# ‘Don’t Ask, Don’t Tell’

## Secrecy, Security, and Oversight of Targeted Killing Operations

Policy Paper 9E

**Shiri Krebs**
**With a response by Amichai Cohen and Tal Mimran**

Targeted killing is a lethal and irreversible counter-terrorism measure. Its use is governed by vague legal norms and controlled by security-oriented decision-making processes. Oversight is inherently limited, as most of the relevant information is top secret. Under these circumstances, attempts to assess the legality of targeted killing operations raise challenging, and often undecided, questions, including: How much intelligence effort should be dedicated to examining the anticipated collateral damage? How many victims would constitute disproportionate

THE ISRAEL DEMOCRACY INSTITUTE

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# Abstract

Governments around the world have been targeting and killing individuals to prevent them from committing terror attacks or other atrocities. They use this method secretly, sometimes without even taking responsibility for such operations, and without making public most of the relevant information: who is being targeted and what are the criteria for targeting individuals, what evidence is used to make targeting decisions, and what procedures (if any) are adopted to identify mistakes or misuse of this method. Recently released documents, such as the U.S. Department of Justice Drone Memo (analyzing lethal operations against U.S. citizen Anwar Al-Aulaqi), the more general White Paper on targeted killings of US citizens, or the Report of the Israeli Special Investigatory Commission on the targeted killing of Salah Shehadeh, shed some light on otherwise highly secretive decision-making processes, thereby introducing to the public debate important information previously unavailable. At the same time, in revealing only a small amount of relevant information, they emphasize the thick veil of secrecy that still surrounds the discussions in this field. Moreover, the information that is available demonstrates the vague nature of the relevant rules; the security-oriented implementation of these rules; and the inadequacy of current oversight mechanisms of targeted killing operations. These challenges to a process designed to take human lives emphasize the need to develop effective and independent accountability mechanisms, with powers to investigate high-level policymakers as well as operational-level decision-makers.

The paper proposes concrete solutions to the main weaknesses of the current legal framework: it narrowly (and clearly) defines legal terms such as 'imminent threat,' 'feasibility,' and 'last resort'; it develops an activity-based test for determinations on direct participation in hostilities; it designs an independent ex post review mechanism; and it calls for governmental transparency and meaningful oversight. Most importantly, it promotes a targeted killing policy that protects civilians from both terror and counter-terror attacks.

"Despite the outcome which resulted in this instance, the means of targeted killing was and continues to be a lawful tool in the war against deadly terrorism."[1]

1 The Report of the Special Investigatory Commission on the targeted killing of Salah Shehadeh [hereinafter: the Shehadeh Commission Report], February 27, 2011, p. 102.

# Secrecy, Security, and Oversight of Targeted Killing Operations

Shiri Krebs

## I. Introduction

On July 22, 2002, Israeli aircraft executed a targeted killing operation directed at Salah Shehadeh, the commander of the Hamas military wing in Gaza. The aircraft crew dropped a one-ton bomb on Shehadeh's house, located in a densely populated neighborhood in Gaza City. As a result of the operation, Shehadeh himself was killed, as well as 14 other people—including his assistant, his wife, and his 15-year old daughter. Another 150 people were injured.[2] Almost a decade later, a special investigatory commission, established by the State of Israel, submitted its final report on the legality of this operation. While concluding that the operation was lawful, thereby exonerating all of the individuals involved in the attack from any liability (criminal, civil or even disciplinary), the report sheds some light and provides significant information on the decision-making processes concerning targeted killing operations conducted by Israeli authorities. The information contained in this report offers a unique glimpse into the otherwise secretive decision-making processes, and allows us to evaluate current oversight mechanisms.

This policy paper begins with a critical examination of the provisions of international law applicable to targeted killing operations. It continues with a comprehensive analysis of current practical dilemmas, including defining

2 Ido Rosenzweig and Yuval Shany, *Special Investigatory Commission Publishes Report on Targeted Killing of Shehadeh*, 27 IDI Terrorism and Democracy Newsletter (2011).

who can be targeted, when and where. It then focuses on the report of the Shehadeh Commission, and highlights some of its more subtle and nuanced implications. The analysis of the Shehadeh Commission Report suggests that secrecy plays an important role not only in keeping the public in the dark, but also in the decision-making process of internal investigatory mechanisms. When the relevant evidence and the concrete targeting criteria remain secret, due process is reduced to various clichés such as 'imminent threat' or 'infeasible capture,' and meaningful oversight is prevented.

While documents such as the report of the Israeli Shehadeh Commission (or the aforementioned US Department of Justice White Paper on targeted killings of US citizens)[3] provide important information for the public debate on targeted killings, the relatively small amount of information released highlights the thick veil of secrecy that still surrounds the discussions in this field.[4] Moreover, the information that is out in the open demonstrates the vague nature of the relevant rules; the security-oriented interpretation and implementation of these rules; and the inadequacy of current parliamentary and judicial mechanisms for oversight of targeted killing operations. It also calls for creating effective and independent accountability mechanisms for targeted killing operations, with powers to investigate high-level policymakers as well as operational-level decision makers.

3 The document, obtained by an NBC News reporter, Michael Isikoff, is available at: http://msnbcmedia.msn.com.

4 In January 2013, a federal judge in Manhattan refused to require the Justice Department to disclose a memorandum providing the legal justification for the targeted killing of United States citizens. Adam Liptak, *Secrecy of Memo on Drone Killing Is Upheld*, The New York Times, January 2, 2013. A similar (yet wider) request from the ACLU was also denied, and the appeals are now pending. See the ACLU website, www.aclu.org/national-security/targeted-killings and here: www.aclu.org/blog/national-security/justice-departments-white-paper-targeted-killing.

## II. Defining 'Targeted Killing' Operations

The phrase 'targeted killings' is often used to describe lethal force intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator.[5] Nils Melzer, former Legal Adviser to the International Committee of the Red Cross [hereinafter: ICRC], defines 'targeted killings' according to five cumulative elements: (a) use of lethal force; (b) with intent, premeditation and deliberation to kill; (c) individually selected persons; (d) who are not in the physical custody of those targeting them; and (e) attributable to states or other subjects of international law.[6] Others use more context-oriented definitions, such as "attacks on individual terrorists" with "a quality of premeditation"[7] or "targeting of a suspected terrorist who is not in the territory of the state which carries out the attack."[8]

This paper deals with the legality of targeted killing operations as a counter-terrorism measure used by states. For the purposes of this paper, 'terrorism' means the deliberate causing of death or other serious injury to civilians, for political or ideological ends.[9]

5 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Human Rights Council, A/HRC/14/24/Add.6, 2010 [hereinafter: UN Special Rapporteur on Extrajudicial Killings], p. 5.

6 Nils Melzer, Targeted Killings in International Law (Oxford University Press, 2008), pp. 4–5.

7 Chris Downs, *'Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike*, 9(2) J. Conflict and Security L. 280 (2004).

8 David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?,* 16(2) The European Journal of International Law 171 (2005), p. 176. For a similar approach, see Mordechai Kremnitzer, *Targeted Killing Policy: Insufficiently Limited*, 44 Justice 38 (2007).

9 Kretzmer, *id*., p. 175. We shall delve more deeply into these definitions later in this paper, while discussing the question of who may be targeted. For a more elaborate discussion of the definitions of terrorism, *see*: Cyrille Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, 27 Cardozo L. Rev. 1987 (2006); Samuel Scheffler, *Is Terrorism Morally Distinctive?*, 14(1) The Journal of Political Philosophy 1 (2006).

# III. The Normative Legal Frameworks that Apply to Targeted Killings

Two alternative normative frameworks may apply to targeted killing operations: the law enforcement framework and the armed conflict framework. The former controls law enforcement operations generally, while the latter controls military operations conducted within the context of a specific armed conflict. Much of the controversy over targeted killings relates to the applicable legal framework and to the legal norms governing such operations.

The tactics used by terror organizations (including conducting military operations from within civilian areas or hiding weapons in such areas) and the difficulty in distinguishing between terrorists and innocent civilians, have challenged the implementation of these legal frameworks. On the one hand, the law enforcement model seemed too weak, too slow and, in general, inadequate to properly respond to large-scale attacks; on the other hand, the application of the means and methods utilized in the laws of war outside of the traditional battlefield puts civilians in great danger, as it brings a full scale battlefield into their homes. Moreover, the traditional definitions of International Humanitarian Law [hereinafter: IHL] failed to adequately characterize suspected terrorists: They could not enjoy the protections reserved for civilians, but at the same time—were not granted the legitimacy of lawful combatants. Neither the law enforcement nor the armed conflict model were prepared or equipped to confront this new threat. And so, gradually, the futile attempts to choose one of these existing models and apply it to terrorism have caused considerable erosion of some of the core principles of these models: Both in the law enforcement principle that every man is presumed innocent until proven guilty beyond a reasonable doubt, and the law of war principle that we must carefully distinguish between legitimate military targets and protected civilians.

While in many of the existing international conventions the phenomenon of terrorism is perceived as a criminal offense that must be dealt with according

to criminal law,[10] some states that confront terrorism (including the US and Israel) and even the UN Security Council, in some of its resolutions, view the 'war on terror' as part of an armed conflict rather than a merely criminal phenomenon.[11] Unfortunately, terrorism is a versatile phenomenon, which should be treated as one. While some acts of terrorism constitute domestic or international crimes, which should be prosecuted and dealt with by means of law enforcement, other acts of terrorism may rise to the level of 'protracted armed violence,' thereby constituting an armed conflict.[12]

Determining that an armed conflict between a state and a terror organization exists is not enough. It is also necessary to determine the temporal and geographical boundaries of that armed conflict. The conflict between the US and Al-Qaeda is a good example: On the one hand, the United States and its supporters argue that the conflict—and therefore their targeting powers under IHL—extends to wherever the alleged enemy is found.[13] On the

10 *See, e.g.,* International Convention for the Suppression of Terrorist Bombings, 15 December 1997, UN Doc., A/RES/52/164; International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, UN Doc., A/RES/54/109; International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005, UN Doc., A/RES/59/290.

11 Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); CrimA 6659/06 A v. State of Israel, 62(4) IsrSC 329, at pp. 339–340 (2008), available in English at www.elyon1.court.gov.il/verdictssearch/englishverdictssearch.aspx; UN Security Council Resolution 1373, S/Res/1373 (2001).

12 Prosecutor v. Tadic, ICTY, Case No. IT-94-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

13 See, for example, the remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, at the Harvard Law School Program on Law and Security: "An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to "hot" battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that — in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves." *Strengthening our Security by Adhering to our Values and Laws*, available at: www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

other hand, European states, human rights groups and scholars, counter that the armed conflict should be geographically limited to the 'hot battlefields' or 'active hostilities' areas in Afghanistan and possibly northwest Pakistan.[14] Based on this view, while state actions within hot battlefields are subject to the laws of armed conflict, state actions outside these areas should generally be governed by the law enforcement model.[15] Interestingly, this later approach recently received some support from the U.S. itself: In their recent Drone Memo, the U.S. Department of Justice emphasized that "…according to the facts related to us, AQAP has a significant and organized presence, and from which AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States."[16] Prof. Goodman argues that by confining the use of lethal force to areas with a significant presence of enemy forces, from where attacks against the U.S. are launched, the memo injects a limiting principle for the geographic scope of the conflict with Al Qaeda.[17]

14 See, e.g., UN Special Rapporteur on Extrajudicial Killings, *supra* note 5, at p. 18; Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. Conflict and Security L. 245, 266 (2010); Jennifer C. Daskal, *The Geography of the Battlefield: a Framework for Detention and Targeting Outside the "Hot" Conflict Zone* 161(5) U. Pa. L. Rev. 1170 (2013) (*and see* citations in footnote 10.)

15 In a recent study on the geography of the battlefield, Daskal argues that the rules for targeted killings (as well as for any other means of war) ought to distinguish between the so-called 'hot battlefield' and elsewhere (zones outside of active hostilities). According to her view, lethal targeting outside a zone of active hostilities should be focused on those threats that are clearly tied to the zone of active hostilities and other significant and ongoing threats that cannot be adequately addressed through other means. These targeted killings shall be subject to individualized threat assessment, a least-harmful-means test, and significant procedural safeguards. Daskal, *id.*, p. 1208.

16 David J. Barron, Acting Assistant Attorney General, *Memorandum for the Attorney General: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi,* U.S. Department of Justice, Office of the Legal Counsel, July 16, 2010 [hereinafter: the Drone Memo], p. 27.

17 Ryan Goodman, *The OLC's Drone Memo and International Law's Ascendance,* Just Security, June 24, 2014.

According to this view, an armed conflict between a state and a terror organization is limited in its geographic scope to the areas in which active hostilities take place (areas of 'hot battlefield'). As Daskal suggests, zones of active hostilities should be geographically limited to areas in which there is actual fighting, a significant possibility of fighting, or preparation for fighting.[18] In the context of terrorist activity, such areas would include those places in which active, organized terrorists are planning or organizing attacks, even if they are only in their preliminary planning stages, as well as places from which such attacks are launched. This approach is consistent with international law, which limits the scope of non-international armed conflicts to 'protracted armed violence' involving 'organized armed groups.'[19] Nonetheless, such terrorist activities could extend the territorial boundaries of the armed conflict only so long as there exists sufficient convincing information that a concrete terror attack is in fact underway, and so long as such an attack is clearly tied to the active hostilities. This means that the mere presence of Al-Qaeda members in Yemen, for example, does not necessarily expand the armed conflict regime to those areas, and any such individuals should generally be governed by the law enforcement model, unless they present a concrete threat which is tied to the active zone of hostilities.

Outside of these active hostilities areas, the law enforcement model should generally apply. Typically, the jurisdiction of domestic law is limited to a state's territory and could be extended extraterritorially only under unique and limited circumstances (which could vary from state to state). Nonetheless, in addition to domestic laws, the law enforcement model contains international human rights law [hereinafter: IHRL], which applies, at least to some extent, extraterritorially.[20] It is well established that the

18 *Id*.

19 Prosecutor v. Tadic*, supra* note 12.

20 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1996), article 2 [hereinafter*:* ICCPR]. Van Schaack summarizes the current consensus, according to which States owe human rights obligations to all individuals within the authority, power, and control of their agents or instrumentalities. She further argues that the failure to acknowledge this established principle undermines the legitimacy of U.S. arguments in

universal human right to life, as enshrined in the International Covenant on Civil and Political Rights [hereinafter: ICCPR], extends to any territory or person within the power or effective control of a party to that treaty.[21] The United Nations Human Rights Committee, and later on the International Court of Justice [hereinafter: ICJ], have specifically affirmed the ICCPR's extraterritorial application to military operations outside the territory of the state concerned.[22] In its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, the ICJ concluded that the ICCPR's reach extends to "acts done by a State in the exercise of its jurisdiction outside its own territory."[23]

Other international human rights instruments, such as the European Convention on Human Rights (ECHR), also enjoy some extraterritorial jurisdiction. However, the European Court of Human Rights' (ECtHR) case law on this matter is somewhat inconsistent. In *Al-Skeini*, one of its recent decisions on extraterritoriality of the procedural aspects of the ECHR right to life, the ECtHR concluded that the ECRH extends to situations when a contracting party (a) detains or exercise physical power and control over a person anywhere in the world, or (b) occupies or otherwise effectively

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these fora as well as its commitment to the human rights project more broadly. Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change,* 90 Int'l L. Stud. 20 (2014), pp. 22–23.

21 Robert K. Goldman, *Extraterritorial Application of the Human Rights to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflicts,* in Robert Kolb and Gloria Gaggioli (eds.), Research Handbook on Human Rights and Humanitarian Law (2013), p. 107.

22 *Id.*, p. 106, and the reference provided there to the Concluding Observations on Israel, Human Rights Committee, 21 August 2003 (UN Doc. CCPR/CO/78/ISR), para. 178. And see, also: Concluding Observations of the Human Rights Committee: United States of America, UN doc. CCPR/C/USA/CO/3/Rev.1, 18 December, 2006, para. 10; Armed Activities on the Territory of Congo (Congo v. Uganda), Judgment, 19 December 2005, ICJ Reports 2005, 168, paras. 216–217.

23 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports (2004), 136, paras. 109–111.

controls the territory of another state.[24] Scholars point out that according to the reasoning of the *Al-Skeini* decision, it seems that states would incur no liability if its agents targeted and killed a person in another state whose territory, at the time, was not subject to its effective control.[25] Nonetheless, they find that this outcome creates a 'glaring and unseemly gap in legal protection,'[26] 'rests on shaky ground,'[27] is 'unfortunate,'[28] and 'unsustainable.'[29] In an effort to resolve this inconsistency, Yuval Shany suggests adopting a functional approach to the extraterritoriality of international human rights law: Namely, requiring states to apply IHRL in situations in which they can do so.[30] Shany stresses that the important factor to be considered in determining extraterritorial application of IHRL is the nature of the relationship between governments and persons and not the location of the interaction.[31]

We agree with Shany's approach, which we find both practical and inherently consistent. It bridges gaps in the current inconsistent extraterritorial application of IHRL, and is consistent with our general approach towards a more coherent application of IHRL and IHL to situations which involve the use of force outside the substantive and geographical boundaries of armed conflicts.

24 App. No. 55721/07, Al-Skeini and others v. United Kingdom, 7 July 2011 (hereinafter Al-Skeini GC). See also App. No. 52207/99, Bankovic and Others v. Belgium and Others [GC] (dec.), 12 Dec. 2001

25 Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg,* 23(1) The European Journal of International Law 121 (2012), p. 130; Goldman, *supra* note 21, p. 109.

26 Goldman, *id*., p. 109.

27 Milanovic, *supra* note 25.

28 *Id*.

29 *Id*.

30 Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law,* 7(1) L. and Ethics of Hum. Rts. 47 (2013), p. 71.

31 While Shany limits this broad extraterritorial applicability to situations where there exists 'intense power relations' or 'special legal relations,' it is clear that targeted killings of individuals fall under this functional extraterritorial applicability approach. *Id*.

## A. The Law Enforcement Framework: Targeted Killing Operations Outside Zones of Active Hostilities

The law enforcement paradigm contains both criminal law and human rights norms (domestic and international). Under this framework, suspected terrorists should be treated like any other criminal suspects (including those suspected of involvement in organized crime, as well as trafficking in drugs, weapons or human beings). Under extreme circumstances, terrorism may pose a severe and unique threat to public safety that justifies declaring a state of emergency within the state. During times of emergency, a derogation regime may apply, enabling states, under certain conditions, to derogate from some of the protected human rights and to limit their scope of application in order to maintain peace and security. Nonetheless, no such derogation is allowed with regard to the right to life.[32]

Generally, under the law enforcement legal framework, states are permitted to kill a person who is not in their custody only in rare and extreme situations, *if the use of deadly force is necessary to prevent a threat of death or serious injury to others*.[33] Melzer sets forth five cumulative requirements necessary for a targeted killing operation to be lawful under the law enforcement framework: (1) there is a sufficient legal basis under the relevant domestic law; (2) it is of an exclusively preventive (and not punitive) nature; (3) it aims at protecting human life against an unlawful attack; (4) it is absolutely necessary for the achievement of this purpose; and (5) it is the undesired *ultima ratio*, and not the actual aim, of an operation which is planned, prepared and conducted so as to minimize the recourse to

32 Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 Denv. J. Int'l L. and Pol'y (2003), p. 65; article 4 of ICCPR, *supra* note 20.

33 Richard Murphy and John Radsan, *Due Process and Targeted Killing of Terrorists*, 31(2) Cardozo L. Rev. 408–9 (2009). Blum and Heymann further discuss the applicability of the defense of necessity under US law with regard to targeted killing operations. Gabriela Blum and Philip Heymann, *Law and Policy of Targeted Killings,* 1 Harv. Nat'l Security J. (2010), p. 160.

lethal force.[34] A less restrictive interpretation of law enforcement framework could seriously undermine basic values of law enforcement, including the presumption of innocence, the right to a fair trial, the protection of the right to life and ultimately—the rule of law itself.

As mentioned, the law enforcement framework includes not only the relevant domestic laws, but also ***international human rights norms***, especially those concerning the use of lethal force. These, on their part, protect the ***right to life*** and forbid any derogation from it, even in times of emergency.[35] However, the protection of the right to life under IHRL is not absolute and only extends to 'arbitrary' deprivations of life. Moreover, under article 2(2) of the ECHR, 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 absolutely necessary in order to defend any person from unlawful violence.[36] The establishment of the *'absolutely necessary'* standard includes two distinct requirements: the proportionality test (limiting the permissible level of force based on the threat posed to others by the suspect); and the necessity test (which imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate).[37]

The requirement of ***proportionality*** means, in this context, that the nature of the concrete threat removed by the use of lethal force must justify the taking of human life, regardless of whether this would be necessary in

34 Melzer, *supra* note 6, p. 239.

35 ICCPR, *supra* note 20, articles 4, 6; European Convention of Human Rights of 1950 [hereinafter: ECHR], art. 2(2), 15; B.G. Ramcharan, The Right to Life in International Law (Martinus Nijhoff Publishers, 1985), at 51.

36 Art. 2(2) of the ECHR includes two more cases in which such a deprivation of life will not be considered a violation of the right to life: Effecting a lawful arrest or preventing the escape of a person lawfully detained; and action lawfully taken for the purpose of quelling a riot or insurrection.

37 McCann v UK, 21 EHRR (1996) 97, at para. 149. *See also*, Kretzmer, *supra* note 8, at pp.177–178; UN Special Rapporteur on Extrajudicial Killings, *supra* note 5, at p. 11. Melzer adds two more requirements: (a) requirement of sufficient legal bases; and (b) requirement of precaution. Melzer, *supra* note 6, pp. 116–117.

order to remove that threat.[38] The requirement of ***necessity*** means that the use of lethal force, at the moment of its application, is absolutely necessary to achieve a legitimate aim (and that this legitimate aim cannot be achieved without resorting to lethal force).[39]

While the law enforcement paradigm has its advantages (mainly, meaningful guarantees of basic human rights), the severity of the threats of terrorism has led decision-makers around the world to reform the traditional paradigm and to stretch its boundaries in order to grant national authorities stronger enforcement powers at the cost of compromising the human rights of people suspected of terrorist activity.[40] Moreover, not only is there a risk that the criminal process will be jeopardized- doctrines developed in the terrorism context may migrate beyond that context to affect other areas of criminal law.[41] This emphasizes the importance of a nuanced approach to combating terrorism: To apply the law enforcement and the criminal legal system to criminal peace-time activities, while applying armed conflict norms to high-scale hostilities, as will be elaborated upon in the next section.

38 Melzer, *id.,* p. 117; McCann, *id.*, para. 192; Kelly and Others v. the United Kingdom, ECHR 30054/96, Strasbourg, May 4, 2001.

39 Melzer, *id.*, p. 116; Nachova and Others v. Bulgaria, ECHR 43577/98, Strasbourg, July 6, 2005, para. 108.

40 States may adjust the criminal process in ways that undermine its safeguards but enable them to more effectively capture suspects who have not yet but still might commit an attack, and thus may be contaminating the criminal process. Robert Chesney and Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 Stan. L. Rev. 1079 (2008); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide,* 33 Yale J. Int'l L. 369 (2008), p. 384.

41 Kent Roach, *The Criminal Law and Terrorism*, in Global Anti-Terrorism Law and Policy (Cambridge University Press, Victor V. Ramraj, Michael Hor and Kent Roach eds., 2005), p. 139.

## B. The Armed Conflict Framework: Targeted Killing Operations during Armed Conflicts

### (1) Preliminary Categorizations

Sometimes terrorist activities may constitute armed conflict—international or non-international—or take place within the context of such conflict. An ***international armed conflict*** includes:

> Any difference arising between two States and leading to the intervention of members of the armed forces […] even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces.[42]

Therefore, when terrorist activities can be attributed to a state, thus triggering the conduct of hostilities between the armed forces of those states, the IHL norms governing international armed conflicts will apply to the conduct of hostilities between those states. For example, the hostilities between the US and Afghanistan, immediately following the terror attacks of 9/11, constituted an international armed conflict.[43]

Nonetheless, many of the armed conflicts between states and terrorist organizations do not involve more than one state and therefore cannot be

42 Jean S. Pictet (ed.), The Geneva Conventions of 12 August 1949; Commentary (1958), p.23. This definition was reaffirmed later on by the ICTY in the Delalic case (judgment of 16 November, 1998), para. 184, 208. See also: Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (Cambridge University Press, 2004), pp. 14–16; Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (merits), ICJ judgment of 27 June 1986, para. 14, 114.

43 Dinstein, *id.*, at p. 16; Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153(2) U. Pa. L. Rev. 675, pp. 713–714 (2004).

considered international armed conflicts. In such cases, when the intensity and gravity of the terrorist organization activities reach a high level, a ***non-international armed conflict*** may arise between the state and the terrorist organization. A non-international armed conflict includes all situations of sufficiently intense or protracted armed violence between identifiable and organized armed groups, regardless of where they occur, as long as they do not involve more than one state.[44] It should be emphasized that not every act of violence constitutes a non-international armed conflict. Normally, the use of force among private individuals, and between private individuals and public authorities, is governed by domestic criminal law and the paradigm of law enforcement.[45] In order to qualify as a non-international armed conflict, 'protracted armed violence' is required,[46] and the use of force must go beyond the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.[47] While an international armed conflict is governed by the IHL regime as a whole, a non-international armed conflict triggers only the common article 3 of the Geneva Conventions as well as Protocol II Additional to the 1949 Geneva Conventions.[48]

When the hostilities or violence caused by terror organizations constitute an 'armed conflict' (whether an international or non-international armed conflict), the prevailing normative regime is the law of armed conflict

44 Melzer, *supra* note 6, p. 261.

45 *Id.*, p. 256.

46 Prosecutor v. Tadic*, supra* note 12, para. 70; Rome Statute of the International Criminal Court, 1998 [hereinafter: Rome Statute], article 8(2)(f).

47 Additional Protocol II to the 1949 Geneva Conventions, 1977, article 1(2) [hereinafter: APII].

48 Lindsay Moir, The Law of Internal Armed Conflict (Cambridge University Press, 2002), at p. 1. It should be noted, however, that APII only applies to non-international armed conflicts taking place in the territory of a state, between its own armed forces and non-state actors. And see, also: Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC, 1987), para. 4453.

(or IHL).[49] Nonetheless, while IHL is the *lex specialis* during an armed conflict, it is not the only applicable set of rules. In the past decade or so it was gradually established that even in the conduct of hostilities, the international human rights regime still applies, although in part it is superseded by the *lex specialis*, IHL.[50]

As part of the *lex specialis* of war, IHL grants the state broad authority to kill enemy combatants as well as civilians who directly participate in the hostilities. However, it also imposes significant limitations on states' power, as well as minimum standards of humane treatment of individuals.[51] These rules vary depending on the relevant context (an international or non-international armed conflict) and on the identities of the targets (combatants, civilians or civilians directly participating in the hostilities). With regard to terrorism, both these categorizations are not always easy to make. State practice and academic literature on international law differ as to whether such an armed conflict—between a state and a terror organization—should be regarded as an international armed conflict, as a non-international armed conflict or as a new type of conflict that is not yet recognized by traditional international law. The classification of the conflict determines the unique set of norms that would apply. Moreover, state and international practices, as well as the scholarly legal literature, characterize terrorist groups' members differently: as civilians, combatants, and civilians directly participating in the hostilities or 'unlawful combatants.' The controversies surrounding these issues are substantial, and numerous contradictory academic articles have been written on this topic, claiming that international law dictates one

49 Yuval Shany, *The International Struggle Against Terrorism—The Law Enforcement Paradigm and the Armed Conflict Paradigm*, Parliament, IDI (2008).

50 Kretzmer, *supra* note 8, p. 185; Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL (2000) 239. This theory was adopted by the ICJ in the Nuclear Weapons case back in 1996 (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996 [1996] ICJ Rep 226 [hereinafter: Nuclear Weapons case]) and was repeated later on in several cases, including the separation wall advisory opinion: Construction of a Wall Advisory Opinion, *supra* note 23.

51 Murphy and Radsan, *supra* note 33, pp. 408–9.

characterization or another.[52] The significance of this characterization lies in its normative implications: Theoretically, the Third Geneva Convention applies to combatants; the Fourth Geneva Convention applies to civilians; and only the third common article to the Geneva Conventions (along with the "Martens Clause") applies to 'unlawful combatants.'[53]

As was determined by both the U.S. Supreme Court and the Israeli High Court of Justice [hereinafter: HCJ], terrorists cannot be characterized as 'combatants.' By definition, terrorists do not fulfill the requirements specified in article 4 of the Third Geneva Convention, including the requirement to conduct their operations in accordance with the laws and customs of war.[54] From a policy perspective, we agree that it is undesirable to treat terrorists as lawful combatants, thus granting them combatants' privileges (including permission to engage in the hostilities, immunity from criminal prosecution following such participation and other privileges that stem from prisoner of war status, as elaborated upon in the Third Geneva Convention),[55] as well as

52 See, for example, Knut Dormann, *The Legal Situation of 'Unlawful/Unprivileged' Combatants*, 849 IRRC 45 (2003); Gerald L. Neuman, *Humanitarian Law and Counterterrorist Force*, 14 EJIL 283 (2003); Georg Nolte, *Preventative Use of Force and Preventative Killings: Moves into a Different Legal Order*, 5 Theoretical Inquiries in Law 111 (2004); Kenneth Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle over Legitimacy*, 11 Harvard Program on Humanitarian Policy and Conflict Research (2005); Jason Callen, *Unlawful Combatants and the Geneva Conventions,* 44 Va. J. Int'l L. 1025 (2004); Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 Case W. Res. J. Int'l L. 227 (2002); Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?,* 38 ILR 378 (2005).

53 Hamdan v. Rumsfeld, *supra* note 11.

54 In its Targeted Killing Case, the Israeli High Court of Justice held that members of terrorist organizations are not combatants, since they do not fulfill the conditions for combatants under international law. For example, they do not comply with the international laws of war. Therefore, it determined that members of terrorist organizations have the status of civilians, whose protections under international law applies as long as they do not directly participate in the hostilities. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr., 57(6) Isr SC 285 [2005] [hereinafter: the Targeted Killing Case], para. 25–28.

55 This contention, of course, is directly connected to—and limited by—the definitions of 'terrorist' and 'terrorism.'

legitimizing their participation in the conflict. Therefore, suspected terrorists should be treated as civilians.[56]

As to the developing third category of 'unlawful combatants'—there is substantial controversy in the literature (and inconsistent states' practice) concerning the legal meaning (and applicability) of this category.[57] The term is widely used to describe persons who lack combatant status under international law but take an active part in hostilities in an international armed conflict.[58] The United States, for example, takes the position that members of terror organizations are 'unlawful combatants,' who are protected only by the third common article to the Geneva Conventions and the Martens Clause (which includes the requirement of 'due process').[59] Nonetheless, the term 'unlawful combatant' does not appear in any of the Geneva or Hague conventions, regulations and protocols, and, therefore, does not denote a recognized status of persons involved in armed conflict.[60]

In our opinion, the creation of a new, status-based category, which was not recognized by any of the Geneva Conventions or Protocols, is dangerous. It deviates from the fundamental IHL principle of distinction, and from the idea that each status-based category is accorded unique privileges or protections.

## (2) Permissibility of Targeted Killings under IHL

### a. The Existence of Armed Conflict and the Conduct of Hostilities

See, *supra*, section B(1).

56 Indeed, this was the decision of the Israeli High Court of Justice in the Targeted Killing Case, *supra* note 54. For a different characterization, see the US Supreme Court decision in the Hamdan case, *supra* note 11.

57 See, for example, *supra* note 52.

58 David Kretzmer, *Unlawful Combatants*, The Encyclopedia of War (Wiley-Blackwell, 2011).

59 Hamdi v. Rumsfeld*, supra* note 11*;* Hamdan v. Rumsfeld, *supra* note 11.

60 Kretzmer, *supra* note 58.

### b. Military/Imminent Necessity

One of the fundamental principles of IHL is the principle of military necessity.[61] It requires that the kind and degree of force resorted to would be necessary for the achievement of a concrete and legitimate military advantage, and that it must not otherwise be prohibited under IHL.[62] Therefore, like any other military actions taken during the course of hostilities, the lawfulness of direct attacks against terrorists is subject to the requirement of military necessity. In order for considerations of military necessity to override humanitarian considerations, the military necessity should be "concrete, direct and definite,"[63] and the operation must be likely to contribute effectively to the achievement of a concrete and direct military advantage.[64]

In our opinion, in order to adequately apply the principle of military necessity to the context of terrorism, it should be interpreted to include a requirement of responding to an imminent threat. In traditional warfare, any combatant is a legitimate military target, and killing such a combatant is considered to meet the test of military necessity. As explained above, members of terror organizations are not combatants, and therefore targeting such individuals will not always fulfill the military necessity requirement. For example, targeting a terror organization member who performs religious duties, serves as a cook, or even collects general information, cannot be justified as fulfilling a "concrete, direct and definite" military necessity.

Generally, the necessity principle requires distinguishing between members of terror organizations who actively participate in the hostilities, and those whose membership in the organization and individual activities

61 Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,* 50(4) Va. J. Int'l L. 795 (2010), p. 796; Burrus M. Carnaha, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 Am. J. Int'l L. 213 (1998).

62 Melzer, *supra* note 6, p. 286.

63 *Id.*, pp. 292–293.

64 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Geneva, 8 June 1977, 1125 UNTS 3 [hereinafter: API], article 52(2); President Obama's national security speech, May 23, 2013.

do not include active participation in hostilities and therefore cannot be considered legitimate targets. Naturally, it is not easy to distinguish between suspected terrorists and civilians, nor is it simple to determine their exact ties to the terror organization. In addition to the sometimes vague nature of membership in terror organizations, including the various social functions these organizations often provide, we should also take into account how necessity determinations are made. Such determinations are made based on secret intelligence information, which can rarely—if ever—be challenged. Therefore, we submit that the principle of military necessity should be interpreted and implemented in this context to include a requirement of imminent necessity. Under this principle, the killing of a suspected terrorist will only be deemed 'necessary' if the *threat* they pose is concrete and imminent. Indeed, this is the declared policy of the current US administration. In his speech at Northwestern University School of Law in March 2012, Attorney General Eric Holder stated that targeted killings are only lawful and legitimate when the targeted individual poses an ***imminent threat*** of violent attack against the United States.[65] Recently, in his annual national security speech, President Obama stated the following:

> We act against terrorists who pose a continuing and imminent threat to the American people and when there are no other governments capable of effectively addressing the threat.

The Drone Memo determined that Al-Aulaqi posed a 'continued and imminent' threat.[66] Unfortunately, it left open important questions concerning how

65 Attorney General Eric Holder, speech at Northwestern University School of Law regarding targeted killing, March 5, 2012 [hereinafter: Holder's Speech]. And see, also, the Department of Justice White Paper, *supra* note 3, p. 6. Nonetheless, the white paper demonstrates the need to carefully interpret such a requirement. While the white paper requires the existence of an 'imminent threat of violent attack', it later explains that such an imminent threat does not require the United States to have clear evidence that a specific attack will take place in the immediate future. *Id*., p. 7.

66 The Drone Memo, *supra* note 16.

this determination was made, the level of proof required and the quantity and quality of the required evidence to make such a determination. Most importantly, it is unclear how the requirement of imminence could be determined about 14 months before the actual use of lethal force.[67]

### c. The Principle of Distinction

In an armed conflict paradigm, the lawfulness of an intentional killing operation depends, predominantly, on the distinction between legitimate military targets and protected civilians.[68] As a general rule, the principle of distinction permits direct attacks only against the armed forces of the parties to the conflict, while the peaceful civilian population must be spared and protected from the effects of the hostilities.[69] Nevertheless, this general rule has several important exceptions. *First*, combatants cannot be targeted while they are 'hors de combat' (i.e., have surrendered, are wounded or are otherwise incapable of fighting). *Second*, civilians are not always protected against direct attack: They are legitimate targets while directly participating in the hostilities.[70] Therefore, the category of persons who do not benefit from immunity against direct attack includes not only combatants, but also civilians directly participating in the hostilities, as well as medical, religious, and civil defense personnel of the armed forces or persons hors de combat who commit hostile acts despite the special protection afforded to them.[71]

67 For further discussion of these issues, see: Jennifer Daskal, *Reflections on What the Drone Memo Does and Does Not Say*, Just Security, June 24, 2014.

68 API, *supra* note 64, article 48.

69 Melzer, *supra* note 6, pp. 300–301; Nuclear Weapons Case, *supra* note 50, para. 78.

70 API, *supra* note 64, article 51(3); APII, *supra* note 47, article 13(3). For a thorough normative and practical interpretation of the meaning of 'direct participation,' see section IV *infra*.

71 Geneva Convention I for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 1949 [hereinafter: Geneva Convention I], article 24; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 [hereinafter: Geneva Convention II], article 26; API, *supra* note 64, articles 12(1), 41(1), 41(2), 67(1). While this terminology and these

Applying the principle of distinction to attacks directed against suspected terrorists poses a difficult challenge to the attacking forces. More specifically, it challenges the broad status-based protections accorded to civilians by the Geneva Conventions. The challenge is dual: *first*, it is often difficult to determine the precise role or involvement of a civilian in terror activities; *second*, since terrorists typically operate within populated areas and hide among the civilian population, mistakes in identifying targets are more likely, at least potentially, to put innocent civilians at risk. We shall return to some of these issues in section IV, while discussing the meaning of 'direct participation in hostilities' [hereinafter: DPH]. The presence of suspected terrorists in the vicinity of civilian neighborhoods also increases the risk of harming innocent bystanders, which we shall now discuss as a part of the proportionality principle.

### d. The Principle of Proportionality

The principle of proportionality is part of customary IHL applicable both in international and in non-international armed conflicts.[72] Therefore, a targeted killing operation which is militarily necessary and is directed against an individual representing a legitimate military objective, must additionally comply with the principle of proportionality. According to the principle of proportionality, launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.[73] In contrast to the

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references relate to international armed conflict, the same basic distinctions and protections against direct attacks apply to non-international armed conflict as well. See: APII, *supra* note 47, articles 4(1), 7(1), 9(1), 13; common article 3 of the Geneva Conventions, 1949. *See also*, Melzer, *supra* note 6, p. 314, arguing that in both international and non-international armed conflicts, the category of persons protected against direct attack includes peaceful civilians, medical and religious personnel, as well as persons hors de combat.

72 Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Vol I: Rules (Cambridge University Press, 2005), Rule 14, p. 46.

73 *Id.*

proportionality assessment under the law enforcement paradigm, the main focus of the principle of proportionality during the conduct of hostilities is not the damage or harm caused to those persons who are the target of the operation, but the 'collateral damage' inflicted on peaceful bystanders.[74]

The Israeli HCJ has applied the IHL principle of proportionality in various contexts, concerning different military means employed by the Israeli Defense Force [hereinafter: IDF], including targeted killings. In the Targeted Killing Case, (then) Supreme Court President Aharon Barak held that a targeted killing operation, much like any other reviewed military measure, must conform to three proportionality requirements: (i) rational link—the means selected should rationally lead to the desired military objective; (ii) least-injurious alternative—the means selected ought to cause the least possible humanitarian harm and (iii) proportionality *stricto sensu*—the harm caused by the measure should stand in reasonable proportion to its anticipated military benefits.[75]

Furthermore, the Court determined that the principle of proportionality applies to targeted killing operations on two distinct levels: *first*, it is necessary that the anticipated collateral damage (i.e., harm to innocent civilians and bystanders) will not be excessive as compared to the anticipated military advantage; and *second*, with regard to the intentional targets, the Court determined that lethal force should not be used if other, less harmful means, are available. In the Court's words:

> [A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct

74 Melzer, *supra* note 6 p. 359. And, *see also* Rome Statute, *supra* note 46, article 8(2)(b)(iv).

75 HCJ 2056/04 Beit Sourik Village Council v. Gov't of Israel [2004] IsrSC 58(5) 807 (an English translation is available at:http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf, at para 41).

> part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed (*see* Mohamed Ali v. Public Prosecutor [1969] 1 A.C. 430). Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force.[76]

Yuval Shany and Amichai Cohen criticize this decision. They agree that the need to limit collateral damage requires attacking forces to adopt measures that would be least injurious to civilians not taking a direct part in hostilities. Nonetheless, they argue that the Court's conclusion according to which "armies must always resort to less injurious alternatives in all cases involving civilians taking a direct part in hostilities (even if such hostilities take place in foreign territory)" is, at best, unsubstantiated and probably also inaccurate.[77] Indeed, it seems that this determination by the Court deviates from classic IHL interpretations of the proportionality principle, and derives its validity from general human rights norms and the centrality of the right to life; nonetheless, in our opinion, the Court was right in adopting an approach which respects and fulfills the humanitarian purposes of this principle. Classic IHL was not designed to cope with transnational terrorism, and terrorists are not classic combatants who constitute distinguishable military targets at all times. Targeted killing of suspected terrorists is a military means which is intended to kill—not to weaken or to neutralize—hostile civilians (as oppose to lawful combatants.) As early as 1868, the St. Petersburg Declaration—one of the earliest IHL documents—proclaimed:

> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

76 Targeted Killing Case, *supra* note 54, para. 40.

77 Amichai Cohen and Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5(2) J. Int'l Crim. Justice 315 (2007).

> That for this purpose it is sufficient to disable the greatest possible number of men;
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.[78]

Keeping this monumental text in mind, it is not difficult to embrace the Court's interpretation of the principle of proportionality with regard to this unique military method.[79] Classic IHL did not envisage 'kill lists' and individualized killing operations directed against specific dangerous civilians. Using this method as a last resort—when capture is not feasible—serves to tailor this unique method of counterterrorism to the purposes and principles of IHL (especially the principle of distinction and the challenges it poses in the context of identifying suspected terrorists as legitimate targets for attack). Indeed, this is the declared policy of the current US administration. Attorney General Eric Holder has stated that targeted killings are only lawful and legitimate when capture is not feasible.[80] The U.S. Drone Memo suggests that targeted killings would violate the Fourth Amendment if capture *was* feasible.[81] Moreover, limiting the principle of proportionality (in the context of targeted killings) to collateral damage calculations alone risks turning the proportionality assessment into a meaningless exercise, as preventing a terror attack could potentially justify almost any collateral damage.

And indeed, with regard to proportionality in its 'strict sense,' the Court offered only limited guidance, referring to two considerations: (i) the desired military advantage should be 'direct and anticipated'; (ii) an act of balancing ought to be performed between the 'state's duty to protect the lives of its

78 The preamble to the St. Petersburg Declaration, 1868. See, also: Nuclear Weapons Case, *supra* note 50, 257.

79 And see also, the 'Martens Clause,' Hague Convention IV, 1907.

80 Holder's speech, *supra* note 65.

81 Drone Memo, *supra* note 16, p. 41. Nonetheless, it is still silent with regard to how feasibility will be determined, and how could such decisions be reviewed.

soldiers and civilians' and its 'duty to protect the lives of innocent civilians harmed during attacks on terrorists.'[82] The first consideration supports our contention that targeted killing operations are legally justified only to prevent a concrete attack that is already in the planning or preparatory stage (and therefore there is a 'direct and anticipated' military advantage to the operation).[83] The second consideration, in our opinion, is too abstract to set a standard for the application of the proportionality principle in specific cases.[84] The Court did not provide a concrete formula for this calculation, nor did it offer a numerical death toll or other practical clear-cut tests that would help in making proportionality determinations in real-time scenarios. As many commentators agree, the difficulty with the principle of proportionality *stricto senso* lies with its open-ended application, which largely depends on the person applying the test. One commentator, who had previously served as a military lawyer for 20 years, stated that "a human rights lawyer and an experienced combat commander would probably not assign the same relative values to military advantage and to injury to noncombatants."[85] Since this

82 Targeted Killing Case, *supra* note 54, para. 46. See, also, Cohen and Shany, *supra* note 77, p. 316.

83 This is consistent with the ICRC definition of the term, which was later adopted by the ICTY in the *Galic* Case. Prosecutor v Galic, ICTY Case No. IT-98–29-T Judgment and Opinion, 5 December 2003, para. 58, note 6; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (*eds.),* Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva, 1987 [hereinafter: ICRC Protocols Commentary], para. 2209.

84 See, also: Georg Nolte, *Thin or Thick? The Principle of Proportionality and International Humanitarian Law*, 4(2) Law and Ethics of Human Rights 245, 248 (2010).

85 Wiliam J. Fenrick, *Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives*, 27 Windsor Y.B. Access Just. 271 (2009); Schmitt emphasizes the case-by-case analysis required by the application of this principle: "Multiple civilian casualties may not be excessive when attacking a senior leader of the enemy forces, but even a single civilian casualty may be excessive if the enemy soldiers killed are of little importance or pose no threat." Michael N. Schmitt, *Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate,* 30 B.U. Int'l L. J. 595, 616; *see*, *also*: Gregory S. McNeal, *Targeted Killing and Accountability*, 102 Geo. L. J. 681, (2014). 750.

test is normally applied by military personnel, and not by human rights activists, this assessment demonstrates how the vagueness of the principle of proportionality is likely to dictate its actual implementation.

The HCJ interpretation of the principle of proportionality was further criticized by Nolte, who emphasized its potential impact on IHL more generally: According to Nolte, while the HCJ interpretation of the principle of proportionality appears to be 'thick' and sophisticated, it could, in fact, lead to reduced protection of civilians and civilian life in general.[86] Nolte argues that the price for this sophistication is a loss of clarity in practice, when decisions are made by military or security authorities, and not by capable and sophisticated courts.[87] Another important criticism (although not directly against the decision of the HCJ) relates to the urgent need to clarify the modalities of civilian harm, which is not limited to physical harm. Lieblich, for example, highlights the fact that incidental mental harm has largely been neglected in international discourse concerning collateral damage calculations, and argues that it should be incorporated into these assessments.[88]

### e. The Duty of Precaution

The principle of precaution in attack, which is considered to be of customary nature both in international and in non-international armed conflicts,[89] aims to prevent erroneous targeting and to minimize incidental harm to civilians during the conduct of hostilities.[90] According to the International Committee

86 Nolte, *supra* note 84, pp. 253–4.

87 Nolte warns that the HCJ's sophisticated interpretation of the proportionality principle might further erode civilian protections, simply because its implementation by militaries, in chaotic circumstances of armed conflicts, would likely render decisions to target civilians who might not be targeted under a clearer and less sophisticated rule. *Id*.

88 Eliav Lieblich, *Beyond Life and Limb: Exploring Incidental Mental Harm under International Humanitarian Law*, in Derek Jinks, Jackson Nyamuya Maogoto and Solon Solomon (eds.), Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects (TMC Asser Press, 2013).

89 Henckaerts and Doswald-Beck, *supra* note 72, Rules 15–21, p. 51.

90 API, *supra* note 64, article 57.

of the Red Cross Customary International Humanitarian Law project [hereinafter: ICRC IHL project], the principle of precaution contains several distinct obligations for those planning and deciding upon an attack, and for those responsible for its actual conduct. These obligations include: (a) the duty to do everything feasible to verify that the objectives to be attacked are legitimate military objectives;[91] (b) the duty to take all feasible precautions in the choice of the means and methods to be used in the attack, in order to avoid, or at least minimize, incidental harm to civilians;[92] (c) the duty to do everything feasible to assess whether the attack may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated, and if so, refrain from deciding to launch that attack;[93] and (d) the duty to do everything feasible to cancel or suspend the attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause excessive collateral damage.[94] 'Feasible precautions' are defined as "precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."[95]

In its judgment concerning the legality of targeted killings, the HCJ held that:

> The burden of proof on the attacking army is heavy (see Kretzmer, at p. 203; Gross at p. 606). In the case of doubt, careful verification is needed before an attack is made.[96]

91 Henckaerts and Doswald-Beck, *supra* note 72, Rule 16; API, *id.*, article 57(2)(a)(i).

92 Henckaerts and Doswald-Beck, *id.,* Rule 17; API, *id.*, article 57(2)(a)(ii).

93 Henckaerts and Doswald-Beck, *id.,* Rule 18; API, *id.*, Article 57(2)(a)(iii).

94 Henckaerts and Doswald-Beck, *id.,* Rule 19; API, *id.*, article 57(2)(b).

95 Convention on Certain Conventional Weapons, 1980, Protocol II, article 4. And see, also: Jean-Francois Que´guiner, *Precautions under the Law Governing the Conduct of Hostilities*, 88 Int'l Rev. of the Red Cross 864 (2006).

96 Targeted Killing Case, *supra* note 54, para. 40.

Supreme Court President Beinisch emphasized in this regard that:

> Since §51(3) is an exception to the duty to refrain from causing harm to innocent civilians, great caution must be employed when removing the law's protection of the lives of civilians in the appropriate circumstances. In the framework of that caution, the extent of information for categorization of a "civilian" as taking a direct part in hostilities must be examined. The information must be well based, strong, and convincing regarding the risk the terrorist poses to human life—risk including continuous activity which is not merely sporadic or one-time concrete activity. I should like to add that in appropriate circumstances, information about the activity of the terrorist in the past might be used for the purposes of examination of the danger he poses in the future. I further add that in the framework of estimating the risk, the level of probability of life threatening hostilities is to be taken into account. On that point, a minor possibility is insufficient; a significant level of probability of the existence of such risk is required. I of course accept the determination that a thorough and independent (retrospective) examination is required, regarding the precision of the identification of the target and the circumstances of the damage caused.[97]

While we fully agree with these determinations, it is important to note that targeted killings of suspected terrorists are based on secret 'kill lists' and on confidential intelligence information, which is not always easy to assess, especially when interpreted from the viewpoint of security agencies. We shall elaborate further on the duty of precaution in such circumstances while dealing with the concrete findings of the Shehadeh investigation commission, in section E below.

97 Targeted Killing Case, *id.,* in Supreme Court President, Justice Beinisch's concurring opinion.

# IV. The Main Challenges

## A. Who May be Targeted? The Substantive Scope of 'Direct Participation in Hostilities'

Legal scholars, judges and policymakers around the world have been grappling with this question for many years without reaching an agreed-upon practical and concrete solution. While the ICRC Commentary on the notion of DPH equates it to "acts of war which by their nature or purpose are likely to cause actual harm,"[98] others support more liberal interpretations of the term. Schmitt, for example, argues that grey areas should be interpreted liberally, i.e., in favor of finding direct participation. In his view, suggesting that civilians retain their immunity even when they are intricately involved in a conflict will only engender disrespect for the law by combatants endangered by such civilian involvement.[99] Moreover, Schmitt argues that only a more ***liberal interpretation*** of direct participation will provide the necessary incentive for civilians to remain as distant from the conflict as possible.[100]

Against this view, others consider such a liberal interpretation to be an unacceptable erosion of civilian protection,[101] and they advocate a ***restrictive approach*** to the term direct participation.[102] Melzer concludes that 'direct

98 ICRC Protocols Commentary, *supra* note 83, para 1944, discussing commentary on article 51 of API.

99 Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in H. Fischer (ed.), Crisis Management And Humanitarian Protection (Berliner Wissenschafts-Verlag, 2004), pp. 505–509.

100 *Id.*, p. 509.

101 Melzer, *supra* note 6, p. 341.

102 ICRC Protocols Commentary, *supra* note 83, para 1945; Watkin, *supra* note 52, pp. 657–660; Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, (ICRC, 2009) [hereinafter: ICRC DPH Guidance].

participation in hostilities' includes "any hostile act that is specifically designed to support one party to an armed conflict by directly causing—on its own or as an integral part of a concrete and coordinated military operation—harm to the military operations or military capacity of another party, or death, injury or destruction to persons or objects protected against direct attack."[103]

Unfortunately, state practice is no more telling: Governments refrain from exposing their criteria or working definitions for 'direct participation,' as well as the evidentiary standards of proof which are used to form their 'kill lists.' More disturbing is the fact that in some targeted killing operations, states have been justifying those operations based on past crimes rather than on future-based prevention (i.e., information includes some evidence concerning crimes that may have been committed in the past, and not evidence concerning the concrete future attack that the targeted killing operation is intended to prevent).

In our opinion, due to its severe and irreversible outcomes, direct participation should be interpreted and implemented in a very restrictive manner. *First*, unlike combatants, who are visibly distinguishable and who can be off-duty or discharged from service, the category of civilians who directly participate in hostilities is vague and has no clear boundaries. There are almost no visible characteristics, no time constraints or ability to be off duty or discharged, and no foreseeable end to hostilities; they don't have a clear and practical way to immediately detach themselves from terror organizations and their activities (without putting their lives at risk); and they are part of a civilian population and are located in civilian areas. Therefore, broadening this category will significantly increase the danger to innocent civilians. Since the objective of these operations is to *kill* the targeted individual, there is no way to repair or reverse mistakes, and any such mistake will critically endanger the principle of distinction. Since use of targeted killings is justified as a means to save civilians' lives from the threats of deadly terrorism—it should be construed and limited in a way that effectively protects civilians.

103 Melzer, *supra* note 6, p. 343.

*Second*, it is questionable whether targeted killing operations constitute an effective means to combat terrorism. In recent years, studies have been conducted to explore this question, many of which reached interesting conclusions concerning the counter-productive nature of targeted killing operations.[104] As Byman points out, the use of targeted killings prevents the use of interrogations to gather important information; it encourages acts of revenge and retaliation; it creates martyrs that increase the groups' popularity in their communities; true decapitation (killing the head or leader of a terror organization) is almost impossible due to decentralization in many terrorist organizations and furthermore, it can complicate peace negotiations.[105] More specifically, in a study designed to evaluate the effect of Israel's targeted killings policy on rates of Palestinian violence, Hafez and Hatfield found that targeted killings have no significant impact, in either the short or long term, on rates of Palestinian attacks. They conclude that targeted killings may be useful as a political tool to signal a state's determination to punish terrorists and placate an angry public, but "there is little evidence that they actually impact the course of an insurgency."[106] Moreover, in a recent large-scale empirical study focused on the effects of targeting the leadership of terrorist

104 International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law, Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan (2012); David A. Jaeger and Zahra Siddique, *Are Drone Strikes Effective in Afghanistan and Pakistan? On the Dynamics of Violence between the United States and the Taliban, Institute for the Study of Labor*, Discussion Paper No. 6262 (2011); Micah Zenko, *Reforming U.S. Drone Strike Policies, Council on Foreign Relations*, Special Report No. 65 (2013); Luke A. Olney, Lethal Targeting Abroad: Exploring Long-Term Effectiveness of Armed Drone Strikes in Overseas Contingency Operations, Georgetown Univ. (Master's Thesis 2011); *Do Drone Attacks Do More Harm than Good?*, New York Times Room for Debate, Sept. 25, 2012; Nick Hopkins*, "US Drone Attacks Counter-Productive', Former Obama Security Adviser Claims,* Guardian, Jan. 7, 2013.

105 Daniel Byman, *Do Targeted Killings Work?*, 85(2) Foreign Affairs (2006), pp. 99–100.

106 Mohammed M. Hafez and Joseph M. Hatfield, *Do Targeted Assassinations Work? A Multivariate Analysis of Israel's Controversial Tactic during Al-Aqsa Uprising,* 29 Stud. Conflict and Terrorism 359 (2006).

organizations on such organizations, Jenna Jordan analyzed 298 incidents of leadership targeting from 1945–2004 to determine whether and when decapitation is effective.[107] Based on the data collected, the study concludes that decapitation is not an effective counterterrorism strategy. In fact, the findings demonstrate that decapitation is more likely to have counterproductive effects in larger, older, religious, and separatist organizations. In these cases, decapitation not only has a much lower rate of success, but the marginal value is also negative. Interestingly, the study further found that organizations that have not had their leaders removed are more likely to fall apart than those that have undergone a loss of leadership. One of the case studies analyzed in Jordan's study concerns Israeli attacks against Hamas' leadership. She concludes that "Hamas, a religious and separatist group, is more resistant to leadership attacks" and finds that it was not affected by four years of sustained decapitation attempts and in fact became stronger: "Not only was Hamas able to continue its activities in the face of repeated attacks to its leadership, it gained strength as the intifada continued." Similarly, Pedahzur and Perlinger explain that Hamas has a strong structure of local networks making the organization very difficult to destabilize.[108]

These studies indicate that targeted killing as a counterterrorism method is at best of questionable efficacy, and at worst, is actually counter-productive, all the more so with regard to larger, older, religious and separatist organizations such as Hamas. We argue, therefore, that these undesirable and negative effects of targeted killing operations should serve as important considerations when determining the proper interpretation of the relevant law and defining the scope of DPH in this regard.

Watkin, following the restrictive ICRC approach to direct participation, emphasizes ***three cumulative criteria necessary to meet the requirement of direct participation in hostilities: (1) threshold of harm; (2) direct causation;***

107 Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leadership Decapitation,* 18 Security Stud. 719 (2009).

108 Ami Pedahzur and Arie Perlinger, *The Changing Nature of Suicide Attacks: A Social Network Perspective,* 84(4) Soc. Forces (June 2006). And see, also: Martha Crenshaw, *How Terrorism Declines,* 3(1) Terrorism and Pol. Violence (1991).

***and (3) belligerent nexus***.[109] The threshold of harm test is met "by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected from direct attack."[110] The materialization of the harm is based on an objective likelihood or a threshold of harm "which may reasonably be expected to result from an act in the prevailing circumstances."[111] The ICRC Interpretive Guidance significantly narrows the definition of activities that might constitute DPH based on the requirement of a direct causal link between the specific act and the likelihood of harm. It does this by introducing the concept of "one causal step,"[112] meaning that anything which simply builds up the capacity of a party to inflict harm "is excluded from the concept of direct participation in hostilities."[113] The Interpretive Guidance excludes the production and transport of weapons and equipment unless those acts are carried out as an integral part of a particular military operation specifically designed to directly cross the threshold of harm.[114] Similarly, recruitment, training and planning activities will meet this criterion only if such activities are specifically conducted to enable the execution of a concrete operation.[115] The final criterion is the belligerent nexus, where an act must not only be linked to the first two criteria, but also be specifically designed to support a party to the conflict.[116] Goodman and Jinks criticize the ICRC approach, and argue that the Interpretive Guidance is flawed in that it defines DPH too broadly, and fails to provide meaningful guidance on exactly when, if ever, humanitarian concerns should yield to military necessity.[117]

109 Watkin, *supra* note 52, p. 657.

110 ICRC DPH Guidance, *supra* note 102, p. 47.

111 *Id.*, p. 47.

112 *Id.*, p. 53.

113 *Id*.

114 Watkin, *supra* note 52, p. 658.

115 *Id*.

116 *Id.*, p. 659; ICRC DPH Guidance, *supra* note 102, p. 63.

117 Ryan Goodman and Derek Jinks, *ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: An Introduction to the Forum*, *42* N.Y.U. J. Int'l L. and Pol. 637, 639 (2010).

In its judgment on the legality of targeted killings, the HCJ adopted a broader and less restrictive ***test of functionality*** in order to determine the directness of the part taken in the hostilities. According to this test, a civilian directly participates in the hostilities when he performs the functions of a combatant. By applying the test of functionality, the Court therefore held that the following cases constitute direct participation: a person who collects intelligence on the army, "whether on issues regarding the hostilities… or beyond those issues";[118] a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, regardless of the distance from the battlefield. The Court went on to decide that civilians serving as 'human shields' for terrorists taking direct part in the hostilities, of their own free will, out of support for the terrorist organization, should be seen as persons taking a direct part in the hostilities.[119] Furthermore, the Court determined that the directness of participation should not be restricted merely to the person committing the physical act of attack: "Those who have sent him, as well, take 'a direct part.' The same goes for the person who decided upon the act, and the person who planned it."[120] With regard to persons who sell food or medicine to an unlawful combatant; persons who aid the unlawful combatants by general strategic analysis and provide them with logistic or general support, including monetary aid; or persons who distribute propaganda supporting those unlawful combatants—the Court determined that they take an indirect part in the hostilities.[121]

The UN report also adopted a test of functionality. Nonetheless, it interpreted this test narrowly, determining that direct participation may include only "conduct close to that of a fighter or conduct that directly supports combat."[122] More attenuated acts, such as providing financial

118 Targeted Killing Case, *supra* note 54, para. 35.

119 *Id.*, para. 36.

120 *Id.*, para. 37.

121 *Id.,* para. 35.

122 UN Special Rapporteur on Extrajudicial Killings, *supra* note 5, p. 19.

support, advocacy, supplying food or shelter, economic support and propaganda or other non-combat aid, do not constitute direct participation.[123] While the obvious cases—such as violent and active combat operations—do not raise many difficulties, there is still much room left for debate with regard to the many grey areas, which include various preparatory or supporting measures, such as gathering intelligence information, planning of hostilities or other violent activities, recruitment of personnel, transmission of fighters or weapons to the battlefield, and voluntarily serving as 'human shields' for terrorists taking a direct part in the hostilities. Moreover, it seems that the main difference between the ICRC causality approach and the HCJ functionality approach is that the former focuses on concrete terrorist attacks which are under way, while the latter focuses on the general combat role within the organization (which is not necessarily linked to an imminent and concrete terrorist attack.)

In our opinion, the ICRC approach is more nuanced and provides clear answers to practical dilemmas. The three cumulative tests, and especially the direct causation requirement, serve to narrow the scope of direct participation and to confine it to those who are truly acting as an integral and internal part of the combat efforts—in relation to a concrete terrorist attack which is under way. The 'test of functionality,' on the other hand, leaves more room for grey areas without prescribing clear answers to difficult cases, and allows states to target individuals who are not currently taking a direct part in a concrete terrorist attack.[124]

The use of human shields can serve to illustrate the differences between these two approaches. The HCJ's test of functionality treats voluntary human shields as legitimate targets under all circumstances. In contrast, the ICRC nuanced approach examines their exact activity, and the way in which they in fact participate in the hostilities, and allows treating them

123 *Id*.

124 In addition to widening the scope of combat activities, thus allowing the targeting of individuals who collect general intelligence; drive weapons trucks from a factory to a storage place; or voluntarily serve as human shields (other than creating a physical obstacle to a concrete military operation).

as legitimate targets only if by their activity they pose a physical obstacle to military operations (i.e., blocking the soldiers with their bodies and interfering with their activities), while treating them as protected persons if their presence on site only poses a legal (and not physical) obstacle (i.e., shifts the proportionality calculations).[125] **The focus of this test is not *activity based* but rather *status based*, and therefore deviates from the language, purpose and framework of article 51(3) of API, which sets an *activity-based norm*.** Using this mixed activity-based and causality-oriented test serves several goals: it sets a practical, clear and meaningful limitation on targeted killings; it satisfies the prevention purpose of targeted killing operations; it distinguishes suspected terrorists (who should be caught and prosecuted) from individuals who are currently in the midst of planning or executing a concrete attack; and it enables making this distinction ex ante, since it leaves no obscure grey areas.

## B. When? The Temporal Scope of Direct Participation in Hostilities ('For Such Time')

According to the law governing both international and non-international armed conflicts, a civilian loses their civilian protections only 'for such time' as they directly participate in the hostilities.[126]

The ICRC DPH Guidance distinguishes between ***temporary, activity-based loss of protection*** (discussed above in section IV(a), devoted to the substantive scope of 'direct participation in hostilities'), and ***continuous status or function-based loss of protection*** (due to combatant status or continuous combat function).[127] According to ***the first, activity-based-category***, the loss of civilian protections applies to the immediate execution

125 ICRC DPH Guidance, *supra* note 102, pp. 56–57.

126 API, *supra* note 64, article 51(3); APII, *supra* note 47, article 13(3). The ICRC Customary IHL study considers the rule to be of customary nature for both types of conflicts. Henckaerts and Doswald-Beck, *supra* note 72, Rule 6.

127 ICRC DPH Guidance, *supra* note 102, p. 43–44.

phase of a specific act meeting the three criteria of *threshold of harm, direct causation* and *belligerent nexus*, as well as to measures preparatory to the execution of such an act or deployment to and return from the location of its execution, where they constitute an integral part of such a specific act or operation.[128] ***The second category—a 'continuous combat function'***—requires lasting integration into an organized armed group acting as the armed forces of a non-state party to an armed conflict.[129] Thus, individuals, whose continuous functions involve the preparation, execution, or command of acts or operations amounting to DPH, are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act. Nonetheless, recruiters, trainers, financers and propagandists, as well as those purchasing, smuggling, manufacturing and maintaining weapons and other equipment outside specific military operations, or collecting intelligence other than of a tactical nature, are not considered members of an organized armed group.[130] The ICRC DPH Guidance emphasizes that a 'continuous combat function' may be openly expressed through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behavior, for example, where a person has on repeated occasions directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.[131]

The HCJ has made a somewhat similar distinction between civilians taking a direct part in hostilities on a one-time basis or sporadically, and those who continuously perform combat functions and commit a chain of hostilities, with short periods of rest between them. The Court determined that those

128 *Id.*, p. 65.
129 *Id.*, p. 34.
130 *Id.,* pp. 34–35.
131 *Id.*, p. 35.

belonging to the first group are entitled to resume their civilian protections once they have detached themselves from that sporadic activity, while those belonging to the second group lose their civilian protections completely, as of the time they join the terror organization. To support this decision, the Court raised the need to avoid the 'revolving door' phenomenon, with each terrorist having a 'city of refuge' to flee to, in order to rest and prepare themselves for the next combat activity.[132] The Court further discussed the 'grey area' cases, in between these two extreme scenarios, and determined that each case must be examined according to its specific circumstances.[133]

The HCJ approach is less nuanced and less restrictive than the ICRC approach. It does not provide practical or clear tests to distinguish between those who sporadically participate in hostilities (who can resume their civilian protections), and those whose participation is considered continuous, and could therefore be targeted at all times. Moreover, the broad definition of the 'continuous combat function' type of participation, together with the narrow definition of the temporary, activity-based, participation, necessarily leads to the prevalence of the former over the later. The predominance of 'direct participation in hostilities' with no temporal limits significantly erodes the protections afforded to civilians and therefore runs against the core idea behind the principle of distinction, which is protecting civilians and civilian targets from military attacks.

The two approaches resemble one another in that both recognize, implicitly, a third category not included in the Geneva Conventions, of individuals whose direct participation in the hostilities is indefinite. While the ICRC Interpretative Guidance significantly narrows the substantive scope of civilians who fall under this category, it deprives them of their civilian status altogether. Eliminating the 'for such time' requirement from the definition of DPH will result in creating a group of civilians who are constant targets based on their alleged past activities. As with the substantive scope of DPH, the definition of its temporal scope also leaves many grey areas and unanswered

132 *Id.*, para. 40.
133 *Id*.

questions, including: How many activities does it take for a civilian to indefinitely lose their protections, and for how long are those protections lost? How much time can pass between one activity and the next? And, how can a person reverse such a classification? Since membership in a terrorist organization is often vague, voluntary and less organized or constructed than military or even guerrilla forces, such an approach suffers from inherent difficulties in terms of proving membership (or lack thereof).

***Therefore, in our opinion, the temporal scope of 'direct participation' (the 'for such time' requirement) should only include individuals who actively and directly participate in any preparatory or executional stage of a concrete attack.*** This is not to say that combatant-like terrorists are protected: They can always be targeted on the battlefields, carrying out operations or even outside of hot battlefields, while planning a concrete attack which is underway. But, they cannot be targeted at all times, while sleeping in their beds at home, next to their children, when they are not involved with the planning or executing of a concrete attack. To clarify, we do not suggest that states will be required to provide evidence regarding the *thoughts* of suspected terrorists at any given moment, and attack them only when they are *thinking* about a concrete terror attack; nor do we suggest states be required to present visual evidence of an imminent danger. All we are suggesting is a requirement that states present clear and convincing information according to which a killing target is indeed currently *involved* in an ongoing attack. If that is the case, that person can be targeted *at any time* while this plot is underway. This requirement is consistent with the preventive rationale that justifies targeted killing operations to begin with: the notion that it is intended to frustrate a future attack.

We also reject the HCJ's 'revolving door' rationale: Since DPH status is activity-based, the fact that an individual can only be targeted at a time and place where they engage in combatant-activities does not constitute a 'city of refuge,' but rather limits the legal justifications for targeting and killing this person to the time and place where they actually engage in such activities. The question here is not whether suspected terrorists are immune from state actions, but rather *when* is it lawful to kill them, outside of 'hot battlefields,' without warning, and without due process.

## C. Where? The Territorial Scope of Targeted Killing Operations

There are two important distinctions to make in this regard: the first is between zones of active hostilities and areas outside of 'hot battlefields.' As previously discussed, IHL would generally apply in areas of hot battlefields, while domestic law and IHRL would apply outside of these combat areas. The second distinction concerns state sovereignty and jurisdiction over the relevant territory. While some targeted killing operations take place within the targeting state's own territory[134] or in areas under its effective control,[135] others are conducted in third parties' territories,[136] including failed or quasi states.[137] The former two cases—where the operation is conducted in a territory controlled by the relevant state—raise, mainly, questions relating to the legality of the relevant operation, under the law enforcement or the armed conflict models (depending on the proximity to a zone of active hostilities). The latter case—where the operation is conducted in the territory of another country—triggers, in addition to IHRL and IHL (*jus in bello*), the international law governing the use of force (*jus ad bellum*). Issues concerning the use of force norms governing targeted killing operations are the subject of intensive scholarly writing and are beyond the scope of this paper. In this policy paper, our purpose was to focus not on sovereignty and relations between states, but rather on the legal obligations states owe to persons who are the target of their lethal use of force. Nonetheless, in the next paragraph we will briefly mention a few central issues that will have to be considered while analyzing the legality of targeted killing operations conducted on the territory of another state.

It is a basic principle of international law that a country is prohibited from engaging in law enforcement operations in the territory of another country. This prohibition carries particular weight when such law enforcement

134 Such as the Russian targeted killing operations against Chechen rebels.

135 Such as the Israeli targeted killing operations in the West Bank.

136 Such as the US targeted killing operations in Yemen or Pakistan.

137 Possibly such as Israeli targeted killing operations in Gaza after the disengagement.

operations involve killing a person. Deadly attacks by air strikes or drones clearly violate the international prohibition on the use of force between states.[138]

Under the norms governing use of force, a targeted killing operation may be based on a self-defense exception to the international law prohibition on the use of force. A successful self-defense argument must be based on attribution of the terror attack to the relevant state, as well as on the gravity of the terror attack, which must amount to an 'armed attack.'[139] International law permits the use of lethal force in self-defense in response to an 'armed attack' as long as that force is necessary and proportionate.[140]

If the terror attack cannot be attributed to the state from whose territory it was launched, a targeted killing operation on the territory of a neutral state should be executed taking into consideration the other country's sovereignty, and must be based either on the consent of that state to the operation or else on the fact that it is unable or unwilling to interdict the terrorist (as demonstrated by its failure to fulfill its duties).[141]

## D. Security, Secrecy, and Accountability

### (1) Secrecy and Counterterrorism Measures

So far, we have established the normative legal framework applicable to targeted killings, including the conditions under which targeted killing operations may be considered lawful and legitimate. Nonetheless, establishing the normative

138 Blum and Heymann, *supra* note 33, p. 161.

139 For detailed elaboration on the norms and limitations regulating such a 'self-defense' operation, see: Noam Lubell, Extraterritorial Use of Force against Non-State Actors (Oxford University Press, 2010), pp. 25–63.

140 Military and Paramilitary Activities in and against Nicaragua (Nicar. vs. US), 1986 I.C.J. 14, para. 194.

141 Blum and Heymann, *supra* note 33, p. 164; Lubell, *supra* note 139, p. 43, 70; Downes adds that the armed forces may be invited to assist a state in maintaining order, for example, through law enforcement and the suppression of the rebels. Chris Downes, "*'Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike*," 9(2) Journal of Conflict and Security Law (2004), p. 280.

legal framework is only the first step. Just as important are the interpretation and application of the norms by the relevant militaries or security agencies. The legality of each operation rests, mainly, on the specific circumstances of the case, and especially on the relevant information concerning the severity of the security threat, the exact role and activities of the targeted individual, the feasibility of less harmful measures, and the anticipated collateral damage. Therefore, the legality of a targeted killing operation is heavily dependent upon the quality and reliability of the intelligence on which it is based.[142] Unfortunately, such information is usually classified by the relevant states (or security agencies) as a 'state secret,' and is not revealed to the public (or to the relevant parties.)[143] As the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, concluded:

> Reaction to the events of 9/11 placed intelligence agencies at the forefront of efforts to combat terrorism, and put a premium on rapid action, efficiency, and the exercise of only very loosely constrained agency discretion, often at the expense of transparency, respect for human rights, and meaningful congressional consultation. Agency personnel numbers and budgets increased greatly, special operations became far more common, and double-hatting served to make scrutiny more difficult…
>
> In an age of enhanced global terror operations the structural predisposition to secrecy on the part of intelligence officials has only been strengthened. The heterogeneity and geographical spread of actual and potential terrorist groups, the reality of homegrown terror, and the potential for large-scale acts of terrorism, have all contributed to support for secrecy.[144]

142 UN Special Rapporteur on Extrajudicial Killings, *supra* note 5, p. 25; *and see*, Shehadeh Commission Report, supra note 1.

143 *See, e.g.*, Shehadeh Commission Report, supra note 1; Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 Harv. Nat'l Sec. J. 283 (2011), p. 316.

144 Alston, *id.*, p. 316.

While this is true with regard to targeted killing operations in general, it is particularly important with regard to secret operations such as the Al-Mabhouch killing in Dubai in January 2010 (allegedly conducted by Israeli Mossad agents),[145] where intelligence agencies operate in ways that are intended to leave no fingerprints, and no country openly takes responsibility for the operation.[146] The secrecy and lack of relevant information relates to various aspects of targeted killing operations, from the target lists and the criteria for their establishment, to procedures for designing such operations and determinations regarding proportionality assessments. With regard to US targeted killing operations in the armed conflicts in Afghanistan and Iraq, for example, in spite of partial transparency concerning, mainly, the formal aspects of the targeting process, the substantive criteria for putting individuals on kill lists remain largely secret.[147] Methods to calculate and implement the proportionality principle are also secretive, and the U.S. did not release official estimates concerning the numbers of civilian casualties in targeted killing attacks.[148] The UN report on targeted killings concluded that "the failure of States to disclose their criteria for direct participation in hostilities is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing."[149] The challenges created by the current schemes of secrecy are magnified by the use of new

145 Jerusalem Post Staff, "*Dubai 99% Sure Mossad killed Mabhouh,"* Jerusalem Post, Feb. 18, 2010; Ian Black, *Dubai Police Identify 15 More Suspects in Mabhouh Murder,* The Guardian, Feb. 24, 2010.

146 Interestingly, according to media accounts, Mabhouch, who was killed in his hotel room, was not participating, promoting or planning concrete terrorist attacks at the time he was killed, but was rather involved in smuggling weapons into the Gaza strip. *See, e.g.:* Ian Black*, Killed Hamas Official Mahmoud al-Mabhouh Betrayed by Associate, Says Dubai Police Chief,* The Guardian, February 21, 2010.

147 Alston, *supra* note 143, p. 33.

148 *Letter from Mark H. Herrington, Associate Deputy General Counsel, Office of Litigation Counsel, Department of Defense*, Dec. 30, 2010, addressed to Jonathan Manes, National Security Project, ACLU; Gareth Porter and Ahmad Walid Fazly, *McChrystal Probe of SOF Killings Excluded Key Eyewitnesses*, Inter Press Service, July 6, 2010.

149 UN Special Rapporteur on Extrajudicial Killings, *supra* note 5, p. 21.

techniques such as drones, which gradually create the development of a 'Sony PlayStation' mentality to killing.[150] In the following paragraphs we shall elaborate on the critical impact of secrecy on two of the most important and potentially meaningful limitations on targeted killings: the requirement of proportionality and the requirement of precaution.

## (2) Secret Intelligence Information and Proportionality

One of the obvious challenges of the application of the principle of proportionality to targeted killing operations is assessing the meaning of 'excessive collateral damage' in terms of the number of lives lost. It is universally acceptable that "every effort must be made to minimize collateral damage."[151] Nonetheless, it is much harder to agree on the quantification of that minimum. How many innocent deaths are too many? How many children is it legitimate and proportional to wound or kill, as collateral damage, in order to target a dangerous terrorist? Not only are such a priori calculations kept concealed and unreviewable, but many times facts concerning collateral damage assessments remain uninvestigated. Schemes of secrecy make it even harder to assess, ex post facto, the application of the principle of proportionality, as there is almost no available information to assess whether the collateral damage was (i) excessive; or (ii) anticipated.

## (3) Secret Intelligence Information and Precaution

Although less debated and analyzed by scholars or relevant policymakers, the requirement of precaution is a central one. In order for the requirement of precaution to be meaningful, a lack of information or uncertainty about the facts should give rise to a presumption in favor of humanitarian considerations and protection of civilians.[152] 'Feasible' precautions almost always depend greatly, among other things, on the availability of intelligence

150 *Id.*, at p. 25.

151 Amos N. Guiora, *Determining a Legitimate Target: The Dilemma of the Decision Maker,* 47 Tex. Int'l L. J. 14 (2011), p. 331.

152 API, *supra* note 64, article 50(1).

information about the target and its surroundings.[153] Determining whether states did everything possible to ensure a correct identification of the target, chose appropriate means and carefully assessed the anticipated collateral damage necessitates a careful examination of all relevant information. In the absence of such information, any attempt to critically scrutinize targeted killing decisions would be meaningless.

## (4) Transparency and Ex Post Accountability

Both human rights norms and IHL obligate states to effectively investigate any alleged violations of the right to life.[154] Effective investigations necessitate, among other things, a meaningful degree of transparency.[155] Indeed, the European Court of Human Rights has long insisted that "[t]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts."[156] Transparency in this regard relates to all aspects of targeted killing operations: from the relevant normative standards (national and international), to the decision-making process, to the operational responsibility,[157] and finally to the investigations of alleged violations. The importance of such transparency is emphasized by a former member of the CIA's Directorate of Operations, who stressed that CIA agents "lack detailed rules of engagement, standing orders, and international conventions to define limits of behavior."[158]

153 Melzer, *supra* note 6, p. 365.

154 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 1949 [hereinafter: Geneva Convention IV], article 146; ICCPR, *supra* note 20, article 2.

155 Alston, *supra* note 143, p. 23.

156 Anguelova v. Bulgaria, ECHR, Application no. 38361/97, 13 June 2002, p.140.

157 A degree of transparency in relation to operational responsibility is essential both in terms of facilitating public or political accountability, and of establishing whether operations are being conducted with the necessary legal authority under domestic law. Alston, *supra* note 143, p. 51.

158 James M. Olson, *Intelligence and the War on Terror: How Dirty Are We Willing to Get Our Hands?,* 28 The SAIS Rev. Int'l Aff. 37, 44 (2008).

National investigatory procedures must meet two different levels of accountability. The first is that national procedures must meet certain standards of transparency and accountability in order to comply with existing international obligations. The second is that the national procedures must *themselves* be sufficiently transparent to international bodies as to permit the latter to make their own assessment of the extent to which the state concerned is in compliance with its obligations.[159] Effective accountability may have various dimensions, including: (1) internal control (within the relevant security agencies); (2) executive oversight over the relevant security agencies; (3) parliamentary oversight over the relevant security agencies; (4) judicial review, which is able to independently and effectively review alleged violations—including those committed by decision-makers from the highest political level; and (5) external oversight, which includes civil society and the media.[160]

When it comes to targeted killing operations, each of these accountability mechanisms faces difficulties. The reliance on secret intelligence information poses a significant challenge to legal, political and external accountability: "increased secrecy has impacted upon the legislative and judiciary branches' ability to oversee and review intelligence activities," according to Van Puyvelde.[161] Both legal and political oversight mechanisms suffer from an expertise problem.[162] The executive branch simply knows more about how they conduct targeted killings than the legislature which oversees it. As American scholars have noted with respect to congressional oversight of the executive branch, this expertise advantage enables the executive branch to shield certain activities from oversight because Congress is comparatively

159 Alston, *supra* note 143, pp.25–26.

160 *Id.*, p. 86. For a criticism of media oversight concerning state secrets, see: Gabriel Schoenfeld, Necessary Secrets: National Security, The Media, And The Rule Of Law (2010).

161 Damien Van Puyvelde, *Intelligence Accountability and the Role of Public Interest Groups in the United States*, 1 Intelligence and Nat'l Security 9 (2012) (citing Philip B. Heymann, Terrorism, Freedom and Security: Winning without War (MIT Press, 2003).

162 McNeal, *supra* note 85, p. 774.

disadvantaged with regard to the knowledge necessary to ask the right questions.[163] Amy Zegart points out that Congress is not designed to oversee intelligence agencies well, since the congressional intelligence committees have been traditionally conducting oversight with limited expertise and weak budgetary authority.[164]

As for internal and executive oversight, these, too, are inherently compromised by secrecy, the high-risk nature of the threat and the bureaucratic nature of the decision-making process with respect to targeted killing operations. These conditions contribute to the development of groupthink dynamics,[165] which can lead to suboptimal decision-making. Groupthink fosters excessive optimism, lack of vigilance, and stereotypical thinking about out-groups, and at the same time causes members to ignore negative information by viewing messengers of bad news as people who 'don't get it.'[166] Under groupthink conditions it may be difficult to stop a targeted killing operation once it has begun. As Klaidman notes:

> The military was a juggernaut. They had overwhelmed the session with their sheer numbers, their impenetrable jargon, and their ability to create an atmosphere of do-or-die urgency. How could anybody, let alone a humanitarian law professor, resist such powerful momentum? Koh was no wallflower when it came to expressing his views; normally he relished battling it out with his bureaucratic rivals. But on this occasion he'd felt powerless. *Trying to stop a targeted killing "would be like*

163 *Id.*, pp. 102–3.

164 Amy Zegart, *The Domestic Politics of Irrational Intelligence Oversight*, 126 Pol. Sci. Q. 1, 4 (2011).

165 A phenomenon defined by Irving as "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action." Irving L. Janis, Groupthink: Psychological Studies of Policy Decisions and Fiascoes (Cengage Learning, 2nd ed. 1982) p. 9.

166 Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. Cin. L. Rev. 1233, 1258 (2003).

> *pulling a lever to stop a massive freight train barreling down the tracks"* he confided to a friend.[167] [emphasis added – S.K.]

Moreover, "the collectivity itself may have caused an error while the public has no individual to hold to account."[168]

The importance of identifying an effective accountability mechanism for targeted killing operations motivated the HCJ to introduce a legal requirement of ex post review, which is subject to judicial supervision:

> [T]he law dealing with preventative acts on the part of the army which cause the deaths of terrorists and of innocent bystanders requires *ex post* examination of the conduct of the army (*see* paragraph 40 above). That examination must—thus determines customary international law—be of an objective character. In order to intensify that character, and ensure a maximum of that required objectivity, it is best to expose that examination to judicial review. That judicial review is not review instead of the regular monitoring by the army officials, who perform that review in advance. "According to the structure and role of the Court, it cannot act by way of continuous monitoring and supervision" (*Shamgar, P.* in HCJ 253/88 *Sejdia v. The Minister of Defense*, 42(3) PD 801, 825). In addition, that judicial review is not review instead of *ex post* objective review, after an event in which it is alleged that harm was caused to innocent civilians who were not taking a direct part in hostilities. After the (*ex post*) review, in the appropriate cases, judicial review of the decisions of the objective examination committee should be allowed. That will ensure its proper functioning.[169]

167 Daniel Klaidman, Kill or Capture: The War on Terror and the Soul of the Obama Presidency 202 (Houghton Mifflin Harcourt, 2012).

168 McNeal, *supra* note 84, p. 783.

169 Targeted Killing Case, *supra* note 54, para. 54.

Shany and Cohen consider this determination to be "a positive contribution to the development of the principle under IHL."[170] They further argue that such a robust institutional requirement could compensate for the inevitable ambiguity of the substantive content of the proportionality principle and provide courts with objective criteria for judicial review.[171] Similarly, Byman has urged the United States to follow the Israeli targeted killing policy, including its openness about the policy, its procedures for authorizing killings, and its provision of some form of legal review over the decision-making process.[172]

Unfortunately, as will be demonstrated bellow, the example of the Israeli Shehadeh Commission suggests that the ex post Israeli review of targeted killing operations should not be overly praised. The 112-page report lays out a transparent and detailed account of the decision-making process of the Shehadeh targeted killing operation. Nonetheless, a careful reading of the report reveals reliance upon vague and obscure norms, as well as complete deference to security agencies' decisions. Ultimately, the Shehadeh Commission demonstrates the weaknesses of state-sponsored investigations of targeted killing operations, and casts a shadow over their potential to meaningfully scrutinize the security agencies' decisions.

## E. Security, Secrecy, and Accountability: The Shehadeh Commission as a Case Study

Salah Shehadeh was head of the Operational Branch of Hamas in Gaza and was accused by Israel of having killed large numbers of Israeli military personnel and civilians. On July 22, 2002, the Israeli Air Force dropped a one-ton bomb on a house in Gaza City, killing Shehadeh, his assistant, his wife, his 15-year old daughter and eleven other civilians. Nine of the

170 Cohen and Shany, *supra* note 77, p. 320.

171 *Id.*

172 Byman, *supra* note 105, p. 110–11.

civilians killed (including Shehadeh's daughter) were children. 150 civilian bystanders were injured.[173]

## (1) The Establishment of the Commission

Due to the severe outcomes of this operation and the extensive collateral damage, the IDF conducted internal investigations of the incident. Eventually, the IDF Military Advocate General [hereinafter: MAG] decided not to initiate any criminal investigations concerning this incident. In response, several human rights organizations and individuals submitted a petition to the Israeli Supreme Court, sitting as the HCJ, demanding to reverse the MAG's decision and to open a criminal investigation. During the Court hearings, the State accepted the Court's suggestion to establish an independent and objective investigatory commission to investigate the circumstances of the operation and the severe collateral damage inflicted on innocent civilians.

On January 23, 2008, then Prime Minister Ehud Olmert appointed the special investigatory commission to examine the targeted killing operation directed against Shehadeh. The Commission was instructed to review the circumstances of the attack and the availability of an effective alternative. It was also authorized to recommend administrative measures, disciplinary measures, or the initiating of criminal proceedings against the relevant actors.

The Commission was composed of three members: As head of the Commission, the Prime Minister appointed Adv. Zvi Inbar, the former MAG and the Legal Advisor of the Knesset (the Israeli Parliament). The other two members of the Commission were Major General (retired) Yitzhak Eitan, former Commander of the IDF Central Command, and Mr. Yitzhak Dar, the former head of the Operations Department at the Israel Security Agency [hereinafter: ISA].

Soon after the announcement of the appointment of the Commission members, the petitioners submitted new arguments, opposing the decision to

173 Ariel Meyerstein, *Case Study: The Israeli Strike Against Hamas Leader Salah Shehadeh*, Crimes of War, Sept. 19, 2002.

appoint only members with military and security experience. On August 23, 2008, the HCJ finally rejected the petition, holding that there was no defect in the appointment and formation of the Commission.[174] The Court emphasized that none of the Commission members were at the time serving in any of the State's security or military agencies. The Court further stated that the skepticism regarding the objectivity of the Commission was completely unfounded, especially *"at this preliminary stage, in which the Commission did not yet finish its job and did not reach any conclusions."*[175] On August 31, 2009, the Commission's chairperson, Adv. Inbar, passed away, and was replaced by retired Supreme Court Justice Tova Strasberg-Cohen.

Throughout its investigation, the Commission heard testimony from relevant individuals, including high officials in the IDF, the ISA and the Government. The Commission also received and reviewed relevant documents. On February 27, 2011, the Commission published its final report.

## (2) The Report

The report begins with an analysis of the security situation that existed between the beginning of the Second Intifada (September 2000) and the targeted killing of Shehadeh on July 22, 2002. The Commission characterized this period as an 'armed conflict' and noted that during these two years, many Palestinian terror attacks took place within Israel, causing the death of 474 Israelis and injuring 2,649.

The report then describes the role that each governmental authority plays in a targeted killing operation. The ISA, as the authority that initiates targeted killing operations, is responsible for gathering the relevant intelligence and for mapping the surroundings of the target area in order to facilitate evaluation of anticipated collateral damage (i.e., uninvolved civilians and civilian objects that might be damaged from the attack). The IDF is the authority that usually executes the attack. The IDF's Operations Department

174 HCJ 8794/03 *Hess v. Military Advocate General* (not published, 12.23.08) [hereinafter: the Shehadeh Case].

175 *Id.*, para. 13.

is responsible for ensuring that the intended target is a legitimate target and for exploring the feasibility of detaining the targeted individual or using a less lethal measure that would attain the same goal of preventing the intended target from continuing their terror activity. After receiving all the necessary authorizations to implement the operation, the method of attack is chosen in a way that will ensure the operation's success while minimizing the anticipated collateral damage (which must remain non-excessive). Apart from authorization from the head of the ISA and the IDF's Chief of General Staff, the operation must also be approved by two senior politicians: the Prime Minister and the Minister of Defense.

With regard to the normative framework, the Commission referred to the MAG's legal opinion, which stipulated that IHL is the relevant legal framework, and that it allows attacking military targets or combatants and civilians taking a direct part in hostilities, provided that the attack also meets the requirements of distinction and proportionality. The opinion referred to several additional principles that should be considered when ordering a targeted killing operation: the exceptionality of the measure; the use of this measure only against persons who are either committing terror attacks or ordering the commission of such attacks; basing the operation on solid, accurate, and reliable intelligence that indicates that the designated target takes direct part in terror attacks and will probably continue to take part in such actions unless neutralized; using this measure as a preventive measure only, rather than as a punitive measure; using this measure only where there is no less lethal alternative; minimizing the damage to uninvolved civilians and applying the principle of proportionality; and using this measure only in areas in which the IDF does not have actual control. The report further stressed four requirements stemming from the Israeli Supreme Court's landmark case concerning the legality of targeted killings: (a) accurate and reliable information should be gathered about the identity and classification of the civilians who take direct part in the hostilities; (b) all feasible efforts to use less lethal measures should be made; (c) the principle of proportionality must be observed and the harm to uninvolved civilians must not be excessive; and (d) an investigatory committee should be established in order to investigate operations that resulted in exceptional outcomes.

Applying the normative legal framework to the specific circumstances of this operation, the Commission determined that Shehadeh was indeed a legitimate target, as a civilian who took direct part in hostilities. The Commission also found that there were no lesser means—such as detaining him—available, since Shehadeh took shelter in a very densely populated refugee camp in Gaza and any operation to detain him would have endangered the lives of IDF soldiers.

The report then elaborates on the internal processes and the role that each military or security authority played in preparing the targeted killing of Shehadeh. The ISA was in charge of surveillance of Shehadeh and was responsible for planning the operation. All the information was brought to Yuval Diskin, the Deputy Head of the ISA, who was the ISA authority responsible for targeted killings. Diskin's recommendation to approve Shehadeh as a legitimate target was submitted to Avi Dichter, the Head of the ISA, and was then presented to Moshe Yaalon, then Chief of General Staff, who consulted with the IDF authority responsible for targeted killings, the Deputy Chief of General Staff, Gabi Ashkenazi, and with the highest political echelons: then Minister of Defense, Benjamin Ben-Eliezer, and then Prime Minister, Ariel Sharon. After receiving all of the relevant authorizations, the ISA began tracking Shehadeh's location. Knowing he was wanted by the Israeli authorities, Shehadeh used seven hideouts and kept moving between them. Throughout this time, several alternative plans to target Shehadeh were abandoned, due to a low-success assessment and high risk to IDF soldiers and civilians in the area (twice due to positive information concerning the presence of Shehadeh's daughter). According to the report, Israel security services cancel operations when there is positive information about the presence of children who might be affected by the attack.

A few days before the operation, Shehadeh was located in an apartment in a two-story building in a densely populated refugee camp in northern Gaza. According to the information available at the time, the first floor was used as a warehouse and the second floor was used as a residence. The method of attack chosen was the dropping of a one-ton bomb from the air. According to the report, this method of attack was chosen for two reasons – high probability of success and low risk to IDF forces. The Commission also

noted that the alternative of using two half-ton bombs had been considered but was rejected because the probability of success was too low and because there was a higher risk that one of the bombs would miss the target and kill many uninvolved civilians.

Ultimately, the Commission concluded that the decision to approve the implementation of the operation, the risk of harming Shehadeh's daughter notwithstanding, was a legitimate decision. With regard to Shehadeh's assistant, Zahar Natzer, the Commission found him to be a legitimate target on his own, and the anticipated death of Shehadeh's wife was considered proportionate collateral damage. The Commission nonetheless concluded that the death of Shehadeh's daughter, as well as the other 11 civilian fatalities, was disproportional and excessive, even though Shehadeh himself was a high-risk target. However, the Commission accepted the Israeli authorities' claims that this disproportionate outcome was not anticipated, and that had such an outcome been anticipated, the operation would not have been carried out. The Commission examined the information gathering process that led to the belief that the collateral damage would be less extensive than it was, and concluded that the intelligence that was presented before the decision-makers was incomplete. It also found that at one point in the process, the absence of information as to the presence of people in the vicinity of the house was presented as information to the effect that there were no people in that area. The Commission determined that the failure of intelligence with respect to the presence of uninvolved civilians in close proximity to Shehadeh stemmed from two main factors: (a) the resources that were devoted to discovering his whereabouts (and not the surroundings of this area); and (b) the concern that if Israeli intelligence agencies were to attempt to retrieve information regarding others in the area, Shehadeh would understand that his hideout was not secure. Therefore, it concluded that the balance between military necessity and protection of uninvolved civilians was inappropriate, and this led to a disproportionate (yet unanticipated) outcome.

Based on its analysis, the Commission found no reason to suspect that a crime (or any violation of relevant IHL or Israeli law) was committed by any of the persons involved in the planning, authorization, and implementation of the targeted killing operation. The Commission emphasized that the mere fact

that civilians were inadvertently killed does not render the operation unlawful or a war crime, and that the reasonableness and legality of the operation should be considered on the basis of the available ex ante information, even if it turned out that the information was false. The Commission was therefore satisfied with the fact that all of the relevant State bodies conducted internal inquiries and that the process was subsequently improved in order to avoid outcomes of this nature in the future.

In its recommendations, the Commission suggested that the rules of IHL be better embedded within the work of the security services, that the principle of proportionality be observed, and that written guidelines on the use of targeted killing in accordance with IHL be formulated by the IDF. Moreover, it expressed the opinion that the ISA should strengthen its intelligence efforts with regard to collateral damage to the uninvolved civilian population. The Commission also recommended that all relevant interactions, communications, and decisions preceding a targeted killing operation be documented and that the relevant documentation be preserved for future investigation, if needed. While we have important reservations concerning the work and conclusions of the Commission, we acknowledge its important contribution to advancing transparency of targeted killing operations. We also find these general recommendations to be of significant value, as they highlight some procedural aspects that should—and can—be improved.

## (3) The Shehadeh Commission and the Principle of Proportionality

Importantly, the Commission determined that the death of 13 uninvolved civilians is excessive collateral damage in comparison to the benefit of killing one (high-risk) terrorist. Nonetheless, the Commission did not lay out the methods, calculations or considerations that led it to this conclusion. In fact, its decision in this regard was mainly based on the ISA and military assessments that the outcomes were disproportionate. More importantly, while acknowledging that the disproportionate outcome resulted from severe intelligence failures (including misrepresentation of existing information), the Commission concluded that the targeted killing of Shehadeh was completely lawful. It determined that the operation was a legitimate attack against a

person who participated directly in the hostilities, and that the 'unfortunate harm' caused by the attack was *unintentional* and *unpredictable*, and was not the result of disrespect for human life. The Commission therefore determined that none of the involved security and political decision-makers violated either Israeli or international criminal law, and exonerated all of those involved in the attack from any criminal, administrative or even ethical responsibility. The 'mistakes' made were attributed to an isolated ***intelligence failure*** caused by "***incorrect assessments and mistaken judgments***" [emphasis added—S. K.].[176] The Commission refrained from attributing these 'failures,' 'incorrect assessments' and 'mistakes' to any of the relevant decision-makers, and no one was held responsible for any of it.

The principle of proportionality, according to the analysis of the Shehadeh Commission, becomes an empty phrase. *First*, the Commission does not explain how it assessed the excessiveness of the collateral damage, and does not provide guidance for future decision-makers as to how to apply the proportionality principle. *Second,* the Commission does not distinguish between state responsibility and individual (criminal or civil) responsibility. It concludes that the operation was completely lawful—a conclusion that seems inconsistent with the determination that the attack was disproportionate. While it certainly could be the case that no specific individual was criminally responsible for committing international or domestic crimes, it is nonetheless possible—a possibility that was not examined by the Commission—that international law (namely, the principle of proportionality or the principle of precaution) was violated. Unfortunately, the Commission did not separate between the relevant facts, the deviation from the applicable legal norms and the possible legal implications of such a deviation.

176 *Salah Shehadeh—Special Investigatory Commission*, English summary prepared by the ministry of Foreign Affairs. Available at: www.mfa.gov.il/MFA/Government/Law/Legal%20Issues%20and%20Rulings/Salah_Shehadeh-Special_Investigatory_Commission_27-Feb-2011.htm [hereinafter: Shehadeh Report summary].

## (4) The Shehadeh Commission and the Principle of Precaution

The Shehadeh Commission acknowledged the duty of precaution and declared that the State of Israel is bound to respect it. Nonetheless, its application of this principle to the concrete circumstances of this case was deeply flawed, and created an unbridgeable gap between the legal norm and its implementation. In analyzing the application of the principle of precaution by the relevant State officials, the Commission found almost automatically that the requirements of this norm were fulfilled and respected, and it conveniently ignored many pieces of evidence that demonstrated the exact opposite. Several concrete examples illuminate this point:

(a) The Commission stated that the ISA had spent much more time investigating Shehadeh's whereabouts than the immediate surroundings, including the presence of civilians in the vicinity. Yet it did not consider this fact to be relevant in applying the duty of precaution.

(b) In dealing with the death of Shehadeh's 15-year-old daughter in the attack, the Commission adopted the State's position that her death was not anticipated by any of the relevant decision makers.[177] In adopting this view, the Commission completely ignored the testimony of the Deputy Head of ISA, who objected to carrying out the operation as planned, based on his concrete concerns that Shehadeh's daughter was with him. In dismissing this information, the Commission stated that without positive information that the child was actually present in the house, it was legitimate to assume she wasn't there and to carry on with the operation.[178] The combination of this determination (the need for positive information as to the presence of civilians), together with the acceptance of the intelligence decision not to focus its efforts on investigating the surroundings of the target, lead to an unacceptable outcome. It empties the principle of precaution from any substance, and encourages states to shoot with their eyes closed: Without positive intelligence information determining that innocent civilians are

177 Shehadeh Commission Report, supra note 1, p. 67.

178 *Id.*, p. 69.

present—anything is permissible. This 'don't ask don't tell' policy creates a fictional reality, shaped by the information that intelligence and security agencies choose to collect. Naturally, these agencies prefer to focus their efforts on security threats rather than on humanitarian interests. The result is that a 15-year-old girl, as well as eight other children, were killed, simply because no one chose to collect and provide *positive information* confirming their presence.

(c) The Commission concluded that there was 'no positive information' affirming the presence of civilian residents in the tin shacks located next to Shehadeh's house. The Commission did acknowledge the fact that this area is densely populated. It also mentioned the several air force photos clearly showing water tanks and TV satellite dishes on the roofs of these tin shacks, as well as the air force estimations of severe collateral damage to the tin shacks and their inhabitants. Nonetheless, it did not view this information as sufficiently 'positive' evidence to arrive at a conclusion that people were actually living in the shacks and that precautions should be taken to protect their lives.[179] The Commission decided to treat this information, instead, as 'speculative' and 'unclear.'

(d) The decision to carry out the operation, despite the evidence that suggested that innocent civilians might be hurt, was not a unanimous decision. On July 19, 2002, the Deputy Director of the ISA held a meeting of both ISA and Air Force personnel concerning the planned operation. In the meeting, the intelligence information was presented, and various scenarios were discussed. In the discussion, the Air Force representatives estimated that the surroundings would suffer severe damage, and that the greatest damage—even if the attack hits the target precisely as planned—would be caused to the tin shacks and to a nearby garage house. While the garage house was believed to be empty at night, the assessment indicated there would be at least several wounded and dead in the tin shacks.[180] At

179 *Id*., p. 78.

180 *Id.*, p. 73.

this point, two senior ISA members advocated two opposing options: the Head of Operations Division suggested a different course of action, in order to minimize collateral damage and to prevent the anticipated harm to uninvolved civilians; while the Head of the Southern Region insisted that the operation should proceed as planned (and stated that attacking at night would minimize the harm to uninvolved civilians). At the end of that meeting, the Deputy Head of the ISA decided not to proceed with the operation as planned, and to continue gathering intelligence in order to come up with an alternative ground operation that would better protect innocent civilians.[181] Immediately afterwards, the Head of the Southern Region appealed this decision to the Director of the ISA. The Director of the ISA upheld the appeal and reversed the decision, determining that the operation would be carried out as planned. His decision was based on several considerations, all focused on state security: (1) the scope, frequency and severity of terror attacks against Israel had increased; (2) the probability of finding a practical alternative was low and the discussions that would have to be conducted with regard to the potential new plan might thwart the killing of the target altogether.[182] Later that day, the IDF Head of Operations Branch held a meeting, where the ISA representatives presented the planned operation. At the end of this meeting, the IDF Head of Operations Branch recommended postponing the operation until the tin shacks were evacuated. Then, the final meeting was held at the IDF Chief of Staff's office. The discussion focused on the potential harm to residents of the tin shacks. The Deputy Chief of Staff, as well as the Head of the IDF Operations Branch, objected to the proposed plan and recommended waiting and, in the meantime, gathering more information. The Head of the ISA recommended carrying on with the operation as planned. At the end of this meeting, the IDF Chief of Staff decided to approve the operation as planned. His decision was based on the assumption that the garage house would be empty, and that the risk of killing a few civilian bystanders is proportional to the enormous damage anticipated from the

181 *Id.*, p. 74.

182 *Id.*, pp. 74–75.

continuing terrorist attacks planned by Shehadeh.[183] Between July 19 (when the final decision to carry out the operation was made) and July 22 (when the attack took place), the operation was postponed several times due to conclusive evidence concerning the presence of Shehadeh's daughter and other children in the vicinity.[184] These internal deliberations demonstrate the different approaches to precaution: One approach would be to err on the side of caution and to treat uncertainty as evidence that civilians will be harmed, unless conclusively proven otherwise. This approach motivates the state to conduct the necessary investigations to clarify the situation and to positively find out the possible implications of an attack. This was indeed the approach adopted by the Deputy Head of the ISA and by the IDF Head of Operations Branch. A different approach would be to ignore uncertainty and to consider only 'positive information' that the relevant agencies came across in deciding the appropriate course of action. This approach reduces the state's burden to investigate to a minimum, and contradicts the very concept of precaution. Nonetheless, this was the approach adopted by the Head of the ISA and the IDF Chief of Staff, as well as, later on, by the Shehadeh Commission. By adopting such a narrow approach to precaution, the Shehadeh Commission paved the way for decision makers to ignore inconclusive information that does not coincide with their tactical plans, without the need to investigate further and obtain more information. And more than that: According to the testimony before the Commission, the security agencies and decision-makers in this case had, in fact, positive information affirming the presence of civilians in the vicinity of the targeted area. Nonetheless, they chose to ignore this information, probably due to their strong motivation to carry out the targeted killing operation.

(e) Lastly, political oversight of the military and security agencies is crucial for maintaining and upholding the principle of precaution. While security agencies are focused on narrow security considerations, the political

183 *Id.*, p. 76.

184 *Id*.

leadership considers a wider range of considerations, including foreign affairs and diplomatic interests, economic interests and humanitarian interests. The report of the Shehadeh Commission revealed a troubling deference to the security experts on the part of the political leaders. The responsible minister—the Minister of Defense—testified that he largely left the decision to his military secretary and that he trusted the ISA and military experts. In fact, the Minister of Defense was abroad, and did not personally participate in any of the relevant meetings. He was briefed by his military secretary by phone, and approved the operation. The brief did not include information on the existence of alternatives, the danger to residents of the tin shacks and the disagreements between senior officials of the ISA and IDF.[185] The Prime Minister could not testify due to his medical condition.

## (5) The Shehadeh Commission and Intelligence Information

The Commission's report was based on the information that was submitted to it by the IDF, ISA and the Air Force. The information provided by these bodies—in spite of being interested parties in this investigation—was accepted by the Commission in its entirety. The Commission did not find any of their testimony unconvincing—even when parts of the testimony were inherently inconsistent. The Commission did not critically challenge any of the positions presented by the security agencies. In some instances, the complete and overwhelming acceptance of the security agencies' position stands in stark contradiction to plain logic or to other pieces of evidence. For example, while elaborating on Shehadeh's terrorist activity—a description that could be a 'cut and paste' from the information provided by the relevant security agencies—the Commission accepts as fact the assertion that Shehadeh was personally responsible for all of the Israeli terror casualties who were killed or injured from July 2001 till Shehadeh's death in July 2002.[186] Incidents are not specified, details are not presented, and no other, external, sources

185 *Id.*, pp. 82–83.

186 *Id.*, pp. 21, 55–59.

are mentioned; nor is there any reference to the fragmentation in Hamas leadership or to other terror organizations that were operating in Gaza at the time. Another example can be found in the Commission's acceptance of the IDF's claim that the method of dropping a one-ton bomb on Shehadeh's house was chosen, among other reasons, to reduce collateral damage (while mentioning the alternative that was considered—and rejected—to use two half-ton bombs instead).[187] To support this finding, the Commission added that indeed, the one-ton bomb was accurate in hitting Shehadeh's house, and that the damage to the surroundings was caused not by the impact of the bomb itself, but rather by its shock wave (as if that was not a natural anticipated outcome of the hit).[188] The Commission also accepted as an uncontested fact the claim that the operation was conducted at night in order to minimize risk to civilians. This claim stood in stark contradiction to other pieces of information, suggesting that people were actually living in the tin shacks, and thus would most probably be sleeping in their beds at such time (the evidence also suggested that the tin shacks would sustain the most severe collateral damage).

These examples demonstrate the effect of trust in and deference to the security experts for the understanding and analysis of intelligence information. This information is presented by the security agencies ex parte, without another party who may have the will and the knowledge to challenge the information presented.[189] It is examined only by State-authorized investigators, who, as the Shehadeh example demonstrates, accept the information presented almost automatically.

The conclusion is, therefore, that internal State-sponsored investigatory commissions such as the Shehadeh Commission might be subject to meaningful limitations that may prevent them from performing effective oversight of targeted killing operations. In our opinion, it is essential that

187 *Id.*, pp. 63–64.

188 *Id.*, pp. 65.

189 On the impact of secret evidence on judicial review, see: Shiri Krebs, *Lifting the Veil of Secrecy: Judicial Review of Preventive Detentions in the Israeli Supreme Court*, 45(3) Vand. J. Transnat'l L. (2012).

targeted killing decisions will be subject to a more rigorous and systematic review process, capable of strictly implementing the limitations set forth in the previous sections. A permanent and independent committee should be established, with powers to review decisions to kill an individual directly participating in the hostilities. The committee members should be appointed by the President of the Supreme Court, and should include, in addition to a security expert, representatives from the national defender's office, civil society organizations, and the judiciary branch.[190]

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Finally, beyond the practical and normative weaknesses, the Shehadeh report highlights a more general and basic problem of assessing 'collateral damage' to the enemy. The internal Israeli Commission was held captive by the Israeli-security narrative, and interpreted any information accordingly. In stark contradiction to the many paragraphs and elaboration on the suffering of the Israeli population as a result of terror attacks, the information regarding the concrete damage to Palestinian civilians and to their properties caused by the attack was short and laconic, containing only two figures—the numbers of civilians killed and the number of those injured. The damage to nearby houses and civilian properties was not mentioned at all; the names of the innocent bystanders who were killed were completely missing; and the description of the poor and densely populated refugee camp, where the attack took place, was limited to the potential security dangers it created for IDF soldiers. No descriptions or factual determinations were dedicated to the innocent people who were killed in their beds inside their tin shacks, in the middle of the night. No horror stories were presented, no children crying, no people trapped under the ruins of their homes. In the factual reality of the Commission, only Israelis live in fear, are terrorized and are victimized by Palestinians. The Palestinians, on the other hand, are mere numbers, cold calculations of 'collateral damage.'

190 Another option would be to establish a tribunal, similar to the design of the US Foreign Intelligence Surveillance Court, which authorizes wiretaps on foreign agents inside the United States. *See*, *Lethal Force Under Law* (editorial) New York Times, Oct. 9, 2010.

# V. Conclusion: A New Model for Scrutinizing Targeted Killing Operations

"It is time to stop killing in secret," proclaimed Prof. David Cole of Georgetown Law School in an op-ed published by the New-York Review of Books.[191] And indeed, even if the targeted killing of suspected terrorists is sometimes lawful, democratic governments should not target and kill individuals clandestinely, according to secret internal processes and without disclosing the criteria according to which individuals are targeted. As the Shehadeh Commission example demonstrates, a limited transparency, by a semi-independent ad-hoc Commission, cannot—and should not—be enough.

We shall now summarize the normative and practical framework we propose, starting with a clarification of the relevant rules, continuing with the establishment of clear, transparent and reviewable processes and finally by devising an ex post accountability mechanism.

(a) **Imminent necessity:** Targeted killings are lawful only when killing the targeted individual is necessary to prevent them from committing a concrete violent act that is underway. It will only be considered necessary to kill a suspected terrorist if the *threat* they pose is concrete and imminent. The emphasis should be on the preventive purpose of targeted killings: such operations should never be used as a punishment for past actions, but only as a narrowly construed preventative measure.

(b) **Distinction and DPH:** An activity-based test ("acts of war which by their nature or purpose are likely to cause actual harm,") which includes three cumulative criteria—(1) threshold of harm; (2) direct causation; and (3) belligerent nexus. DPH should be understood as a temporary, activity-based loss of protection, which starts with the planning and preparatory measures for a concrete attack that satisfies the three previous criteria and lasts until the return from the location of its execution. The criteria for direct participation should be clear, transparent and leave no room for

191 David Cole, *It's Time to Stop Killing in Secret,* New York Review of Books, Nov. 28, 2012.

'grey areas' or interpretation. Most importantly: It should be clear that when the categorization is unclear or doubtful—the civilian protections should remain in place.

(c) **Proportionality:** Targeted killing should only be used as a last resort, when other means (such as capture and detention) are unavailable. As a general rule, less harmful means, such as capture and detention, are almost always available in a territory under the (de facto) jurisdiction of the targeting state. When calculating the collateral damage, civilian lives from both sides should be equally respected and protected.

(d) **Feasible precautions:** A duty to err on the side of caution. Before executing a targeted killing operation, all relevant information (including potential collateral damage) should be thoroughly gathered and carefully analyzed. 'Inconclusive' or doubtful information necessitates conducting further investigation and information gathering.

(e) **Transparent internal processes and political oversight:** The state should make public its policies concerning targeted killings—what are the criteria for targeting individuals, what are the policies concerning collateral damage, what is considered sufficient evidence to justify targeted killing, and what is the internal process for approval of a targeted killing operation. It should be clear that the final responsibility lies with the political leadership, who must exercise meaningful oversight over the security agencies.

(f) **Ex post review:** A rigorous and independent committee, capable of challenging the security agencies and of conducting effective ex post review, should be established. The committee should be permanent and independent, and should be empowered to review, ex post, the decision to target an individual, the processes that were undergone, and the design and execution of the actual operation. The committee should include members from various backgrounds, such as individuals who have served in the public defender's office or civil society organizations, and not only former military officials or security experts. The committee must be authorized to review not only the security agencies' decisions, but also the policies and oversight of the political leadership. While conducting an ex post review of targeted killing operations, the independent committee

> should be empowered to recommend initiating criminal investigations in appropriate cases; to determine whether international or national law concerning targeted killing were violated; and to determine whether reparations should be paid by the state in appropriate cases.

Governments around the world have been targeting and killing individuals to prevent them from committing terror attacks or other atrocities. They use this method secretly, sometimes without even taking responsibility for such operations, and without making most of the relevant information public: who is being targeted, the criteria for targeting individuals, the evidence used to make targeting decisions and the procedures adopted (if any) to identify mistakes and avoid misuse of this method. The policy proposed in this paper offers a concrete legal framework which fills in the many gaps in the current legal literature: it narrowly (and clearly) defines legal terms such as 'imminent threat', 'feasibility', and 'last resort'; it develops an activity-based test for determinations regarding DPH; it designs independent ex post review mechanisms; and it calls for governmental transparency and meaningful public oversight. Most importantly, it promotes a targeted killing policy that protects civilians from both terror and counter-terror attacks.

President Obama recently addressed the use of drones by the US (including for targeted killing operations), emphasizing the many sensitive and problematic aspects of such operations:

> [T]his new technology raises profound questions—about who is targeted, and why; about civilian casualties, and the risk of creating new enemies; about the legality of such strikes under U.S. and international law; about accountability and morality.[192]

It's about time that these pressing questions are answered openly, clearly and decisively.

192 President Obama's speech, *supra* note 64.

# Response

## Amichai Cohen and Tal Mimran

## I. Introduction

During the first decade of the 21st century, the world witnessed a dramatic rise in national and international terrorism.[1] Several western governments respond to this challenge in two principal ways:[2] First, they seek to strike a new balance between security interests and international human rights law [hereinafter: IHRL]. Second, they depict anti-terror activities as belonging to the category of armed conflict, to which they apply international humanitarian law [hereinafter: IHL]. The latter response promotes the stance that terror attacks can be considered acts of war and may consequently be countered by

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1 C. Raj Kumar, *Global Responses to Terrorism and National Insecurity: Ensuring Security, Development and Human Rights*, 12, ILSA J. Int'l and Comp. L. 99 (2005); Jonathan Grebinar, *Responding to Terrorism: How Must A Democracy Do It? A Comparison of Israeli and American Law*, 31 Fordham Urb. L.J. 261 (2003); Kevin J. Fandl, *Recalibrating the War on Terror by Enhancing Development Practices in the Middle East* , 16 Duke J. Comp. and Int'l L. 299 (2006); Kenneth Anderson, Review Essay, *Goodbye to All That? A Requiem for Neoconservatism*, 22 Am. U. Int'l L. Rev. 227 (2007); Aziz Z. Huq, *Modeling Terrorist Radicalization,* 2 Duke Forum for L. and Soc. Change 39 (2010).

2 For further elaboration, see for example: Yuval Shany, *Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror*, in International Humanitarian Law and International Human Rights Law: Pas de Deux (Orna Ben-Naftali, ed., Oxford University Press, 2011).

war-like measures.[3] In practical terms, some states have claimed the right to conduct operations in which pre-emptive lethal force is used against terrorists[4] (also known as targeted killings) [hereinafter: lethal targeting].

The Policy Paper written by Shiri Krebs (under the supervision of Prof. Mordechai Kremnitzer) [hereinafter: the Policy Paper][5] adds to the growing debate over the legality of such practices.[6] Given the inconsistencies and occasional lack of clarity concerning the relevant legal regime with respect to the use of extraterritorial lethal targeting operations, scholarly work like the Policy Paper is of great value. Hence, we find it to be helpful and important. However, we feel that some issues in the Policy Paper need to be clarified. Accordingly, our response will present both our views regarding specific legal issues, and counter some of the assertions made in the Policy Paper.

At the outset, we would like to stress that we agree with much of Policy Paper's analysis and proposals. Specifically, we agree with the claim that more rigorous external supervision should be applied to the use of lethal force against active terrorists. We also agree with several other limits and precautions recommended in the Policy Paper. Since these points are detailed

3 Emanuel Gross, *The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive?*, 15 Fla. J. Int'l L. 389 (2003).

4 Gabriela Blum and Philip Heymann, *Law and Policy of Targeted Killings,* 1 Harv. Nat'l Security J. (2010); Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case*, 89 Int'l Rev. Red Cross 866 (2007).

5 Shiri Krebs, Secrecy, Security and Targeted Killings: What We Learn from and What is Still Missing in the Report of the Investigatory Commission on the Targeted Killing of Salah Shehadeh.

6 Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'*, 27 Fletcher Forum of World Affairs 55 (2003); Milanovic *supra* note 4; HCJ 769/02 The Public Committee against Torture in Israel, et al v. The Government of Israel, et al., (Dec. 11, 2006) [hereinafter: The Targeted Killing Case] available at elyon1.court.gov.il/verdictssearch/englishverdictssearch.aspx; Al-Aulaqi v. Obama, 727 F.Supp.2d. 1, 8 (D.D.C. 2010); International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (Geneva, 2009); Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, UN Doc. A/66/330 (2011).

at length in the Policy Paper, we shall deal with them in an abbreviated manner towards the end of this response. Our principal purpose is to highlight the disagreements we have with the views presented in the Policy Paper, and our hesitations with respect to some of its conclusions and recommendations.

Our position, in short, is that the use of lethal force against terrorists, under specific circumstances as detailed below, is not prohibited by IHL.[7] Considering the unique challenges posed by widespread terrorist activities, these operations are actually preferable to the alternatives in terms of protection of civilian lives.[8] Naturally, the use of lethal force should be limited by specific rules of international law.[9] However, at its core, it constitutes a response that allows democracies to fight terrorism without causing the enormous damage to civilian society, which would occur if, for example, states were to invade areas from which terrorists are acting.[10]

7 The limitations are detailed below. They consist of necessity, proportionality, discrimination, and avoidance of unnecessary suffering. For discussion in this regard see: Jonathan Ulrich, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 Va. J. Int'l L. 1029 (2005).

8 For discussion, see: Blum and Heymann, *supra* note 4; Milanovic, *supra* note 4.

9 Melanie J. Foreman, *When Targeted Killing Is Not Permissible: An Evaluation of Targeted Killing Under the Laws of War and Morality*, 15 U. Pa. J. Const. L. 921 (2013); Benjamin McKelvey, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 Vand. J. Transnat'l L. 1353; W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 Colum. J. Transnat'l L. 711 (2007); Leila Nadya Sadat, *Presidential Powers and Foreign Affairs: Rendition and Targeted Killings of Americans: America's Drone Wars,* 45 Case W. Res. J. Int'l L. 215 (2012); John C. Harwood, *Knock, Knock; Who's There? Announcing Targeted Killing Procedures and the Law of Armed Conflict*, 40 Syracuse J. Int'l L. and Com. 1 (2012).

10 Mona Ali Khalil, *Iraq, Afghanistan, and the War on Terrorism: Winning the Battles and Losing the War*, 33 Ga. J. Int'l and Comp. L. 261 (2004); Jennifer Moore, *Practicing What We Preach: Humane Treatment For Detainees in the War on Terror*, 34 Denv. J. Int'l L. and Pol'y 33 (2006); Edward Rial Armstrong, *Dying Like Men, Falling Like Princes: Reflections on the War on Terror*, 29 U. Ark. Little Rock L. Rev. 529 (2007); Stephen P. Marks, *Branding the "War On Terrorism": Is There A "New Paradigm" of International Law?*, 14 Mich. St. J. Int'l L. 71 (2006).

Moreover, we feel that the discussion of the use of pre-emptive lethal targeting actually brought to light a method that has secretly been in use for decades, below the radar of international law. Such a discussion is essential in order to facilitate the formulation of clearer rules and conditions for the use of lethal force.[11] However, we fear that the imposition of a surfeit of limitations on this category of operations might only push it back to the shadows, where it will continue to exist unregulated.

More concretely, we do not agree with the views presented in the Policy Paper on several specific points: The geographical scope of the conflict should not be limited to the 'hot battlefield,' as suggested by the Policy Paper; rather it should be broadened to encompass all areas in which organized armed activities take place. The 'imminence' of the threat posed by the terrorist, as required by the Policy Paper, should be interpreted on a flexible basis. The Policy Paper considers the terrorist to be a legitimate target only when they are specifically involved in terrorist activity. We believe that in some circumstances terrorists lose their civilian protection, and may therefore be considered legitimate targets even when they are not actually involved in conflict related activity. We also take issue with some of the Policy Paper's specific criticisms of the Strasberg-Cohen Commission.

Before expanding on these specific points, we shall explicitly state two underlying premises that form the basis for our contentions.

*First*, counter-terrorism activities require extreme measures, especially when the terrorists are operating from outside the state, precisely because the terrorists exploit the fact that democratic states abide by their international law obligations. Terrorists use the law manipulatively. They endanger civilians by operating from within civilian populations, knowing that democracies will hesitate before acting against a target hiding in the midst of a civilian population.[12] The law, therefore, must steer a middle course. The legal limits

11 Blum and Heymann, *supra* note 4.

12 *See*, *e.g.* Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 Case W. Res. J. Int'l L. 279 (2011); Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State against Terrorism?*, 16 Emory Int'l L. Rev. 445 (2002).

set on the operations that democracies conduct against terrorism should allow these states to preserve their fidelity to the law while enabling them to combat terrorism effectively.[13] It follows that creative solutions offered by states in an attempt to respect their legal and moral obligations while fighting terrorism should be viewed positively.[14]

*Second*, we think that reality, including practical consequences, must be taken into account. When declaring that a particular response to terrorism is forbidden, we should also ask ourselves what practical alternative methods are available to states, and whether those alternatives might not be more deleterious in terms of the protection of human rights and the fundamental rule of law. Therefore, careful consideration of the consequences of such a response must be undertaken, so as to ensure that we do not essentially force states to choose methods of warfare entailing even greater suffering and loss of life.[15]

13 For discussion on possible interpretations of IHL when dealing with an enemy that intentionally uses civilians to disguise itself, see Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 Isr. L. Rev. 81 (2006); Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 Vand. J. Transnat'l L. 683 (2009). For more reading on asymmetrical conflicts, see Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict,* 40 Vand. J. Transnat'l L. 2*,* (2007); Gross, *supra* note 3.

14 For an interesting discussion concerning the way courts should deal with the balance of security and human rights in the context of terror, see: Aharon Barak, *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. Miami L. Rev. 125 (2003).

15 For discussion concerning the need to take practical consequences into considerations, see for example: David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarism (Princeton University Press, 2004); David Kennedy, *The International Human Rights Movement: Part of the Problem?,* 15 Harv. Hum. Rts. J. 101 (2002).There are, of course, cases in which a method would be completely prohibited, irrespective of the consequences, even if not using it would cause much greater suffering to innocent people. The prohibition on the use of torture may be a case in point. But these prohibitions require careful consideration, and strict limits because of their destructive potential. See in this regard: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, UN Doc. A/39/51; Nigel S. Rodley, *The Prohibition of Torture: Absolute Means Absolute*, 34 Denv. J. Int'l L. and Pol'y 145 (2006); Gafgen v. Germany, App. No. 22978/05 (Eur. Ct. H.R. June 1, 2010). For discussion on the theoretical level,

# II. The Geographical Scope of the Conflict and the Application of IHL

A crucial question in assessing the legality and legitimacy of lethal targeting in counter-terrorism operations entails the identification of the relevant legal framework. It is generally accepted that lethal force may be permissible in certain armed conflict situations governed by IHL.[16] What remains controversial, however, is the applicability of IHRL to a counter-terrorism operation occurring in the context of armed conflict, often in foreign territory,[17] as well as the precise implications of the parallel applicability of IHRL and IHL.[18]

In light of that, we find it crucial to address two important issues regarding the normative framework, concerning both of which we take issue with the Policy Paper. The first concerns the applicability of IHRL extra-territorially; the second focuses on the significance of IHRL in the different manifestations of armed conflicts.

## A. Armed Conflicts and Geographical Limitations

According to the Policy Paper, even when a situation of armed conflict between a state and a terrorist organization can be said to exist (a point about which we feel the Policy Paper remains ambivalent), IHL should apply only on a 'hot' battlefield. In all other areas, the normative framework should be that of IHRL.

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see: Shelly Kagan, Normative Ethics (Westview, 1998); Thomas Nagel, The View from Nowhere (Oxford University Press, 1986).

16 Lethal targeting of active terrorists may constitute an unlawful use of force if it does not comply with the requirements of necessity, proportionality, discrimination, and avoidance of unnecessary suffering. For discussion in this regard see Ulrich, *supra* note 7.

17 Karinne Coombes, *Balancing Necessity and Individual Rights in the Fight Against Transnational Terrorism: "Targeted Killings" And International Law*, 27 Windsor Y.B. Access Just. 285 (2009).

18 Ulrich, *supra* note 7.

Before dealing with the question of the geographical scope of the conflict, we should first define when an armed conflict between a state and a terrorist organization would give rise to the applicability of IHL. Since IHL allows states to resort to lethal force in situations in which its use is not normally permitted (both international and non-international armed conflicts[19]), the rule in international law is that IHL applies only to violence that passes a certain threshold of intensity.

The threshold was set by International Criminal Tribunal for the former Yugoslavia [hereinafter: ICTY] in the *Tadic* case.[20] In that case, the ICTY found that an armed conflict exists whenever there is protracted armed violence between governmental authorities and organized armed groups.[21] While some may debate whether armed activities between a state and a terror organization should be considered an international or a non-international armed conflict, almost all will agree that armed activities that meet the relevant thresholds should be considered as one of the two.[22]

International law dictates that an armed conflict framework would apply only if the terrorist organization is 'organized' and the conflict is protracted—usually interpreted as an issue of intensity as well as duration.[23] Naturally, many battles between states and terrorist organizations fail to meet that test. For example, one terrorist act perpetrated by Al-Qaeda in Spain during the past 20 years certainly does not mean that Spain is involved in an armed conflict

19 For general reading, see Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (Cambridge University Press, 2nd ed. 2010); Dieter Flack, The Handbook of International Humanitarian Law (Oxford University Press, 2008).

20 Prosecutor v. Tadic, Decision on the Defense Motion, ICTY Case No. IT-94-1-A (2 October, 1995).

21 *Id*., para. 70.

22 Shany, *supra* note 2; Milanovic, *supra* note 4; The Targeted Killing Case, *supra* note 6.

23 Commentary, Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention II (Jean Pictet (gen. ed.), ICRC, Geneva, 1960); Prosecutor v. Jean Paul Akayesu, ICTR-96-4-I, Trial Chamber, (2 September 1998) (ICTR) para. 619–620.

with Al-Qaeda.[24] However, when a state is involved in a lengthy and intense conflict with a specific group, as is the case with Israel vis-à-vis Hamas and the United States vis-à-vis Al-Qaeda, there are clear grounds for positing the existence of an armed conflict, in which the laws of international armed conflict apply.[25] Once again, this definition is context-based, and admittedly applies only to a minority of the states involved in the fight against terrorism. Each conflict should be assessed individually. Indeed, very few states undertake lethal targeting operations against active terrorists.[26]

In light of the above, if in fact we categorize a situation as an armed conflict, then the traditional rule is that IHL applies wherever the conflict takes place. This rule is supported by precedent and practice.[27] The counter-argument is that in the case of terrorism the fight should be limited to the 'hot battlefield,' otherwise the entire world would become a legitimate battlefield.[28] That position seems to us to be deficient, both because it contradicts the law as it stands, and for policy reasons.

Before looking at policy considerations, we should first ask what the law actually is in this case. It seems to us that there is simply not enough state practice to support the call for a change in international law that would limit the applicability of IHL to the 'hot battlefield.'[29]

24 For a discussion of the Spanish response to the Al-Queda attack, see: Amos N. Guiora, *Legislative and Policy Responses to Terrorism, A Global Perspective*, 7 San Diego Int'l L.J. 125 (2005).

25 Mark Weisburd, *Crimes, War Crimes, and the War on Terror Al-Qaeda and the Law of War*, 11 Lewis and Clark L. Rev. 1063 (2007); Andrew C., *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 Cornell Int'l L.J. 729 (2011); Regina Goff, *The Legality of Israel's Blockade of Gaza*, 8 Regent J. Int'l L. 83 (2011).

26 Foreman *supra* note 9; See also the Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, UN Doc A/68/389 (2013).

27 Michael Schmitt, *Extra-Territorial Legal Targeting: Deconstructing the Logic of International Law*, 52 Colum. J. Transnat'l L. 77 (2013).

28 Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. Rich. L. Rev. 845 (2009).

29 On the importance of state practice, see for example: Kasikili/Sedudu Island (Bots./Namib.), [1999] I.C.J. 1045, 1076.

We realize that the Policy Paper might be advocating a change in legal doctrine here. However, we also challenge the assertion on policy grounds. After all, the main *modus operandi* followed by terrorists is to conceal themselves from the hot battlefield within innocent civilian populations. What the Policy Paper in effect proposes, therefore, is to grant immunity, or something very close to it, to terrorists who act in that way. This is surely counterproductive.[30] In response, terrorists will simply seek refuge in third party states, where they will not only be immune to attack but where they will be likely to ferment destabilization, as has been the case in Lebanon and the Democratic Republic of Congo.[31] Those examples suggest that, where the 'hot battlefield' limitation is applied, it is not the state that takes the fight to other parties, but rather the terrorists who do so.

Nevertheless, we agree that not every terrorist in every part of the world can simply be targeted. According to our analysis, international law includes two inherent limitations on the use of lethal targeting of active terrorists.

*First,* our analysis only relates to cases in which there is an armed conflict between the state and the terrorist organization, hence excluding all counter-terrorism activities conducted by states not involved in intense fighting against terrorism. For all these other cases we agree that the correct model is that of law enforcement. *Second,* as detailed below, a terrorist constitutes a legitimate target only as long as they operate within the framework of the organized activity of the terrorist organization.[32] This

30 Rosen, *supra* note 13; Hays Parks, *Air War and the Law of War*, 32 Air Force L. Rev. 1 (1990).

31 For a discussion concerning destabilization in these states, see Christopher Williams, *Explaining the Great War in Africa: How Conflict in the Congo Became a Continental Crisis*, 37 Fletcher F. World Aff. 81 (2013); Guy Fiti Sinclair, *The Ghosts Of Colonialism In Africa: Silences And Shortcomings In The ICJs 2005 Armed Activities Decision*, 14 ILSA J. Int'l and Comp. L. 121 (2007); Bassam Tibi, *The Fundamentalist Challenge to the Secular Order in the Middle East*, 23 Fletcher F. World Aff. 191 (1991).

32 The Targeted Killing Case, *supra* note 6; Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, (ICRC, 2009) [hereinafter: ICRC DPH Guidance]. For further reading on this guidance,

condition may also have a geographical facet. Therefore, it seems that the terrorist is a legitimate target only when they operate in an area in which the terror group itself operates in an organized manner. For example, if the terrorist group moves a certain camp to a third country, and that camp serves an organizational purpose of the terrorist group, anyone operating in the camp would be considered to be operating within the geographical zone of the conflict because the terrorists are operating in an organized manner in that geographical zone. However, if the terrorist is running away and hiding in a remote place with no organizational connection, it would seem that they are no longer part of the conflict.[33]

The last point that bears emphasis regarding the geographical scope of the use of pre-emptive lethal targeting has to do with the division between *jus ad bellum* and *jus in bello*. The question whether there is a general right to use extra-territorial force is an issue of *jus ad bellum*. For example, whether or not the United States is allowed to use force in Pakistan is a question arising from the interpretation of *jus ad bellum*[34] and respect

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see Bill Boothby, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance: "And For Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. Int'l L. and Pol. 741 (2010).

33 We think that this is actually the reason behind the determination of the U.S. Department of Justice in its recently released memo in which the DOJ claimed: "if an operation of the kind discussed in this paper [lethal targeting—A.C. and T.M.] were to occur in a location where al-Qa'ida or an associated force has a significant and organized presence and from which al-Qa'ida or an associated force, including its senior operational leaders, plan attacks against U.S. person and interests, the operation would be part of the non-international armed conflict between the United States and al-Qa'ida…" *Department of Justice White Paper: Lawfulness of a Lethal Operation Directed against a U.S. Citizen who is a Senior Operational Leader of Al-Qa'ida or an Associated Force (2011)*.

34 Kurt Larson and Zachary Malamud, *The United States, Pakistan, the Law of War and the Legality of the Drone Attacks*, 10 J. Int'l Bus. and L. 1 (2011); Chris Jenks, *Law From Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict,* 85 N. D. L. Rev. 649 (2009); Andrew C. Orr, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 Cornell Int'l L.J. 729 (2011).

for the sovereignty of Pakistan. It involves the legal issues of neutrality, sovereignty, responsibility of states, and the correct scope of self-defense with regard to any military action. It seems to us that current circumstances allow the United States to use extra-territorial force in some situations. The justifications might include state consent, the inability or unwillingness of other states to act, and self-defense.[35] However, each case has to be examined in its own context.[36]

Our conclusion regarding the right to use force is separate from the question of the legality of the method of lethal targeting. Even were we to grant (which we do not) that there exists no justification for some of the United States' resort to extra-territorial force, the legality of the specific methods employed during those operations would still be determined by IHL.

## B. The Extra-Territorial Applicability of International Human Rights Law

As is clear from the previous analysis, we agree with the Policy Paper that it is quite possible that in some cases IHL cannot be applied to the use of lethal force, either because the situation cannot be defined as one of armed conflict or because of the geographical scope of the conflict. The Policy Paper assumes that wherever IHL cannot be applied, by default the correct applicable framework is that of IHRL and the law enforcement model, which, because it invokes the extra-territorial principle, dramatically limits the possibilities of the use of lethal force. Granted, the Human Rights Committee and certain other bodies do support the extra-territorial application of IHRL;[37] however, it is not at all clear that all, or even most, states accept that **during a**

35 Foreman, *supra* note 9; McKelvey, *supra* note 9*;* Fisher, *supra* note 9; Leila Nadya Sadat, *Presidential Powers and Foreign Affairs: Rendition and Targeted Killings of Americans: America's Drone Wars*, 45 Case W. Res. J. Int'l L. 215 (2012); Harwood, *supra* note 9.

36 Schmitt, *supra* note 27.

37 Orna Ben-Naftali and Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories,* 37 Isr. L. Rev. 17 (2003–2004).

**single attack** (from the air) a state is obligated to apply IHRL.[38] Once again, we understand that the Policy Paper might advocate a change in existing legal doctrine. However, we submit that it is important to understand that if the proposals of the policy paper regarding the limited scope of IHL were to be immediately adopted, the law *as it stands now* would mean that for many states there would simply be no international standard.

The IHRL right that is most relevant to the case at hand is the right to life, which is enshrined in article 6 of the International Covenant on Civil and Political Rights [hereinafter: ICCPR].[39] Article 2 of this document requires a State party to respect the rights enshrined in the Covenant and ensure that they are available to individuals within its territory and subject to its jurisdiction. The European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter: ECHR][40] applies to persons subject to a state's jurisdiction. The decisive question in the case at hand is whether lethal targeting of active terrorists outside the territory of a state can be considered to fall within that state's jurisdiction. A review of some of the case law addressed by the European Court of Human Rights [hereinafter: ECtHR] might help resolve this issue.

In the famous *Bankovic* case,[41] the ECtHR applied a narrow interpretation of the concept of jurisdiction.[42] In that instance, the Court ruled that NATO aerial bombings in Kosovo and Serbia were not subject to the jurisdiction of

38 Bankovic v Belgium, 11 BHRC (2000) 435; Barbara Miltner, *Revisiting Extraterritoriality after Al-Skeini: the ECHR and its Lessons*, 33 Mich. J. Int'l L. 693 (2012); Joanne Williams, *Al Skeini: A Flawed Interpretation of Bankovic*, 23 Wis. Int'l L.J. 687 (2005); Erik Roxstrom, Mark Gibney *and* Terje Einarsen, *The NATO Bombing Case (Bankovic et Al. V. Belgium et Al.) and the Limits of Western Human Rights Protection*, 23 B.U. Int'l L.J. 55 (2005).

39 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966).

40 European Convention for the Protection of Human Rights and Fundamental Freedoms.

41 Bankovic, *supra* note 38; Roxstrom, Gibney *and* Einarsen, *supra* note 38.

42 David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?,* 16(2) The European Journal of International Law 171 (2005), p. 184.

NATO states, thus excluding the applicability of IHRL to such operations.[43] Although this decision was certainly criticized,[44] we nevertheless suggest that it should have been noted in the Policy Paper.

More recently, the decision in the *Al-Skeini* case,[45] which has proven more acceptable at a broader level, refutes the contention that IHRL is, as a matter of course, applicable to aerial attacks launched outside the territory of the state. In that decision, the ECtHR referred to two possible situations in which IHRL would apply outside the territory of a state.[46] One is when the state possesses effective control over [the] area [hereinafter: ECA], as would be the case when it fulfills some of the functions of the public authorities in a foreign territory. The second situation that, according to the ECtHR, would allow the applicability of IHRL outside a state's territory, is when there exists a state agent authority [hereinafter: SAA] responsible for the action. That would be the case when, for example, actions were undertaken by diplomatic agents on behalf of a state.[47] An additional instance, which seems to be of importance to our discussion, would occur when an agent of a state exerts force over an individual under its control and authority.[48]

The ECtHR has in the past discussed the latter situation with respect to persons held in detention centers under Turkish and British custody in Iraq.[49]

43 Bankovic*, supra* note 38.

44 Kretzmer, *supra* note 42; Miltner, *supra* note 38.

45 Al-Skeini v. United Kingdom, App. No. 55721/07 (Eur. Ct. H.R. July 7, 2011), 50 ILM 995 (2011); Dominic Ralph Wilde, *Symposium on Complementing International Humanitarian Law: Exploring the Need for Additional Norms to Govern Contemporary Conflict Situation: Complementing Occupation Law? Selective Judicial Treatment of the Suitability of Human Rights Norms*, 42 Isr. L. Rev. 80 (2009);

46 Al-Skeini, *id.*, paras. 79–81, 134–135.

47 *Id*., para. 134.

48 Id., para. 79–81.

49 Issa v. Turkey, App. No. 31821/96, 41 Eur. H.R. Rep. 567 (2004); Al-Saadoon and Mufdhi v. United Kingdom, App. No. 61498/08, Eur. Ct. H.R. (2009); Stefka Kavaldjieva, *Jurisdiction of the European Court of Human Rights: Exorbitance in Reverse?: Can, and Should, An Iraqi Victim of Human Rights Abuses Inflicted by U.K. Troops Have a Remedy in U.K. Courts Under the European Convention of Human Rights?*, 37 Geo. J. Int'l L. 507 (2006).

However, it is debatable whether an agent who guards a detainee wields the same level of control and authority as does a pilot who attacks an individual from the air. Accordingly, it has been suggested that the application of the *Al-Skeini* ruling to the 2011 bombing operations against Libya launched by a number of European states would result in a conclusion that those actions did not fall under article 1 to the ECHR. [50]

In conclusion, perhaps international law *lex ferenda* should include a default rule that all actions of states would be subject to either IHL or IHRL. However, according to many states, this is not the *lex lata*. According to some states, if their actions were not subject to IHL, they would not be subject to IHRL either. Viewed from this perspective, while taking into account the position of states, it seems to us that the IHL framework is preferable to having no legal framework controlling actions of states.[51]

## III. Analysis of Direct Participation of Civilians in Hostilities

The Policy Paper analyzes the question of direct participation of civilians in hostilities, in order to determine when a terrorist is a legitimate military target. We shall first briefly describe the approach of the Policy Paper, and then discuss the specific disagreements we have with this approach.

50 Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg,* 23(1) The European Journal of International Law 121 (2012). For further reading, see Samantha Miko, *Al-Skeini v. United Kingdom and Extraterritorial Jurisdiction under the European Convention for Human Rights*, 35 B.C. Int'l and Comp. L. Rev. 63 (2013).

51 Other possible explanations for the approach presented by Krebs could have been offered, as a substitute to the required discussion concerning extra-territorial application of IHRL. For example, it has been argued that because the right to life is considered a *jus cogens* norm, a preemptory norm from which no derogation is allowed, the state's duty to respect the right to life follows its agents wherever they operate. Nevertheless, the Policy Paper failed to offer such explanations. *See, e.g.,* Kretzmer, *supra* note 42.

## A. The Principled Approach

The Policy Paper argues that the analysis of the use of lethal targeting against active terrorists should be framed around three basic IHL principles: distinction; proportionality; and the need for precaution in attack. We unhesitatingly concur with the assessment of the centrality of these three principles in IHL. However, we find ourselves unable to agree with the conclusion that the Policy Paper draws from them. The Policy Paper appears to consider that the pre-emptive lethal targeting of active terrorists somehow undermines each of the three principles cited. It accordingly takes a very restrictive view of the conditions under which such operations are allowed. We contend that such a position is unjustified. In fact, the three principles cited **support** the lethal targeting of active terrorists who, according to reasonably available information, can be considered persons who pose a specific danger. This is because no alternative military method implemented in armed conflicts is nearly as likely as is pre-emptive lethal targeting to meet the requirements of distinction, proportionality, and the need for precautions that IHL mandates. Specifically, the principle of **distinction**[52] supports the use of force against individuals who use force. The principle of **proportionality**[53] requires states to target their operations solely against persons engaged in combat against them, and not to use lethal force against innocent civilians. The least injurious *modus operandi* available to states confronting terrorists who hide within the civilian population is the lethal targeting of active terrorists, taking into account protection of civilians. The

52 Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Vol I: Rules (Cambridge University Press, 2005), Rule 1: The Principle of Distinction between Civilians and Combatants; Trevor A. Keck, *Not all Civilians are Created Equal: The Principle of Distinction, The Question of Direct Participation in Hostilities and Evolving Restraints on The Use of Force in Warfare,* 211 Mil. L. Rev. 115 (2012).

53 Henckaerts and Doswald-Beck, *id.*, Practice Relating to Rule 14: Proportionality in Attack; Amichai Cohen, *Proportionality in Modern Asymmetrical Armed Conflicts* (November 5, 2009), available at SSRN; Benvenisti, *supra* note 13; Rosen, *supra* note 13; Parks, *supra* note 30; Blum and Heymann, *supra* note 4.

principle of **precaution in attack**[54] requires that states gather information before acting. In terms of precautions, lethal targeting of active terrorists evinces the greatest respect for the need to take precautions simply by virtue of the fact that those attacks are indeed 'targeted'—i.e., based on prior intelligence regarding the identity of the specific targets.

At its root, our disagreement with the Policy Paper derives from its author's reading of article 51(3) to the First Additional Protocol to the Geneva Conventions,[55] according to which, "civilians taking direct part in hostilities" lose the protections afforded to civilians by the Geneva Conventions "for such time" as they take part in hostilities. The Policy Paper would seem to argue that such persons basically retain their identities as civilians, with some exceptions in very concrete and limited cases. That being the case, the point of departure in any analysis of the ways in which they might be combated should always be very similar to that of the law enforcement paradigm, even if we consider the circumstances of the moment to be associated with an armed conflict.

Our view, which we think is shared by the Israeli High Court of Justice [hereinafter: HCJ] in its *Targeted Killings Case*,[56] as well as by the International Committee of the Red Cross [hereinafter: ICRC],[57] is that in very extreme circumstances and for as long as they are involved in armed activity, terrorists forfeit their civilian identity. Hence, the point of departure should now be that such persons choose to forego their basic civilian protections.

54 Afsheen John Radsan *and* Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 11 U. Ill. L. Rev. 1201 (2011); Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 Case W. Res. J. Int'l L. 279 (2011).

55 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Geneva, 8 June 1977, 1125 UNTS 3 [hereinafter: API].

56 The Targeted Killing Case, *supra* note 6.

57 ICRC DPH Guidance, *supra* note 32. For further reading on this guidance, see: Boothby, *supra* note 32.

That being so, the basic paradigm now applicable to them is that of armed conflict, i.e., they should be treated very much like combatants in terms of targeting. They are not *illegal combatants*, simply because there exists no norm in international law that forbids their participation in war.[58] They are simply persons who have forfeited their protected status as civilians, but are also not entitled to protection as soldiers. Of course, declaring a person to be a civilian who forfeited their status requires concrete evidence that they have indeed chosen the life of a terrorist—that they are constantly and continuously involved in terrorist activities. However, once such evidence has been attained, there is no need to show that they are currently involved in the actual planning of a specific operation. We can see nothing immoral or unethical with this interpretation of the law, which declares that should a person choose to participate in an armed conflict, they will become a legitimate target during the course of that conflict.

## B. Response to the Specific Recommendations

The Policy Paper specifies certain conditions under which, in the opinion of its author, lethal targeting operations against active terrorists are permitted. We have already expressed our opinion on one such condition, pertaining to the geographical scope of the use of force, and will therefore not refer to that subject here. Instead, we shall respond as concisely as possible to the other recommendations presented in the Policy Paper.

58 Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 IRRC 849 (2003); Sonia R. Farber, *Forgotten at Guantanamo: The Boumediene Decision and Its Implications for Refugees at the Base Under the Obama Administration,* 98 Cal. L. Rev. 989 (2010); Tyler L. Sparrow, *Indefinite Detention After Boumediene: Judicial Trailblazing in Uncharted and Unfamiliar Territory*, 44 Suffolk U. L. Rev. 261 (2011); Randolph N. Jonakait, *Rasul v. Bush: Unanswered Questions*, 13 Wm. and Mary Bill Rts. J. 1129 (2005).

Three broad clusters of questions are:

## (1) 'Who May be Targeted': What Does 'Direct Participation in Hostilities' Really Mean?

The Policy Paper suggests adopting a very narrow interpretation of the term 'direct participation,' substantially limiting the scope of civilian loss of protection due to participation in armed activities. The view adopted by the policy paper contrasts the HCJ's approach in the *Targeted Killings Case*[59] to that of the ICRC interpretative guidance,[60] which adopts an 'activity based' test. The Policy Paper prefers the latter and proposes the adoption of a tripartite test for direct participation: ***(1) threshold of harm; (2) direct causation; and (3) belligerent nexus***.

## (2) 'When': What are the Concrete and Practical Temporal Constraints of the 'For Such Time' Requirement?

Here, too, the Policy Paper adopts a strict approach. Its premise is that the category of illegal combatants, to which we referred above, should be rejected. The Paper also rejects the interpretation of 'direct participation' adopted by the HCJ in its *Targeted Killings Case*, and even by the ICRC in its interpretative guidance. Instead, the Policy Paper states: "Therefore, in our opinion, the temporal component of 'direct participation' (the 'for such time' requirement') should be limited to the first group only: those individuals who actively and directly participate in a concrete attack."

## (3) Precautions and Transparency

The Policy Paper recommends:

**Feasible Precautions**—a requirement that mandates a duty to err on the side of caution. Specifically, prior to executing a lethal targeting operation against

59 The Targeted Killing Case, *supra* note 6.

60 ICRC DPH Guidance, *supra* note 32.

active terrorists, all relevant information (including information concerning potential collateral damage) has to be thoroughly gathered and carefully analyzed. 'Inconclusive' or doubtful information necessitates carrying out clarifying investigations and information gathering.

**Transparent Internal Processes and Political Oversight**—The Policy Paper requires states to make public their policies concerning the lethal targeting of active terrorists. Hence, they have a duty to itemize the criteria for targeting an individual. They also have to clarify their policies concerning collateral damage, what they consider to be 'sufficient evidence' to justify the lethal targeting of active terrorists, and the internal process required to approve a lethal targeting operation. Transparency thus applies to all aspects of lethal targeting operations against active terrorists: from the relevant normative standards (national and international) applied, to the decision-making process required as well as the participants in such process. The spectrum also extends to operational responsibility,[61] and to the investigations of alleged violations.

## C. Comments and Disagreements Concerning Specific Recommendations

As stated, we basically accept the premise of the Policy Paper, according to which lethal targeting operations against active terrorists should not be undertaken until the targeted individuals have been identified as and ascertained to be terrorist activists. However, we submit that in these areas the Policy Paper delineates too high a threshold—so much so that, in all but a few cases, it effectively bars the resort to the lethal targeting of active terrorists, thereby practically ignoring the difference between IHL and IHRL.

61 A degree of transparency in relation to operational responsibility is essential both in terms of facilitating public or political accountability, and establishing whether operations are being conducted with the necessary legal authority under domestic law.

## (1) Conditions for Targeting Terrorists

Our own point of departure is a recognition that terrorism is *sui generis*, a condition arising from the fact that terrorists choose to disguise themselves as civilians: At times they conceal their weapons and equipment in civilian houses and places of worship; on occasion they also fire rockets from schools or other protected locations.[62]

As stated above, the Policy Paper refers, in this context, to the ICRC approach concerning the question of direct participation in hostilities [hereinafter: DPH],[63] which its author consider to be flawed (albeit preferable, in her view, to that adopted by the Israeli Supreme Court). According to the Policy Paper, the indefinite temporal element implicit in the 'continuous combatant status' violates the basic principles of IHL; it creates a group of people who are not protected by any of the relevant IHL treaties and who constitute legitimate targets at all times. Hence, the Policy Paper argues, the temporal component of 'direct participation' (the 'for such time' requirement') should be limited only to those individuals who actively and directly participate in a concrete attack, and only for as long as they participate in the attack. Taken to its logical conclusion, this argument implies that terrorists will be immune from targeting while in their homes or as long as no concrete attack is being planned or executed.

That position seems to us to be untenable. We fail to understand why the principle of distinction, designed to enhance humanitarian protection of persons not involved in the hostilities,[64] should protect people who misuse it.[65] This contradicts the logic behind such rules as the prohibition against perfidy (a war crime under the First Additional Protocol to the Geneva Conventions)—defined as an action carried out by one who invites an adversary to believe that they are entitled to protection under the rules

62 Cohen, *supra* note 53; Rosen, *supra* note 13.

63 ICRC DPH Guidance, *supra* note 32. For further reading on this guidance, see: Boothby, *supra* note 32.

64 Henckaerts and Doswald-Beck, *supra* note 52; Keck, *supra* note 52.

65 For a discussion, see: Cohen, *supra* note 53.

of IHL, but that is undertaken out of an intent to betray that confidence.[66] Terrorists who disguise themselves as civilians invite the adversary state to believe that they are entitled to protection under IHL, thus betraying the confidence of that state.

If we were to adopt the most stringent of the recommendations of the Policy Paper, we might also require states to prove—in extreme circumstances—that their targets were engaging in terrorist activity **while** being attacked. This demand too would appear to raise the threshold to a level that, other than in very limited circumstances, would be simply unattainable. The challenges of intelligence-gathering confronted by states engaged in conflicts against terrorists are daunting under the best of circumstances. It is surely unwise to add to their burdens by expecting them to know precisely when a terrorist is planning an attack and when they might be studying an innocuous religious text. By the same token, one might ask whether there exists a realistic distinction between activities that might be classified as 'military' and those which can be designated entirely 'private.' People make plans about their work even while dining, going to the grocery store or taking the car to the garage (the same vehicle that might be used to deliver missiles at a later stage). Once an individual chooses to become a 'full-time' terrorist, there is no way to discern when exactly they are or are not acting as a terrorist.

There is another reason for our disagreement with this conclusion of the Policy Paper. Were we to insist on any such requirement, it seems to us that states would usually be able to resort to lethal targeting operations against active terrorists when they were in possession of visual proof that the terrorist concerned was involved in activity that posed imminent danger. Of course, using lethal force against such a danger is allowed even according to the law enforcement model, as this is purely and simply a 'self-defense' case. It therefore seems that according to the Policy Paper, the armed conflict model does not allow states any more leeway than the law enforcement model

66 API, *supra* note 55, article 37(1); Robert Clarke, *The Club-K Anti-Ship Missile System: A Case Study in Perfidy and its Repression*, 20 Hum. Rts. Br. 22 (2012).

gives them. In reality, states would be able to use exactly the same amount of force against terrorists when using the lethal targeting method under the armed conflict model. The fact that there is an armed conflict would not give states any more flexibility or room for operation. We find this result to be problematic. The basic assumption of international law is that during armed conflict states are allowed to use more force than they are allowed to use in law enforcement operations.

To this must be added another consideration, which we find equally problematic. Were the demand for the heightened level of proof stated in the Policy Paper to be adopted, it would surely focus state counter-terrorist operations on the lower echelons of the terrorist organization, and thus effectively provide protection to terrorists higher up in the hierarchy. This is because the individuals about whom it is easiest to acquire information are those who actually carry out the terrorist acts, who are invariably lower-grade operatives. Modern technology allows the attacking states to acquire precise knowledge about the persons actually doing the shooting. It is much more difficult to gather concrete information about terrorists higher up in the chain of command, especially if the higher standard of proof is applied. However, it is precisely those terrorists who conceal themselves behind the frontlines who are the most dangerous.

To summarize: The essence of our criticism of the Policy Paper's recommendations with respect to the conditions for targeting terrorists focuses on the virtual impossibility of meeting the burden of proof that the Paper would requires. Moreover, we argue that the threshold of proof demanded in the Policy Paper is not in accord with current IHL. The level of prior knowledge demanded from states is that expected of a reasonable commander,[67] no more. There is no reason to think that a change in this regard has occurred in the international sphere.[68]

67 Henckaerts and Doswald-Beck, *supra* note 52, Practice Relating to Rule 14, Proportionality in Attack. API, *supra* note 55, article 51(5)(b).

68 For further discussion, see: Amichai Cohen, *The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives*, 35 Rutgers L. Rec. 23 (2009).

## (2) Imminence of the Threat

Another condition that the Policy Paper sets for the lethal targeting of a terrorist is the imminence of the threat that they are thought to pose. We agree, of course, that other methods should be used when the threat does not appear to be imminent, or when there exists a less lethal way of averting it. What we cannot accept, however, is the notion that lethal targeting might be analyzed as though it constituted nothing other than a simple law enforcement operation, in which the imminence of the threat usually means its immediacy. Where terrorism is concerned, the attacking party can never be certain of being able to mount a lethal targeting operation at a later date. By their nature, such operations can only take place at very specific times. Hence, the real question to address is not whether the threat is immediate, but whether there is a reasonable chance that the threat could be dealt with at a later date. If not, then the use of lethal targeting is surely permitted.[69]

## (3) Feasible Precautions

It seems to us that much of what really lies behind the criticism directed against lethal targeting has to do with a deep mistrust of the information supporting the identification of terrorists. Indeed, lethal targeting can be portrayed as extra-judicial killings, situations in which a state is allowed to use lethal force without proper demonstration of proof of guilt. We agree, of course, with the need for a procedure that will verify, as far as possible, whatever information a state has acquired with respect to its targets. We are also aware that such a process requires constant external and independent review, and we therefore agree with much of what the Policy Paper argues in this regard.

Nevertheless, two additional points appear to us to be worthy of consideration. *First,* states are indeed making an effort to enhance their procedures prior to giving instructions for a lethal targeting operation to be

69 Matthew Lippman, *The New Terrorism and International Law*, 10 Tulsa J. Comp. and Int'l L. 297 (2003); Leora Bilsky, *Suicidal Terror, Radical Evil, and the Distortion of Politics and Law*, 5 Theoretical Inq. L. 131 (2004).

carried out. In fact, all available evidence shows that it is with respect to preventive lethal targeting operations that states invest resources to attain information and intelligence regarding the target. This is both because of legal requirements, and because of economy of force. It would simply be wasteful to embark on a relatively expensive targeted shooting of a person without proof of his identity. It seems to us that such a method of warfare should be encouraged. We want the armed forces of states to know whom they are shooting at. *Second,* precaution in attack is a general requirement in IHL.[70] This general requirement has a long history, has customary standing, and is not specific to lethal targeting. What differentiates war from peace is that lethal force is being used, and IHL is constantly confronted with the question of required proof. It might be claimed that states are never to be trusted, but we are not sure why IHL should trust states in implementing correct precautions in applying the principle of distinction between civilian and military targets, and not accord states the same trust regarding the identification of terrorists. All feasible precautions should be used during all military operations, and this includes lethal targeting.

## (4) The Requirement to Detain before Shooting

The Policy Paper argued that states should use lethal force as a last resort—only when capture is not feasible. We accept this position in principle, and in the limited number of cases where it is clear that there exists a simple choice between using lethal force and detaining the terrorist. Even in classic international armed conflicts, where most commentators believe that the rule is that shooting the enemy is allowed even when he can be detained,[71] in

70 *See* Henckaerts and Doswald-Beck, *supra* note 52, Chapter 5: Precautions in Attack (pp. 51–67).

71 There is considerable literature on this subject, with most commentators supporting the view that at least in international armed conflicts there is no duty to capture before killing. See e.g. Hays Parks, *'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect'*, 42 NYU J Int'l L and Politics 794 (2010); William H. Boothby, The Law of Targeting (Oxford University Press, 2012),

many cases soldiers choose to detain those enemy soldiers whose capture does not endanger themselves.[72] It seems to us to represent good policy as well as good law to declare that capture is preferable to killing. The problem, of course, is that where the conflict against terrorism is concerned, the situation is almost never so simple.

President Obama recently delivered some especially pertinent remarks on this issue:[73]

> In some cases—such as parts of Somalia and Yemen—the state has only the most tenuous reach into the territory. In other cases, the state lacks the capacity or will to take action. It is also not possible for America to simply deploy a team of Special Forces to capture every terrorist. And even when such an approach may be possible, there are places where it would pose profound risks to our troops and local civilians– where a terrorist compound cannot be breached without triggering a firefight with surrounding tribal communities that pose no threat to us, or when putting U.S. boots on the ground may trigger a major international crisis.[74]

Thus, while arrest and prosecution constitute the first preferred option, practical difficulties may invariably preclude its adoption. This is most obviously the case with respect to the most common uses of that modus operandi, in situations

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at 526; Michael N. Schmitt, *Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'*, 24 Eur. J. Int'l L. 855 (2013). The ICRC DPH Guidance, *supra* note 32, seems to suggest a duty to capture, at least in Non-International Armed Conflicts. See also Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 Eur. J. Int'l L. 3 (2013). We, however, claim that the duty to capture is almost irrelevant to situations of lethal targeting, even if the ICRC/Goodman position is adopted, for the reasons detailed in the text.

72 Goodman, *id*.

73 President Obama's national security speech, May 23, 2013.

74 *Id*. For discussion on such barriers and their significance, see: Blum and Heymann, *supra* note 4.

of extraterritorial lethal targeting, or in areas over which the state does not exercise full effective control. Under those circumstances, the requirement that detention be the first option requires clarification. How many lives of soldiers should be placed at risk in order to detain a terrorist in preference to using lethal force? More importantly, how many civilian lives should be put at risk if the terrorist is hiding within a civilian population, and using civilians as "human shields"?[75] We think that the answer to these questions is self-evident: Detention should be the first option only if its use carries no risk to either soldiers, or does not carry more risks than the alternatives to the civilian population. To prefer any option other than preventive lethal targeting when there is danger to civilians or soldiers would imply that we attach greater value to protecting the life of a terrorist than to protecting those of soldiers (which we consider intrinsically objectionable) and civilians—a proposition that in our opinion borders on the absurd.

To sum up: we agree with the principle that the least harmful alternatives should be used. It seems to us, however, that there are not many instances in which such alternatives are indeed available.

## IV. The Shehadeh Commission

Much of the Policy Paper deals with one specific instance—the *Shehadeh Commission*.[76] In this response we will not discuss the criticism regarding the *Shehadeh Commission* in detail. We agree that in this specific instance the inquiry conducted by the Commission was too protracted, and could have led to other conclusions. That said, however, we consider it important to make two observations which we consider to be of a principled nature.

75 As we note later, our assumption is that sending troops to detain a person, or putting 'boots on the ground' creates more risk of civilian casualties than the use of lethal targeting. See our discussion *infra* next to footnote 280.

76 The Report of the Special Investigatory Commission on the targeted killing of Salah Shehadeh.

## A. The Need for External Control over the Procedure

First, the *Shehadeh Commission* report is of great importance in the sense that it clarifies the procedures to be required before approving the use of lethal targeting operations against active terrorists. It is therefore a positive development. It lays the groundwork for the proper procedure, which is the basis of the principle of precaution, and sets very specific requirements. It is a unique document in the sense that it in fact conforms to the major requirement of the Policy Paper for transparency in decision-making procedures. However, the mere fact that a procedure exists does not guarantee that it will be efficient.

In the words of Professor Eyal Benvenisti:

> As may have become clear, the framework as outlined reflects much trust in institutional and procedural guarantees as key to ensure compliance with the substantive legal obligations. This assumption—which informs every effort to regulate decision-making—relies on the hope that in a deliberative process, in which participants have different opinions and engage in open and informed deliberations, the outcome eventually will be a well-balanced and lawful decision. But when all the involved parties conform to a certain vision of legality, often the mere compliance with the procedure will not prove an effective restraint. For this reason, while the institutional and procedural constraints are necessary, they should not be regarded as sufficient. External mechanisms of review, including parliamentary and judicial review, individual sanctions, and open public debate, are also necessary to ensure that the decision-makers do not get accustomed to 'follow the script' of the rules without seriously contemplating the justification for action in each case.[77]

77 Eyal Benvenisti, *Report on the Legal Regulation of Targeted Killing in Israel*, in Targeted Killing, Unmanned Aerial Vehicles and EU Policy (Nehal Bhuta, Claus Kreß, Ian Seiderman, Christof Heyns, Nils Melzer, Martin Scheinin, Eyal Benvenisti and Anthony Dworkin (eds.) European University Institute, 2013).

We agree of course that there is a need for external control. We therefore agree with the suggestion of the establishment of an independent commission, comprised of representatives of both the state and civil society.[78] However, we caution against putting too much trust in such bodies. Permanent oversight bodies (as opposed to *ad-hoc* committees) tend to accept the point of view of the institutions that they are supposed to review. At the end of the day, the question would still be whether we trust the armed forces in their assessment. An external body might provide some assurance, but would surely not replace the judgment of commanders.

## B. The Correct Interpretation of the Principle of Proportionality

The Policy Paper takes the view, as elaborated here, that *the Shehadeh Commission* turned the principle of proportionality into an empty cliché. *First*, the Commission does not explain the calculation of collateral damage versus security gain, and provides no guidance as to how decision-makers might in the future apply the proportionality test. It leaves it as an obscure test, to be determined in each case by the relevant decision-makers. *Second*, the Commission did not distinguish between state responsibility and individual responsibility. It concludes that the operation was completely lawful—a conclusion that is inconsistent with the determination that the attack was disproportionate. While it certainly could be the case that no one was criminally responsible for committing international or domestic crimes, it is nonetheless obvious that the principle of proportionality was violated.

It seems to us that it is important to point to the fact that the criticism which the Policy Paper directs against *the Shehadeh Commission* is actually a general criticism of the fact that the principle of proportionality has no clear content. This is true of any use of force, in any conflict. It is not unique to the

78 For a full discussion of review mechanisms in national security see: Amichai Cohen and Stuart A. Cohen, Israel's National Security Law (Routledge, 2012), pp. 230–238.

use of lethal targeting of active terrorists, and hence it seems that it is not a reason to use or not to use this method.

The main problem with the principle of proportionality is that its content is not at all clear. One controversy concerns the variants required in a formula to calculate the value of human lives.[79] Such a formula simply does not exist.[80] Related questions are how does one measure the excessiveness of civilian casualties against possible danger to the lives of soldiers, and which persons should be counted as civilians?[81] The committee appointed by the prosecutor of the ICTY to review the NATO bombing campaign against the Federal Republic of Yugoslavia in 1998 tried to answer this question by concluding that states are permitted to protect their soldiers by resorting to an aerial campaign, even though such operations place a greater number of civilian lives at risk.[82]

An additional issue of importance concerns the lives of the state's civilians. How should they be measured against the lives of the enemy's civilian population? Commanders in targeted killing operations must take into account the likelihood that their implementation endangers anyone in the immediate vicinity of the individual terrorist who is targeted. However, should they also weigh the threat that the terrorist will inevitably pose to the intended

79 For opposing opinions, *see* Michael Walzer and Avishai Margalit, *Israel: Civilians and Combatants*, 56 New York Review of Books 8 (2009); Asa Kasher and Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. Mil. Ethics 1(2005).

80 Cohen, *supra* note 53.

81 For discussion of possible approaches in situations where the civilian population is deliberately placed in danger by the defending side, see: Rosen, *supra* note 13; Hays Parks, *supra* note 30.

82 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M.1257 (2000), para. 56. In the case of Yugoslavia, the end result was around 500 civilian casualties, a relatively low number for a war. However, it is doubtful whether that case can serve as a marker since the Yugoslavia campaign was conducted against an enemy which did not intentionally operate from within civilian population. Ward Thomas, The Ethics of Destruction: Norms and Force in International Relations (Cornell University Press, 2000), pp. 161–168.

victims of his planned suicide bombing if he is not killed?[83] These are general problems concerning the use of proportionality, and if proportionality is a cliché, as the Policy Paper suggests, it is such in all manifestations of armed conflicts around the world, regardless of whether or not they are terror-related.

Finally, concerning the use of proportionality in the context of international criminal law [hereinafter: ICL].[84] ICL may not be the proper instrument to deal with the problems this principle creates.[85] To the best of our knowledge, there has not been any conviction of an individual for violating the principle of proportionality, when the accused has proven that they indeed considered the possible incidental damage to civilian life in comparison to the military advantage. On the contrary, the only ICTY case in which a person was convicted for violating the principle of proportionality was the *Blaskic* case,[86] and this problematic decision was overturned on appeal.[87]

The upshot of our argument is that, as one of us has proposed in the past,[88] proportionality does not focus on results—it examines the process. Part of the duty of the attacking state is to go through a process of verification regarding the extent of potential harm to civilians.[89] We are not aware of any army that tries to calculate *ex ante* the number of civilian casualties out of the possible

83 The Targeted Killing Case*, supra* note 6, para. 21, (Allowing the use of the practice of targeted killing provided the conditions of proportionality are met).

84 For reading on this subject, see: M. Cherif Bassiouni, *Symposium: Redefining International Criminal Law: New Interpretations and New Solutions: Criminal Law: The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. Crim. L. and Criminology 711 (2008).

85 Cohen, *supra* note 53.

86 Prosecutor v. Blaskic, ICTY Case No. IT-95-14-T, T. Ch. 1 (3 March 2000).

87 For a discussion concerning the decision, see: Shahram Dana, *Revisiting the Blaskic Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY*, 4 Int'l Crim. L. Rev. 321 (2004); William J. Fenrick, *Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals: Symposium Article: Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities*, 30/111 B.C. Int'l and Comp. L. Rev. (2007); Jennifer J. Clark, *Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 96 Geo. L.J. 1685 (2008).

88 Cohen, *supra* note 53.

89 Cohen, *supra* note 68.

victims. Normally, the main question asked is whether a proper procedure has been followed.

In this last regard, we are actually in agreement with the Policy Paper's criticism regarding the specific way in which the principle of proportionality was in fact applied by the *Shehadeh Commission.* The decision to drop the bomb that caused the death of 13 civilians, despite the fact that the intelligence was lacking, was indeed problematic. It seems to us that the problem with the *Shehadeh Commission* was not that the principle of proportionality was not understood, but rather that this understanding was not applied.

## V. Efficacy of the Lethal Targeting of Active Terrorists

We will conclude with the question of the efficacy of lethal targeting. Based on recent studies, the Policy Paper claims that lethal targeting of active terrorists as a counterterrorism method is at best of questionable efficacy, and at worst, counter-productive. The Paper suggests that these undesirable and negative effects of the use of lethal force should serve as important policy considerations when determining the proper interpretation of the relevant law and defining the scope of DPH in this regard.

The studies presented in the Policy Paper are helpful in the sense that they provide an empirical basis for discussion.[90] It is especially helpful regarding the use of the principle of proportionality, which requires a demonstration of concrete military advantages in order to legitimize collateral damage. However, we should bear in mind that IHL allows the use of a military method such as targeting a military objective, irrespective of whether that

90 Michael Heise, Symposium: *Empirical and Experimental Methods of Law: The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. Ill. L. Rev. 819 (2002); Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. Legal Educ. 313 (2000).

policy might be considered wise. IHL does not review the effectiveness or wisdom of military policies, only their legality.

Furthermore, when evaluating the effectiveness of a policy, the alternatives should be taken into account. Were lethal targeting operations against active terrorists to be banned, the result might be increased use of ground troops, an option that has greater potential for mistakes and killing civilians. As President Obama pointed out,[91] it is false to assert that putting boots on the ground is less likely to result in civilian deaths, or to create enemies. The result may actually be more deaths, more Blackhawks down, more confrontations with local populations, and an inevitable mission creep in support of such raids that could easily escalate into new wars. In other words, if the claim is an empirical one, we feel that more evidence should be gathered regarding the alternatives, before the empirical claim is made. It seems that presently available information provides insufficient evidence to assert that preventive lethal targeting operations are not effective.

# VI. Conclusions

We agree that preventive lethal targeting operations against active terrorists present several problems. However, we believe that what is therefore necessary is not the banning of this *modus operandi* but a careful examination of the ways in which it might be improved and its faults corrected. Studies such as *the Shehadeh Commission* and the Policy Paper certainly contribute to that end.

*Ex post* examination is an important tool—not just for assessing the legality of acts that have occurred in the past but also for learning how to improve them in the future.[92] We should aspire to improving the challenging aspects of the use of lethal targeting of active terrorists, such as information-gathering and proportionality. When doing so, however, we must also be careful not to undermine *in toto* the legitimacy and the legality of this tool.

91 President Obama's national security speech, *supra* note 73.

92 Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, 8 Yearbook of International Humanitarian Law 47 (2005).

# Some Thoughts, Clarifications, and Answers to Cohen and Mimran's Response

Shiri Krebs

Before delving into the arguments, we wish to thank Amichai Cohen and Tal Mimran for their thoughtful comments, and for engaging in this important discussion on targeted killing law and policy. We welcome all comments and criticisms, as these help clarify important issues as well as highlight the main disagreements in this field. It is also important to note, that while we wish to clarify the existing international law norms governing targeted killings, a main purpose of this policy paper was to propose significant modifications and clarifications to some of the weaknesses of the existing practices. At the outset of the Policy Paper we present the existing legal norms, stating their limitations and possible interpretations, and then offer ways to overcome some of these limitations based on policy considerations. We believe, based on empirical studies that we have analyzed in depth, that such changes are both feasible and necessary to improve security and protect human lives. We see this Policy Paper as an important opportunity to shed light on these challenges, and offer new ways to deal with them and improve existing practices.

Fundamentally, it seems that some of the disagreements stem from different approaches to counter-terrorism in general. Terrorists often disguise themselves as civilians: They do not wear uniforms, they do not carry their weapons openly and they hide among civilian populations. Terrorism also blurs the boundaries of the battlefield and the home-front: It is not clear anymore what the temporal and geographical scopes of the battlefield are. The Commentators, as well as other scholars in this field, argue that since terrorists violate the laws of war, they should not enjoy

the protections that the laws of war grant lawful combatants (or innocent civilians). But the basic assumption underlying this approach is that we *know* for a fact who those terrorists are, and can target and kill them in order to protect civilians and lawful combatants. As demonstrated in the analysis of the Shehadeh Commission Report, counter-terrorism is typically based on secret, uncertain, intelligence information. As information is limited, so is our ability to pinpoint those active and violent terrorists who are constantly plotting terror attacks. Therefore, we should be cautious, and tailor counter-terrorism measures—especially those involving the use of lethal force—to a reality where suspected terrorists are just that: suspects. A careful approach will truly allow us to protect *civilians*, who are mistakenly considered 'terrorists,' are living in the vicinity of a suspected terrorist , or are otherwise endangered by terrorists.

More specifically, the commentators promote a principle according to which "the use of lethal force against terrorists, under specific circumstances […] is not prohibited by IHL." We completely agree with this general principle. Our disagreement concerns the circumstances under which targeted killing *is* prohibited. In the Commentators' opinion, this Policy Paper is too restrictive, thereby in fact practically prohibiting targeted killings altogether. We disagree. First, we carefully craft a targeted killing policy which allows targeting of dangerous individuals as long as they are involved with the planning, organizational stages or execution of concrete terror attacks. Limiting is not equivalent to prohibiting. Second, we believe that only a significantly restrictive approach can be meaningful enough to overcome the challenges inherent in the exclusive reliance upon secret intelligence information. Lethal force is irreversible. There is no second chance to correct mistakes that were based on a misinterpretation of intelligence information. This is why this policy paper focuses on the Shehadeh Commission: It allows us to evaluate the role of intelligence information and group-think dynamics within the security agencies, which can potentially lead to targeting civilians or ignoring the presence of civilians in the vicinity of the targeted individual. We shall now reply to some of the concrete challenges raised by the Commentators.

# I. The Geographical Scope of the Battlefield

We suggest, following other scholars in this field, the adoption of different standards for zones of active hostilities, and other, peaceful, areas. The Commentators argue that such an approach is tantamount to providing terrorists with immunity. While our approach indeed limits, to some extent, the scope of the armed conflict model, it certainly does not grant immunity to terrorists. First, the armed conflict model will continue to apply wherever active hostilities occur (including places where terrorists plan their concrete ongoing operations)—areas which justify resort to the laws of war. Second, outside these zones of active hostilities the law enforcement model, including International Human Rights Law [hereinafter: IHRL], would apply. This model does not by any means confer immunity on terrorists. On the contrary, it permits the use of lethal force in limited circumstances (including self-defense), and provides many other tools to fight terrorists, including detention and criminal prosecution. Third, we simply do not agree with the approach that the end justifies the means.

The Commentators support the alternative approach, according to which the armed conflict model applies everywhere, as long as the relevant target is part of the organized activity of the terror organization. In their opinion, as long as an active terrorist is hiding in a remote place, they are a part of the armed conflict and can be targeted anywhere they hide. The problem with this approach is that the paradigmatic case is active terrorists, who hide in remote places, among civilian populations. Adopting this rule means that the entire world can be governed by International Humanitarian Law [hereinafter: IHL], as long as we have one terrorist who travels from one peaceful place to another. We do not completely rule out a situation where the armed conflict model follows an active terrorist; but we do require strong evidence that goes beyond the organizational ties—we require evidence that the active terrorist is indeed active, and is planning, organizing or executing a concrete terror attack, in order to justify extending the armed conflict model to such a location.

## II. Extra-Territorial Application of IHRL

We welcome the Commentators' comments and discussion of the important issue. Nontheless we do not share the approach that broadening the scope of the armed conflict model is necessary to avoid 'lawless zones' where no legal regime applies. The Policy Paper's starting point is that the use of lethal force could be governed either by the law enforcement model (which includes domestic law as well as human rights law) or the armed conflict model, and we lay down several policy considerations to support our view that the law enforcement model should govern some of these operations. To the best of our knowledge and understanding, the European Court of Human Rights [hereinafter: ECtHR] decisions mentioned by the Commentators only deal with the extra-territorial application of a concrete mechanism—the European Convention on Human Rights [hereinafter: ECHR]—and do not deal with matters concerning the potential applicability of IHL (or even other IHRL mechanisms). The use of lethal force should always be governed by law, whether IHL or IHRL, and we do not interpret the discussed European case law as suggesting anything to the contrary.

Substantively, we would argue that recent European case law reflects a tendency towards more permissive extra-territorial jurisdiction of IHRL, as is reflected by cases such as *Al-Skeini*, but also, and more to the point, cases such as *Pad v. Turkey*, which applied IHRL in an extra-territorial shooting.[1] Marko Milanovic, whose paper the Commentators cite in support of their view that the ECHR does not apply to situations such as the NATO bombing of Libya, strongly criticizes the inconsistencies of the European cases, and advocates for a broader judicial extra-territorial application of the ECHR, based on policy considerations. He also clarifies that *Al-Skeini* was limited to the procedural component of the right to life (including the duty to investigate), thus allowing the Court to say nothing about how the ECHR would interact with IHL and its targeting rules.

1 ECtHR, App. No. 60167/00, Pad v. Turkey (dec.), 28 June 2007.

Finally, and without underestimating the importance of the ECtHR case law, we wish to mention the decisions of other international tribunals, such as the ICJ, on this point. In its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, and in its later judgment concerning the *Armed Activities on the Territory of Congo*, the ICJ adopted a broader jurisdictional approach concerning extra-territorial application of IHRL. According to this approach, the right to life (and the ICCPR more generally) extends to military operations outside the territory of the State concerned. Specifically, it determined that the ICCPR's reach extends to "acts done by a State in the exercise of its jurisdiction outside its own territory."[2] We find this approach to be consistent with our analysis.

## III. The Principle of Precaution in Attack

The Commentators argue that targeted killing operations respect the principle of precaution simply by being 'targeted.' While this could be relevant to the principles of distinction or proportionality, we fail to understand how naming a method 'targeted' can satisfy the principle of precaution, which is facts-dependent. The requirement of precaution concerns all aspects of a military operation, from the decision-making process to the execution of the operation. It necessitates careful examination of all relevant facts, including ensuring that the target is indeed an active terrorist, and that the weapons used are appropriate to the surroundings of their concrete whereabouts. Precaution represents the exact opposite of approving a method in the abstract. The Shehadeh case, where 13 innocent civilians, 9 of whom children, were killed, exemplifies the gap between a *targeted* operation in the abstract, and its potential not-so-targeted outcomes in reality. Moreover, even in the abstract, we fail to see how a use of lethal force can exemplify general respect for precaution, as opposed to other, less harmful, methods, such as detention.

2 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports (2004), 180, para. 111.

# IV. The Quantum of Proof

The Commentators argue, without providing any empirical references, that the quantum of proof required by the Policy Paper "simply cannot be met except in very limited circumstances." They also argue that "it is not wise to elevate the threshold in a way that states cannot actually meet." We truly cannot understand why that is. Targeted killing operations are military operations designed to take human lives. Such operations are performed in an area of uncertainty, based on secret intelligence information. If states want to hunt down and kill persons who are believed to be plotting terror attacks from distant hideaways, they should be able to provide convincing evidence that these people are indeed plotting such attacks. To clarify, and contrary to the Commentators' claims, the Policy Paper does not require states to provide evidence regarding the *thoughts* of suspected terrorists at any given moment, and attack them only when they are *thinking* about a concrete terror attack. The Policy Paper requires states to present clear and convincing evidence that a killing target is currently *involved* in an ongoing attack. If that is the case, that person can be targeted *at all times* while this plot is underway. The policy paper does not require admissible evidence—only evidence that is concrete and convincing. If this threshold is impossible to meet—it is probably the best argument against targeted killing of suspected terrorists, which rests on the assumption of being able to frustrate future attacks. The paradox here is that the Commentators argue that IHL should not protect those who misuse it—but at the same time refuse to require concrete evidence that these people in fact misuse IHL. Moreover, if it is impossible to provide evidence that suspected terrorists currently engage in plotting violent attacks, how would it be possible to prove they are 'active' terrorists, whose everyday job is to promote terror attacks? The answer lies with the Commentators' characterization of terrorism as a matter of identity: A stable, continuous and possibly even permanent determination, which is based on an unspecified quantum and quality of proof. This 'terrorist until proven otherwise' approach reverses the burden of proof in a dangerous way, thus putting at risk innocent civilians.

# V. Efficiency of Targeted Killing Operations

The Commentators argue that IHL does not review military policies for their effectiveness or wisdom, only for their legality. We agree, and this is why we feel that the Policy Paper can contribute to the discussion. The fact that a certain means of war is (or could be, under some circumstances) legal, does not necessarily mean that it makes a good policy. The Policy Paper was intended to clarify what the law is, and add relevant policy considerations (including effectiveness) to the discussion. As lawyers, we know that the law is not always clear, and can often tolerate different interpretations. Policy considerations, such as effectiveness, could contribute to the discussions.

The Commentators further disagree with our analysis of the effectiveness of targeted killings on the merits. They argue (without providing any empirical basis for this claim) that targeted killing operations are more likely to result in fewer civilian deaths than 'boots on the ground' operations. While the empirical basis for this claim is questionable, it seems irrelevant to the question we raised, which was focused on comparing targeted killings goals and outcomes. The question was not whether 'boots on the ground' operations cause more or fewer civilians casualties than targeted killings, but rather whether killing suspected terrorists is effective or not in reducing violence and destroying terror organizations.

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In essence, we believe that cosmetic changes are not enough to deal with the problems and weaknesses of the current practice of targeted killings of suspected terrorists. The Policy Paper points out several weaknesses of the current practices, and suggests meaningful policy considerations which we believe justify important changes of this practice. These changes, if adopted, will hopefully increase security for all.

Targeted killing is a lethal and irreversible counter-terrorism measure. Its use is governed by vague legal norms and controlled by security-oriented decision-making processes. Oversight is inherently limited, as most of the relevant information is top secret. Under these circumstances, attempts to assess the legality of targeted killing operations raise challenging, and often undecided, questions, including:

How much intelligence effort should be dedicated to examining the anticipated collateral damage? How many victims would constitute disproportionate collateral damage, when set against the prevention of a large-scale terror attack? And, given the inherent limitations of intelligence information, how certain must one be that the targeted area is free of innocent bystanders?

While exploring these and other questions, this policy paper sheds light on the targeted killing decision-making process. It highlights some of its weaknesses, proposes concrete solutions to these problems, and advocates a restrictive targeted killing policy, one that protects civilians from the ravages of both terrorism and counter-terrorism.

The policy paper includes a response by Amichai Cohen and Tal Mimran.

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