, e.g. by using forbidden means.<sup>231</sup> Conversely, even when a targeted killing is otherwise permissible under IHL, it is unlawful when there is no military necessity in the specific circumstances of that targeted killing.<sup>232</sup>

In conclusion, the principle of military necessity requires that the killing of the targeted individual effectively contributes to the targeting State gaining a concrete and direct military advantage. In addition, considerations of military necessity cannot justify an otherwise unlawful targeted killing.

### **3.4 The Principle of Proportionality**

The lawfulness of the targeted killing of an individual is subject to the requirement of proportionality.<sup>233</sup> Hence, military necessary targeted killings of legitimate military objectives must also comply with the principle of proportionality.<sup>234</sup> The principle of proportionality is con-

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<sup>225</sup> Fleck (2013), p. 34

<sup>226</sup> Fleck (2013), p. 34

<sup>227</sup> Fleck (2013), pp. 36-37

<sup>228</sup> Melzer (2008), p. 397

<sup>229</sup> Melzer (2008), p. 397; and Fleck (2013), p. 37

<sup>230</sup> Melzer (2008), p. 397

<sup>231</sup> Fleck (2013), p. 37

<sup>232</sup> Melzer (2008), p. 397

<sup>233</sup> Melzer (2008), p. 403

<sup>234</sup> Melzer (2008), p. 403

sidered customary international humanitarian law applicable in both IACs and NIACs.<sup>235</sup> The customary rule has been formulated by the ICRC as follows: “Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”<sup>236</sup> Hence, the requirement of proportionality prohibits the targeted killing of a person subject to lawful attack if the collateral damage is expected to be excessive compared to the anticipated concrete and direct military advantage gained by the killing of that individual.<sup>237</sup>

In the absence of a battlefield, civilians and combatants often live side by side. This is one of the challenges of asymmetric warfare. The question in this regard is whether saving the potentially threatened lives is proportional with the deprivation of the right to life of the collateral victims.<sup>238</sup> In other words, the requirement of proportionality weighs the importance of the anticipated military advantage against the severity of the expected collateral damage of peaceful bystanders.<sup>239</sup> When no such collateral damage is expected, there is no need for an assessment of proportionality. On the other hand, any targeted killing likely to cause excessive collateral damage is prohibited regardless of the lawfulness otherwise.<sup>240</sup>

The proportionality of a targeted killing causing collateral damage depends on the relative military importance of the target (military target value).<sup>241</sup> Hence, “high value” targets justify a larger collateral damage than “low value” targets. The targeted individuals rank, operational function and tactical position at the time of the targeting are factors that must be assessed when deciding the value of a target.<sup>242</sup> An example, a military leader may be a “high value” target, but only for as long as he or she assumes the leader position in the armed group party to the conflict. Hence, each operation of targeted killings require a separate proportionality evaluation. Further, the anticipated concrete and military advantage obtained from a targeted killing must be assessed from the perspective of the only legitimate purpose in armed conflicts, namely to weaken and defeat the enemy.<sup>243</sup> The killing of an enemy is not considered purpose itself, the operation must be carried out with a view to progressing the military effort against the enemy, with the aim to end the conflict.

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<sup>235</sup> Henckaerts, *Customary International Humanitarian Law* (2005), rule 14

<sup>236</sup> Henckaerts, *Customary International Humanitarian Law* (2005), rule 14

<sup>237</sup> Melzer (2008), p. 404

<sup>238</sup> Perisic (2014), p. 100

<sup>239</sup> Melzer (2008), p. 404

<sup>240</sup> Melzer (2008), p. 404

<sup>241</sup> Melzer (2008), p. 404

<sup>242</sup> Melzer (2008), p. 404

<sup>243</sup> Melzer (2008), p. 406

### 3.5 Lawful Methods and Means of Warfare

One of the fundamental aims of IHL is to protect the civilian population, as well as combatants, against excessive and exceptionally cruel violence.<sup>244</sup> The right to choose methods and means of warfare in an armed conflict is not unlimited.<sup>245</sup> The principle of limited warfare (limited to what is military absolutely necessary in order to achieve the military objectives<sup>246</sup>) expresses concisely the customary principle that any act of warfare should be guided by the requirements of military necessity. This is one of the core principles of IHL derived from established custom, from the principles of humanity, and from dictates of public conscience.<sup>247</sup> It is prohibited to employ means and methods which are intended or of a nature to cause superfluous injury or unnecessary suffering<sup>248</sup>, to injure military objectives, civilians and other protected persons or civilian objects without distinction<sup>249</sup> and to cause widespread, long-term, and/or severe damage to the natural environment<sup>250</sup>. Hence, certain weapons are restricted or prohibited.<sup>251</sup>

Further, it is prohibited to kill an adversary by resort to perfidy.<sup>252</sup> This is part of customary international law applicable in IACs and NIACs.<sup>253</sup> This is relevant to targeted killings because the element of surprise is often crucial for a successful operation. If a State employs soldiers in plain clothes to operate a targeted killing, this is a feigning of civilian, non-combatant status for the purpose of killing an adversary and it thus amounts to perfidy.<sup>254</sup> Undercover operations with the aim to kill a specific individual are unlawful without exception.

### 3.6 Conclusion

A suspected terrorist may lawfully be the victim of a targeted killing if he or she is a member of the armed forces of a party to the conflict, or if he or she directly participates in the hostilities. Further, the killing of that particular terrorist must be necessary for the achievement of a

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<sup>244</sup> Fleck (2013), p. 115

<sup>245</sup> API art. 35 (1); and Hague Regulations art. 22

<sup>246</sup> Fleck (2013), p. 123

<sup>247</sup> Fleck (2013), p. 122

<sup>248</sup> API art. 35 (2); and Hague Regulations art. 23 *litra e*

<sup>249</sup> API art. 51 (4) and (5)

<sup>250</sup> API art. 35 (3) and art. 55 (1)

<sup>251</sup> Melzer (2008), p. 374

<sup>252</sup> Melzer (2008), p. 372

<sup>253</sup> Henckaerts, *Customary International Humanitarian Law* (2005), rule 65

<sup>254</sup> Melzer (2008), p. 373

legitimate military purpose. In addition, the military target value of that terrorist must be proportionate in relation to the anticipated collateral damage caused by the operation. As to the “War on Terror” and US sponsored targeted killings, an assessment is conducted prior to the operation of whether the intelligence supports and validates the choice of target, examining the target location and purpose, as well as the potential collateral damage and intelligence gain and loss.<sup>255</sup> In addition, targets are assessed in terms of their military importance and in line with compliance with military objectives and the rules of IHL.<sup>256</sup> In conclusion, a targeted killing is only permissible under IHL when employed against a lawful military target, provided that the killing of that individual contributes effectively to the achievement of a concrete and military advantage proportionate to the expected collateral damage.

## **4 Legality under the Law on the Use of Force**

### **4.1 Introduction**

Targeted killings raise sovereignty concerns when conducted within the territory of other States.<sup>257</sup> The UN Charter art 2(4) prohibits the use of armed force and forbids States from using force in the territory of another. This provision reads: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”<sup>258</sup> The general view is that art. 2(4) aims to restrict the first resort to armed force by a state or states, unless it can be justified by the exceptions. Whether a targeted killing violates the sovereignty of a State or not, is determined by the law governing inter-state force, whereas the legality of the particular targeted killing is governed by IHL/IHRL.<sup>259</sup>

The specific targeted killing conducted by one State in the territory of another State does not necessarily violate the second State’s sovereignty. The sovereignty is not violated only if the targeted State consents to the targeted killing or if the targeting State has the right to resort to armed force, either under art. 51 of the UN Charter due to the exercise of individual or collective self-defense, or under art. 39-42, which states that use of force is justified when author-

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<sup>255</sup> Falk (2014), p. 298

<sup>256</sup> Falk (2014), p. 298

<sup>257</sup> UN Human Rights Council (2010), p. 11

<sup>258</sup> UN Charter art. 2(4)

<sup>259</sup> UN Human Rights Council (2010), p. 11



ized by the Security Council.<sup>260</sup> Hence, without consent, the right to resort to self-defense only legitimizes the targeted killing in the event that the targeted State is responsible for an armed attack on the targeting State.<sup>261</sup>

It is not legally controversial that a State may consent to another State using force on its territory.<sup>262</sup> However, the consenting State's obligations to protect those within their jurisdiction applies at all times, thus, the consent does not relieve the States in question from their duty to abide by the rules of IHL and IHRL when using force against an individual.<sup>263</sup> Hence, the consenting State cannot authorize a targeted killing unless the targeted killing operation is in accordance with the applicable law (IHL/IHRL).<sup>264</sup>

Without such consent, the States right to self-defense may justify an extraterritorial targeted killing. It is lawful under international law for a State to use lethal force in self-defense as response to an "armed attack" provided that the used force is both proportionate and necessary.<sup>265</sup> In the context of self-defense, the targeted killing must be proportionate to the "armed attack". The use of force is necessary when used defensively and as long as it is restricted to the objective.

## **4.2 Self-Defense Against Non-State Actors**

The question that arises, in the context of targeted killings in the "War on Terror", is whether it is permitted under art. 51 of the UN Charter for States to use force against non-State actors. This question arises due to the fact that the targeted individual will often be a member of a non-State organized armed group party to a non-international armed conflict, see chapter 2.3. The ICJ found in the Wall Advisory Opinion that art. 51 cannot be invoked by a State as self-defense against armed attack by non-State actors whose activities do not engage the responsibility of a State<sup>266</sup>. The Court holds that "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State."<sup>267</sup> The Court consequently concludes that art. 51 has no relevance in that present

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<sup>260</sup> UN Human Rights Council (2010), pp. 11-12

<sup>261</sup> UN Human Rights Council (2010), p. 12

<sup>262</sup> UN Human Rights Council (2010), p. 12

<sup>263</sup> UN Human Rights Council (2010), p. 12

<sup>264</sup> UN Human Rights Council (2010), p. 12

<sup>265</sup> UN Human Rights Council (2010), p. 13

<sup>266</sup> ICJ Wall, Advisory Opinion, para. 139

<sup>267</sup> ICJ Wall, Advisory Opinion, para. 139

case.<sup>268</sup> On the contrary, some States have argued that art. 51 has not displaced the customary right to act in self-defense, including against non-State actors.<sup>269</sup> Support for the latter argument is found in Security Council Resolutions 1368 and 1373, both adopted in September 2001 in the aftermath of 9/11. NATO also supports this view by stating in a press release on September 12<sup>th</sup>, 2001, that the attacks of 9/11 “shall be regarded as an action covered by Article 5 of the Washington Treaty”, invoking Article 5 for the first time in history.<sup>270</sup> Article 5 provides that if a party to NATO is the victim of armed attack, the other members will take the actions it deems necessary to assist the attacked State. This is the principle of collective self-defense.<sup>271</sup> Hence, with this statement, NATO does not only support the view that art. 51 may be invoked against non-State actors, but it also defines the attacks of 9/11 as an “armed attack”.

This leads me to address the question concerning the threshold for the types of attacks that may justify the extraterritorial use of force in self-defense. More precisely, whether terrorist attacks by non-State actors constitutes an “armed attack” within the meaning of art. 51. The ICJ has established a high threshold for armed attacks, holding that sporadic, discrete attacks do not reach the threshold required for permitting the right to use extraterritorial force in self-defense.<sup>272</sup> Further, the legality of a defensive response to an “armed attack” must be assessed with regard to each armed attack, not by considering occasional armed attacks combined.<sup>273</sup>

As to the “War on Terror”, which started after the attacks of 9/11, the question that arises is whether these attacks reached the threshold for constituting an armed attack. As stated above, the high threshold established by the ICJ excludes sporadic and low-intensity attacks from the notion of “armed attack” in art. 51. Due to limited time and space I will not go deep into this assessment. Briefly, the four coordinated terrorist attacks of 9/11 carried out by Al Qaeda, resulted in the loss of almost 3000 lives and damage for several billion dollars.<sup>274</sup> In my view, these attacks will undoubtedly rise to the level of “armed attack”, justifying the extraterritorial use of force by the US following the attacks.

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<sup>268</sup> ICJ Wall, Advisory Opinion, para. 139

<sup>269</sup> UN Human Rights Council (2010), p. 13

<sup>270</sup> North Atlantic Council (2001)

<sup>271</sup> NATO (2005)

<sup>272</sup> UN Human Rights Council (2010), p. 13

<sup>273</sup> UN Human Rights Council (2010), p. 13

<sup>274</sup> Institute for the Analysis of Global Security

### **4.3 Anticipatory and Pre-Emptive Self-Defense**

The right to self-defense may be exercised not only in response to an armed attack, but it may be permissible to invoke the right in advance providing that the defensive operation meets certain criteria. The legality of anticipatory self-defense, or the use of force as a pre-emptive measure in response to a continual threat that may manifest in the future, is a controversial topic. If interpreted strictly, art. 51 does not give permission for States to invoke the right to self-defense before an attack has occurred. In a more liberal view reflecting State practice, the right to self-defense comprises the right to use force against a threat before an actual attack has taken place, provided that it is 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>275</sup> The US has invoked that the use of force is permitted as “pre-emptive self-defense”, which is the use of force even in a situation of a threat that is not imminent and uncertainty as to the time and place of the enemy’s attack remains.<sup>276</sup> However, this view is invoked solely by the US and has no support under international law.<sup>277</sup>

### **4.4 Conclusion**

In the preceding analysis, I have found that in the absence of consent, the use of targeted killings as a measure of self-defense employed against members of non-State armed groups is permissible when the preceding attack reaches the threshold of “armed attack” in art. 51. However, the targeted killing must comply with the applicable law (IHL/IHRL), which is determined by the circumstances in which it takes place.

## **5 Legality under International Human Rights Law (IHRL)**

### **5.1 Introduction**

In the absence of an armed conflict, the legal body that applies to targeted killings is international human rights law. In the situations of targeted killings happening outside the context of an armed conflict, the question is whether these targeted killings violate the human rights standards. The key human right that is challenged in relation to targeted killings is the right to life set out in art. 6 (1) of the International Covenant on Civil and Political Rights (ICCPR)

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<sup>275</sup> UN Human Rights Council (2010), p. 15

<sup>276</sup> UN Human Rights Council (2010), p. 15

<sup>277</sup> UN Human Rights Council (2010), p. 15

and in art. 2 of the European Convention on Human Rights (ECHR). Art. 6 (1) reads as follows: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>278</sup> As mentioned above, when a State is in position to carry out a targeted killing outside its jurisdiction, it is also in a position to assume legal responsibility for not respecting the conventional right to life of the targeted person.<sup>279</sup> On the other hand, whether a State is under an obligation to actively protect the right to life of persons outside its territorial jurisdiction depends on the level of control actually exercised over the specific territory or person.<sup>280</sup>

Most scholars that consider targeted killings as impermissible also view the “War on Terror” not to be an armed conflict. Hence, their view is that terrorism should be governed by criminal law, which means that officers cannot use lethal force unless lives are in immediate danger and that the deprivation of life is solely a manner of last resort.<sup>281</sup> For those states that practice targeted killings as a strategy of counter-terrorism, international humanitarian law would be the favorable choice of law. During an armed conflict, IHL is *lex specialis* and the prohibition on the deprivation of life set out in ICCPR art. 6 has to be interpreted in light of the more permissible rules for taking lives that prevail in situations of an armed conflict<sup>282</sup>. Hence, IHL provides a more liberal regime for the use of lethal force against individuals than the generally applicable rules of IHRL, where targeted killings would primarily be a measure of last resort.<sup>283</sup>

Outside the context of an armed conflict, a targeted killing may only be legally permissible when it is required to protect human life and there are no other means available capable of preventing the threat.<sup>284</sup> The ICJ has recognized the prohibition of murder and extrajudicial execution as a non-derogable rule of international law in the Nicaragua case.<sup>285</sup> In addition, the UN Human Rights Committee and the Inter-American Commission on Human Rights, and numerous international law experts, have also confirmed this peremptory nature of the right to life.<sup>286</sup> Hence, the right to life is today undeniably part of *jus cogens*.<sup>287</sup> However, under

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<sup>278</sup> ICCPR art. 6(1)

<sup>279</sup> Melzer (2008), pp. 138-139; and ICCPR art. 6

<sup>280</sup> Melzer (2008), p. 139

<sup>281</sup> Falk (2014), p. 299

<sup>282</sup> ICJ Nuclear Weapons, Advisory Opinion, para. 25

<sup>283</sup> Melzer (2008), p. 176; and Ramsden (2013), p. 20

<sup>284</sup> UN Human Rights Council (2010), p. 11

<sup>285</sup> Nicaragua v. United States of America

<sup>286</sup> Melzer (2008), p. 220

<sup>287</sup> Melzer (2008), p. 220

ICCPR art. 6 no individual shall be “arbitrarily” deprived of his life.<sup>288</sup> Hence, the deprivation of the life of an individual is not considered as murder or extrajudicial execution unless it arbitrary or otherwise prohibited by international law.<sup>289</sup>

Hence, the protection of individuals against deprivation of life set forth in ICCPR and ECHR is not absolute.<sup>290</sup> Only “arbitrary” deprivation of life is prohibited. Hence, the lawfulness of extra-judicial killings of individuals by State agents depends on the interpretation of the term “arbitrary”. The term is not defined in ICCPR. However, the UN Human Rights Committee, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples’ Rights have set four standards of “arbitrariness”.<sup>291</sup> Firstly, the deprivation of life is “arbitrary” when lethal force is used without legal basis. Secondly, it is “arbitrary” when caused by force exceeding what is necessary to maintain, restore, or impose, law and order in the circumstances of the particular case (see chapter 5.2). Thirdly, the deprivation of life is “arbitrary” when the force used is disproportionate to the actual present threat or danger (see chapter 5.3). Lastly, it is “arbitrary” when it could be avoided by taking reasonable precautionary measures, or if it is not preceded by a warning or the opportunity to surrender, or if the deprivation of life is based merely on the suspicion that the individual in question may be involved in a threat.<sup>292</sup>

In the US National Security Strategy of 2015, the US President holds that “outside of areas of active hostilities, we endeavor to detain, interrogate, and prosecute terrorists through law enforcement. However, when there is a continuing, imminent threat, and when capture or other actions to disrupt the threat are not feasible, we will not hesitate to take decisive action. We will always do so legally, discriminately, proportionally, and bound by strict accountability and strong oversight.”<sup>293</sup>

In conclusion, whether a deprivation of life is arbitrary depends on the circumstances that prevail in each case.<sup>294</sup> More precisely, IHRL requires that any use of lethal force is proportionate to the legitimate aim of safeguarding life and that deprivation of life is a necessary

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<sup>288</sup> ICCPR art. 6 if.

<sup>289</sup> Melzer (2008), p. 221

<sup>290</sup> Melzer (2008), p. 92

<sup>291</sup> Melzer (2008), p. 100

<sup>292</sup> Melzer (2008), pp. 100-102

<sup>293</sup> US President (2015)

<sup>294</sup> Melzer (2008), p. 59

measure with no other available means to address the threat. Hence, in exceptional circumstances, it is conceivable that targeted killings are justifiable under IHRL.<sup>295</sup>

## 5.2 Requirement of Absolute Necessity

Under the requirement of absolute necessity, the use of lethal force is only permitted as a manner of last resort. In other words, there must be no other non-lethal means available to address the threat in question. Hence, the requirement of necessity obliges the State exercising the killing to minimize the use of force through warnings, capture, etc.

There are three elements to the requirement of necessity, namely the aspects of qualitative, quantitative and temporal necessity.<sup>296</sup> As to the qualitative aspect, a deprivation of life is “arbitrary” if the potentially lethal force is used when it was not “strictly unavoidable” or “strictly necessary” to protect any person from imminent death or serious injury.<sup>297</sup> Hence, all other means must be ineffective and a targeted killing cannot be qualitatively necessary if the aim of the operation can be achieved by other means than lethal force.<sup>298</sup> The aspect of quantitative necessity implies that the deprivation of life is “arbitrary” when the used lethal force was extensive compared to what is necessary to achieve a legitimate aim.<sup>299</sup> Therefore, a targeted killing is only quantitatively necessary for the achievement of the desired purpose when it is insufficient to merely incapacitate the targeted person by *potentially* lethal force.<sup>300</sup> In other words, in order for a targeted killing to be lawful, the force used may or may not have lethal consequences. Hence, it must be objectively indispensable to intentionally kill the targeted individual.<sup>301</sup> Lastly, the deprivation of life is “arbitrary” when it is caused by force directed at a person who does not yet or no longer represent a threat (temporal aspect).<sup>302</sup>

In conclusion, the requirement of absolute necessity require that targeted killings comply with the exceptionally strict standards of necessity in the three aspects shown above.

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<sup>295</sup> Ramsden (2013)

<sup>296</sup> Melzer (2008), p. 101 and p. 228

<sup>297</sup> Melzer (2008), p. 101

<sup>298</sup> Melzer (2008), p. 228

<sup>299</sup> Melzer (2008), p. 101

<sup>300</sup> Melzer (2008), p. 228

<sup>301</sup> Melzer (2008), p. 228

<sup>302</sup> Melzer (2008), p. 101

### 5.3 Requirement of Proportionality

The issue of proportionality arises regardless of which rules are applicable to a specific targeted killing.<sup>303</sup> Hence, under IHRL it is required that any use of lethal force is proportionate to the legitimate aim of safeguarding life. As opposed to the requirement of proportionality within the context of hostilities, where the assessment regards the “collateral damage” inflicted on civilians, the assessment outside the context of armed conflict involves a value judgment independent from considerations of necessity.<sup>304</sup> In this regard, the requirement of proportionality limits the acceptable intensity of force to an amount that is proportionate based on the posed threat. Even when the use of lethal force is necessary to remove the threat, as addressed above, it is not lawful to use lethal force if the expected harm is disproportionate compared to the gravity of the threat.<sup>305</sup>

A specific proportionate assessment must be made with regard to the circumstances prevailing in each case.<sup>306</sup> In general, *potentially* lethal force may only be used to defend any person against an imminent threat of death or serious injury, or to prevent the perpetration of a exceptionally serious crime involving serious threat to life, or to arrest a person presenting such a danger and who resist arrest, or to prevent the escape of that person.<sup>307</sup> The *intentional* use of lethal force is a more severe measure. The use of lethal force with the intent to kill is only considered proportionate where strictly unavoidable for the protection of human life from unlawful attack.<sup>308</sup>

In conclusion, the requirement of proportionality prohibits States to resort to targeted killings outside armed conflicts, unless when it is strictly unavoidable to save human life.

### 5.4 Conclusion

In the absence of an armed conflict, targeted killings must be assessed under the international normative paradigm of law enforcement and international human rights law. The preceding analysis has shown that the use of lethal force outside the conduct of hostilities is only per-

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<sup>303</sup> Perisic (2014), p. 100

<sup>304</sup> Melzer (2008), p. 403

<sup>305</sup> Melzer (2008), p. 232

<sup>306</sup> Melzer (2008), p. 232

<sup>307</sup> Melzer (2008), p. 232

<sup>308</sup> Melzer (2008), p. 233

missible in exceptional circumstances. Hence, the legal framework does not prohibit targeted killings categorically, but it imposes strict restraints on the method of targeted killings.<sup>309</sup>

For a targeted killing to be permissible under IHRL, it must have a sufficient legal basis in domestic law regulating the use of force in accordance with international law. In addition, it must be of exclusively preventive nature and the aim must exclusively be to protect human life from unlawful attack. Further, it must be of absolutely qualitative, quantitative and temporal necessary for the achievement of the purpose. Lastly, it must be a matter of last resort, the killing cannot be the actual aim of an operation which is planned, prepared and conducted as to minimize, to the greatest extent possible, the recourse to lethal force.<sup>310</sup>

The killing of an individual cannot be the sole purpose of the operation, unless it is strictly unavoidable to save human life from unlawful attack. The targeted killing *must* remain as a measure of last resort, in other words, the inevitable consequence of the operation. In other words, it is not permissible to target and kill an individual if this is the sole objective of the operation without absolute certainty that if not killed, human life will suffer gravely. This leads me to the conclusion that targeted killings in general, as a deliberate, calculated and intended killing, cannot be legally permissible outside of an armed conflict. Only extreme situations may render a targeted killing lawful under IHRL.

## 6 Conclusion

In this thesis I have found that the international *lex lata* provides a merely satisfactory, regulatory framework for targeted killings carried out by States as part of their counterterrorism strategy. The rules of international humanitarian law provide a more permissible set of rules for governing this counterterrorism strategy than the rules of international human rights law solely.

In the context of an armed conflict, a targeted killing of a suspected terrorist may indeed be carried out lawfully, provided that the targeted individual is a combatant in the fighting forces of a party to the conflict, and that the operation is both necessary and proportionate. In addition, no unlawful means and methods of warfare may be used. I have found that terrorists in organized armed groups are combatants, and may therefore be lawfully targeted.

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<sup>309</sup> Melzer (2008), p. 239

<sup>310</sup> Melzer (2008), p. 239



Outside the context of armed conflict, targeted killings cannot be carried out lawfully due to the nature of targeted killings, except in exceptional circumstances. The deprivation of life is only justifiable as a matter of last resort, and hence, the aim of the operation cannot be to kill. Hence, targeted killings as a deliberate, calculated and intended killing, cannot be legally permissible outside of an armed conflict.

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