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(IM)PERMISSIBILITY OF TARGETED KILLINGS IN THE „WAR ON TERROR“

Abstract:

As a response to the 9/11 terrorist attacks, the United States have introduced the policy of targeted killings – targeting individual suspect terrorists and killing them, most often using the unmanned drones operated by the CIA. Likewise, Israel has begun with the same practice, responding thus to the ongoing terrorist threats from the surrounding Muslim-populated areas.

An introduction of such killings has raised much controversy over their legality, as well as their moral justification. The core problem lies within the specific nature of the so called „war on terror“ – the war in which the other party is not accurately defined, the war which is most probably indefinite, since it is not likely that terrorist activities will, in this form or the other, ever completely vanish, and most importantly, the war in which means of struggle against terrorists are not defined at all.

The „war on terror“ differs from the war in a traditional sense. It is thus not clear whether terrorist acts should be regarded as acts of combatants or acts of civilians. This issue arises from the general dilemma of whether terrorism falls within the ambit of criminal law or within the laws of war. The fact is that it is actually somewhere in between those two and that international law currently has no adequate rules to appropriately address the problem of terrorism.

Since terrorists are neither combatants, in the sense of Geneva Conventions of 1949, nor are they pure civilians, which are granted protection from attack under international humanitarian law, a new term of „unlawful combatants“ has been coined. Being „combatants“, terrorists are considered to be the legitimate target of the attack, while the „unlawful“ character of such combatant deprives them of enjoying the prisoners of war status. As much as the „unlawful combatant“ status can appropriately serve as a political justification for the commission of targeted killings, it can hardly be considered consonant with the laws of war.

On the other hand, preventing a greater evil might speak in favor of applying such a policy.

This paper will focus on examining the legality of the targeted killing practice within the contemporary international law.

Keywords:

international law, war on terror, targeted killings

JEL Classification: K33, K33, K33

1. Introduction

Killings of particular individuals by state authorities have existed, in this form or the other, throughout the history, and have more often than not been executed in secrecy. In recent years there has been extensive debate over the legality of practice of targeted killings, primarily due to the open policy of two states, the United States and Israel, in undertaking them.

Following the 9/11 terrorist attacks, the United States have introduced the policy of targeted killings as a part of the global “war on terror”. Targeted killings have been understood as locating and killing suspect terrorists by a government of a state which does not have custody over these individuals.

In a same manner, Israel has introduced the targeted killing practice of the suspect Palestinian terrorists. While Israel has until not-so-long-ago denied the existence of any such practice, claiming that “there is no policy, and there never will be a policy or a reality of willful killing of suspects” and “that the sanctity of life is a fundamental principle of the Israeli Defence Force (IDF)” (Alston Report, 2010, para. 13), it was at the beginning of the Second Intifada that it has openly proclaimed targeting of terrorists as a part of its national policy.¹

Some of the instances of targeted killings have attracted much attention in public, although they are just illustrative examples of a wider practice. One of these is the case of Anwar al-Aulaqi, a propagandist of Al-Qaeda operating from the Arabian Peninsula. He was claimed to be connected with a murder of fifteen men at Fort Hood in 2009 and was placed on the United States “kill or capture” list in 2010. (Foreman, 2013, p. 925) The killing of al-Aulaqi raised another question – that of the permissibility of targeting suspect terrorist who have an American citizenship, as was the case with himself. We shall not deal with this issue in the present paper.

Soon after the killing of al-Aulaqi, his sixteen-year-old son – for whom no evidence of taking part in terrorist activities existed – had been killed during the attack apparently directed against another person. (Foreman, 2013, 925) Similarly, when Hussein Abayat was targeted and killed by the IDF in 2000, two innocent women who were standing in front of their houses waiting for the taxi have been killed. In its statement regarding the killing of Abayat, the IDF has not even referred to the collateral victims.² Furthermore, in 2012, a United States drone strike killed a 68-year old woman, who was at that time working in her field. It is not known who has been an intended target of the attack. The United States government failed to admit to the public what it did, just as it failed to address and compensate the victim’s family. (Shah, 2013) The list of collateral victims goes on.

In 2011, chief counterterrorism advisor to President Obama and CIA director nominee John Brennan stated that there had not been “a single collateral death in covert United States drone strikes because of the exceptional proficiency and precision of the United States targeted killings”. (Kelley, 2013) It appears, though, that there has been a significant number of civilian casualties during the targeted killings of suspect terrorists. Some estimates show that around one third of people who have

¹ Press briefing by Colonel Daniel Reisner, IDF Legal Division, 15 November 2000, available at: <http://mfa.gov.il/MFA/PressRoom/2000/Pages/Press%20Briefing%20by%20Colonel%20Daniel%20Reisner-%20Head%20of.aspx>.

² Amnesty International: Israel and the Occupied Territories: State Assassinations and other Unlawful Killings, available at: <https://www.amnesty.org/en/library/asset/MDE15/005/2001/en/84859e22-dc4b-11dd-a4f4-6f07ed3e68c6/mde150052001en.html>.

so far been the object of targeted killings have been innocent bystanders.³ It is such a high number of collateral victims, aside from the question of permissibility of targeting terrorists *per se*, that makes these killings so controversial.

The practice of targeted killings is of dubious legality for several reasons. First, it is not clear whether targeted killings, as well as treating terrorists in general, should be a matter of international human rights law or should these killings be regarded as acts of war. Should it be the latter, the question is, from the *jus ad bellum* perspective, could targeted killings be considered as acts of legitimate self-defence, and from the *jus in bello* perspective, should the targeted terrorists be considered as combatants, civilians, or some other category of persons. Second, no matter which of the mentioned rules apply, the issue of proportionality arises – even if targeted killings should be found permissible in particular cases, there is always a question of assessing whether saving the potentially threatened lives is in proportion with depriving the right to life of a suspect terrorist or, even more, collateral victims that lose their lives in the course of the targeted killing.

This paper will explore the contentious issues regarding the status of suspect terrorists. The paper focuses on examining three different issues: 1) the permissibility of targeted killings as self-defence, 2) the targeted killings policy with respect to the human rights law and 3) targeted killings in light of the international humanitarian law rules (*jus in bello*).

2. *Jus ad bellum* – the argument of targeted killings as self-defence

One of the core arguments in favor of the targeted killings policy is the one of self-defence. The proponents of such a view claim that the United States are involved in an ongoing self-defence, which began with the *Operation Enduring Freedom* in Afghanistan and which currently exists even outside of Afghanistan, being based on the link between those who carried the attacks of 9/11 and terrorist organizations which were not involved in the original attacks, but are the “affiliates” of Al-Qaeda. (Gray, 2013, p. 11) This argument is quite controversial. It rests on the assumption that the post-9/11 law on self-defence has changed and is now much wider than before – an assumption which is very much disputed among both states and legal authors.

Debates on the scope of self-defence in contemporary international law are long and extensive, and they go way beyond the scope of this paper. For the purpose of the present paper, we shall outline the basic controversies pertinent to the right of self-defence.

First, the question arose of whether self-defence can be undertaken in anticipation of an armed attack even though it has not yet occurred, and second, whether self-defence can be undertaken against non-state actors or solely against states. Both of these questions relate to the issue of permissibility of the targeted killing practice, insomuch as the attitude taken towards these questions answers the question of the possibility of the invocation of self-defence as a legal ground for targeted killings.

In comparison to the pre-Charter customary law on self-defence, Article 51 of the UN Charter limits the scope of this right by providing it only in cases in which *an armed attack occurs*.⁴ Customary law, as formulated in the *Caroline* formula, allowed

³ The Bureau of Investigative Journalism. Covert Drone War, available at: <http://www.thebureauinvestigates.com/category/projects/drones/>.

⁴ The United Nations Charter, available at: <https://www.un.org/en/documents/charter/>.

for self-defense if it was “instant, overwhelming, leaving no choice of means and no moment for deliberation”.⁵ Having in mind the facts of the case – setting on fire by the British forces of the United States steamboat which was transporting supplies to the Canadian insurgents – it can be discerned that self-defense was considered to be allowed even absent the armed attack. Although the parties did not agree on the permissibility of self-defense in the present case, they agreed on the possibility of its undertaking in circumstances formulated above.

Some legal writers sustain that the customary law right to self-defense continued to exist in parallel with the Charter. (Bowett, 1958, p. 184-185) However, this line of reasoning is inconsistent with the fact that the universal acceptance by states of the Charter reveals the states’ *opinio juris*, pointing thus to the fact that the Charter law on self-defense and the customary law on that right were equivalent at the time of the adoption of the Charter. (Ago, 1980, p. 63) As to the possible divergence of these two sources of law in the II half of the 20th century and the beginning of the 21st century, there is no evidence that there has been the emergence of a new, different and widespread practice, accompanied by the relevant *opinio juris*. Clearly, not more than a few states does invoke self-defense as a means of pre-emption, that is, anticipation of the possible unlawful attack, while the majority of states tend to condemn such a practice. If we rely on the reasoning of the International Court of Justice (ICJ) in its *Nicaragua* judgment, it is to be concluded that instances of state conduct inconsistent with a rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule. Going back to the targeted killing issue, it might be concluded that targeting individuals in the anticipation of the possible attack would not fall within the ambit of legitimate self-defense.

The second relevant issue – that of the non-state actors being the possible targets of self-defense – is a much disputed one and, as indicated earlier in the text, its elaboration calls for a separate analysis. We maintain that self-defense is not permissible against non-state actors, unless their actions can be attributed to the state, becoming thus acts of state. Although Article 51 of the Charter is not explicit on whom self-defense can be directed against, it can be inferred that the drafters of the Charter had in mind exclusively sovereign states. Such a finding is supported by the ICJ practice in two of its judgments – the *Nicaragua* judgment (ICJ Reports, 1986, p. 98) and the *Armed Activities* judgment (ICJ Reports, 2005, p. 222-223) – and one advisory opinion, that regarding the *Israeli Wall*. (ICJ Reports, 2004, p. 682)

For the proponents of the extensive interpretation of the right to self-defense, targeted killings might fall within the ambit of that right. It is their contention that such killings are acts of “active” self-defense – “active” being equated with the anticipatory one. (Guiora, 2004, p. 322) International law rules, however, do not differentiate between “active” and “passive” self-defense. Since the existing rules, both treaty rules and customary law rules, point to, as mentioned earlier, the existence of the right to self-defense in cases in which “an armed attack occurs”, it is to be concluded that targeted killings could not be undertaken as a part of a state’s right to self-defense. However, if in a particular case self-defense is found to be permissible, in sense that it is a response to a prior unlawful armed attack committed by a state in which targeted killings are taking place, the issue of accordancy of targeted killings with the rules applicable in an armed conflict nevertheless remains. That is, even within the lawful self-defense, the IHL rules have to be applied. As confirmed in the ILC Draft Articles

⁵ More on Caroline incident: Green, J.: Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self – Defense, *Cardozo Journal of International and Comparative Law*, vol. 14, nr. 2, 2006, p. 429.

on State Responsibility, unlike certain human rights, which may be derogated in cases of public emergency (including actions taken in self-defense), humanitarian law rules, as well as non-derogable human rights, have to be applied even in those cases.⁶

3. Targeted killings and international human rights law

Targeted killings take place in a whole variety of situations, most of which occur outside the classical battlefield. If a drone hits a suspected terrorist, for instance, in Yemen or Pakistan, it should be concluded that this particular case of targeted killing is committed in peacetime, if the targeting state and the state in which the killing takes place are not in an armed conflict. Consequently, the human rights law should apply to assessing their legality.

The right to life is guaranteed by many international law instruments. The most important one on the international level, the International Covenant on Civil and Political Rights (ICCPR), states in its Article 6 that “every human being has an inherent right to life” and that “no one shall be arbitrarily deprived of his life”.⁷ There is also a number of significant instruments on the regional level. The American Convention on Human Rights contains similar provision in its Article 4, stating that “every person has the right to have his life respected”, that “this right shall be protected by law” and that “no one shall be arbitrarily deprived of his life”.⁸ African Charter of Human and People’s Rights states in its Article 4 that “every human being shall be entitled to respect for his life and the integrity of his person” and “no one may be arbitrarily deprived of this right”.⁹ All of these conventions grant the right to life, although none of them grants it in absolute terms, suggesting that there might be a deprivation of life, although it may not be “arbitrary”. The European Convention on Human Rights is even more precise on this matter, providing that “everyone’s right to life shall be protected by law” and that “no one shall be deprived of his life intentionally, save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”.¹⁰ This provision might lead to the conclusion that killings which are undertaken intentionally, but not in the execution of a sentence of a court, are by no means allowed under the Convention. However, the provision of the second paragraph of the same Article 2 leaves room for a different conclusion. It reads in relevant part that “deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary in defense of any person from unlawful violence”.

It is worth noting that each of the stated instruments, save for the African Charter, contains a derogation clause. The ICCPR in its Article 4 provides that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the Covenant may take measures

⁶ Commentary of Article 21, para. 3. Draft Articles on Responsibility of States for Internationally Wrongful Acts, available at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

⁷ International Covenant on Civil and Political Rights, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (hereinafter: ICCPR).

⁸ American Convention on Human Rights, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

⁹ African Charter on Human and People's Rights, available at: <http://www.achpr.org/instruments/achpr/#a4>.

¹⁰ Article 2. Convention for the Protection of Human Rights and Fundamental Freedoms, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (hereinafter: European Convention).

derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin. However, the same Article in its next paragraph states that no derogation from, *inter alia*, Article 6 (providing the right to life) may be made under the stated derogation clause.

A derogation clause similar to the one from the ICCPR is contained in the European Convention as well.¹¹ And again is that provision accompanied by the one providing that no derogation from Article 2 (granting the right to life) shall be made under that derogation provision, except in respect of deaths resulting from lawful acts of war.¹² Since the analysis presented in this chapter deals with the legality of targeted killings in peacetime, this exception concerning the lawful acts of war bears no significance for the discussion at hand.

Finally, the American Convention on Human Rights provides the possibility of undertaking measures derogating from its obligations from the Convention in cases of war, public danger or other emergency that threatens the independence or security of that state, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination.¹³ The foregoing provision, however, does not authorize suspension of certain rights provided by the Convention, among which is the right to life.¹⁴

As seen from the abovementioned, no derogation clause points to the conclusion that right to life could be derogated in exceptional circumstances. This is confirmed also by the United Nations Human Rights Committee, which has emphasized that the right to life „is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation“.¹⁵ It follows from this that the only way in which it can be determined when a person might possibly be deprived of the right to life is to interpret the term “arbitrary”.

Defining the meaning of an arbitrary deprivation of life is not an easy task. Besides, it is not clear whether it is the international law that should govern the arbitrariness of the deprivation of someone’s life, or is it the internal law of a state. The complexity of the problem can be illustrated on one particular example of non-arbitrary killing, provided in the ICCPR. Namely, Article 6 of the Covenant outlines the execution of a death penalty as an instance of non-arbitrary deprivation of life. Let us say, however, for the purpose of this analysis, that a certain domestic law ordains death penalty for acts such as adultery, but not for those of homicide. (Ramcharan, 1985, p. 221) It is hard to imagine that executing the death penalty in such circumstances would satisfy the request of non-arbitrariness set forth in the Covenant and other international law instruments.

However, in spite of the controversies pertinent to the execution of a death penalty, and even setting aside a trend of abolishing the death penalty as such,¹⁶ it is to be concluded that the death penalty, resulting from a judgment rendered by a competent court, has been awarded a status of an exception to the prohibition of the right to life.

¹¹ Article 15., para. 1.

¹² Article 15., para. 2.

¹³ Article 27., para. 1.

¹⁴ Article 27., para. 2.

¹⁵ UN Human Rights Committee, General Comment Nr. 6: The Right to Life (Article 6 of the ICCPR), 27 July 1982, para. 1 (UN Doc. HRI/GEN/1/Rev.1 at 6 (1994)).

¹⁶ See: Protocol 6 to the European Convention.

Although the ICCPR mentions no other exceptions to the right to life but the death penalty, there are presumably other circumstances which preclude the illegality of a life deprivation. As indicated above, the European Convention provides that deprivation of life shall not be regarded as violating the right to life when it results from the use of force which is no more than absolutely necessary in three situations: 1) in defense of any person from unlawful violence, 2) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, and 3) in action lawfully taken for the purpose of quelling a riot or insurrection.

The approach taken in the European Convention was taken as well in another regional document – the Report on Terrorism and Human Rights, issued by the Inter-American Commission on Human Rights. Although confirming that the right to life may not be suspended under any circumstances, the Committee found that in situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations.¹⁷ Such situations include, according to the Report, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury or to otherwise maintain law and order where strictly necessary and proportionate. The Committee supports its position by referring to the practice of the Inter-American Court of Human Rights, which found that states have the right to use force, “even if this implies depriving people of their lives”.¹⁸

Both of the aforementioned documents, although providing exceptions to the right of life, limited the right of their undertaking to situations of law enforcement which are “absolutely necessary”, “imminent” and “strictly necessary and proportionate”. These requirements are intended to insure that forceful actions are permitted merely as a means of averting an imminent danger and not as a part of a “shoot-to-kill” policy.¹⁹ The paradigmatic case in which the use of force would be justifiable is where serious violence against the person to be protected is so imminent that trying to arrest the perpetrator would allow him time to carry out his threat. (Kretzmer, 2005, p. 179)

Under the human rights model, each person should be granted some procedural rights, such as the presumption of innocence, the right to a fair trial, the right of appeal, and so forth. It is a paradox that those who are convicted for the most serious crimes and sentenced to death penalty do have the right to seek pardon or commutation, or to be granted amnesty,²⁰ while those who are (only) suspected of a terrorist activity do not enjoy the right to be apprehended and to exercise all the rights prescribed by law. Therefore, under the human rights law, no targeted killing would be permissible if there is any possibility of apprehending the suspected perpetrator of the terrorist act.

There, however, remains the question of what should be done in cases in which apprehension of a suspect terrorist is not possible. For instance, what if the suspected perpetrator is situated on the territory other than the state in jeopardy and the state under whose jurisdiction he finds himself under is either unwilling or unable to

¹⁷ Inter-American Commission on Human Rights Report on Terrorism and Human Rights, para. 87, available at: <http://www.cidh.org/terrorism/eng/part.c.htm#A>.

¹⁸ I/A Court H.R., *Neira Alegría* Case, Judgment of January 19, 1995, Ser. A N° 20, para. 74.

¹⁹ Civil and Political Rights, including the Questions of Disappearances and Summary Executions; Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, Philip Alston, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/116/84/PDF/G0611684.pdf?OpenElement>.

²⁰ ICCPR, Article 6, paragraph 4, *supra* note 7.

apprehend him? (Kretzmer, 2005, p. 176) Perhaps such a situation would meet the standard of „absolute necessity“, provided that there is clear and unequivocal evidence that the individual in question is about to perform a terrorist act, that is, „that he is in the process of committing acts of terror“.²¹ Again, what “the process of committing acts of terror” means is open to discussion. Does the commission of a terrorist act already have to be in progress? If not, what proximity does there have to be between the targeted killing and the planned terrorist act? Some believe that even when the unlawful violence in form of a terrorist act is not imminent, the need to use lethal force in order to prevent that violence might be immediate. (Kretzmer, 2005, p. 178) On one hand, this reasoning might hold true, insomuch as killing the terrorist once the terrorist attack has already commenced might be an impossible task, given the specific manner in which terrorists operate. On the other hand, setting at least an approximate time frame in which targeted killing may take place or defining the strict criteria which have to be fulfilled in order for the killing to be permissible is the only way to avoid killing as the mere pre-emption. In spite of the fact that states which pursue the policy of targeted killings the most, namely the United States and Israel, undertake pre-emptive actions considering them a legitimate means of their national policies,²² undertaking of these actions has no ground in international law. Majority of states and legal commentators, as well as relevant United Nations bodies, agree on this.²³

To conclude, the currently existing human rights law provisions in essence do not support the targeted killing policy. It might be asserted, though, that some regional instruments exceptionally provide for the possibility of using lethal force, if such use is absolutely necessary to defend a person from the unlawful violence. Since the terms of absolute necessity are not defined, it remains dubious whether targeted killings could fall within the scope of this exception. The answer to this question probably depends on the circumstances of each particular case. Two preconditions should be fulfilled in order for the targeted killing to be permissible: first, there has to be clear and unequivocal evidence that the individual in question is about to commit a terrorist attack, and second, there is no possibility of stopping that individual from committing the attack by using means short of lethal force, such as apprehension. Proving the fulfillment of the abovementioned conditions is, of course, a factual question. The process of establishing those facts should be under a lot of scrutiny so that a state wishing to conduct a targeted killing is not in a position to employ this tactic motivated by the mere inconvenience, rather than necessity.

An argument advanced by some was that international human rights law cannot be applicable in situations in which targeted killings occur outside of the territory of the state undertaking them because the human rights law, according to them, applies solely to state's actions within its own territory. (Guiora, 2004, p. 329-330) However,

²¹ Concluding Observations of the Human Rights Committee: Israel, 21.08.2003., CCPR/CO/78/ISR, available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument).

²² See: The National Security Strategy of the United States of America, 2002, available at: <http://www.state.gov/documents/organization/63562.pdf>. On Israeli policy of pre-emption see: Steinberg, G. M.: The Evolution of Israeli Military Strategy: Asymmetry, Vulnerability, Pre-emption and Deterrence, available at: <http://www.jewishvirtuallibrary.org/jsource/isdf/text/steinberg.html>.

²³ See, *inter alia*: In Larger Freedom: Toward Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005 (March 21 2005), available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/2005; A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, 2004, available at: https://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf; Declaration on the Purposes and Principles of the NAM (NAM 2006/Doc.5/Rev.3), available at: <http://nam.gov.ir/Portal/Home/Default.aspx?CategoryID=9ba18247-2a38-4f63-8c97-02dc04113e74>.

adopting such a view would significantly undermine the importance of human rights protection. That is why it should be considered that, as the UN Committee on Human Rights put it, anybody directly affected by a State party's actions will be regarded, for the purposes of the ICCPR, as subject to that State party's jurisdiction. (Kretzmer, 2005, p. 184)

4. Targeted killings in the context of an armed conflict

The existence of an armed conflict, either between states or on the territory of one state, gives rise to the application of the whole new set of rules. International human rights law remains to be applicable, although the primacy is given to the rules of international humanitarian law, which specifically relate to situations of an armed conflict.²⁴

At the outset of this chapter it is necessary to answer the question of qualification of the conflict in which targeted killings might take place, so as to determine what are the applicable rules governing the issue of the targeted killing. This qualification depends on who the state undertaking targeted killings is in conflict with. If the state is in a conflict with another state, according to Common Article 2 of the Geneva Conventions, it is then certainly an international armed conflict.²⁵ If it finds itself, on the other hand, in a conflict with a terrorist organization whose activity is not attributable to another state, the question is whether this constitutes "armed conflict" at all, either international or non-international, or should such situations be ruled by human rights law, as previously indicated.

4. 1. Non-International Armed Conflict

Let us first examine whether a conflict between a state and a terrorist organization whose actions are not attributable to another state can be considered as non-international armed conflict. The idea of characterizing these conflicts as non-international ones might seem appealing because the rules governing them were created for a level of hostilities that the international human rights law might be unequipped to address, and, unlike the rules of international armed conflicts, they were designed to reach non-state actors. (Fisher, 2007, p. 719) According to the Additional Protocol II to the 1949 Geneva Conventions (hereinafter: AP II), non-international armed conflicts are the ones "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".²⁶ It must be noted that the United States and Israel, as states which mostly apply the targeted killing policy, are not states parties to the AP II, so that the parameters concerning a non-international conflict, outlined in its Article 1, can serve as indicators for determining the existence of such conflicts, but are not binding upon the two states.²⁷

²⁴ The ICJ, when discussing the legality of the use of nuclear weapons, found that the right to life is governed by the ICCPR in peacetime, while questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict. *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 24.

²⁵ Text of the Geneva Conventions available at: <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>.

²⁶ Article 1(1) of the AP II.

²⁷ The list of the states parties to the AP II is available at:

Unlike with an international armed conflict, where the threshold for its existence is set very low, meaning that it exists regardless of the duration of the conflict and the quantity of slaughter (Pictet, 1952, p. 32), there is no agreement on the degree of violence that has to be employed in order for a conflict to be a non-international one. Therefore, reaching the threshold of a non-international armed conflict, with regard to its duration and intensity, might not be as easy as in the international ones. According to the International Criminal Tribunal for the Former Yugoslavia, only those conflicts in which there is “protracted violence between governmental authorities and organized armed groups” can be considered as non-international ones.²⁸ A relatively high standard for the existence of a non-international conflict was adopted also by the International Criminal Tribunal for Rwanda, which stated that Common Article 3 of the 1949 Geneva Conventions (hereinafter: Common Article 3) requires armed groups to be “organized as military in possession of a part of the national territory”.²⁹

The International Committee of the Red Cross (hereinafter: ICRC) Commentary to Common Article 3 provided guidance for the identification of “organized armed groups”, stating thus that those groups possess an organized military force under responsible command, have possession over the part of the national territory, exercise *de facto* authority over persons within that part of the territory, purport to have characteristics of a state, agree to be bound by the provisions of the Conventions, to confront it, a recourse to its regular military forces is needed by the opposed government, that Government either recognized the revolting party as belligerents or claimed to itself the right of a belligerent.³⁰

It should be mentioned, though, that the criteria set down in the ICRC Commentary are not obligatory and are mentioned as an indication.³¹ Thus, different interpretations of the criteria necessary for a conflict to be a non-international one exist. One such is advocated by the Inter-American Commission on Human Rights, which proposes a lower threshold for the existence of a non-international armed conflict, stating that the application of the rules of non-international armed conflict does “not require the existence of large-scale and generalized hostilities or a situation comparable to a civil war”.³²

Although it can be argued whether there is an “organized armed group under responsible command” in case of terrorist organizations threatening a certain state, other criteria set forth in AP II are certainly not fulfilled. Namely, terrorists do not “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations”. Rather, they undertake isolated attacks. Therefore, both with regard to the criteria of having control over the territory, as well as to the criteria of duration of the hostilities, terrorist activities do not satisfy the conditions outlined in AP II. In addition, there have been controversies over the requirement, set forth both in the Common Article 3 and Article 1(1) of the AP II, that non-international armed conflicts be occurring within the territory of a state party. This

http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475.

²⁸ Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction, para. 70, available at: <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

²⁹ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Chamber I), para. 619.

³⁰ Commentary of the First Geneva Convention, p. 49-50, available at:

<http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=BA A341028EBFF1E8C12563CD00519E66>.

³¹ *Ibid.*, p. 50.

³² Inter-American Commission on Human Rights, Juan Carlos Abella v. Argentina (Tablada Case), No. 11.137, Report 55/97, para. 152.

requirement has been open to interpretations. It is true that terrorists operate on a territory of a victim state when they are performing a terrorist act, but are not located on that same territory in the moment in which a targeted killing takes place. This lead some to believe that the rules and principles regarding non-international conflicts are reserved for internal domestic armed conflicts, and do not apply to a conflict between a state and a terrorist group acting from outside of its territory. (Kretzmer, 2005, p. 182)

On the contrary, in his Report to the General Assembly on extrajudicial, summary or arbitrary executions, the Special Rapporteur Philip Alston took a view that a conflict between a state and a non-state group, such as a terrorist organization, might constitute a non-international armed conflict if certain criteria are met. These criteria reiterate the conditions prescribed in Common Article 3 and the AP II. (Alston Report, 2010, para. 52) Alston applied those criteria to the situation with the United States and Al-Qaeda and concluded that it is problematic for the United States to show that, outside the context of the armed conflicts in Afghanistan and Iraq, it is in a transnational non-international armed conflict against Al-Qaeda, the Taliban and other associated forces without further explanation of how these entities constitute a "party" under the IHL of non-international armed conflict, and whether and how any violence by any such group rises to the level necessary for an armed conflict to exist. (Alston Report, 2010, para. 53) Alston thus asserts, contrary to those who maintain that a transnational character of a terrorist threat is an impediment for the characterization of the conflict as a non-international one, that Common Article 3, being universally applicable and not limited to internal conflicts, allows for such a characterization, however other preconditions need to be cumulatively fulfilled. (Alston Report, 2010, para. 54) Since these preconditions are not fulfilled in case at hand, it cannot be maintained that the legality of targeted killings should be assessed by rules applying to a non-international armed conflict.

Should the particular conflict between a state and a terrorist organization fulfill all the necessary criteria and should it be found to constitute a non-international armed conflict, the question of applicability of the IHL rules arises. The Common Article 3, applicable in the non-international armed conflicts, prohibits "violence to life" against "persons taking no active part in the hostilities". In the same vein, AP II states that "the civilian population as such, as well as individual civilians, shall not be the object of attack".³³ Applying the same standard as in the AP I, AP II goes on to say that civilians shall be protected "unless and for such time as they take a direct part in hostilities".³⁴

The aforementioned provisions raise two crucial questions: first, if there is a civilian status in a non-international armed conflict, is there a combatant status as well, and second, what does the direct participation in hostilities mean. As to the first question, the majority will agree that the combatants-civilians dichotomy is characteristic for international armed conflicts, not the non-international ones. Indeed, no combatant status is provided by the documents regulating the non-international armed conflicts. There are, however, assertions that the existence of the civilian status necessarily implies the existence of a category of persons which are non-civilians, presumably combatants. The omission of providing the combatant status within the non-international armed conflict is explained by the intentional decision of states not to grant that kind of status to insurgents and other non-state actors who take part in such conflicts, as doing so would not only afford them an element of

³³ Article 13(2) of the AP II.

³⁴ Article 13(3) of the AP II.

legitimacy, but would mean that they enjoy the privileges of combatants, namely the immunity from criminal liability and the prisoner-of-war status when apprehended. (Kretzmer, 2005, p. 186) It has been maintained that persons taking part in the non-international armed conflict, although lacking the formal combatant status, are *de facto* combatants and should be treated as such. Such assertion is, however, quite dubious. If states were unwilling to provide the existence of the combatant status in non-international armed conflicts, differentiating thus the status of its participants from that granted to the participants in the international conflicts, this intention of states should be taken as such. It is nowadays widely accepted that there are no “combatants” in a non-international armed conflict.

Instead of presuming the existence of the combatant status, it is more useful to turn to the second relevant issue – that of the meaning of the “direct participation in hostilities”. As with many other terms and phrases in international law, this one has also been left undefined, its meaning being subject to states’ auto interpretation. In getting to the meaning of the “direct participation in hostilities”, one must be careful about two things: first, not to deprive the civilians of their privileged status by interpreting the phrase too strictly, and second, not to let those who do take part in hostilities to get away with it, by interpreting the phrase too loosely, so that they are considered civilians. Whether there exists a direct participation in hostilities of a civilian depends on whether the conduct of that civilian is close to that of a fighter, meaning that one has to directly support the combat and not merely provide a financial support, advocacy or other non-combat aid. (Alston Report, 2010, para. 60)

The ICRC issued in 2009 the Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, in which it aimed at identifying the criteria that determine whether and, if so, for how long a particular conduct amounts to direct participation in hostilities. (Interpretative Guidance, 2009, p. 41) According to the Interpretative Guidance, in order for a specific act to qualify as a direct participation in hostilities, the act must meet the following cumulative criteria: 1) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), 2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and 3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus). (Interpretative Guidance, 2009, p. 46) It derives from this that an act, for example a terrorist act, might be illegal, but still not constitute a direct participation in hostilities if it does not satisfy the three requirements. (Alston Report, 2010, para. 64)

The precondition of taking direct part in the hostilities bans the use of lethal force against individuals merely because they belong to a certain potentially dangerous terrorist organization. Such participation should be assessed on a case-by-case basis, which is confirmed in the ICRC Guidance. In a discussion on the temporal scope of the loss of protection, it has been provided that civilians lose their protection for the duration of each specific act amounting to direct participation in hostilities, meaning that it is their actual involvement in hostilities and not their status that matters. In contrast to this, the Guidance provides that those persons who are members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians and lose protection against direct attack for as long as they assume their continuous combat function. (Interpretative Guidance, 2009, p. 70)

In this case, it is the status and not the actual involvement in the hostile activities that is being taken into account.

A view expressed in the Guidance leaves room for the targeting state to employ the targeted killings practice, provided it has proved the existence of two circumstances: first is the existence of an armed conflict and second is the existence of an organized armed group, with the targeted terrorist being the part of that group. Alternatively, if an individual in question is not a part of an organized armed group, targeted killing might be possible only for such time as that individual is taking actions that amount to hostilities.

4. 2. International Armed Conflict

As has been shown in the previous chapter, in theory there is a possibility that a conflict between a state and a non-state actor amounts to a non-international conflict. In practice, however, it is rarely the case that all the requirements necessary for the existence of such a conflict be fulfilled. This brings us to the question of whether a conflict between a state and a non-state actor can be considered as international one and, consequently, can targeted killings be lawfully undertaken in such a conflict.

The international armed conflict exists in four different situations. According to the Common Article 2 of the 1949 Geneva Conventions, it includes all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them, as well as in all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.³⁵ The AP I has provided a fourth category of international armed conflicts – armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.³⁶

It derives from the abovementioned that a state undertaking targeted killings must be in a state of a declared war or in some other type of armed conflict arising between two or more of the High Contracting Parties in order to be able to invoke the application of rules which apply to an international armed conflict. What the United States President George Bush at the time called a “war”, referring to the global war against terrorism, might be called a war merely as a political rhetoric, not in the legal sense.³⁷ The reasoning of President Bush, expressed in the 2006 National Security Strategy of the United States of America, was partly abandoned in the 2010 National Security Strategy, adopted under President Obama. It reads in relevant part: „This is not a war against a tactic – terrorism – or a religion – Islam. We are at war with a specific network – Al-Qaeda and its terrorist affiliates who support efforts to attack the United States, our allies and our partners.”³⁸

Can a state be in war with a group, such as Al-Qaeda, or even more with an undefined group such as the so-called “terrorist affiliates of Al-Qaeda who support

³⁵ See: *supra* note 25.

³⁶ Article 1 paragraph 4, AP I, available at:

<http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6C86520D7EFAD527C12563CD0051D63C>.

³⁷ The 2006 National Security Strategy of the United States of America, available at: <http://www.whitehouse.gov/nsc/nss.html>.

³⁸ The 2010 US National Security Strategy, p. 20, available at:

http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

efforts to attack the United States”? The United States obviously believe that such a war is possible. As the former President Bush stated, the United States “make no distinction between terrorists and those who knowingly harbor or provide aid to them”,³⁹ equating thus non-state actors with states. Debates on the international legal personality of non-state actors are extensive ones. However, there seems to be a consensus among the majority of states that acts committed by non-state actors may represent acts of states solely if these acts can be attributed to that state, in accordance with the rules on attribution provided in the Draft Articles on Responsibility of States for Internationally Wrongful Acts.⁴⁰ This means that the existence of an international armed conflict depends on whether acts of terrorist organizations can be attributed to a certain state. In spite of some assertions that the humanitarian concern and the transnational nature of the hostilities warrant the application of the law of international armed conflict (Ben-Naftali, Michaeli, 2003, p. 255-256), the majority view is that only in conflicts between states can the humanitarian law rules stipulated in the Geneva Conventions and the Additional Protocol I to the Geneva Conventions (hereinafter: AP I) be applicable. Such a view is confirmed by the International Tribunal for the Former Yugoslavia (ICTY), which found in Tadic case that “an armed conflict is international if it takes place between two or more states”. The Appeals Chamber of the Tribunal went on to say that an internal armed conflict breaking out on the territory of a State may become international if: 1) another state intervenes in that conflict through its troops, or alternatively, if 2) some of the participants in the internal armed conflict act on behalf of that other state.⁴¹

Israeli Supreme Court was of a different opinion, though. In its 2005 decision, it found that there is an international armed conflict going on between Israel and terrorist organizations. The Court said that the fact that terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict.⁴² The Court went on to say that in today's reality, a terrorist organization is likely to have considerable military capabilities, which exceed those of states. The confrontation with those dangers cannot be restricted within the state and its penal law and should therefore be considered as a part of the international law dealing with armed conflicts of international character.⁴³

Under the law of international armed conflicts, the major distinction is the one between “combatants” and “civilians”. Combatants may be subject to attack, while civilians may not. An indication as to who may be considered a combatant can be found in the Third Geneva Convention Relative to the Treatment of the Prisoners of War, which says that the prisoner of war status is granted to persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict;
2. Members of militias and volunteer corps, fulfilling the following conditions:
 - (a) That of being commanded by a person responsible for his subordinates

³⁹ The 2006 National Security Strategy, *supra* note 37.

⁴⁰ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, available at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

⁴¹ Prosecutor v. Tadic, 15 July 1999, App. Ch., IT-94-1-A, para. 84.

⁴² H CJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel (Targeted Killing Case), 2006, para. 21, available at: http://www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf.

⁴³ *Ibid.*, para. 21.

- (b) That of having a fixed distinctive sign recognizable at a distance
- (c) That of carrying arms openly
- (d) That of conducting their operations in accordance with the laws and customs of war;

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power;

4. Persons who accompany the armed forces without actually being members thereof, provided that they have received authorization from the armed forces which they accompany;

5. Members of crews of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law;

6. Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces.⁴⁴

Individual terrorists who are subject to targeted killing fall into neither of the abovementioned categories. Even if they do meet some of the requirements for a combatant status, they certainly lack the others, such as “conducting their operations in accordance with the laws and customs of war”.

The AP I has introduced a broader definition of a combatant. It has, by having included national liberation movements into the international armed conflicts, redefined the notion of a combatant, so as to include members of the armed forces, including all organized armed forces, groups and units of a party to a conflict, even if that party is represented by a government or an authority not recognized by an adverse party.⁴⁵ AP I, although providing an obligation of the combatants to distinguish themselves from the civilian population, provides the possibility of retaining the combatant status even if a person cannot distinguish oneself due to the nature of the hostilities, provided he carries his arms openly during each military engagement and during each time he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.⁴⁶ The particular feature of terrorists is that they are in essence invisible. So it is hard to imagine how this broadened definition of combatants could encompass terrorists, even if the United States and Israel did accede to the AP I.

If terrorists do not match the criteria for combatants, they should be regarded as civilians. Civilians enjoy the protection from the attack, “unless and for such time as they take a direct part in hostilities”.⁴⁷ We have discussed the direct participation in hostilities requirement in the previous chapter and found that if we apply the criteria from the ICRC Interpretative Guidance, it might be permissible to employ targeted killings under certain circumstances. On the other hand, according to the ICRC Commentary on the AP I, neither the meaning of the “hostilities”, nor the interpretation of the “direct” participation, support the conclusion that targeted killings might be employed against terrorist on the ground of them losing their civilian status by taking a direct part in the hostilities. Namely, the Commentary defines hostile acts as those “acts which by their nature and purposes are intended to cause actual harm to the

⁴⁴ See: Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 25, Article 4.

⁴⁵ Article 43(1) and 43(2) of the AP I.

⁴⁶ Article 44(3) of the AP I.

⁴⁷ Article 51(3) of the AP I.

personnel and equipment of the armed forces". Such understanding of hostile acts is not in accordance with terrorist acts which are directed against civilians. Likewise, the Commentary explains the "direct" participation in hostilities as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces".⁴⁸

Even if the broader interpretation of the direct part in hostilities phrase is applied, it nevertheless remains possible for the targeted killing to be performed only for such time as the actual hostility takes place. This means that terrorists should not be targeted prior or posts the commission of a terrorist act. In situations in which they are planning or preparing an attack, they may only be arrested. (Cassese, 2003, p. 19) Many authors maintain that such a "revolving door" theory is inadequate because it allows terrorist to shift from unprotected to protected persons as soon as they complete a terrorist act. However, it guarantees that innocent civilians will not be targeted by mistake. If a belligerent were allowed to fire at any enemy civilians simply suspected of planning or conspiring to plan hostile action, the fundamental distinction between civilians and combatants would be called into question and the whole body of IHL would eventually be eroded. (Cassese, 2003, p. 10)

In an attempt to reconcile the protection of civilians on one side and the efficient fight against terrorists on the other, the Israeli Supreme Court has maintained that targeted killings are neither necessarily forbidden, nor necessarily allowed, dependent on the circumstances. The Court stated that for the targeted killing to be lawful, four conditions must be fulfilled: 1) well based information is needed before categorizing a civilian as falling into a category of persons susceptible to attack; information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities, 2) 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, 3) after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively), and 4) if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage, which must withstand the proportionality test.⁴⁹

Referring to the distinction between civilians and combatants, the Court was of the opinion that terrorists are civilians, since they do not fulfill the conditions for the combatant status. However, if these civilians take a direct part in the hostilities, they lose the protection granted to civilians. In these circumstances, they can be subject to attack, but only during the time of partaking in hostilities.⁵⁰ Killing as a means of preventing possible future attacks, as well as that undertaken as a revenge for past events is forbidden.

4. 3. "Unlawful combatant" status

A disagreement on whether terrorist are civilians or combatants, and an inability of both categories to properly describe terrorists, has resulted in a creation of a third category of persons – that of "unlawful combatants" or "illegal combatants".

⁴⁸ For the Commentary of the AP I, Article 51(3) see:

<http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=4BEBD9920AE0AEAE12563CD0051DC9E>.

⁴⁹ Targeted Killing Case, *supra* note 42, para. 40.

⁵⁰ *Ibid.*, para. 31.

The term “unlawful combatant” is, however, merely descriptive and is by no means intended to create a third status, between that of a combatant and a civilian. (Cassese, 2003, p. 5) Terrorist taking a direct part in hostilities do not, as has been sustained previously, enjoy the same status for the entire period of duration of the conflict – they lose immunity when partaking in hostilities and they regain it after the completion of those activities. Unlike combatants, who cannot be prosecuted after the conflict, for their involvement in it was legal, terrorist may be prosecuted, for their participation in the conflict was illegal.

The newly coined term would in itself not be so disputable, if it did not imply depriving the suspected individuals of virtually any kind of protection. “Unlawful combatants” are thus perceived as not being civilians and therefore not subject to the protection granted to civilians, and as not being combatants and therefore not enjoying the prisoner-of-war status. They inhabit a twilight space outside the legal order and are subject to being shot at will (Proulx, 2005, p. 824), on a mere suspicion on taking part in terrorist activities.

5. Conclusion

It is a fact that international law is not properly equipped with rules regulating a fight against terrorism. At the time the United Nations Charter, which regulates the permissibility of the use of force, as well as the four Geneva Conventions were adopted, states were preoccupied exclusively with the inter-state conflicts and the rules stipulated in those documents were designed to address that kind of conflicts. This is not to say that terrorism is a new phenomenon, which did not exist at the time. On the contrary, terrorist acts were, in this form or the other, present throughout the human history. What is it then that has changed since? Terrorist activities became both more frequent and more elaborated, growing thus from occasional incidents into an omnipresent danger, especially for some states.

The 9/11 attacks were the most striking example of the capacity of terrorists to cause a massive loss of innocent human lives. The same attacks also showed the change in weapons used to infringe such damage. But their occurrence also revealed another thing – that states were not sure how to respond to those events and that there were insufficient rules of law to rely upon. Soon after the 9/11 attacks, the so-called “war on terror” began. Such “war” is marked with much controversy. It exists as a phenomenon separate from the currently existing legal system. It seems that anything and anywhere is allowed if it is committed under the “war on terror” mantra. Targeted killings are one such thing.

Yet, we are living in a real world, in which the real threat of terrorism exists. It is thus necessary to bear the existence of that threat in mind when deciding on the most appropriate way to respond to it. The conclusion of this paper on the permissibility of the targeted killing is the following: as a rule, targeted killings are not allowed, however, in exceptional circumstances they might be permissible.

We have analyzed targeted killings in the context of an armed conflict and have concluded that under certain circumstances, targeted killings might be considered as being a part of that conflict. If acts of terrorists can be attributable to a state, targeting of terrorists might be a part of an international armed conflict. This follows from the Draft Articles on Responsibility of States for Internationally Wrongful Acts. On the other hand, the Report of the Special Rapporteur Philip Alston offers some guidelines as to when a fight between a state and a terrorist organization (or individual terrorists)

might be considered as a non-international armed conflict. In both cases, terrorists are considered civilians, but lose their protection if they take a direct part in the hostilities and only for such time as they take part in them. This means that targeting of terrorists is not permitted once they have completed a terrorist act.

In situations in which the existence of an armed conflict cannot be established, human rights model should be applied. According to this model, terrorists are subject to apprehension and prosecution. There is, thus, no distinction between combatants and civilians, characteristic for armed conflicts. In practice, this model is most likely to be applied.

Bearing in mind that targeted killing should be an exception and not a state policy, it should be assessed on a case-by-case basis whether circumstances of a particular case speak in favor of employing the tactic. It is generally preferable to have a rule, rather than a case-by-case evaluation, given that such evaluations, which are often subject to states' auto interpretation, can leave room for misuses. However, until more elaborate rules of international law – appropriate for dealing with terrorist threats – appear on the horizon, this seems to be the best way to reconcile the currently existing legal rules with what might constitute an imminent threat to human lives.

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