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# Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?

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## Abstract

*Whether a state that has been subject to attacks by a transnational terrorist group may target active members of that group who are not in its jurisdiction has caused controversy. Some refer to targeted killings of suspected terrorists as extra-judicial executions; others claim they are legitimate acts of war. The author examines the legality of such killings under norms of international human rights law and international humanitarian law. Under the former system, such killings can only be lawful when carried out to prevent an imminent attack that cannot be stopped by other means. Under the latter system, such killings may be lawful if the suspected terrorists are to be regarded as combatants. He argues that while in international armed conflicts suspected terrorists are generally not combatants, in non-international armed conflicts they may well be combatants. In such conflicts norms of international humanitarian law cannot stand on their own; the applicable system must be a mixed model, which incorporates features of international human rights law. In the final section the author discusses the Israeli policy of targeted killings and the US attack on suspected members of al-Qaeda in Yemen, and applies the mixed model to these cases.*

## 1 Introduction

In November 2002 a car travelling in a remote part of Yemen was destroyed by a missile fired from an unmanned Predator drone. Six people in the car, all suspected members of al-Qaeda, were killed. While the US did not publicly acknowledge responsibility for the attack, officials let it be known that the CIA had carried it out.<sup>1</sup> One of

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<sup>1</sup> See Dworkin, 'The Yemen Strike: The War on Terrorism Goes Global', *Crimes of War Project*, 14 Nov. 2002, available at <http://www.crimesofwar.org/onnews/news-yemen.html> (last accessed 19 June 2004).

the men killed, Qaed Salim Sinan al Harethi, was said to be a former bin Laden security guard who was suspected of playing a major role in the October 2000 attack on the US destroyer Cole, in which 17 sailors were killed.<sup>2</sup>

The Yemen attack came two years after Israel adopted a policy of 'targeted killings' of Palestinians alleged to be active members of terrorist organizations involved in organizing, promoting or executing terrorist attacks in Israel and the Occupied Territories. This policy commenced with the attack on Hussein 'Abayat<sup>3</sup> and was followed by a series of attacks culminating recently in the attacks on the Hamas leaders Ahmed Yassin<sup>4</sup> and Abdel Aziz Rantisi.<sup>5</sup> In many of these attacks innocent bystanders were killed or wounded.<sup>6</sup> This policy has been officially acknowledged and is at the time of writing being defended by the government before the Supreme Court of Israel.<sup>7</sup>

<sup>2</sup> See CNN report of 5 Nov. 2002, 'Sources: U.S. kills Cole suspect', available at <http://www.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html> (last accessed 19 June 2004).

<sup>3</sup> See B'Tselem The Israeli Information Centre for Human Rights in the Occupied Territories, *Israel's Assassination Policy: Extra-judicial Executions*, Position Paper, Jan. 2001, available at [http://www.btselem.org/Download/Extrajudicial\\_Killings\\_Eng.doc](http://www.btselem.org/Download/Extrajudicial_Killings_Eng.doc) (last accessed 19 June 2004). 'Abayat was killed in the West Bank village Beit Sahour by an IDF helicopter. Two bystanding women, Rahmeh Shahin and 'Aziza Muhammed Danun, were also killed in the attack.

<sup>4</sup> See the official communiqué by the IDF spokesman issued by the Israel Ministry of Foreign Affairs, 'IDF strikes kills Hamas leader Ahmed Yassin', 22 Mar. 2004, available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Sheikh+Yassin+killed+in+IDF+attack+22-Mar-2004.htm> (last accessed 1 June 2004). 4 people who were accompanying Yassin, including 2 of his sons, were killed in the attack.

<sup>5</sup> See CNN International Report, 'Hamas leader killed in Israeli airstrike', 18 Apr. 2004, available at <http://edition.cnn.com/2004/WORLD/meast/04/17/mideast.violence/> (last accessed 1 June 2004). In this attack 2 other people, 1 of whom was Rantisi's bodyguard, were killed and 10 people were wounded.

<sup>6</sup> The most extreme case was the attack on Salah Shehadeh, leader of Hamas' military wing, Iz Adin al-Kassam, who was reportedly responsible for numerous attacks on Israeli soldiers and civilians. Besides Shehadeh, 16 people were killed, 15 of whom were civilians, including 9 children and Shehadeh's wife and child, and hundreds were wounded when an IDF plane dropped a 1-ton bomb on a house in a densely populated area of Gaza. See Meyerstein, 'Case Study: The Israeli Strike Against Hamas Leader Salah Shehadeh', *Crimes of War Project*, Sept. 2002, available at <http://www.crimesofwar.org/onnews/news-shehadeh.html> (last accessed 1 June 2004). As a result of the public outcry the IDF carried out an inquiry into this attack. According to the report of this inquiry published by the IDF spokesperson, there were 'shortcomings in the information available, and the evaluation of that information, concerning the presence of civilians near Shehadeh, who was in an operational hide-out'. See 'Findings of the inquiry into the death of Salah Shehadeh', 2 Aug. 2002, available at <http://www.mfa.gov.il/mfa/government/communiqués/2002/findings+of+the+inquiry+into+the+death+of+salah+sh.htm> (last accessed 27 June 2004).

<sup>7</sup> See H.C. petition 769/02, *Public Committee Against Torture in Israel v. Government of Israel*, pleadings on file with the author (hereinafter H.C. petition 769/02). This is not the first time the Court has been asked to rule on the legality of targeted killings. In a previous case the Court dismissed the petition in a few lines, merely stating that '[c]hoice of the means of fighting adopted by the respondents with the aim of frustrating murderous terrorist attacks in good time is not one of the matters in which this court will interfere. This is all the more so when the petition provides no concrete factual basis and asks for a wide remedy': H.C. 5872/2002, *M.K. Muhammed Barake v Prime Minister and Minister of Defence*, available at <http://62.90.71.124/files/01/720/058/f04/01058720.f04.HTM> (last accessed 25 Feb. 2004). The attitude of the Court in this case is criticized in Ben-Naftali and Michaeli, 'Justice-Ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings', *1 J Int'l Criminal Justice* (2003) 368.

The Yemen attack by the US and the 'targeted killings' by Israeli forces have been castigated by human rights NGOs,<sup>8</sup> and some UN bodies<sup>9</sup> as 'extra-judicial executions'.<sup>10</sup> The states involved argue, on the other hand, that the killings were legitimate acts of war carried out as part of the state's inherent right to self-defence.<sup>11</sup> Some academic commentators have supported this view.<sup>12</sup> While few support the general Israeli policy, even some human rights experts have conceded that there are instances in which a targeted killing may be justified both legally and morally.<sup>13</sup>

<sup>8</sup> See, e.g., Amnesty International, *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, 4 July 2003 AI Index: MDE 15/056/2003; B'Tselem, *supra* note 3, at 2; Amnesty International Press Release, *Yemen/USA: government must not sanction extra-judicial executions*, 8 Nov. 2002, AI Index: AMR 51/168/2002; Amnesty International, *Yemen, The Rule of Law Sidelined in the Name of Security*, 24 Sept. 2003, AI Index MDE 31/006/2003.

<sup>9</sup> See, e.g., Commission on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, Report of the human rights inquiry commission*, (E/CN.4/2001/121), 16 Mar. 2001, at paras. 53–64 (hereinafter: *Report of the human rights inquiry commission*); *Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967*, 59th session, 17 Dec. 2002 (E/CN.4/2003/30); Statement of the UN Secretary General, New York, 10 June 2003 - Statement attributable to the Spokesman for the Secretary-General on the Middle East, available at <http://www.un.org/apps/sg/sgstats.asp?nid=387> (last accessed 9 Feb. 2004). These attacks have also been castigated by governments of other countries: see US Department of State, *Country Reports on Human Rights, 2001, Israel and the Occupied Territories*, available at <http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8262.htm#ot> (last accessed 20 Feb. 2004), strongly condemning the Israeli policy; statement of the Swedish foreign minister criticizing the US attack in Yemen, cited in Dworkin, *supra* note 1.

<sup>10</sup> Many commentators and human rights groups have also referred to the Israeli killings as assassinations: see, e.g., reports of B'Tselem and Amnesty International, *supra* notes 3 and 8; Gross, 'Fighting by Other Means in the Mideast: a Critical Analysis of Israel's Assassination Policy', 51 *Pol Stud* (2003) 350. It seems to me that the term 'assassinations' should be reserved for deliberate killing of political figures, rather than killing of suspected terrorists. The Israeli authorities rarely, if ever, release evidence regarding the activities of the persons targeted, and it is quite possible that some of the cases indeed involved assassinations, in the above sense. And see Schmitt, 'State-Sponsored Assassination in International and Domestic Law', 17 *Yale J Int'l L* (1992) 609, who argues that in an armed conflict an assassination is killing of a specific person (whether a combatant or not) by treacherous means.

<sup>11</sup> See, e.g., statement of National Security Advisor Condoleezza Rice, of 10 Nov. 2002, cited in Dworkin, *supra* note 1; Brief of Government of Israel, in H.C. petition 769/02, *supra* note 7.

<sup>12</sup> See, e.g., Gross, 'Thwarting Terrorist Acts by Attacking the Perpetrators of their Commanders as an Act of Self-Defence: Human Rights Versus the State's Duty to Protect its Citizens', 15 *Temp Int'l & Comp LJ* (2001) 195; Rivkin, Jr., Casey, and Bartram, 'A Legal Analysis of the Attacks on Civilians and Infliction of "Collateral Damage" in the Middle East Conflict', *The Federalist Society for Law and Public Policy Studies*, available at <http://www.fed-soc.org/Laws%20of%20war/collateral%20damage%20white%20paper%20cvr%20pg.pdf> (last accessed 17 Feb. 2004).

<sup>13</sup> According to a MERIP Report, Human Rights Watch Director Kenneth Roth stated in an interview with the press that his organization did not object to the Yemen attack as it saw it as an attack on an enemy combatant: Middle East Report Online, *Israel, the US and 'Targeted Killings'*, available at <http://www.merip.org/mero/mero021703.html> (last accessed 9 Feb. 2004). In a subsequent article, Roth states that if al-Harethi was indeed a top bin Laden operative, use of the rules of war against him might have been appropriate, especially seeing that arresting him might not have been a real option: Roth, 'The Law of War and the War on Terror', 83(1) *Foreign Affairs* 2, Jan./Feb. 2004. And see *Concluding Observations of the Human Rights Committee on Report of Israel*, 21/08/2003, CCPR/CO/78/ISR, discussed below, in the text accompanying note 38.

Granting licence to state authorities to kill suspected enemies of the state cannot appeal to anyone sensitive to human rights and suspicious of the uses and abuses of state power. On the other hand, one cannot simply dismiss out of hand the parallel drawn by the states involved between legitimate killing of enemy combatants during an armed conflict and the targeting of active members of terrorist organizations that have, for all intents and purposes, declared war on those states.<sup>14</sup>

The disparity in the attitudes taken towards ‘targeted killings’ reveals a fundamental disagreement not only regarding their morality or legality,<sup>15</sup> but also on the issue of the legal regime by which that legality should be judged. The states involved claim that such killings are legitimate means of fighting the ‘war on terror’, whose legality must be judged on the basis of the laws of armed conflict; those who label these killings ‘extra-judicial executions’ rely on a law-enforcement model of legality, which rests primarily, though not exclusively, on standards of international human rights law.<sup>16</sup>

Fundamental disagreement over the applicable legal regime is part of a wider controversy over the proper categorization of state measures to combat international or transnational terrorism. Are we talking about a ‘war on terror’ to be pursued according to the laws of armed conflict, or a struggle against a particularly pernicious form of criminal activity that should be managed according to a law-enforcement model?<sup>17</sup> Or perhaps we should be thinking of a new phenomenon, not adequately covered by either legal regime, so that a new, mixed legal regime should be devised.<sup>18</sup>

Human rights institutions, activists and NGOs generally reject the perception that existing norms of international law are inadequate to deal with domestic or transnational terror. With more than a measure of justification they still fear that the real threat in the present situation lies in over-reaction to terror by governments and adoption of measures that are incompatible both with human rights standards and rules of humanitarian law.<sup>19</sup> Their assumption is either that the constraints on state

<sup>14</sup> See Statman, ‘Targeted Killing’, 5 *Theoretical Inquiries in Law* (2004) 179.

<sup>15</sup> For an exchange on the moral and legal justification for Israeli targeted killings, see David, ‘Israel’s Policy of Targeted Killing’, 17 *Ethics and International Affairs* (2003) 111; Stein, ‘By Any Name Illegal and Immoral’, *ibid.*, at 127; David, ‘If Not Combatants, Certainly Not Civilians’, *ibid.*, at 138. For arguments that the policy can be defended on moral grounds see Statman, *supra* note 14; Kasher and Yadlin, ‘Fighting against Terror Morally’, 2/3 *Bitachon Leumi* (2003) 5 (in Hebrew).

<sup>16</sup> One of the most difficult questions in discussing the Israeli policy is whether the applicable norms are those which apply to an occupying power (fundamentally a law enforcement model based on international humanitarian law) or those which apply in a situation of active armed conflict. I will return to this question in part 5 B below.

<sup>17</sup> For discussion of this question see: Slaughter and Burke-White, ‘An International Constitutional Moment’, 43 *Harv Int’l LJ*, (2002) 1; Fitzpatrick, ‘Speaking Law to Power: The War Against Terrorism and Human Rights’, 14 *EJIL* (2003) 241.

<sup>18</sup> See Slaughter and Burke-White, *supra* note 17; Delbrück, ‘The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action?’, 44 *German Yearbook on Int’l Law* (2001) 9; Watkin, ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’, 98 *AJIL* (2004) 1.

<sup>19</sup> See, e.g., statement of the UN High Commissioner on Human Rights, ‘Terrorism and Human Rights’, available at <http://www.unhchr.ch/terroris/index.html> (last accessed 18 Feb. 2004); International Commission of Jurists, ‘Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism’, 6 Sept. 2004, available at [http://icj.org/news.php3?id\\_article=3503?en](http://icj.org/news.php3?id_article=3503?en) (last visited 28 Nov. 2004).

action against terror placed by existing standards do not hinder effective anti-terror measures, or that even if they do so, the dangers to human rights that result from relaxation of these standards is far greater than the danger presented to those rights from international terrorism itself. It has, however, recently been argued by the head of the American branch of a leading international human rights NGO that human rights NGOs have been somewhat selective in their concern for victims of human rights violations, showing little real concern for the victims of terror attacks.<sup>20</sup>

The issue of targeted killings has been analysed by a number of writers.<sup>21</sup> Their analyses reveal different ways of looking at the issue. My primary purpose in this paper is to examine the different perceptions and their difficulties. My conclusions are that neither the law-enforcement model, as reflected in standards of IHR, nor the armed conflict model, as reflected in standards of IHL, provides an adequate framework for the issue of transnational terror. I therefore conclude by suggesting a framework that combines elements of both models.

Before delving into the issue, some remarks about the terms I shall be using. It hardly bears repeating that the terms 'terror' and 'international terror' have proved notoriously difficult to define.<sup>22</sup> I do not intend to enter a debate on this question here. For the purposes of this discussion I will regard terrorism as the deliberate causing of death, or other serious injury, to civilians for political or ideological ends.<sup>23</sup> I will regard transnational terrorism as terrorism carried out across international lines or directed against the citizens or residents of a country that is not the country of the perpetrator.<sup>24</sup> An organization will be seen as a terrorist group, not only if terror is its sole aim or *modus operandi*, but also if it regularly employs terror as a means of achieving its aims. The legitimacy of those aims will be regarded as irrelevant.

<sup>20</sup> See Schulz, 'Security Is a Human Right Too', *NYTimes Magazine*, 18 Apr. 2004, available at <http://www.amnestyusa.org/about/security.html> (last accessed 19 June 2004). Mr. Schulz is the executive director of the American branch of Amnesty International.

<sup>21</sup> For recent analyses of this question, in the Israeli context, see Gross, *supra* note 10, at 350; Ben-Naftali and Michaeli, "'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings", 36 *Cornell Int'l LJ*, (2003) 233. Also see Rivkin, Casey, and Bartram, *supra* note 12; Kendall, 'Israeli Counter-Terrorism: "Targeted Killings" Under International Law', 80 *NCL Rev* (2002) 1069 and the exchange between David and Stein, *supra* note 15.

<sup>22</sup> For a discussion of the difficulties in finding an agreed definition see Teichman, 'How to Define Terrorism', 64 *Philosophy* (1989) 505; Primoratz, 'What is Terrorism?', 7 *J Applied Philosophy* (1990) 129. Also see Gearty, 'Introduction', in C. Gearty (ed.), *Terrorism* (1996), at p. xi (hereinafter: Gearty, *Terrorism*). For problems in reaching a legal definition of terrorism and international terrorism see UN Commission on Human Rights, *Specific Human Rights Issues: New Priorities, in Particular Terrorism, Additional Progress Report*, prepared by Ms. Kalliopi K. Koufa, Special Rapporteur on terrorism and human rights, E/CN.4/Sub.2/2003/WP.1, 8 Aug. 2003.

<sup>23</sup> Cf. Gearty, 'What is Terror?', *The Times Saturday Review*, 9 Mar. 1991; Cowdy, 'The Morality of Terrorism', 60 *Philosophy* (1985) 47; both articles are reprinted in Gearty, *Terrorism*, *supra* note 22, at 173 and 495 respectively. Like Gearty, I place the emphasis on the means employed, and not on the acceptability or non-acceptability of the aims. Furthermore, I too do not regard attacks on military targets as a form of terrorism. Finally, rather than using the notion of 'innocent persons' as the targets, I refer to attacks on civilians. This rests on the notion that even in situations in which killing and wounding is 'lawful', i.e., an armed conflict, it is never lawful to target civilians.

<sup>24</sup> Cf. Schachter, 'The Lawful Use of Force by a State Against Terrorists in Another Country', in H. H. Han (ed.), *Terrorism and Political Violence: Limits and Possibilities of Legal Control* (1993), at 243.

The typical case to be examined here is the targeting of a suspected terrorist who is not in the territory of the state which carries out the attack. While many of the same issues may arise in cases of internal terror, especially in a situation that has reached the scale of violence that justifies its categorization as a non-international armed conflict under Additional Protocol II to the Geneva Conventions, the present discussion shall not deal directly with this question.<sup>25</sup>

State A's civilians have been subject to terror attacks by a terrorist organization, which operates out of other countries. Is it ever legal for that state to target suspected members of that organization who are not at present in its borders? If so, in which situations would such targeting be legal?

## 2 Law Enforcement Model

Categorization of targeted killings as 'extra-judicial executions', rather than war crimes or grave breaches of international humanitarian law, implies that the relevant legal model is a law-enforcement model and that the applicable regime by which state action is to be assessed is the international human rights regime.<sup>26</sup> Under such a regime the intentional use of lethal force by state authorities can be justified only in strictly limited conditions. The state is obliged to respect and ensure the rights of every person to life and to due process of law. Any intentional use of lethal force by state authorities that is not justified under the provisions regarding the right to life, will, by definition, be regarded as an 'extra-judicial execution'.<sup>27</sup>

In examining application of international human rights standards to the issue of targeted killings of international terrorists, a number of questions have to be addressed:

- A. Assuming that the regime of international human rights applies in such a situation, are there circumstances in which a targeted killing would *not* be regarded as a violation of the victim's right to life?

<sup>25</sup> There are differences between the non-international conflicts covered by Common Art. 3 of the Geneva Conventions and those covered by Additional Prot. II: see L. Moir, *The Law of International Armed Conflict* (2002). The main difference that interests me here is that under APII there must be some control over territory by the non-state party involved. It is this feature that could make a struggle with a terror group in the territory of a state similar to a case of trans-national terror.

<sup>26</sup> I stress that the emphasis is on state behaviour or responsibility, and not on individual criminal liability. Clearly, with the growing body of international criminal law and the establishment of the International Criminal Court, issues of individual liability of those who carry out the targeting on behalf of the state also needs to be addressed.

<sup>27</sup> In its report on the Israeli policy, *supra* note 8, Amnesty International defined an extrajudicial execution as follows: '[a]n extrajudicial execution is an unlawful and deliberate killing carried out by order of a government or with its acquiescence. Extrajudicial killings are killings which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice. These killings take place outside any judicial framework.'

- B. Does the international human rights regime apply to the act of state A carried out on the territory of state B over which the state A does not exercise jurisdiction and has no control?
- C. Does the international human rights regime apply in the 'warlike' situation of protracted violence between an international terror group and a given state?

### ***A Right to Life under the International Human Rights Regime***

All international conventions dealing with civil and political rights protect the 'inherent right to life'.<sup>28</sup> While all conventions classify this right as a non-derogable right, i.e., a right that may not be derogated from in times of emergency, none of them grants this right absolute protection. The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights and the African Charter of Human and People's Rights prohibit *arbitrary* deprivation of life, leaving the question of when intentional deprivation of a person's life will violate that person's right to life to be determined by interpretation of the term 'arbitrary'.<sup>29</sup> The approach of the European Convention for the Protection of Human Rights and Fundamental Freedoms is somewhat different. Article 2(1) states that no one shall be deprived of his life intentionally. Under Article 2(2), however, deprivation of life shall not be regarded as a violation of the right to life when it results from the use of force which is no more than absolutely necessary in any of three cases, one of which is 'defence of any person from unlawful violence'.<sup>30</sup>

I shall in due course examine whether there may be cases of lethal force that do not amount to 'arbitrary' deprivation of a person's life, as this term is used in the ICCPR, American Convention or African Charter, even if they are not covered by the exceptions in Article 2(2) of the European Convention. For the moment, I shall concentrate on the European model, as it is widely accepted that this model provides a fair statement of cases in which such force may be regarded as non-arbitrary.<sup>31</sup> May targeting a person suspected of being a member of a terrorist organization that is waging a 'war of terror' against residents of the victim state be regarded as legitimate use of force under Article 2 of the European Convention?

The answer to this question depends on the meaning of the proportionality test adopted in Article 2(2) – that the use of lethal force is no more than absolutely necessary to defend persons whose lives are in danger. While the European Court of Human Rights

<sup>28</sup> See Art. 6 of the International Covenant on Civil and Political Rights, 1966. This is the only right referred to as an inherent right. It seems that reference to the right to life as 'inherent' is based on the notion that this right does not depend on the particular society or legal regime, but derives from the humanity of every individual, wherever he or she may be: see B.G. Ramcharan, *The Right to Life in International Law* (1985), at 51; M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (1993), at 105; W. Schabas, *The Abolition of the Death Penalty in International Law* (2nd edn., 1997), at 95.

<sup>29</sup> See Art. 6(1) of the ICCPR, Art. 4 of the American Convention on Human Rights, and Art. 4 of the African Charter.

<sup>30</sup> Art. 2(2) of the ECHR. The other cases are effecting a lawful arrest or to preventing the escape of a person lawfully detained and action lawfully taken for the purpose of quelling a riot or insurrection.

<sup>31</sup> See Nowak, *supra* note 28, at 111; N. Rodley, *The Treatment of Prisoners under International Law* (2nd edn., 1999), at 183.

has not had occasion to address the question of targeted killings, it has made it clear that the test to be employed in examining whether the use of lethal force is absolutely necessary is a strict one – the ‘force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2 (art. 2-2-a-b-c).’<sup>32</sup>

Establishing that the use of lethal force meets the absolute necessity tests involves examining two questions:

1. Is the use of *force* absolutely required, or could other measures be employed to protect the threatened persons?
2. Assuming that no other measures are available, is it absolutely necessary to use *lethal force*, or could some lesser degree of force be employed?

I shall concentrate on the first question, and shall assume that in cases regarding suspected terrorists, if force can be justified on the basis of Article 2(2), the seriousness of the threat and the need for effective frustration of that threat will generally lead to the conclusion that force may be lethal.<sup>33</sup>

The exceptions to the prohibition on intentionally depriving a person of his life must be interpreted in light of the fundamental assumption that international human rights law adopts a law-enforcement model based on principles of due process. All law-enforcement measures must be compatible with these principles, foremost amongst which are the following: 1. every individual benefits from the presumption of innocence; 2. persons suspected of perpetrating or planning serious criminal acts should be arrested, detained and interrogated with due process of law; and 3. if there is credible evidence that such persons were indeed involved in planning, promoting, aiding and abetting or carrying out terrorist acts they should be afforded a fair trial before a competent and independent court and, if convicted, sentenced by the court to a punishment provided by law. Under this model a state may not prevent criminal acts by eliminating the potential perpetrators. Prevention is to be achieved by apprehending those planning and preparing the violence and subjecting them to the criminal process. Deterrence is to be achieved by the threat of legal sanctions and enforcement of the criminal law against those convicted of breaking the law.<sup>34</sup>

<sup>32</sup> See *McCann v UK*, 21 EHRR (1996) 97, at para. 149.

<sup>33</sup> Support for this assumption may be drawn from the *McCann* case, *ibid.* This case involved the killing in Gibraltar by British special force soldiers of 3 IRA terrorists. The Court found that the soldiers involved honestly believed that the deceased would detonate a car bomb if they were given time to act after they realized that they were about to be apprehended. They therefore shot them several times, making quite sure that the force was lethal. The European Court of Human Rights found that this action by the soldiers did not amount to a violation of Art. 2 of the Convention. (The majority held, however, that in the planning of the action to apprehend the suspected terrorists, sufficient weight had not been given to alternative means that would not have involved lethal force, and that the UK was therefore liable for violation of Art. 2.)

<sup>34</sup> See F. Ni Aolain, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (2000), at 187. A state may derogate from certain rights during a state of emergency. Thus, for example, if the exigencies of the situation strictly demand it, a state may resort to administrative detention, which does not meet the principles of due process in criminal trials. However, the right curtailed in such cases is personal liberty. Unlike this right, the right to life is a non-derogable right. A state may not derogate from due process principles needed to protect this right: see Human Rights Committee, *General Comment No. 29 on Article 4 of ICCPR*, 31 Aug. 2001, CCPR/C/21/Rev.1/Add.11, at para. 15.



Under the law-enforcement model use of force can never be regarded as necessary (let alone absolutely necessary) unless it is clear that there was no feasible possibility of protecting the prospective victim by apprehending the suspected perpetrator. The paradigmatic case in which use of force would be justifiable is where serious violence against the person to be protected is so imminent that trying to arrest the perpetrator would allow him time to carry out his threat. It has been strongly argued that in no other case could we say that use of lethal force is absolutely necessary.<sup>35</sup> Borrowing US Secretary of State Daniel Webster's classic definition of a state's right to use force in self-defence in the exchange of notes following the *Caroline* incident, only where there is a concrete imminent threat can it be said that there is 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.<sup>36</sup>

The problem with the law-enforcement model in the context of transnational terror is that one of its fundamental premises is invalid: that the suspected perpetrator is within the jurisdiction of the law-enforcement authorities in the victim state, so that an arrest can be effected. What is the situation when, according to our premise, the terrorist is in the territory of another state? The victim state may not arrest or apprehend that person without the active assistance and support of that other state. But what if that state is either unwilling to arrest the suspected terrorist or incapable of doing so? Leaving aside issues of state sovereignty, and relying solely on the duty of the victim state under international human rights law to respect the right to life, could it not argue that it has no choice but to resort to force against the suspected terrorist? That force is absolutely necessary to protect its civilians against unlawful violence? Obviously it could not do so in every situation. Thus, it could not do so if its aim were to punish the suspected terrorist for past acts, or to deter potential terrorists from acting. But what if the state has strong evidence that the suspected terrorist is continuing to plan terrorist attacks against people in its territory? That if it does not either apprehend or target him, there is a very strong probability that he will carry out or organize further attacks? Would this also not be the kind of situation described

<sup>35</sup> See Rodley, *supra* note 31, at 182–188; Nolte, 'Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order', 5 *Theoretical Inquiries in Law* (2004) 111.

<sup>36</sup> Note, *ibid.* According to this view, Art. 2(2) follows the model of self-defence in criminal law. In many legal systems this defence is available only when the threat to the life or body of the person against whom unlawful violence was to be used was imminent: see Bernsman, 'Private Self-Defence and Necessity in German Penal and in the Penal Law Proposal – Some Remarks', 30 *Israel L R* (1996) 171; B. Sanjero, *Self-Defence in Criminal Law* (2000), at 185–186 (in Hebrew). It should be noted that there is some limited authority for the view that the defence in Art. 2(2) may apply even when the danger is not imminent: see Rodley, *supra* note 31, at 188, who cites the decision of the European Commission of Human Rights in *Kelly v United Kingdom*, 74 D & R (1993) 139. In that case the authorities shot and killed a person who tried to avoid an army road block, as they thought he was a terrorist. The Commission found the complaint of violation of Art. 2 manifestly unfounded. Rodley remarks that 'the Commission's decision... seems to ignore any requirement of imminence of the anticipated threat as part of the necessity or proportionality tests'. The Commission's decision in this case has been strongly criticized: see Joseph, 'Denouement of the Deaths on the Rock: The Right to Life of Terrorists', 14 *Netherlands QHR* (1996) 5, at 9; Ni Aolain, *supra* note 34, at 196–198. Also see Smith, 'The Right to Life and the Right to Kill in Law', 144 *New L.J.* (1994) 354.

by Secretary of State Webster in his classic formulation of a state's right to self-defence? Could this not be regarded as a situation in which it was absolutely necessary to use lethal force? To put it another way: if the requirement of imminent danger rests on the availability of non-lethal, due process law-enforcement measures when the danger is not imminent, does the imminency requirement lose part of its force when such measures are unavailable?

As stated above, the ICCPR does not set out specific cases in which intentional use of lethal force does not involve violation of the right to life. The fear was that mentioning such cases might be regarded as an endorsement of killing.<sup>37</sup> Instead, Article 6 protects every person against arbitrary deprivation of his life. Where there is strong evidence that a suspected terrorist is preparing or planning a terrorist attack against residents of the victim state, will a pre-emptive attack be regarded as an arbitrary deprivation of his life, if there was no reasonable way of apprehending or arresting him? The Human Rights Committee addressed this question when considering the periodic report of Israel in July 2003. In its Concluding Observations the Committee stated:

The Committee is concerned by what the State party calls 'targeted killings' of those identified by the State party as suspected terrorists in the Occupied Territories. *This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6.* While noting the delegation's observations about respect for the principle of proportionality in any response to terrorist activities against civilians and its affirmation that only persons taking direct part in hostilities have been targeted, the Committee remains concerned about the nature and extent of the responses by the Israeli Defence Force (IDF) to Palestinian terrorist attacks.

The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. *Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.*<sup>38</sup>

From the first part of this observation it would seem that the Human Rights Committee is of the opinion that targeted killings of suspected terrorists in the Occupied Territories only raise issues under Article 6, when they are used as a deterrent or punishment, and not, presumably, when they are used as a pre-emptive preventive measure. On the other hand, in its recommendation, the Committee refers to use of deadly force against a 'person suspected of being in the process of committing acts of terror'. This would seem to imply that the Committee adopts the approach that preventive force may only be used in the face of an imminent attack, which cannot be halted by arresting the perpetrator.

Ambiguity in interpretation of the term 'arbitrary' deprivation of life in the context of targeting terrorists is also apparent in the recent Inter-American Commission on Human Rights *Report on Terrorism and Human Rights*.<sup>39</sup> The Commission addresses

<sup>37</sup> See Boyle, 'The Concept of the Arbitrary Deprivation of Life', in B.G. Ramcharan (ed.), *supra* note 28, at 221.

<sup>38</sup> *Concluding Observations of the Human Rights Committee: Israel*, *supra* note 13 (emphasis added).

<sup>39</sup> OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr, 22 Oct. 2002, available at <http://www.cidh.oas.org/Terrorism/Eng/exe.htm> (last accessed 15 Feb. 2004).

the use of lethal force by state agents. It mentions that ‘in situations where a state’s population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations’.<sup>40</sup> It goes on to give examples: the first, protection of persons from imminent threat of death or serious injury, and the second, ‘to otherwise maintain law and order where strictly necessary and proportionate’.<sup>41</sup> The second example obviously refers to situations of violent riots or other disturbances and not to targeting a specific individual. However, in its attempt to pursue the issue further, the Commission creates some confusion.

The Commission states that in circumstances where force may be used:

the state may resort to force only against individuals that threaten the security of all, and therefore the state may not use force against civilians who do not present such a threat. The state must distinguish between the civilians and those individuals who constitute the threat.<sup>42</sup>

This is a highly peculiar statement, which seems to confuse issues of international human rights law and international humanitarian law.<sup>43</sup> The status of a person as a civilian or combatant is only relevant in the latter system. In the former system, whether lethal force can be used against an individual is unconnected with that individual’s status; it should depend entirely on the threat that the said individual poses, and the availability of alternative means of neutralizing that threat.

The confusion is compounded when the Commission continues with the following statement:

Similarly, in their law enforcement initiatives, states must not use force against individuals who no longer present a threat as described above, such as individuals who have been apprehended by authorities, have surrendered, or who are wounded and abstain from hostile acts. The use of lethal force in such a manner would constitute extra-judicial killings in flagrant violation of Article 4 of the Convention . . .<sup>44</sup>

The examples given are impeccable. However, what about suspected terrorists who have not been apprehended or wounded and have not surrendered? If there is an assessment that they ‘threaten the security threat of all’ may lethal force be used against them?<sup>45</sup>

<sup>40</sup> *Ibid.*, at para. 87.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, at para. 90.

<sup>43</sup> It must be stressed that this statement of the Commission is part of its discussion of protection of the right to life under international human rights law. In another part of its report the Commission addresses issues of IHL.

<sup>44</sup> *Report on Terrorism and Human Rights*, *supra* note 39, at para. 91.

<sup>45</sup> In another part of the report the Commission addresses ‘[t]he Right to Life and Terrorism’. In this part it compares norms of international human rights law and IHL. After mentioning the duty under IHL to distinguish between combatants and civilians, the Commission states: ‘[s]imilarly, in peacetime situations, state agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury, or a threat of committing a particularly serious crime involving a grave threat to life, and persons who do not present such a threat, and use force only against the former’: *ibid.*, at para. 111 (emphasis added). From this section it seems that the Commission takes the clear stand that when there is a threat of a particularly serious crime involving a grave threat to life, use of force may be justified even if the threat is not imminent.

The Commission was apparently well aware that its analysis left matters unclear. In what reads as a somewhat feeble attempt to reduce the ambiguity, the Commission ends its analysis of the right to life issue with the following statement:

It should be emphasized that, contrary to international humanitarian law governing situations of armed conflicts, relevant applicable norms of international human rights law require that state agents not use force to target individuals involved in a violent confrontation except in the above-mentioned circumstances.<sup>46</sup>

The problem is, of course, that ‘the above-mentioned circumstances’ are extremely vague. The question that interests us – targeting of suspected terrorists who are not within the state’s jurisdiction – remains obscure.

Where does this all lead us? Clearly, the mere fact that a suspected terrorist is outside the territory of the victim state, and may therefore not be arrested by its authorities, does not mean that he has lost his right to life and that he may be targeted. It may be argued, however, that when there is strong evidence that the suspected terrorist is actually planning terrorist attacks against the victim state, and there is no feasible way of preventing those attacks by apprehending or arresting him, targeting him would not necessarily be regarded as an arbitrary deprivation of life. In such a case the unlawful violence might not be imminent, but the need to use lethal force in order to prevent that violence might be immediate, since if such force is not used now it may not be possible to prevent the violence later.<sup>47</sup> This may be what has been termed the last window of opportunity to frustrate further terrorist attacks.<sup>48</sup>

On the substantive level this argument may seem tempting. It should be noted, however, that the imminency requirement may be justified not only because of the lack of opportunity to use due process methods, but also on evidentiary grounds. When the violence is imminent we do not face the need to prove the intention to employ unlawful violence. The evidence is right there before us.<sup>49</sup> In the absence of such tangible evidence, can we rely on the law enforcement officials in the victim state to ‘convict’ persons of planning terrorist attacks? Should we not fear that this limited ‘exception’ may be exploited and abused by states eager to turn the struggle against terrorists into all-out war? Can we really create an exception that will be limited to the case of *absolute* necessity, in the sense mentioned above? The Israeli experience with the attempt to allow use of moderate physical force in the interrogation of suspected terrorists would seem to show that the answer is negative. While the original idea was that such force should only be used when all other methods of obtaining essential information for preventing terrorist attacks had failed, it would

<sup>46</sup> *Ibid.*, at para. 92.

<sup>47</sup> Under s.34J of the Israel Criminal Code, 1977, self-defence is a defence when violence was ‘immediately required to ward off an unlawful attack which created a concrete danger of harm to life, body, liberty, property’. Under this provision the immediacy requirement does not relate to the danger to life, but to the need to use violence to frustrate that danger.

<sup>48</sup> See Schmitt, ‘Counter-Terrorism and the Use of Force in International Law’, 32 *Israel Yrbk on HR* (2002) 53, at 110.

<sup>49</sup> I am grateful to my colleague, Miri Gur-Aryeh, for raising this point.

seem that over time physical force and other unacceptable methods of interrogation became fairly standard methods of interrogation.<sup>50</sup>

When then may a state use lethal force against suspected terrorists? It seems that there are three possible approaches to this question:

- a. Restricting the exceptions to the right to life (whether under Article 2(2) of the European Convention, or the 'arbitrary' deprivation escape clause in the ICCPR and American and African Conventions) to cases in which lethal force is used to thwart an imminent attack.<sup>51</sup> Absent imminency, pre-emptive targeting of a suspected terrorist will be regarded as not being absolutely necessary, or as an arbitrary deprivation of life, no matter how strong the evidence that he is planning further terrorist attacks and how high the probability that there may not be another opportunity to prevent such attacks.
- b. Allowing the targeting in the very restricted circumstances in which apprehending or arresting the suspected terrorist is not feasible, provided there is extremely strong evidence that the suspected terrorist is involved in executing or planning a terrorist attack and there is a well-founded fear that other means of preventing that attack are likely to fail.<sup>52</sup> I have already described the difficulties of this approach. I shall return to it below.
- c. Positing that the law-enforcement model, which lies at the basis of the treaty provisions on the right to life, does not provide an adequate answer to the issue of transnational terror. When the terror is intense, organized and protracted, the appropriate model should be the armed conflict model, which is not based on notions of imminent danger from the specific person targeted, but on notions of the danger posed by the group to which the person belongs.<sup>53</sup> I shall discuss this position below.

## **B Jurisdictional Application of International Human Rights Norms**

Does the international human rights regime apply to actions of one state in the territory of another? Or to put it in another way, towards which individuals is a given

<sup>50</sup> I have addressed this question elsewhere: see D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002), at 135–143. Also see B'Tselem, *The Interrogation of Palestinians During the Intifada: Ill-treatment, 'Moderate Physical Pressure' or Torture?* (1991), available at [http://www.btselem.org/Download/1991\\_Interrogation\\_Eng.doc](http://www.btselem.org/Download/1991_Interrogation_Eng.doc) (last accessed 19 June 2004); and *Routine Torture: Interrogation Methods of the General Security Service*, (1998), available at <http://www.btselem.org/Download/eRTorture.rtf> (last accessed 19 June 2004).

<sup>51</sup> This is the view of Nolte, *supra* note 35.

<sup>52</sup> This view would be consistent with the lenient approach adopted in *Kelly v. UK*, *supra* note 36, and could be consistent with the *Concluding Observations of the Human Rights Committee*, *supra* note 38, and the Inter-American Commission Report, *supra* note 39. And cf. Principle 4 of the *Basic Principles on the Use of Force and Firearms, adopted by the 8th UN Congress on Prevention of Crime and Treatment of Offenders, Havana, Cuba, 1990*:

'Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result'.

No mention is made of the imminency requirement, or the failure of an attempt to arrest the person.

<sup>53</sup> For this distinction see M. Walzer, *Just and Unjust Wars* (3rd edn., 2000), at 144–147.

state obligated under its international *human rights* obligations?<sup>54</sup> Under the ICCPR a state party is bound to respect and ensure the rights enshrined in the Covenant ‘to all individuals in its territory and subject to its jurisdiction’; under both the European and American Conventions, the duty is to all persons subject to the state party’s jurisdiction.

In the *Bankovic* case<sup>55</sup> the European Court of Human Rights took a narrow view of the concept of jurisdiction, when it held that a state party to the European Convention generally exercises its jurisdiction only in its own territory. The exceptions are cases where the state exercises all or some of the public powers of government in the territory of another state with that state’s consent, invitation or acquiescence, or where it is occupying territory in which it exercises effective control.<sup>56</sup> Applying this approach, the Court held that when NATO forces bombed targets in Kosovo and Serbia from the air the persons in the bombed areas were not subject to the jurisdiction of the NATO states. Following this decision doubt has been expressed whether international human rights norms apply to actions of states against transnational terrorists outside their borders.<sup>57</sup> This doubt has been challenged.<sup>58</sup> In interpreting the ICCPR, the Human Rights Committee has adopted an approach similar to the cause and effect theory *rejected* by the European Court.<sup>59</sup> Under this approach anybody directly affected by a state party’s actions will be regarded, for the purposes of the Covenant, as subject to that state party’s jurisdiction.

Even if we are prepared to assume that neither the European Convention, nor the ICCPR, apply to persons who are not subject to the jurisdiction of a state party, within the meaning of this term adopted in the *Bankovic* decision, does this mean that a state has no obligations under *international human rights law* towards such persons? Answering this question in the affirmative would be incompatible with the very notion of the universality of human rights, which lies at the foundation of international human rights law. While a state party’s *treaty* obligations are a function of the scope of application defined in the particular treaty, some of the substantive

<sup>54</sup> I stress that for the moment I shall not refer to the state’s general obligations under international law, such as the obligation to respect the sovereignty and territorial integrity of other states.

<sup>55</sup> See *Bankovic v Belgium*, 11 BHRC (2000) 435. On application of human rights standards to armed conflict situations by the European Court of Human Rights see Heintze, ‘The European Court of Human Rights and the Implementation of Human Rights Standards During Armed Conflict’, 45 *German Ybk on Int’l L* (2002) 60.

<sup>56</sup> See *Loizidou v Turkey*, 23 EHRR (1996) 513. In this case, the Court held that as an occupying power in northern Cyprus Turkey has jurisdiction over persons in that part of the island. Turkey could therefore be held liable for violations of an individual’s rights under the European Convention.

<sup>57</sup> See Neuman, ‘Humanitarian Law and Counter-terrorist Force’, 14 *EJIL* (2003) 283.

<sup>58</sup> See Fitzpatrick, *supra* note 17, at 241. For a detailed criticism of the *Bankovic* decision see Ben-Naftali and Shani, ‘Living in Denial: The Application of Human Rights in the Occupied Territories’, 37 *Israel Law Review* (2004) 17.

<sup>59</sup> See Communication No. 52/1979, *Lopez Burgos v Uruguay*, CCPR/C/OP/1 at 88 (1984); *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13. The wide view has also been taken by the Inter-American Commission on Human Rights and by various learned writers: see Meron, ‘Extraterritoriality of Human Rights Treaties’, 89 *AJIL* (1995) 78; Fitzpatrick, *supra* note 17, at 241. But cf. Dennis, ‘Application of Human Rights Treaties in Times of Armed Conflict: Fuzzy Thinking All Around?’, forthcoming in 99 *AJIL* (2005).

norms in human rights treaties that have been ratified by the vast majority of states in the world, have now become peremptory norms of customary international law. The duty to respect the right to life is surely one of these norms.<sup>60</sup> A state's duty to respect the right to life (as opposed to its duty to ensure that right) follows its agents, wherever they operate. Any other approach would imply that in the absence of an armed conflict (to which IHL will apply) under international law a state may lawfully kill persons in the territory of another state.<sup>61</sup> Such a result is unconscionable and should be rejected.

### C International Human Rights Law in Armed Conflict

The prevalent theory at one time was that the international human rights regime applies to the internal domestic situation of a state, both in times of peace and war. The authority given to a state to derogate from some of its obligations in times of emergency is directed towards its domestic front. On the battlefield, on the other hand, the applicable legal regime is the law of war, including international humanitarian law. In recent years this theory seems to have been abandoned. The prevailing theory is that even in the conduct of hostilities the international human rights regime applies, although in part it is superseded by the *lex specialis*, international humanitarian law.<sup>62</sup> This theory was adopted by the International Court of Justice (ICJ) in the *Nuclear Weapons* case.<sup>63</sup> In that case it was claimed that the use of nuclear weapons would inevitably involve violation of the right to life, protected under Article 6 of the ICCPR. In reply, it was argued that nuclear weapons would be used in war when international humanitarian law, and not the ICCPR, would apply.<sup>64</sup> Article 6 of the ICCPR was therefore not pertinent.

The ICJ rejected the argument that the ICCPR ceases to apply in times of war. It added:

In principle, 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*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of

<sup>60</sup> See Dinstein, 'The Right to Life, Physical Integrity, and Liberty' in L. Henkin (ed.), *The International Bill of Rights – the Covenant on Civil and Political Rights* (1981), at 114, 115; Gormley, 'The Right to Life and the Rule of Non-derogability: Peremptory Norms of *Jus Cogens*', in Ramcharan (ed), *supra* note 28, at 120; Rodley, *supra* note 31, at 178–179.

<sup>61</sup> It may indeed be argued that by acting in the territory of another state, the targeting state would be violating that state's territorial integrity, protected under Art. 2(4) of the UN Charter. Even if this is the case, it cannot be the only reason why such an action should be regarded as unlawful under international law.

<sup>62</sup> See, e.g., Meron, 'The Humanization of Humanitarian Law', 94 *AJIL* (2000) 239; Doswald-Beck and Vité, 'International Humanitarian Law and Human Rights Law', 293 *IRRC* (1993) 94. Also see R. Provost, *International Human Rights and Humanitarian Law* (2002); Frowein, 'The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation', 28 *Israel Yrbk on HR* (1998) 1; Watkin, *supra* note 18. But cf. Dennis, *supra* note 59.

<sup>63</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 [1996] ICJ Rep 226 (hereinafter: *Nuclear Weapons* case).

<sup>64</sup> *Ibid.*, at para. 24.

a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>65</sup>

The implications of this theory in the present context seem clear. If the targeted killings take place within the context of an armed conflict between the victim state and the terrorist group, or the states that harbour or host it, their legality will have to be decided on the basis of international humanitarian law. If such killings are permitted under IHL, they will not be regarded as arbitrary deprivations of life under Article 6 of the ICCPR.<sup>66</sup> I will argue below, however, that even if this is the situation in international armed conflicts, in non-international armed conflicts the connection between international human rights law and international humanitarian law is somewhat more complicated.<sup>67</sup> For reasons I shall explain below, in such conflicts one cannot divorce the question of 'lawful acts of war' from issues of due process under international human rights law. I shall try to show that the model for such conflicts must therefore be a mixed model, in which there is interplay of international human rights standards and international humanitarian law.

### 3 Armed Conflict Model

#### A *Terrorist Attacks and the Right to Self-Defence*

My main concern in this paper will be with *ius in bello*, i.e., international humanitarian law that applies to the parties involved in an armed conflict. It is important, however, to preface the discussion with a short review of issues of *ius in bellum* that have some relevance for the analysis.

In its recent Advisory Opinion on the *Legal Consequences of the Wall* the ICJ opined that only an attack by a state can constitute the type of armed attack contemplated by Article 51 of the UN Charter.<sup>68</sup> Three of the judges on the Court disassociated themselves from the Court's opinion on this issue,<sup>69</sup> which does not reflect the view of most experts.<sup>70</sup> Despite the ICJ Opinion, I shall assume that a transnational terrorist attack,

<sup>65</sup> *Ibid.*, at para. 25. Also see *Report of the Human Rights Inquiry Commission*, *supra* note 9, at para. 62.

<sup>66</sup> They may also be regarded as a legitimate derogation from the right to life, under Art. 15 of the ECHR, which states:

'No derogation from Article 2, *except in respect of deaths resulting from lawful acts of war*, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.' (emphasis added).

<sup>67</sup> See Gasser, 'International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint Measure or Mutual Exclusion?', 45 *German Ybk Int'l L* (2002) 149.

<sup>68</sup> ICJ, *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, 43 ILM (2004) 1009, at para. 139 (hereinafter *Legal Consequences of the Wall*).

<sup>69</sup> See *ibid.*, Separate Opinion of Judge Higgins, at paras. 33–34; Separate Opinion of Judge Kooijmans, at paras. 35–36; Declaration of Judge Buergenthal, at paras. 5–6.

<sup>70</sup> See, e.g., Y. Dinstein, *War, Aggression and Self-Defence* (3rd edn., 2001), at 214; Franck, 'Editorial Comments: Terrorism and the Right of Self-Defence', 94 *AJIL* (2001) 839; Brown, 'Use of Force against Terrorism after September 11th: State Responsibility, Self-Defence and Other Responses', 11 *Cardozo J Int'l & Comp L* (2003) 1; Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism', 27 *Fletcher Forum World Aff.* (2003) 35; Müllerson, 'Jus



or a series of such attacks, of sufficient scale and effects, may constitute an armed attack that gives rise to the right of a state to use force in self-defence.<sup>71</sup> Even if one rejects this assumption, it is clear that if a state sponsors or controls a terrorist group, and possibly even if it takes no action to prevent use of its territory as a base for terrorist attacks against another state, such attacks may be imputed to the sponsor or host state. In such a case the attacks could certainly be the kind of armed attack contemplated by Article 51.<sup>72</sup>

The right of a state to use force in response to an armed attack by terrorists will depend on the degree of responsibility of the harbouring state for the attack, and possibly on its willingness or capability of acting to apprehend the terrorists and prevent them from carrying out further attacks.<sup>73</sup> Any use of force by the victim state must conform to requirements of necessity and proportionality.<sup>74</sup> Under the necessity principle, the victim state must not respond to the armed attack with force unless other means of defending itself are not available.<sup>75</sup> Furthermore, the aim of using

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*Ad Bellum* and International Terrorism', 32 *Israel Yrbk on HR* (2002) 1; Schmitt, *supra* note 48. For the view that an attack by non-state actors cannot be an Art. 51 armed attack see Discussion Forum, *The Attack on the WTC: Legal Responses*, Pellet, 'No, This is Not war'; Gaga, 'In What Sense was there an "Armed Attack"?', Discussion forum of the European Journal of International Law, available at [http://www.ejil.org/forum\\_WTC/index.html](http://www.ejil.org/forum_WTC/index.html) (last accessed 3 Feb. 2004). Also see Franck, *supra*, who mentions that this view was advanced at a conference of primarily German international lawyers.

<sup>71</sup> On the scale required of a terrorist attack in order for it to meet the threshold of an armed attack see A. C. Arend and R. J. Beck, *International Law and the Use of Force* (1993), at 159–62. In the *Nicaragua* case, the ICJ stated that 'the prohibition of armed attacks may apply to sending by a state of armed bands to the territory of another State, if such operation because of its scale and effects, would have been classified as an armed attack rather than a mere frontier incident had it been carried out by regular armed force': *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits [1986] ICJ Rep 14, at para. 195. And see Schachter, *supra* note 24, at 248. Schachter mentions that the attacks must be 'sufficiently grave to jeopardize the essential interest of the State in protecting its citizens and political order' and be 'part of a pattern of attacks accompanied by credible indications that future attacks are planned'. This also seems to be the view of Cassese, 'The International Community's "Legal" Response to Terrorism', 38 *ICLQ* (1989) 589. Cassese argues that not only must the attack be very serious, but it must form part of 'a consistent pattern of violent terrorist action rather than just being isolated or sporadic attacks': *ibid.*, at 596.

<sup>72</sup> On the question of state responsibility for a terrorist attack see Travaglio and Altenburg, 'State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of Military Force', 4 *Ch J Int'l L* (2003) 97; Jinks, 'State Responsibility for Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups', *ibid.*, at 83; Brown, *supra* note 70; Frank and Rehman, 'Assessing the Legality of the Attacks by the International Coalition Against Al-Qaeda and the Taleban in Afghanistan: An Inquiry into the Self-Defense Argument Under Article 51 of the UN Charter', 67 *J Crim L* (2003) 415; Schmitt, *supra* note 48.

<sup>73</sup> See Müllerson, *supra* note 70, and Schmitt, *supra* note 48, who both argue that even if the host state cannot be regarded as being responsible for the armed attack, if it is unwilling or unable to prevent the terrorist activities in its territory the victim state may use force against the terrorists.

<sup>74</sup> See *Nicaragua* case, *supra* note 71, at para. 176; *Nuclear Weapons* case, *supra* note 63, at para. 41, and *Oil Platforms (Islamic Republic of Iran v USA)* 6 Nov. 2003, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_ijudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106.PDF) (last accessed 19 June 2004), at paras. 73–77. Also see C. Gray, *International Law and the Use of Force* (2nd edn., 2004), at 120–126; Dinstein, *supra* note 70, at 207–213; Schmitt, *supra* note 48.

<sup>75</sup> See Dinstein, *supra* note 70, at 198, who claims that 'reliance by the victim state on counter-force is contingent on its first seeking in vain a peaceful solution to the dispute'. Also see Cassese, *supra* note 71, at 597.

force must be future-oriented, i.e., halting or repelling an attack. This would seem to exclude attacks whose aim is punitive or retaliatory.<sup>76</sup> Under the proportionality principle the defensive measures should not exceed the degree of force needed to achieve the purpose of using counter-force, namely, defending the victim state against further terrorist attacks.<sup>77</sup>

Following the 9/11 attack on the US, there was a major debate whether this attack gave the US the right to use force against Afghanistan.<sup>78</sup> There did not, however, seem to be any disagreement over one issue: if the US was entitled to use force against Afghanistan in response to the attack, it was legitimate for it to target not only members of the armed forces of that country (presumably the Taliban), but members of al-Qaeda too. Intuitively, this seems self-evident. If a terrorist group mounts an armed attack against a state, that group obviously presents the threat against which the victim state is entitled to defend itself. The problem is that any act in self-defence must be compatible with norms of international humanitarian law.<sup>79</sup> And in order for an attack on members of a terrorist group to meet this requirement we have to adopt one of two theories:

1. The original armed attack, or the armed response of the victim state, has created an international armed conflict between the victim state and the host state, and within the context of this conflict the terrorists are legitimate targets; or
2. Whether or not an international armed conflict exists between the victim and host states, an armed conflict has been created between the victim state and the terrorist group, and within the context of this conflict the terrorists are legitimate targets.

I shall now examine the validity of these theories in international humanitarian law.

<sup>76</sup> See Gray, *supra* note 74, at 121; S.A. Alexandrov, *Self-Defence Against the Use of Force in International Law* (1996), at 184. Based on this requirement it has been argued that the legality of the US attack on Afghanistan following 11 Sept. was questionable, since it was not clear whether the US feared a further attack or was merely retaliating: Quigley, 'The Afghanistan War and Self-Defense', 37 *Valparaiso U LR* (2003) 541, at 561; Gray, *supra* note 74, at 167–172. But see Dinstein, *supra* note 70, at 199, who argues that what he terms 'defensive armed reprisals', whose object is future-oriented, and not purely punitive, may meet the necessity test. Also see Coll, 'The Legal and Moral Adequacy of Military Responses to Terrorism', 81 *Am Soc'y Int'l L Proc* (1987) 287, 297 and the remarks of Roberts, *ibid.*, at 318. And cf. the remarks of Boyle, *ibid.*, at 293–294; Rowles, 'Responses to Terrorism: Substantive and Procedural Constraints in International Law', *ibid.*, at 313.

<sup>77</sup> See Schmitt, *supra* note 48. But cf. Arend and Beck, *supra* note 71, at 165, who distinguish between three approaches to the proportionality requirement in this context: 'tit-for-tat' proportionality; 'cumulative' proportionality; and 'deterrent' proportionality.

<sup>78</sup> See, e.g., Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter', 43 *Harv Int'l LJ* (2002) 41; Bassiouni, 'Legal Control of International Terrorism: a Policy Oriented Assessment', 43 *Harv Int'l LJ* (2002) 83; Beard, 'Military Action against Terrorists under International Law: America's New War on Terror: The Case for Self-Defense under International Law', 25 *Harv JL & Pub Pol'y* (2002) 559; Byers, 'Terrorism, the Use of Force and International Law After 11 September', 51 *ICLQ* (2002) 401; Quigley, *supra* note 76; Gray, *supra* note 74, at 167–172.

<sup>79</sup> See Dinstein, *supra* note 70, at 195.

## B International Humanitarian Law

When force is used against terrorists in a state regarded as responsible for an armed attack, an international armed conflict may be said to exist between the victim state and the host state.<sup>80</sup> But can an armed conflict exist between a victim state and an international terrorist group? And if so, what kind of conflict is this?

### 1 International and Non-International Armed Conflicts

The prevailing view seems to be that the very notion of an *international* armed conflict implies that the conflict is between states.<sup>81</sup> On the other hand, the typical non-international conflict contemplated in IHL instruments is a conflict between the authorities of a state and insurgents or rebels in its territory. Both Common Article 3 of the Geneva Conventions and Article 1(1) of Additional Protocol II to the Geneva Conventions relate to conflicts *occurring within the territory of a state party*.<sup>82</sup> This would seem to imply that the rules and principles regarding non-international conflicts are reserved for internal domestic armed conflicts, and do not apply to a conflict between a state and a terrorist group acting from outside its territory.

There is some debate in the literature whether a conflict between a state and a transnational terrorist group may constitute an armed conflict in international

<sup>80</sup> In its decision in the *Tadić* case, the Appeals Chamber of the ICTY held that an 'armed conflict exists whenever there is resort to armed force between States . . .': *Prosecutor v Tadić* (Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction), 2 Oct. 1995, App. Ch., IT-94-1-AR72, 35 ILM (1996) 32 (hereinafter: *Tadić, Jurisdiction Appeal*), at para. 70. Similarly the ICRC Commentaries on the Geneva Conventions state: '[a]ny difference arising between two States and leading to the intervention of 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. It makes no difference how long the conflict lasts, or how much slaughter takes place': ICRC, *Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949*, at 32.

<sup>81</sup> See Jinks, 'September 11 and the Law of War', 28 *Yale J Int'l L.* (2003) 20. In the *Tadić* case, the Appeals Chamber of the ICTY stated:

'It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State. With the exception of Common Article 3, which shall be discussed below, the four Geneva Conventions of 1949 only apply to armed conflicts between states parties.'

*Prosecutor v Tadić*, Judgment, 15 July 1999, App. Ch., IT-94-1-A, at para. 84 (hereinafter: *Tadić, Merits Appeal*).

<sup>82</sup> Common Art. 3 of the Geneva Conventions refers to 'the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .'. Art. 1(1) of APII states that the Protocol applies only to non-international armed conflicts that 'take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [the] protocol'. The threshold for a non-international armed conflict under the APII is much higher than that required under Common Art. 3. But this issue does not interest us here. The differences between Common Art. 3 and APII armed conflicts are discussed at length by Moir, *supra* note 25.

law.<sup>83</sup> Even though international instruments on IHL do not expressly address such conflicts, the implications of giving a negative answer to this question – that the parties are not subject to rules of IHL – should convince us that this answer should be rejected. Rather, we should choose between two possibilities: stretching the definition of an international armed conflict beyond an inter-state conflict, or widening the definition of a non-international conflict so as to include an armed conflict between a state and non-state actors, even if it is not in its own territory.

## 2 *Armed Conflicts with Terrorists as International Armed Conflicts*

Under the law of international armed conflicts the only legitimate aim of force is weakening the *military* potential of the enemy.<sup>84</sup> According to the fundamental principle of distinction, the parties must distinguish between combatants and civilians, and between military and non-military targets. In order to facilitate respect for this principle, combatants must distinguish themselves from other persons. Those who do not do so become ‘unlawful’ or ‘non-privileged’ combatants, who lose the privileges of combatants discussed below.<sup>85</sup> The distinction between combatants and civilians is clear: anyone who is not a combatant is, by definition, a civilian.<sup>86</sup> While combatants enjoy the privilege to fight, civilians are not permitted to do so and may be tried and punished if they do. Furthermore, civilians taking a direct part in hostilities lose their immunity from attack and become legitimate targets.<sup>87</sup>

Under this model whether an individual may be targeted and killed with impunity is generally dependent on his or her status rather than his or her actions.<sup>88</sup> If the

<sup>83</sup> See e.g., Goldman, ‘Certain Legal Questions and Issues Raised by the September 11th Attacks’, 9 *Hum Rts Brief* (2001) 2, arguing that the answer is positive; and cf. Discussion Forum, *The Attack on the WTC: Legal Responses*, Pellet, ‘No, This is not war’ and Gaga, ‘In What Sense was there an “Armed Attack”?’, both *supra* note 70, arguing the opposite. Also see Müllerson, *supra* note 70, at 36–44. The issue is addressed more fully below, in the text accompanying notes 107–121.

<sup>84</sup> This principle, originally adopted in the St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 1868, is today reflected in the principle that the parties to an international conflict shall direct their operations only against military objectives: Art. 48 of API.

<sup>85</sup> The term ‘unlawful combatant’ dates back to *Ex Parte Quirin et al.*, 317 US (1942) 1, in which the US Supreme Court held that 4 German soldiers who were landed on the US coast during WWII, and proceeded in civilian dress to NYC, could be tried before a military commission for attempting to commit hostile acts against the US. The Court held that by passing US boundaries in order to destroy military targets ‘without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment’. The question whether there is indeed a special category of ‘unlawful combatants’ and, if so, what this implies, has been the subject of great controversy. Nevertheless, the term ‘unlawful’ or ‘unprivileged’ combatant is widely used: see, e.g., *Report on Terrorism and Human Rights*, *supra* note 39, at para. 69; D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), at para. 302; Dinstein, ‘Unlawful Combatancy’, 32 *Israel Yrbk on HR* (2002) 247; Dormann, ‘The Legal Situation of “Unlawful/unprivileged Combatants”’, 85 *IRRC* (849) (2003) 85; Col. K.W. Watkin, *Combatants, Unprivileged Belligerents and Conflicts in the 21st Century*, HPCR Policy Brief, Jan. 2003, available at <http://www/hsph.harvard.edu/hpcr> (last accessed 25 Feb. 2004). It seems to me that the term now refers to persons who take an active part in hostilities although they do not meet the legal definition of combatants. I shall refer to such persons below, in the text accompanying notes 122–127.

<sup>86</sup> See Art. 50 of API.

<sup>87</sup> See Art. 51(3) of API.

<sup>88</sup> The exception is the case of a civilian who takes a direct part in hostilities. I shall discuss this in detail below, in the text accompanying notes 93–103.

individual is a combatant he or she becomes a legitimate target, whether or not he or she *personally* endangers the lives or interests of the other party to the conflict.<sup>89</sup> Furthermore, once an armed conflict exists, it is not incumbent on the army of the one party to inquire whether members of a military unit of the other party wish to surrender before attacking it. The onus is on the party that wishes to surrender and thereby prevent attack to make this wish clear.<sup>90</sup> The legality of an attack on a military unit is not dependent on the imminency of military action by that unit against the state of the attacking army.

Seemingly this is a closed model. One is either a combatant or a civilian. How do members of terrorist groups fit into this model? Assuming that there is an international armed conflict between two or more states, what is their status? They can be regarded as combatants only if they fall into one of two categories:

1. they are part of the armed forces of a state that is a party to the conflict; or
2. they are part of another armed group belonging to such a state which fulfils the four conditions laid out in Article 4(A)(2) of Geneva Convention III:
  - a. being under responsible command;
  - b. wearing a fixed distinctive sign;
  - c. carrying arms openly; and
  - d. conducting their operations in accordance with the laws and customs of war.<sup>91</sup>

International terrorists are generally not part of the armed forces of a given state, and even if they meet some of the conditions of Article 4(A)(2) of Geneva Convention III, the nature of their activities, i.e., the deliberate causing of death or serious injury to civilians, means that they never meet the condition in d. above.<sup>92</sup> They therefore do not meet the conditions to be regarded as combatants and must, by definition, be

<sup>89</sup> See Walzer, *supra* note 53, at 144–145.

<sup>90</sup> See Art. 41 of API, dealing with persons who are *hors de combat*. A person is *hors de combat* if, *inter alia*, ‘he clearly expresses an intention to surrender’.

<sup>91</sup> See Fleck, *supra* note 85, at para. 304. Under API, the application of the law relating to international armed conflicts was extended so as to apply to armed conflicts in which peoples are fighting against colonial domination, alien occupation, or racist regimes, and members of armed groups of such peoples are also regarded as combatants. For the present purposes I shall not discuss when terrorists could fit into this category, since the API extension of combatant status is not part of customary law, and the API has not been ratified by all states that are parties to the Geneva Conventions. It should be noted, however, that those states which refused to ratify API generally did so because they refused to acknowledge the combatant status of insurgents fighting against them. Most pertinently for the present discussion, API has not been ratified by either the US or Israel. For a discussion of the scope of combatants under API see Greenwood, ‘Terrorism and Humanitarian Law – The Debate over Additional Protocol I’, 19 *Israel Yrbk on HR* (1989) 187; Dinstein, *supra* note 85.

<sup>92</sup> In most cases they would also not be a group belonging to a state involved in the conflict, and would therefore not qualify as combatants even if they met all the conditions: see *Military Prosecutor v Kassem and others*, decision of the Israeli Military Court sitting in Ramallah, 13 Apr. 1969, in M. Sassoli and A. A. Bouvier, *How Does Law Protect in War?* (1999), at 806. They would usually also not meet the conditions in subsections b. and c of Art. 4 A (2).

regarded as civilians.<sup>93</sup> As such, they shall not be the object of attack, ‘unless and for such time as they take a direct part in hostilities’.<sup>94</sup> And indeed, in discussing the status of suspected terrorists in the territories occupied by Israel, Professor Cassese takes the view, based on the assumption that the conflict is an international armed conflict, that members of terrorist groups are to be regarded as civilians to whom this provision applies.<sup>95</sup>

If we adopt this view, the big question is when a terrorist may be regarded as taking a direct part in hostilities. In answering this question a few comments are called for:

1. Whether a particular civilian is taking a direct part in hostilities must be examined on an individual level. In other words, as opposed to targeting of combatants, which is based on their status, civilians may only be targeted because of their individual actions. The mere fact that a person belongs to a group, which promotes or carries out terrorist attacks, does not imply that he or she takes a *direct* part in hostilities. This would seem to imply that a state may never attack members of a terrorist group, as such, but would always have to concentrate on targeting specific terrorists.
2. What are ‘hostilities’? According to the ICRC Commentary on Additional Protocol I (API), ‘Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.’<sup>96</sup> This appears to be a somewhat narrow definition that would exclude terrorist acts, which, by definition, are intended to cause harm to civilians. Nevertheless, in his opinion to the Israel Supreme Court in the pending case on targeted killings, Professor Antonio Cassese does not contest that terrorist attacks on civilians are hostilities, within the meaning of Article 51(3) of API.
3. What activities will be regarded as a *direct* part in hostilities? Are planning a terrorist attack, manufacturing the explosives and supplying them included? And what about support of another nature? In a passage that adds little to the description of hostile acts, the ICRC Commentary on API merely states that “‘direct” participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces’.<sup>97</sup> On the other hand, in the commentary on the Joint Services Regulations of the *Bundeswehr*, the term is widened to include ‘civilians who operate a weapons system, supervise such operation, or service such equipment’ as well as ‘preparation for a military operation and intention to take part therein’, provided they are directly related to hostilities and ‘represent a direct threat to the enemy’.<sup>98</sup>

<sup>93</sup> See Brown, *supra* note 70, at 24–25, n. 112; Watkin, *supra* note 85, at 10. Also see Dinstein, *supra* note 70.

<sup>94</sup> See Art. 51(3) of API. This provision is widely regarded as part of customary international law. But see *infra* note 99.

<sup>95</sup> See Cassese *opinion* (on file with the author), at 16–18.

<sup>96</sup> See ICRC, *Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, at para. 1942.

<sup>97</sup> *Ibid.*, at para. 1944.

<sup>98</sup> See Fleck, *supra* note 85, at 232.

4. Article 51(3) refers to such time as the civilians are taking a direct part in the hostilities. In the opinion mentioned above, Professor Cassese is adamant that this term must be given a narrow meaning. It is only while the persons are actually engaged in carrying out their hostile acts that they may be targeted. As soon as they have completed the hostile act, they once again enjoy the same protection as every other civilian. This view is supported by the ICRC Commentary on API.<sup>99</sup>

If we accept this narrow interpretation, terrorists enjoy the best of both worlds – they can remain civilians most of the time and only endanger their protection as civilians while actually in the process of carrying out a terrorist act. Is this theory, which has been termed the ‘revolving door’ theory,<sup>100</sup> tenable? The Inter-American Commission on Human Rights seemed to have its doubts.<sup>101</sup> So do some experts. It has been argued that the contemporary definition of civilians should rest on their inoffensive character and that civilians ‘can lose their civilian status whenever they become “offensive” – that is, whenever they take action against military forces or their fellow citizens’.<sup>102</sup> Another argument is that a ‘combatant-like’ approach based on membership in the military wing of a group involved in hostilities, rather than on individual actions, should be adopted in deciding whether persons may be targeted.<sup>103</sup>

If we adopt the restricted theory, according to which international terrorists are civilians who may only be targeted while taking a direct part in hostilities, the right of self-defence under Article 51 of the UN Charter following an armed attack by a terrorist group may become meaningless. As any action carried out in self-defence must comply with *ius in bello*, targeting the terrorists regarded as responsible for the attack will not be lawful unless they are targeted while carrying out an attack. This does not seem to make much sense. As noted above, none of the experts who discussed the US response to the 9/11 attack contested that such force could be directed against al-Qaeda members in Afghanistan.

<sup>99</sup> ICRC, *Commentary on Protocol Additional*, *supra* note 96, at para. 1944. And see Watkin, *supra* note 85, at 11–12; Behnsen, ‘The Status of Mercenaries and Other Illegal Combatants Under International Humanitarian Law’, 46 *German Ybk of Int’l L* (2003) 494, at 504. In its brief to the Supreme Court of Israel, the government argues, *inter alia*, that the wide definition of Art. 51(3), which speaks not only of taking a direct part in hostilities (language similar to that used in Common Art. 3 of the Geneva Conventions), but also ‘for such time’ as they participate, does not reflect customary international law. Support for this view may be found in Art. 8(2)(b)(i) of the Rome Statute on the ICC, which, in defining the crime involved in violence against civilians, omits reference to the words ‘for such time’.

<sup>100</sup> See Parks, ‘Air War and the Laws of War’, 32 *Air Force LR* (1990) 1, at 118–120; Watkin, *supra* note 85, at 12.

<sup>101</sup> Report on *Terrorism and Human Rights*, *supra* note 39, at para. 69. In discussing Art. 51(3) of API the Commission stated that non-combatants who take a direct part in hostilities temporarily forfeit their immunity from direct individualized attack during such time as they assume the role of combatant. The Commission added: ‘It is possible in this connection, however, that once a person qualifies as a combatant, whether regular or irregular, privileged or unprivileged, he or she cannot revert back to civilian status or otherwise alternate between combatant and civilian status’. And see Parks, *supra* note 100, who claims that under customary international law a civilian who crossed the line and committed combatant like acts could not revert to being a civilian and was a legitimate target.

<sup>102</sup> Slaughter and Burke-White, *supra* note 17, at 13.

<sup>103</sup> Watkin, *supra* note 18, at 16–17.

Aware of the inadequacies of a theory of self-defence which makes it unlawful to attack the very people who threaten the state, Michael N. Schmitt argues that '[s]tates should not be prevented from acting in self-defence by targeting individual terrorists simply because the mode of conflict exists on a different level'.<sup>104</sup> Schmitt argues that 'a state generally may target those reasonably believed to represent a violent threat to it'.<sup>105</sup> He suggests that four factors are relevant in determining the reasonableness of the belief that such a threat exists: the past practices of the terrorist group; whether the group has articulated goals which suggest a long-term conflict with the target state; whether contemporary events have exacerbated or relaxed tensions; and whether intelligence information shows that there are activities underway which suggest that an operation is being planned.<sup>106</sup>

That persons who do not belong to the armed forces of a party to the conflict, or do not have many of the characteristics of such forces, are to be regarded as civilians is understandable when the real armed conflict involved is between states. In such a situation a theory which posits that all persons who are not part of the fighting forces are to be regarded as civilians is not only credible; it is essential if we are to ensure respect for the principle of distinction. In this context, restricting the right to target civilians taking a direct part in hostilities to the actual time when they are so engaged can be explained not only because of the need to frustrate an imminent threat, but also on the evidentiary grounds mentioned above in the discussion of the imminency requirement in human rights law. When a person is actually taking part in hostilities, the evidence is before us, and we do not face difficult evidentiary issues, such as identification and credibility of intelligence sources.

When the armed conflict is essentially between a state and the terrorist group, the theory that the terrorists are civilians simply does not make sense. An armed conflict model of law (as opposed to a law-enforcement model) cannot be applicable if only one party to the conflict has combatants. If we concede, as many do, that protracted violence between an organized terrorist group and a state may constitute an armed conflict ruled by international humanitarian law, we have to find another, more feasible theory. Does that theory lie in regarding such a conflict as a non-international conflict?

### 3 *Armed Conflicts with Terrorists as Non-International Armed Conflicts*

Given the difficulties in regarding a conflict between a state and a trans-national terrorist group as an international armed conflict, it has been argued that such an armed conflict must be regarded as a non-international conflict.<sup>107</sup> This argument faces two difficulties.

As mentioned above, the definitions of a non-international armed conflict adopted in Common Article 3 of the Geneva Conventions and APII both refer to a conflict *within the territory of a state party*. Thus, even if we are to regard the conflict between

<sup>104</sup> Schmitt, *supra* note 10, at 648.

<sup>105</sup> *Ibid.*, at 649.

<sup>106</sup> *Ibid.* Also see Müllerson, *supra* note 70.

<sup>107</sup> See, e.g., Jinks, *supra* note 82, at 38.



a state and a transnational terrorist group as a non-international armed conflict, it is one to which the 'code on non-international conflicts' does not formally apply. This surely cannot mean, however, that a conflict between a state and a transnational terrorist group can never be an armed conflict, or that it may be an armed conflict to which IHL does not apply. It is difficult to believe that states agreed to the application of part of the norms of IHL to internal armed conflicts, but not to transnational armed conflicts that are not covered by the law regarding international armed conflicts.

There is no substantive reason why the norms that apply to an armed conflict between a state and an organized armed group within its territory should not also apply to an armed conflict with such a group that is not restricted to its territory. It therefore seems to me that to the extent that treaty provisions relating to non-international armed conflicts incorporate standards of customary international law, these standards should apply to all armed conflicts between a state and non-state actors. This means that, at the very least, Common Article 3 will apply to such conflicts.<sup>108</sup> The position in relation to APII is more complicated and we would have to be more discriminating, since not all its provisions have the status of customary law.<sup>109</sup>

While resort to force between states is always a situation in which the rules of international law in general, and international humanitarian law in particular, apply,<sup>110</sup> the general assumption is that violence involving non-state actors is primarily a matter for domestic law, relying on the law-enforcement model. States were reluctant to 'internationalize' internal conflicts, under the assumption that doing so might lend a degree of legitimacy to insurgents and might also unduly limit their own freedom of action in dealing with civil strife. Under APII 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature', are expressly excluded from the definition of a non-international armed conflict.<sup>111</sup>

The scope and level of violence required in order for a conflict to be regarded as a non-international armed conflict has never been clearly defined. Acting on the assumption that classification of a conflict as an armed conflict would extend the legal protection offered to those affected, the ICRC has argued for a low threshold of application.<sup>112</sup> The ICTY has held that a non-international armed conflict exists when there is 'protracted armed violence between governmental authorities and organized

<sup>108</sup> In the *Nicaragua* case the ICJ stated that Common Art. 3 'defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits . . .)'. *Nicaragua* case, *supra* note 71, at para. 218. Also see *Tadić, Jurisdiction Appeal*, *supra* note 81, at para. 98, in which the ICTY, citing the *Nicaragua* case, held that Common Art. 3 is part of customary law.

<sup>109</sup> See Moir, *supra* note 25, at 109.

<sup>110</sup> See *supra* note 81.

<sup>111</sup> Art. 1(2) of APII. The ICRC, *Commentary on Protocol Additional to the Geneva Conventions*, *supra* note 96, at para. 4378, claims that the decision to exclude internal disturbances was based on the notion that 'these were considered to be covered by the instruments dealing with human rights'.

<sup>112</sup> See Moir, *supra* note 25, at 33.

armed groups'.<sup>113</sup> The ICTR added that this violence should also meet a fair level of intensity.<sup>114</sup>

Given the vagueness of the conditions for regarding violent confrontation between a state and non-state actors as an armed conflict, there will be room for disagreement whether a particular conflict between a state and transnational terrorists constitutes an armed conflict at all.<sup>115</sup> In the Israeli case, the authorities declared, soon after violence erupted in September 2000, that the level and scope of violence justified regarding the situation as one of 'armed conflict short of war'.<sup>116</sup> This classification is not shared by all.<sup>117</sup> The reason for the difference of opinion lies in the realization that classification of the confrontation between Israel and armed Palestinian groups as an armed conflict implies not only that protection of IHL is extended, but that the state will enjoy powers that it would not enjoy if the applicable regimes of international law were only the law of belligerent occupation and human rights law.<sup>118</sup>

Classifying an armed conflict with a transnational terrorist group as a non-international armed conflict does not imply that alongside this conflict there is not also an international conflict. The ICJ and the ICTY have held that there may be both international and non-international aspects in a particular conflict situation.<sup>119</sup> If another state is held responsible for an armed attack by a terrorist group, and the victim state responds by attacking the terrorists in that state's territory, an international armed conflict will certainly arise between the two states. Thus, when the US attacked Afghanistan in response to 9/11, claiming that the *de facto* Taliban government of Afghanistan was supporting al-Qaeda, an armed conflict was created between the US and Afghanistan. This surely does not mean that the conflict with al-Qaeda was swallowed up by the conflict with Afghanistan, and that the persons who had mounted the armed attack and presented the real threat to the United States were merely civilians taking a direct part in the hostilities between the states involved. Rather it means that the conflict became one that had both international and non-international aspects.

<sup>113</sup> *Tadić case, Jurisdiction*, *supra* note 81, at para. 70. The ICRC Commentary places emphasis on the level of organization of the non-state actors rather than the level of violence involved: ICRC, *Commentary on the Protocol Additional*, *supra* note 111, at para. 4341.

<sup>114</sup> See *The Prosecutor v Akayesu*, Case ICTR-94-4-T, 2 Sept. 1998, at para. 625.

<sup>115</sup> As we shall see below, this is one of the major bones of contention in the Israeli/Palestinian situation.

<sup>116</sup> See *Sharm el Sheikk Fact-Finding Committee Report* (the *Mitchell Report*), citing from statements submitted by the Government of Israel, available at [http://www.mideastweb.org/mitchell\\_report.htm](http://www.mideastweb.org/mitchell_report.htm); government brief submitted in H.C. 769/02 (on file with the author).

<sup>117</sup> See, e.g., 'Legal Consequences of Israel's Construction of a Separation Barrier in the Occupied Territories', *International Law Opinion* by Oxford Public Interest Lawyers, Feb. 2004, (on file with author), at para. 115.

<sup>118</sup> Thus, e.g., the authors of the *International Law Opinion* challenge the power of the Israeli authorities to seize and destroy property, permitted during hostilities if imperatively demanded by the necessities of war.

<sup>119</sup> In the *Nicaragua* case, the ICJ held that that conflict between the contras and the Nicaraguan forces was an armed conflict not of an international character, whereas the conflict between the US and Nicaragua was an international armed conflict: *Nicaragua case*, *supra* note 71, at para. 219. In the *Tadić* case the ICTY held that an international conflict may exist alongside an internal conflict: *Tadić, Merits Appeal*, *supra* note 82, at para. 84.

Let us now assume that a conflict between a state and a transnational terrorist group has reached the necessary level and scope of violence so as to constitute a non-international armed conflict. Such a conflict is not a conflict between two collectives, some of whom are combatants, but most of whom are civilians, but between one such collective and an 'organized armed group'.<sup>120</sup> It is nevertheless perfectly clear that the fundamental principle of distinction, which applies in international armed conflicts, applies in such conflicts too. Thus, Article 13(2) of APII explicitly states that 'the civilian population as such, as well as individual civilians, shall not be the object of attack'. Article 13(3) adopts the principle laid out in Article 51(3) of API, namely that civilians shall be protected 'unless and for such time as they take a direct part in hostilities'. Article 8 of the Rome Statute, which defines war crimes in the jurisdiction of the ICC, includes among crimes that may be committed in armed conflicts not of an international character '[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities'.<sup>121</sup>

Use of the term 'civilians' in APII and the Rome Statute is based on the assumption that there must also be 'non-civilians' or combatants. But who is a combatant in a non-international armed conflict? International instruments do not even attempt to answer this question.<sup>122</sup>

The reasons for this lacuna are well known. States were, and still are, unwilling to grant the *status* of combatants to insurgents and other non-state actors who take part in non-international conflicts, as doing so would not only afford them an element of legitimacy, but would mean that they enjoy the two 'privileges' of combatants – immunity from criminal liability for fighting, and prisoner-of-war status when apprehended.<sup>123</sup> But does the lack of combatant *status* mean that there are in fact no combatants in such a conflict? Unless we give a negative answer to this question the protection extended to civilians becomes meaningless. If there are no combatants, all are civilians and there is no need for special provisions protecting them.

It therefore seems almost self-evident that in non-international armed conflicts there are indeed combatants, who, as opposed to civilians, may legitimately be targeted by the other side. Who are they? The answer lies in identifying the parties to the conflict. APII states that a non-international conflict is a conflict between the armed forces of a High Contracting Party 'and dissident armed forces or organized armed groups'.<sup>124</sup> While Common Article 3 of the Geneva Conventions does not state so

<sup>120</sup> Under Common Art. 3 it may also be a conflict between two or more groups of combatants.

<sup>121</sup> Art. 8(2)(e)(i) of the Rome Statute of the International Criminal Court. War crimes in non-international armed conflicts also include '[k]illing or wounding treacherously a *combatant* adversary' (Art. 8(2)(e)(ix), emphasis added).

<sup>122</sup> See Sassoli and Bouvier, *supra* note 92, at 208.

<sup>123</sup> See *Commentary on APII*, *supra* note 111, at para. 4441.

<sup>124</sup> APII, Art. 1. In order for APII to apply there are further conditions, namely that the armed groups are 'under responsible command, [and] exercise such control over part of [the State's] territory as to enable them to carry out sustained and concerted military operations and the implement this Protocol'.

expressly, it is agreed that in order for a non-international conflict covered by this article to exist, there must also be an organized group.<sup>125</sup>

The logical conclusion of the definition of a non-international armed conflict as one between the armed forces of a state and an organized armed group is that members of both the armed forces and the organized armed group are combatants. While these combatants do not enjoy the privileges of combatants in an international armed conflict, they may be attacked by the other party to the conflict. This is indeed the view adopted in the ICRC Commentary on APII, which states that '[t]hose who belong to armed forces or armed groups may be attacked at any time'.<sup>126</sup> According to this view, if an armed conflict exists between the United States and al-Qaeda, active members of al-Qaeda are combatants who may be targeted. Similarly, if an armed conflict exists between Israel and Hamas, Islamic Jihad and the Fatah/Tanzim in the West Bank and Gaza, active members of these groups are combatants who may legitimately be attacked.<sup>127</sup>

Regarding active members of organized armed groups as combatants who may be attacked raises a number of questions. In the first place, how are such combatants to be distinguished? As opposed to international armed conflicts, in which combatants are required to have 'a fixed distinctive sign recognizable at a distance',<sup>128</sup> absent a definition of 'combatants' in non-international armed conflicts, no similar demand exists. When the combatants are actually engaged in fighting, this may not create special difficulties. But can the opposing party to the conflict (in most cases, the state) be required to fight against combatants only when they are actually fighting? If we answer this in the affirmative there would seem to be no difference between combatants and civilians, as the latter may also be targeted when taking a direct part in hostilities.<sup>129</sup> As we have stressed above, fudging the differences between combatants and civilians would weaken the principles regarding protection of civilians, which form one of the foundations of international humanitarian law.<sup>130</sup>

One possible way out of this difficulty is to tie the definition of combatants to the provision in Common Article 3 of the Geneva Conventions, that persons who take no

<sup>125</sup> In discussing non-international conflicts covered by Common Art. 3 of the Geneva Conventions, Pictet states that 'it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with "armed forces" on either side engaged in "hostilities" – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country': ICRC, *Commentary on Geneva Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949, at 37. Also see Moir, *supra* note 25, at 36; Tādic, *Jurisdiction Appeal*, *supra* note 81, at para. 70.

<sup>126</sup> *Commentary on APII*, *supra* note 111, at para. 4789 (emphasis added).

<sup>127</sup> This is indeed the view of Ben-Naftali and Michaeli, *supra* note 21, at 271. Also see Ni Aolain, *supra* note 34, at 241. In her discussion of the application of IHL in Northern Ireland the writer states: 'The corollary of this in Northern Ireland is that killing members of paramilitary organizations, if they are recognized as insurgents, is generally unproblematic if carried out in accordance with the laws of war. Additionally, the rules allow that a combatant need not be given a warning before being killed'.

<sup>128</sup> Art. 4 A(2) of Geneva Convention III.

<sup>129</sup> Common Art. 3 offers protection to 'persons taking no active part in the hostilities'. Art. 13 of APII forbids use of force against civilians, 'unless and for such time as they take a direct part in hostilities'.

<sup>130</sup> Schmitt, 'The Principle of Discrimination in 21st Century Warfare', 2 *Yale HR & Dev LJ* (1999) 143, at 160-161; Dinstein, *supra* note 85, at 249.

active part in the hostilities shall be protected from violence to their life and body. Thus, combatants are only those persons who take an active part in hostilities.<sup>131</sup> Note, however, that this does not mean that such persons are combatants only for such time as they take part in the hostilities, but merely that their actual participation is what makes them combatants, and not their membership in a certain organization.<sup>132</sup> The conclusion would be that while the armed conflict continues members of the terrorist group who have taken an active part in hostilities are combatants who may be targeted.<sup>133</sup> Other persons are civilians who may only be targeted 'for such time as they take a direct part in hostilities'.<sup>134</sup>

It would seem that this was the approach taken by the UN Human Rights Inquiry Commission established by the Commission on Human Rights soon after the present *intifada* started. The inquiry commission adopted the view that *if* an armed conflict existed between Israel and Palestinian armed groups in the Occupied Territories (a question on which it found it difficult to make a final judgment), that conflict was a non-international conflict. It then stated that it found the Israeli argument that persons targeted were combatants 'unconvincing for two related reasons: they were not participating in the hostilities at the time they were killed; and no evidence was provided by Israel to back up its contention of a combat role despite their civilian appearance.'<sup>135</sup> The implication would appear to be that a person is a legitimate target while he or she is taking a direct part in hostilities (whether a combatant or a civilian) or *if there is other evidence of his or her combatant role*.

One of the obvious difficulties in this approach is the sort of evidence required to establish a combatant role.<sup>136</sup> In many cases such evidence will be based on intelligence information. But in other cases, leaders of a terrorist group may be involved who have made no bones about their role in the terrorist activities of the group.<sup>137</sup>

<sup>131</sup> This seems to be the approach of Rodley, *supra* note 31, at 189. Also see Watkin, *supra* note 85, at 14.

<sup>132</sup> The question which characteristics of combatant status are group characteristics and which are individual characteristics is discussed by Watkin, *ibid*, at 9–10.

<sup>133</sup> See Ni Aolain, *supra* note 34, at 239, who claims that '[i]n a Common Article 3 armed conflict, the killing of an unarmed combatant, even if not immediately engaged in military activity, is legally unproblematic'.

<sup>134</sup> APII, Art. 13(3).

<sup>135</sup> *Report of the Human Rights Inquiry Commission*, *supra* note 9, at para. 62.

<sup>136</sup> I shall not deal here with the question whether a state is obliged in advance to provide such evidence. A state may have to do so when called to account for its actions, but that does not mean that in the course of an armed conflict it has to provide evidence for all its acts: see Franck, *supra* note 70, at 842. In responding to the argument that the right of self-defence arises only upon proof that it is being directed against the actual attacker, Franck states that 'the right of a state to defend itself against attack is not subordinated in law to a *prior* requirement to demonstrate to the satisfaction of the Security Council that it is acting against the party guilty of the attack. The law does have an evidentiary requirement, but it arises after, not before, the right to self-defence is exercised.'

<sup>137</sup> See, e.g., the interview with Salah Shehadeh, head of the 'Izz Al-Din Al-Qassam Brigades, the military wing of Hamas, who was killed by the IDF on 23 July 2002, published in Islam Online on 29 May 2002 and available at <http://www.islam-online.net/arabic/politics/2002/05/article25.shtml> (last accessed 19 June 2004). An English translation of the interview is available at <http://www.bridgesforpeace.com/publications/dispatch/generaltopics/Article-2.html> (last accessed 19 June 2004).

Defining combatants as members of terrorist groups who take an active part in hostilities forces us to distinguish between organized armed groups whose members are all actively involved in the hostilities, whether by planning, directing or executing attacks, and organizations that have both military and political branches. In the case of the latter, only members of the military branch may be regarded as combatants.<sup>138</sup> Targeting members of the political branch should be regarded as assassinations, which are outlawed even in the course of an armed conflict.<sup>139</sup>

Accepting that persons actively involved in the terrorist activities of an international terrorist group are combatants in a non-international armed conflict would seem to solve the problem involved in the tight definition of combatants in international armed conflicts. While the victim state does not have to accord such terrorists POW status if captured, nor are they immune from prosecution for fighting, they are legitimate targets. States would probably be very happy with this result, which allows *them* to enjoy the best of both worlds. But this is the very problem. Are we back to a licence to kill all persons suspected of being active members of the international terrorist group? How can we be sure that the targeted persons are indeed real terrorists? Doesn't this licence create an incentive for victim states to jump as soon as possible from the law-enforcement to the non-international armed conflict model, thus allowing them to ignore due process guarantees and to enjoy almost unrestricted discretion in targeting their suspected enemies? It would seem to me that these difficulties should lead us to the conclusion that the non-international armed conflict model cannot stand on its own. I shall return to the way in which it should be mitigated below.

#### 4 Proportionality

Even if suspected terrorists are legitimate targets, every use of targeting must meet the demands of proportionality. Targeting a suspected terrorist will be regarded as an indiscriminate attack if it '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'.<sup>140</sup> While this principle is as firmly entrenched in IHL as any, it is notoriously difficult to apply.<sup>141</sup> As the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, stated in its report to the ICTY Prosecutor:

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. . . . It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities

<sup>138</sup> See Watkin, *supra* note 85, at 16.

<sup>139</sup> David, *supra* note 15.

<sup>140</sup> Art. 51(5)(b) of API. It is true that that provision refers to international armed conflicts but it clearly reflects a principle of customary international law that applies in all armed conflicts.

<sup>141</sup> Gardam, 'Proportionality and Force in International Law', 87 *AJIL* (1993) 391; Ben-Naftali and Michaeli, *supra* note 21, at 278.

and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.<sup>142</sup>

How does one assess the concrete and direct military advantage gained by targeting a suspected terrorist? The state involved will probably claim that it has prevented terrorist attacks, which would have cost the lives of many civilians. Is such an assessment sufficient to show a concrete and direct military advantage? And assuming the answer is positive, how does one balance that advantage against the loss of life among innocent bystanders likely to be killed in the targeted killing? And are there cases, as the Israeli authorities argue, that even if it is totally certain that civilians (such as family members of the suspected terrorist) will be killed in the targeting, the targeting will still meet the proportionality test?

I shall not venture to provide a full answer to these questions. It seems to me that an extremely strong case has to be made to justify an attack on suspected terrorists when it is likely, not to mention inevitable, that the attack will cause the death of civilians. After all, unless the said terrorists are involved in a concrete terrorist attack that is about to take place and can only be thwarted by targeting them, the military advantages to be gained by targeting them are based largely on speculation. Can the assessment that an attack on civilians by the suspected terrorist might take place outweigh the high and concrete likelihood that the attack on the suspected terrorist will cause the death and wounding of other civilians?

Proportionality must be judged on the basis of the information available at the time of the attack, and not on the actual results. Nevertheless, when as a result of an attack innocent persons are killed or wounded, a heavy burden rests on the state to show either that this could not reasonably have been foreseen, or that even if it could have been foreseen, the necessity of the attack was great enough to justify the risk.

## 4 The Mixed Model

The analysis so far has been based on an either-or situation. Either we adopt the law-enforcement model or the armed conflict model. But neither of these models provides an adequate framework for dealing with transnational terror. The law-enforcement model is not suitable when the scale of violence has reached that of a non-international armed conflict and the terrorists operate from the territory of a state that is either unwilling or incapable of cooperating in law enforcement. The armed conflict model was not developed with the case of international terror in mind. Under the rules of international armed conflicts, terrorists are generally not combatants and may therefore only be attacked for such time as they take a direct part in hostilities, a legal conclusion that does not seem credible when the very conflict is between the victim state and the transnational terrorist group. On the other hand, if an armed

<sup>142</sup> *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, available at <http://www.un.org/icty/pressreal/nato061300.htm> (last accessed 19 June 2004), at para 48. For a scathing criticism of the legal analysis in this report see Colangelo, 'Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor not to Investigate NATO Bombing in the Former Yugoslavia', 97 *NW ULR* (2003) 1393.

conflict with a terrorist group is regarded as a non-international conflict, the state would seem to enjoy almost unlimited power to target persons it claims to be active members of that group, even when they pose no immediate danger and it might be feasible to apprehend them and place them on trial.

Extension of some of the rules of international law relating to armed conflicts to non-international armed conflicts was meant to extend the protection offered by IHL to cases in which it had not traditionally applied.<sup>143</sup> The assumption seems to have been that this was required not only so that these rules would apply to non-state actors, but also because if they were not extended the way such conflicts were handled was entirely within the domestic jurisdiction of the state involved.<sup>144</sup> This assumption may have been understandable at the time, as the first major step in international regulation of non-international armed conflicts, i.e. the adoption of Common Article 3 of the 1949 Geneva Conventions, was taken before the detailed development of international human rights law.

Following the dramatic development of international human rights law, it is no longer the case that if IHL is not applicable to non-international armed conflicts, states will have *carte blanche* to fight those conflicts as they see fit. On the contrary, in the type of non-international armed conflicts contemplated by Common Article 3 and APII, the state's freedom of action will be constrained by the standards of international human rights law. This means, *inter alia*, that the state will be prohibited from arbitrarily depriving individuals of their lives or personal liberty and that it will be bound to afford all persons accused of offences a fair trial before an independent and competent court. Any consideration of the legal regime applying in armed conflicts in general, and especially in non-international armed conflicts, must take these standards into account.<sup>145</sup>

An armed conflict between a state and a transnational terrorist group is not an international armed conflict. However, as it transcends the borders of the state involved it does not fully fit the model of a non-international armed conflict either. Applying human rights standards to such a conflict also faces a serious impediment. As the suspected terrorists are not within the jurisdiction of the victim state, one of the fundamental assumptions of the regimes contemplated in human rights treaties is lacking. While this impediment cannot simply be ignored, it should not lead to the conclusion that human rights standards may be abandoned. These standards must be maintained at all times. However, in their application the special features of a non-international conflict must be taken into account.

The only acceptable justification for targeting suspected terrorists is protection of potential victims of terrorist acts. Under ordinary human rights principles, based on a law-enforcement model with its guarantees of due process, use of lethal force to defend persons against unlawful violence is justified only when absolutely necessary.

<sup>143</sup> For a history of the application of rules of international law to non-international armed conflicts, see Moir, *supra* note 25, at 1–16; *Commentary on Geneva Convention (III)*, *supra* note 125, at 28–35; *Commentary on Protocol II*, *supra* note 111, at paras. 4337–4418.

<sup>144</sup> See UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), at para. 1.33.3.

<sup>145</sup> See Ben-Naftali and Michaeli, *supra* note 21; Ben-Naftali and Shani, *supra* note 58; Watkin, *supra* note 18.



As seen above, the accepted view is that this test will be met only when force is used to stop an imminent attack. In other cases, law enforcement mechanisms must be employed. When the terrorists are not subject to the law enforcement jurisdiction of the victim state, and we are talking about violence of the scale and intensity required for the situation to be regarded as one of armed conflict, the parameters of absolute necessity have to be reconsidered.

When judging if use of force to defend potential victims of attacks by terrorists operating from outside the territory of the victim state is absolutely necessary, whether alternative law enforcement measures are available becomes a crucial question. As the object of such force must always be to prevent further attacks, rather than to punish, or even to seek general deterrence, I suggest that in deciding whether targeting suspected terrorists could be regarded as absolutely necessary we draw a parallel to a state's inherent right to self-defence under Article 51 of the UN Charter. In exercising this right, a state's actions are subject to the requirements of necessity and proportionality.<sup>146</sup> Under the principle of necessity, a state may not use force if there are other means of defending itself. In the present context the implication is that a state may not target suspected terrorists if there is a reasonable possibility of apprehending them and putting them on trial. Whether apprehension, arrest and trial are reasonable alternatives will depend on whether the victim state has effective control over the territory in which the terrorists are operating, and if it does not, on the degree of willingness or capability of the *de facto* force in control of that territory to arrest and try the terrorists, to extradite them, or, at the very least, to take effective steps to stop their activities.

As opposed to the general rule in armed conflicts, under which a party may target combatants of the other side even when they pose no immediate danger, under the necessity requirement the targeting of suspected terrorists must be restricted to cases in which there is credible evidence that the targeted persons are actively involved in planning or preparing further terrorist attacks against the victim state and no other operational means of stopping those attacks are available. As there is always a risk that the persons attacked are not in fact terrorists, even in such a case lethal force may be used against the suspected terrorists only when a high probability exists that if immediate action is not taken another opportunity will not be available to frustrate the planned terrorist attacks.<sup>147</sup>

Use of lethal force must always conform to the proportionality test. In this context this test should be based on balancing three factors: 1. the danger to life posed by the continued activities of the terrorists; 2. the chance of the danger to human life being realized if the activities of the suspected terrorist are not halted immediately; and 3. the danger that civilians will be killed or wounded in the attack on the suspected terrorist. As mentioned in the discussion above of the proportionality test, a heavy burden rests on the state to justify killing or wounding of civilians during an attack on

<sup>146</sup> See Schmitt, *supra* note 48.

<sup>147</sup> *Ibid.*, at 110.

suspected terrorists. The presumption should be that suspected terrorists may not be targeted when there is a real danger that civilians will be killed or wounded too.

There is no doubt that conceding the power of a state to target suspected terrorists, even in strictly limited circumstances, creates a real danger that states will adopt a liberal interpretation of those circumstances and will in fact use this exceptional measure as a general policy. Many will obviously argue that this danger is so great that we have to limit the right to use force to the case of an imminent threat to life. I do not deny that this danger indeed exists. I suggest, however, an institutional mechanism that may mitigate the danger, even if it does not eliminate it.

According to a series of decisions of the European Court of Human Rights, when state officials are involved in the use of lethal force, it is incumbent on the state to carry out an independent investigation in order to determine whether the action was compatible with the state's obligation to respect and ensure the right to life.<sup>148</sup> A state that fails to do so violates that obligation. Applying human rights standards in cases of an armed conflict with terrorist groups means that every case of targeted killings must be subjected to a thorough and credible legal investigation. If it transpires that the measure was used in circumstances that do not comply with international standards, legal action must be taken against those responsible.

## 5 The US and Israeli Cases

The above analysis reveals that one cannot give a clear and general answer to the question of whether targeting a suspected terrorist is an extra-judicial execution, a legitimate 'act of war' or a grave breach of international humanitarian law. The answer 'all depends' on a number of factors, among which is the legal regime that applies. I shall now return to the cases mentioned in the Introduction and apply the analysis suggested here to these cases.

### A *The US Case*

In the absence of clear evidence about the identity of all those who were killed and the danger that they posed to the United States, it is extremely difficult to assess the legality of the US attack in Yemen. I shall therefore confine myself to a discussion of the parameters of the case.

In the first place, we have to ask whether there was an armed conflict involving the United States and al-Qaeda at the time of the attack. If the answer is negative, it is hard to escape the conclusion that the attack was unlawful. If the answer is positive, I have argued that the conflict should be regarded as one of a non-international nature. A strong case could be made for regarding al-Qaeda members who take an active part in hostilities as combatants, even if they were not directly involved in such hostilities when targeted.<sup>149</sup>

<sup>148</sup> See *McKerr v United Kingdom*; *Hugh Jordan v United Kingdom*; *Kelley and Others v United Kingdom*; *Shanaghan v United Kingdom*, Judgments of 4 May, 2001, available at <http://www.echr.coe.int/Eng/Judgments.htm>.

<sup>149</sup> According to reports the attack on al-Harethi was carried out by the CIA and not US armed forces. I shall not address the question whether use of non-combatants to carry out combatant activities is lawful.

According to the approach suggested here, the mere fact that persons are suspected combatants does not justify targeting them. The object of the attack has to be to prevent a concrete danger which could not reasonably be thwarted by other means and that was highly likely to be realized if immediate action was not taken. It is not at all clear that the Yemen attack was preventive, rather than retributive; neither is it clear whether al-Harethi presented a concrete danger that could not reasonably have been thwarted by other means.

Were all the persons killed combatants? This was not a case in which the suspected terrorist was targeted in a civilian area so that the other persons killed were innocent bystanders. It seems likely that the persons with al-Harethi in the desert were party to his activities, but there is no certainty about this. Thus, the issue of proportionality could be relevant. It would be hard to justify the inevitable killing of persons who did not take an active part in hostilities unless it could be shown that targeting of al-Harethi was absolutely necessary to save many lives.

It has been suggested that the US action was carried out with the consent of the Yemen Government whose forces had made several unsuccessful attempts to arrest al-Harethi in the course of which a number of Yemeni soldiers had been killed. The consent of the Yemen Government would mean that Article 2(4) of the UN Charter was not violated. But it would not mean that the targeting of al-Harethi and his companions was compatible with IHL. Had the Yemen authorities been able to arrest al-Harethi, the licence given to the US to act could not have made the targeting lawful. A state cannot avoid its obligations to respect and ensure the right to life, by allowing another state to deprive persons of that right.

## B *The Israeli Case*

Assessing the legality of Israel's targeted killings of suspected members of Palestinian organizations that engage in terror attacks is more complicated than most, if not all, other cases. It would seem that the main bone of contention relates to whether, given Israel's status as an occupying power, terrorist attacks on civilians in Israel should be regarded as instances of *transnational* terror.<sup>150</sup> There is also little agreement on some fundamental legal questions that have an enormous bearing on the topic.

### 1 *Status of the West Bank and Gaza*

Most objective legal observers accept that at least until the Oslo and subsequent accords between Israel and the PLO, the status of the West Bank and Gaza was that of occupied territories to which the international law of belligerent occupation applied. While many government policies in these territories were incompatible with principles of this legal regime, when appearing before the Supreme Court of Israel to defend government actions there the framework of legal discourse adopted by government

<sup>150</sup> From its Advisory Opinion on the *Legal Consequences of the Wall*, *supra* note 68, at para. 139, one may deduce that the ICJ took the view that the answer to this question is negative. The ICJ opined that as the terrorist attacks originated in territory occupied by Israel it may not invoke its right to self-defence under Art. 51 of the Charter. But see Separate Opinion of Judge Higgins, *supra* note 69, at para. 34, in which this attitude of the Court is criticized.

lawyers has always been the law of belligerent occupation. There are numerous decisions and many dicta of the Court accepting this framework.<sup>151</sup> It is also the framework favoured by the whole international community.<sup>152</sup>

Had the situation remained as it was before the Oslo Accords and subsequent agreements, there could have been no doubt about the illegality of all targeted killings. All Palestinians in the West Bank and Gaza were protected persons under Geneva Convention IV, who were entitled, in all circumstances, to protection against all acts of violence.<sup>153</sup> The applicable legal model in occupied territories is the law-enforcement model, based in this case on the international law of belligerent occupation, complemented by international human rights law. Under this model force may only be used in the case of an imminent attack that cannot be halted by arresting the suspected terrorist.<sup>154</sup>

It is the considered view of many commentators that the Oslo Accords and subsequent agreements between Israel and the PLO effected a change in the status of some parts of the Occupied Territories.<sup>155</sup> Under these agreements, the West Bank was divided into three different zones: 'A' areas in which both civil and security matters were in the hands of the Palestinian Authority established under the agreements; 'B' areas, in which security control remained the responsibility of Israel, while civil matters were the responsibility of the Palestinian Authority; and 'C' areas in which Israel retained responsibility for security matters while responsibility for civil matters was divided between Israel and the Palestinian Authority. In Gaza there was a similar, although not identical, arrangement. While the status of 'C' areas, and probably 'B' areas too, remained unchanged, the status of 'A' areas became controversial.<sup>156</sup> On one hand, it was argued that having relinquished effective control over these areas, Israel could no longer be regarded as an occupying power; on the other hand, the claim was that since Israel still retained the ultimate power over all areas, including total control on who could enter or leave, it remained an occupying power in all parts of the West Bank and Gaza.<sup>157</sup>

<sup>151</sup> I have discussed these decisions and dicta elsewhere: Kretzmer, *supra* note 50.

<sup>152</sup> The ICJ recently confirmed that Israel's status on the West Bank was that of an occupying power: *Legal Consequences of the Wall*, *supra* note 68. The ICJ Advisory Opinion in this case did not relate to Gaza.

<sup>153</sup> See Art. 27 of Geneva Convention IV.

<sup>154</sup> It could also be used if it was the minimum force required in order to effect a lawful arrest or to quell a riot.

<sup>155</sup> See Benvenisti, 'The Status of the Palestinian Authority', in E. Cotran and C. Mallat (eds.), *The Arab-Israeli Accords: Legal Perspectives* (1996), at 47.

<sup>156</sup> The divergent views on this issue are presented in International Humanitarian Law Research Initiative, *IHL in Israel and Occupied Palestinian Areas, Briefing Note: Review of the Applicability of International Humanitarian law to the Occupied Palestinian Territory*, available at <http://www.ihlresearch.or/opt/feature.ph?a=31> (last accessed 25 Feb. 2004).

<sup>157</sup> The UN Commission of Inquiry found the argument that Israel is no longer an occupying power because it lacks effective control over 'A' areas untenable. It claimed that the test for application of the legal regime of occupation is not whether the occupying power fails to exercise effective control over the territory, but whether it has the ability to exercise such power. It added that the 'Oslo Accords leave Israel with the ultimate legal control over the OPT and the fact that for political reasons it has chosen not to exercise this control, when it undoubtedly has the military capacity to do so, cannot relieve Israel of its responsibilities as an occupying Power': *Report of the Human Rights Inquiry Commission*, *supra* note 9, at para. 41. I find this statement unconvincing. Under the Oslo Accords and subsequent agreements Israeli

If Israel retained its status as an occupying power in the 'A' areas it was bound to follow the law-enforcement model there. In the case of suspected terrorists acting in those areas, if the Palestinian Authority (under this theory a kind of sub-contractor of the Israeli authorities) refused to arrest or extradite the persons involved, the Israeli authorities were certainly entitled (and maybe even bound) to enter those areas in order to arrest them. On the other hand, if Israel ceased to be an occupying power in 'A' areas, and effective authority was in the hands of the Palestinian Authority, those areas took on many of the characteristics of a foreign state. Israel was not entitled to enter the area to arrest persons suspected of being active in organizing and executing terrorist attacks against its civilians, even if the Palestinian Authority refused to arrest or extradite them.<sup>158</sup> There was therefore some credence to the argument, similar to that raised by the US in the Afghanistan case, that the Palestinian Authority should be regarded as responsible for the attacks carried out from its territory, and that if it failed to act, Israel was entitled to do so. It would not seem reasonable to require a state to refrain from action against terrorists who plan, direct and execute attacks on its citizens from territory that is not under its effective control if the de facto government in that territory refuses to restrain them.<sup>159</sup>

After hostilities started in September 2000 between Israel and the Palestinians, and especially after the Israeli 'Defensive Shield' campaign of April 2002, the IDF took control of many of the 'A' areas. At the time of writing it has resumed effective control over all areas on the West Bank, while in Gaza most areas are still under control of the Palestinian Authority. Even if the 'A' areas ceased to be regarded as occupied territory after the Oslo Agreements, once the IDF resumed effective control they once again became occupied territory, with all that this implies.

## 2 Existence of an Armed Conflict

At the beginning of the present *intifada* the Israeli authorities redefined the legal situation pertaining in the West Bank and Gaza as 'armed conflict short of war'.<sup>160</sup> This view of the situation was based on the assessment that given the frequency and severity of the use of armed force against military and civilians, and the level of organization behind use of that force, there was now 'protracted armed violence between the IDF and organized Palestinian groups', the classic description of an

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forces were not permitted to enter the 'A' areas, unless they were responding to an ongoing incident, and then only until they had handed the matter over to the Palestinian police. Thus, if Israeli forces refrained from entering 'A' areas, they were abiding by Israel's commitments under an international agreement, and not acting for political reasons.

<sup>158</sup> Art. VIII(9)(b) to Annex I, Protocol Concerning Withdrawal of Israeli Military Forces and Security Arrangements, states that: '[w]ithin the territory under the jurisdiction of the Palestinian Authority, in places where Israeli authorities exercise their security functions in accordance with this Annex, and in their immediate vicinities, the Israeli authorities may carry out engagement steps in cases where an act or an incident requires such action', available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Gaza-Jericho+Agreement+Annex+I.htm> (last accessed 19 June 2004). As can be seen, the right of Israeli authorities to carry out engagement steps is restricted to places where they exercise security functions. These places do not include 'A' areas.

<sup>159</sup> See Schmitt, *supra* note 48; Müllerson, *supra* note 70.

<sup>160</sup> See *supra* note 116.

armed conflict between a state and non-state actors.<sup>161</sup> This led to the next division of opinion: was there indeed an armed conflict going on?<sup>162</sup> The answer to this question has a decisive influence on whether targeted killings outside the context of an imminent attack could ever be legal.

It seems to me very difficult to support the view that the level of violence by organized armed groups against Israeli targets did not, at least at some stages of the *intifada*, reach the threshold required for the situation to be regarded as an armed conflict.<sup>163</sup> The situation could not be regarded as one of 'riots, isolated and sporadic acts of violence and other acts of a similar nature', which under APII do not constitute an armed conflict.<sup>164</sup> Many of the measures adopted by Israel in managing the conflict may well have exceeded requirements of necessity and proportionality.<sup>165</sup> However, this does not influence the conclusion that the protracted violence between Israel and the organized Palestinian armed groups amounted to an armed conflict.<sup>166</sup>

### 3 An International or Non-International Armed Conflict?

In his opinion to the Supreme Court of Israel, Professor Cassese works on the assumption that the applicable law 'is the body of international customary and treaty rules relating to international armed conflicts, in particular to *occupatio bellica* of foreign territory'. This assumption is highly problematical. Since Jordan has waived all claims to sovereignty over the West Bank, while Egypt never raised such claims over Gaza, the status of these territories as occupied territory does not imply that there is an ongoing conflict between two or more states.<sup>167</sup> It is for this very reason that

<sup>161</sup> See the government briefs in H.C. 769/02 (on file with the author).

<sup>162</sup> See the discussion on 'Arab-Israeli Conflict and the Laws of War', Interviews by Mark Dennis, *Crimes of War, How the Law Applies*, May 2001, available at <http://www.crimesofwar.org/expert/arab-israel.html> (last accessed 25 Feb. 2004).

<sup>163</sup> According to statistics published by the Israel Ministry of Defence, since Sept. 2000 there have been 21,657 attacks on Israeli military or civilians in the West Bank, Gaza, and Israel. In that period 672 civilians and 291 members of security forces were killed: The statistics are available at [http://www1.idf.il/SIP\\_STORAGE/DOVER/files/7/21827.doc](http://www1.idf.il/SIP_STORAGE/DOVER/files/7/21827.doc) (last accessed 3 June 2004). In the *International Law Opinion*, *supra* note 117, the Oxford Public Interest Lawyers opine that '[t]he present level of violence in the Occupied Territories does not cross the threshold of gravity necessary for a state of hostilities to exist. Violence is low-level, isolated and sporadic and does not amount to widespread, organized, military resistance against the Israeli occupation'. This assessment does not seem to be compatible with the above statistics.

<sup>164</sup> As noted above, APII does not apply to the present situation for two reasons: it has not been ratified by Israel and it applies only to conflicts taking place in the territory of a High Contracting Party. However, as I stated above, whether an armed conflict exists depends on an analysis of the actual situation on the ground, and in evaluating such a situation the standards set out in APII provide useful guidelines, even if they do not formally apply. It should also be noted that the ICTY has held that many of the provisions in APII reflect standards of customary international law. It seems to me that the definition of the parameters of an armed conflict may be one of these provisions.

<sup>165</sup> See, e.g., *Report of the Human Rights Inquiry Commission*, *supra* note 9, at para. 45.

<sup>166</sup> I express no opinion on whether at the time of writing (Nov. 2004), given the reduction in the scale and level of terrorist attacks it is no longer possible to speak of an ongoing armed conflict in the area.

<sup>167</sup> It may very well be asked how these territories can be regarded as territories subject to the international law of belligerent occupation if no other states are involved. The Government of Israel has tried to argue that the lack of sovereignty of other states over the territories means that they are not to be regarded as occupied. This argument has been rejected by foreign governments, international bodies, many Israeli

Cassese's assumption was rejected by the UN Commission of Inquiry into Human Rights Violations in the Occupied Territories,<sup>168</sup> and by others.<sup>169</sup> Even if one assumes that at no time since 1967 did any parts of the West Bank and Gaza cease being territory to which the international law of belligerent occupation applied, this does not necessarily mean that any armed conflict which arises between armed groups in these areas and Israel itself is of an international nature. As we have seen above, both the ICJ and the ICTY have held that some situations involve armed conflicts that have both international and non-international aspects.

The conclusion to which Cassese's assumption leads him also reveals its weakness. Between whom exactly is the international armed conflict that Cassese speaks about? It is not between two states. Is it a conflict between a state and organized armed groups? It would seem so, but such a conflict is *not* regarded as an international armed conflict. Of course, one could say that the conflict is one between Israel and the Palestinian people. But a conflict between a state and a people under occupation is not regarded as an international armed conflict under customary international law,<sup>170</sup> and Israel has not ratified Additional Protocol I to the Geneva Conventions. Furthermore, if the conflict is to be regarded as an international armed conflict between Israel and the Palestinian people, at the very least members of the armed security forces of the Palestinian Authority would be regarded as combatants. But while there have been some incidents in which members of these security forces have been involved, the present conflict has not included hostilities between the IDF and units of the Palestinian security forces. It would therefore be totally unreasonable to argue that all members of these forces are combatants involved in an armed conflict with Israel.

The assumption that terrorists are merely civilians taking a direct part in hostilities might make sense if hostilities of an international nature were also taking place. But this is not the case. To the extent that an armed conflict does indeed exist, it is the very hostilities between Israel and the armed groups to which these terrorists belong that create this conflict. It is difficult to regard the fighting by one party to the armed conflict as 'direct participation of civilians in hostilities'.

Some commentators argue that since members of Palestinian armed groups are not recognized as combatants when captured, and as some captured members are prosecuted for killing Israeli soldiers or civilians, they cannot possibly be regarded as

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academics, and, most recently, the ICJ. It seems to me that the territories became occupied since they were not Israeli territory when captured in the 1967 international armed conflict between Israel and two other states: Jordan and Egypt. The question then becomes whether they retained that status after these two states made peace treaties with Israel. Dinstein has argued that following these treaties the status of the territories changed from one of belligerent occupation to post-belligerent occupation: Dinstein, 'The International Status of the West Bank and the Gaza Strip – 1998', 28 *Israel Ybk on H R* (1998) 37. I do not intend to discuss this view here.

<sup>168</sup> *Report of the Human Rights Inquiry Commission*, *supra* note 9, at para. 39.

<sup>169</sup> See Ben-Naftali and Michaeli, *supra* note 21.

<sup>170</sup> See Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', in A. J.M. Delissen and G. J. Tanja (eds.), *Humanitarian Law in Armed Conflict – Challenges Ahead: Essays in Honour of Frits Kalshoven* (1991), at 93.

combatants who may be targeted.<sup>171</sup> It has even been argued that had Israel ratified API, the conflict would be regarded as an international conflict between Israel and a people fighting alien occupation. It would follow that members of the Palestinian armed groups would be entitled to combatant status, and would also be legitimate targets. However, since Israel has not ratified API, it may not target Palestinian terrorists.<sup>172</sup>

Had Israel ratified API the situation might have appeared to be a lot simpler. From a political point of view, Israel might have been able to justify targeting members of armed Palestinian groups more easily. Thus paradoxically, although Israel and some states in similar situations objected to the API and refused to ratify it,<sup>173</sup> ratifying API would not only have imposed certain obligations on them; it might also seem to have granted them some advantages. However, these advantages would have been purely political. From a legal point of view, even when API has not been ratified by a state, a conflict between that state and a people fighting against colonial domination or alien occupation, might constitute an armed conflict, albeit not an *international* one. One of the objects of API was to extend the protection offered to combatants in an international armed conflict to combatants involved in certain types of conflicts that are not inter-state conflicts. The innovation was in applying the law of *international* armed conflicts to such a conflict, not in recognizing it as an armed conflict. The question of whether a non-international armed conflict exists depends on an analysis of the factual situation – is there protracted armed violence between the state and organized armed groups (or between such groups within a given state)?

Absent ratification of API, Israel is not required to treat members of Palestinian armed groups as POWs. It may try members of such groups who have killed or wounded soldiers.<sup>174</sup> However, even if API had been ratified, Palestinians involved in terrorist activities (which by our definition involve deliberate killing and other severe violence against civilians) could have been tried for war crimes or crimes against humanity.<sup>175</sup>

It seems to me, following the line taken by the UN Commission of Inquiry, that the armed conflict between Israel and the Palestinian organizations which carry out terrorist attacks on civilians in Israel must be regarded as a non-international armed conflict.<sup>176</sup> In such a conflict active members of the organized armed groups are to be

<sup>171</sup> This argument is raised by the petitioner in H.C. 769/02, *supra* note 7.

<sup>172</sup> *Ibid.*

<sup>173</sup> On the objections of the US, Israel, and a few other states to the provisions of API see Greenwood, *supra* note 91.

<sup>174</sup> In non-international armed conflicts combatants may be prosecuted for fighting under the domestic law of the state involved. However, as opposed to terrorists, who commit a war crime under international law when they intentionally kill civilians in such a conflict, members of armed groups do not commit a crime under international law when they kill soldiers (unless they have laid down their arms or are *hors de combat*).

<sup>175</sup> On the notion that the deliberate organized attacks on Israeli civilians are to be regarded as crimes against humanity see Amnesty International, *Israel and the Occupied Territories and the Palestinian Authority: Without Distinction – Attacks on Civilians by Palestinian Armed Groups*, AI INDEX: MDE 02/003/2002, 11 July 2002; Human Rights Watch, *Erased In A Moment: Suicide Bombing Attack Against Israeli Civilians* (2002).

<sup>176</sup> This was also the view taken by Judge Kooijmans in his Separate Opinion in *Legal Consequences of the Wall*, *supra* note 68, at paras. 35–36.



regarded as combatants, even if they do not enjoy the privileges extended to combatants in an international armed conflict. If the law of armed conflict were to stand on its own, such combatants would be legitimate targets until such time as the armed conflict ended. However, as argued above, it does not stand on its own and must be considered together with international human rights law. I shall examine the way this system should work in the next section.

#### 4 *Applying the Mixed Model*

In the present case we have a highly complicated legal situation which requires application of a model that incorporates elements of the laws of belligerent occupation, active armed conflict and international human rights. As Israel has reimposed its effective authority over all parts of the West Bank, it may not employ the armed conflict model in fighting suspected terrorists in this area. Force may be used only when absolutely necessary to halt an imminent attack on the military or on civilians or when an attempt to arrest suspected terrorists is resisted with force.

The issue is far more complicated when it comes to Gaza. Israeli forces have not reimposed military control over all sections of Gaza, and attempts to enter the areas under control of the Palestinian Authority in order to arrest suspected terrorists not only raise legal and political questions; they are invariably met with force that results in loss of life to Israeli soldiers and to Palestinian civilians. The situation there more closely resembles the case of transnational terrorists who are supported, or at least harboured, in another state.

This certainly does not mean that Israel is free to target all such suspected terrorists. As explained above, given the inherent uncertainty in identification, in order to justify targeting a suspected terrorist, not only must the authorities have clear and convincing evidence of that person's active involvement in terrorist activities. They must also have credible evidence that the person poses a real and concrete danger to the lives of others that cannot be thwarted without attacking him at the time he is attacked. Despite the difficulties, where apprehending the person involved is feasible, that avenue must be pursued. If it is not feasible, targeting the person may be lawful, but only if the object of the attack is preventive, and not punitive or deterrent.

But the issue does not end there. The question of proportionality looms large. As stated above, it is extremely difficult to assess the concrete and direct military advantage to be gained from targeting a suspected terrorist, and whether the expected loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, are excessive in relation to that advantage. The presumption must be that if there is a danger that civilians may be killed or wounded in the attack, the attack will be unlawful. Lifting the burden imposed by that presumption depends on the information that decision-makers possessed, or should have possessed, when deciding on the attack. Nevertheless, I share the view of other commentators that even if the persons targeted by the IDF in some of the reported cases were legitimate targets, the results tend to show that the attacks did not meet the proportionality test.<sup>177</sup>

<sup>177</sup> See, e.g., Meyerstein, *supra* note 6; Ben-Naftali and Michaeli, *supra* note 21, at 280 (also analysing the attack on the commander of the military wing of Hamas, in which 16 people, including 9 children, were killed).

Finally, according to the demands of international human rights law, in every case of targeted killing a thorough legal investigation should be conducted. If it transpires that the conditions that justify use of the measure did not pertain, appropriate legal action should be taken. It is not clear whether this condition has been met in all cases of targeted killing.

## 6 Concluding Comments

The issue of transnational or international terror has generated a great deal of discussion, especially since the 9/11 attacks on the United States. Perceptions of the issues differ widely. Decision-makers in states that have been subjected to serious terrorist attacks often think that the 'war on terror' justifies actions that are totally inconsistent with standards of human rights and humanitarian law; human rights NGOs, some human rights institutions and politicians from states who have been free of terror see the great danger in over-reaction to terror, and sometimes offer what have been termed 'nice recipes . . . that have little practical relevance'.<sup>178</sup>

As intimated in the Introduction, I too believe that over-reaction of states acting outside accepted standards of human rights and international humanitarian law is a real danger. But this danger cannot be contained only by pious words and proposals for courses of action that 'seem to be blind to real life hard choices'.<sup>179</sup> International humanitarian law has always been based on recognition of the harsh reality of armed conflicts. It has not attempted to present idealistic standards of behaviour that cannot reasonably be demanded of parties faced with this reality. On the contrary it has made every attempt to lay down standards that recognize military necessity, but aim to spare those who do not participate in hostilities and to limit force to the amount necessary to weaken the fighting potential of the enemy.<sup>180</sup>

The assumption of this article has been that regarding suspected transnational terrorists as civilians who at times take part in hostilities is an unrealistic perception of the situation. On the other hand, regarding them as combatants who may be targeted at will opens the way to serious violations of the right to life in non-international armed conflicts. The middle road proposed here is an attempt to create a realistic alternative that allows states to defend their residents against terrorist attacks without abandoning commitment to standards of human rights and humanitarian law. It is based on the notion that unless realistic standards of conduct for states involved in armed conflicts with terrorist groups exist, they will act in an environment infected by the lawlessness that characterizes terrorism. The danger of this lawlessness is such that however imperfect these standards may be, they are preferable to no standards at all.

<sup>178</sup> Müllerson, *supra* note 70, at 18.

<sup>179</sup> *Ibid.*

<sup>180</sup> See Sassòli and Bouvier, *supra* note 92, at 67.