

# **Targeted Killing and Human Rights**

by

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## **ABSTRACT**

The contemporary diversification of battlefield caused by the military capabilities of non-State actors to plan and execute intensive military operations has shaken an already established world legal order. To curtail the challenges posed by the non-State actors, States have adopted a policy of targeted killing as a counter-terrorism measure. The propriety and the legal regime that govern this policy have been contentious. Hence, a lot has been written about targeted killing, both in favour and against. This research endeavoured to enhance legal certainty in the area of targeted killing by considering the practice of targeted killing under the respective legal regimes and conclude that neither of the legal regimes absolutely prohibit targeted killing. Rather, the legality or otherwise of targeted killing is dependent on the compliance with the rules of the applicable legal regimes. Consequently, this research dispels the argument of impropriety and/or inadequacy of present laws on use of force against non-State actors. In view of the fact that there is no legal void in targeted killing operations, rather than aligning with the argument for an entirely new law, this research calls for interpretive guidance on the controversial areas of the existing laws to enhance legal certainty that will guide State practice in targeted killing operations.

## DECLARATION

I, **Nicholas Chekwube Egbonwonu** declare that this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references and acknowledgements were provided. Hence, I declare that this research work is originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in International Law.

Signed.....

Date.....

Supervisor: **Professor Christof Heyns**

Signed .....

Date.....

## **DEDICATION**

With profound gratitude to God Almighty from whom all good things come from, I dedicate this work to my niece and nephews (Jenny, Duke, Celestine and Prince), who were born while I was away in this sojourn. Their births have brought so much joy and blessings to the family, I love you all.

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## INTRODUCTION

Not really tracing the evolution and/or history of targeted killing, but it is however pertinent to start with highlighting the first officially acknowledged operation of targeted killing by Israel and the United States of America (U.S.) which are the leading States in the use of targeted killing as a counter-terrorism measure.<sup>1</sup> Before September 11, 2001, Israel was the only country that openly acknowledged that it is employing the tactic of targeted killing in its counter-terrorism operations.<sup>2</sup> On November 9, 2000, Israeli Defence Force (IDF) helicopter launched a missile at Husein Abiyat's car in the village of Beit Sahour in Palestine. Husein Abiyat who was a senior member of Fatah organization in Palestine was killed in the attack along with two innocent bystanders.<sup>3</sup> This operation was the first Israeli official acknowledgement of targeted killing and what turned out to be Israeli targeted killing policy.<sup>4</sup> This policy is a continuing policy without any conceivable duration as evidenced in the words of Israeli Deputy Prime Minister, Ephraim Sneh where he stated thus: "We will continue our policy of liquidating those who plan or carry out attacks against Israel".<sup>5</sup>

On the other hand, after the September 11, 2001 attack, the U.S. also adopted a policy of targeted killing in its "war on terrorism". On November 3, 2002, a US unmanned aerial vehicle (UAV) launched a missile at a car in the province of Marih, Yemen killing all six men in the car.<sup>6</sup> Qaed Salim Sinan al Harethi, the prime target, was among the men killed. He was one of the former security guards to Osama Bin Laden. Al Harethi was also the person suspected of masterminding the attack against the USS Cole in October 2002, off the coast of Aden,

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<sup>1</sup> Christof Heyns, UN Special Rapporteur on Extrajudicial, arbitrary or summary execution, "The Human Rights Implications of Targeted Killing", 21 June 2012, at p. 1.

<sup>2</sup> Daniel Statman, "Targeted Killing", (2004) 5 *Theoretical Inquiries in Law* at p. 180.

<sup>3</sup> Nils Melzer, "Targeted Killing in International Law", New York: Oxford University Press, 2008, at p. 28.

<sup>4</sup> *Ibid*, at pp. 28-29.

<sup>5</sup> Cited in 'Nils Melzer', *supra* note 3, at p. 29.

<sup>6</sup> Chris Downes, "Targeted Killing in an Age of Terror: The Legality of the Yemen Strike", (2004) 9 *Journal of Conflict and Security Law* 277 at pp. 277-78; David Kretzmer, "Targeted killing of Suspected Terrorist: Extra-Judicial Executions or Legitimate Means of Defence?", (2005) 16 *European Journal of International Law* 171 at pp. 171-72; Daniel Statman, *supra* note 2, at p. 180.

port in Yemen which caused in the death of 17 sailors.<sup>7</sup>

Although the U.S. government first denied participating in the attack against al Harethi, officials let it be known that the CIA had carried it out.<sup>8</sup> Moreover, the then White House Press Secretary, Ari Fleischer finally acknowledged the U.S. led operation stating that the U.S. was involved in a “different kind of war with different kind of battlefield”.<sup>9</sup> U.S. Deputy Defence Secretary, Paul Wolfowitz also praised the targeted strike against al Harethi describing it as “a successful tactical operation”.<sup>10</sup> Though the U.S. government has not openly accepted responsibility for the attack on al Harethi,<sup>11</sup> the statements of these top government officials of US however impliedly acknowledged the responsibility of U.S. in the attack.

Targeted killing as a counter-terrorism measure has been one of the key confrontations to international law presently. The contestations are borne out of the fact as to whether a State that has been attacked by terrorist group could legally target members of such group with intent to kill whenever opportunity presents itself. For over a decade now, a lot of scholarly writing on targeted killing has been written.<sup>12</sup> However, according to Philip Alston, “the legality or otherwise of targeted killing is dependent on the context in which it was conducted: whether in an armed conflict context, outside an armed conflict context or in relation to the interstate use of force.”<sup>13</sup>

Targeted killing is lawful in the context of armed conflict when it constitutes an integral part of the hostilities and it is not aimed at persons entitled to protection from direct attack. Moreover, it is lawful if the targeted killing is militarily necessary and the force used was proportionate to the anticipated military advantage.<sup>14</sup> Also, to achieve legitimacy, it must be conducted in a manner that will avoid erroneous

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<sup>7</sup> Chris Downes, *supra* note 6, at pp. 277-78; David Kretzmer, *supra* note 6, at pp. 171-72.

<sup>8</sup> See Dworkin, “The Yemen Strike: The War on Terrorism Goes Global”, Crimes of War Project, 14 Nov. 2002.

<sup>9</sup> Cited in ‘Chris Downes’, *supra* note 6, at p. 278.

<sup>10</sup> Cited in BBC, “US Still Opposes Targeted Killing”, 6 Nov. 2002, available at: [http://news.bbc.co.uk/2/hi/middle\\_east/2408031.stm](http://news.bbc.co.uk/2/hi/middle_east/2408031.stm) (last accessed on 30 August 2013).

<sup>11</sup> Nils Melzer, *supra* note 3, at p. 439.

<sup>12</sup> See eg., Karinne Coombes, “Balancing Necessity and Individual Rights in the Fight Against Transnational Terrorism: ‘Targeted Killing’ and International Law”, (2009) 27 Windsor Yearbook of Access to Justice 285; David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?”, 16 European Journal of International Law 171; Amos Guiora, “Targeted Killing as Active Self-Defence (2004) 36 Case Western Reserve Journal of International Law 319; Nils Melzer, “Targeted killing in International Law”, Oxford University Press, 2008; etc.

<sup>13</sup> Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Addendum: Study on Targeted killings by Philip Alston to the Human Rights Council, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, at para 28.

<sup>14</sup> Nils Melzer, *supra* note 3, at pp. 426-27; Philip Alston, *supra* note 13, at p. 10.

targeting and to avoid or at least minimize the incidental infliction of death, injury and destruction of persons and objects protected against direct attack.<sup>15</sup>

Targeted killing outside the context of armed conflict could only be lawful if its sole aim is to protect human life from unlawful attack. Hence, targeted killing could be legal only if it is to protect life and there is no other less lethal means to prevent the imminent threat to life.<sup>16</sup> Consequently, individuals cannot be lawfully deprived of their life based on circumstances other than their conducts at the time the lethal force is being used on them.<sup>17</sup> Thus, if one does not pose imminent threat to life to which no other less lethal means can contain, use of lethal force against such person is highly unjustifiable.

On the other hand, according to Philip Alston, “targeted killings conducted in the territory of other States raise sovereignty concerns”.<sup>18</sup> While the legality of the targeted killing is still subject to the rules of IHL and/or human rights law, the legality of use of force on the territory of another State is dependent on the following: (a) the consent of the territorial State; (b) acting under the right to self defence; or (c) acting pursuant to security council authorization to use force.<sup>19</sup> Consequently, targeted killing that is executed in the absence of any of the above criteria is illegal and as such amounts to extrajudicial execution of the targeted individual.

This research work is a study on extraterritorial use of force and fight against transnational terrorism with a focus on intentional and premeditated killing, self defence and the right to life. This research work will also look into the existing legal frameworks that regulate extraterritorial use of force and proceed to call for a need for an interpretive guidance on the controversial areas in these bodies of laws.

Before proceeding further, it is pertinent to clarify some terminology that will be employed in this research work. First, there is no universally agreed definition of the term ‘targeted killing’ among scholars.<sup>20</sup> Jason Fisher defined targeted

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<sup>15</sup> Nils Melzer, *supra* note 3, at p. 427.

<sup>16</sup> Philip Alston, *supra* note 13 at p. 11, Nils Melzer, *Supra* note 3, at pp. 423-24.

<sup>17</sup> Nils Melzer, *supra* note 3, at p. 425.

<sup>18</sup> Philip Alston, *supra* note 13, at p.11; see also the Security Council Resolution 611 of 25 April 1988 where the Security Council condemned the killing of Khalil al Wazir by Israeli commandos in front of his family in Tunis, Tunisia as an act of aggression.

<sup>19</sup> Nils Melzer, *supra* note 3, at pp. 74-76.

<sup>20</sup> William C. Bank & Peter Raven-Hasen, “Targeted Killings and Assassination: The U.S. Legal Framework”, (2003)37 *University of Richmond law Review* 667 at p. 669; Chris Downes, *supra* note 6 at p. 280.

killing as meaning “the intentional slaying of a specific alleged terrorist or group of alleged terrorists undertaken with explicit governmental approval when they cannot be arrested using reasonable means”.<sup>21</sup> On the other hand, Philip Alston defined targeted killing as “the intentional, premeditated and deliberate use of lethal force by States or their agents acting under the colour of law, against a specific individual who is not in the physical custody of the perpetrator”.<sup>22</sup>

The all encompassing definition of targeted killing is the one given by Nils Melzer because it encapsulates all the common elements of targeted killing. These elements could be summed up thus; targeted killing is the intentional and deliberate use of force with a degree of premeditation against an individual or individuals specifically identified in advance by the perpetrator.<sup>23</sup> Hence, these distinctive elements of targeted killing are that there is existence of use of lethal force authorized by the targeting State on suspected terrorists who are outside the physical custody of the authorizing State with intent to kill.<sup>24</sup>

On the other hand, ‘terrorist’ as used in this research work is defined as individuals who commit violent acts against civilians with the intent to cause death or serious bodily injury and/or take hostages with the purpose to provoke terror in general public or within a group of persons or particular persons. Terrorists are also individuals that commit acts that constitute offences within the scope of international conventions and defined in the international conventions and protocol relating to terrorism.<sup>25</sup>

Lastly, ‘human rights’ as used in this research work, except where the contrary is expressly stated, is not restricted to human right law alone. Human rights, for purposes of this research and without prejudice to the generality of human rights, encapsulates all bodies of laws, such as IHL, IHRL, and/or customary international law that are aimed at providing and safeguarding the basic “right to life” of every individual.<sup>26</sup>

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<sup>21</sup> Jason Fisher, “Targeted Killing, Norms and International Law”, (2007)45 Columbia journal of Transnational Law 711 at p. 715.

<sup>22</sup> Philip Alston, supra note 13, at p.3.

<sup>23</sup> Ibid, at p. 5; Nils Melzer, supra note 3, at pp. 4-5.

<sup>24</sup> Nils Melzer, supra note 3, at pp.4-5.

<sup>25</sup> See UN Security Council Resolution 1566 (2004), UN Doc. S/Res/1566, 8 October 2004 at para 3.

<sup>26</sup> Nils Melzer, “Human Rights Implications of the Use of Drones and Unmanned Robots in Warfare”, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI\\_ET%282013%29410220\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET%282013%29410220_EN.pdf) (last accessed on 25 August 2013).

This research contains four distinct chapters. Chapter one examines targeted killing under IHRL. It discusses also the right to life under IHRL and the contestations among scholars on propriety of the IHRL regime to targeted killing.

Chapter two examines targeted killing under the IHL regime. It also discusses the contestations among scholars on the propriety of the IHL regime to targeted killing. Moreover, the principle of distinction, *inter alia*, is discussed here.

Chapter three distinguishes between *jus ad bellum* and *jus in bello* and examines execution of targeted killing by States on claim to right of self defence under Article 51 of the UN charter. The chapter also examines the principles of self defence and posits that extraterritorial use of force that does not fall within the exceptional circumstances upon which force can be used extraterritorially amounts to acts of aggression.

Chapter four will seek to look into processes of humanizing IHL in the area of targeted killing policy. Thus, there will be a call for authoritative interpretive guidance on the requirement of armed attack, the principles of proportionality and necessity in line with the peculiarities of hostilities between States and organized armed group which is quite distinct from conventional hostilities between States. There will also be a call for interpretive guidance on the extent of State's right to self-defence against non-State actors. Lastly, it will also be discussed that for targeted killing to achieve legitimacy it must, *inter alia*, comport with the requirements of accountability and transparency.

# CHAPTER ONE

## TARGETED KILLING UNDER INTERNATIONAL HUMAN RIGHTS LAW

### 1.1 The Right to Life under International Human Rights Law

Intentional deprivation of life outside the context of armed conflict is a matter of law enforcement.<sup>27</sup> This is governed by rules laid down in various human rights instruments and also under customary international law; especially by the concept of the right to life.<sup>28</sup>

The right to life has been held to be sacrosanct and the most important right upon which all other rights are predicated. The universal notion of the right to life could be traced from the end of World War II and the heinous nature of the holocaust. Since then, all human rights instruments provide for the inherent right to life.<sup>29</sup> Contemporarily, the right to life is generally accepted as a right that is non-derogable and forming part of customary law – *jus cogens*.<sup>30</sup> Hence, the right to life has been regarded as a non-derogable right, i.e., in the sense that it is not subject to derogation even in the time of emergency and it has a higher value than all other rights.

Consequently, whenever the right to life is applicable, there will be no room for derogation, not even on the general claim of existence of public emergency.<sup>31</sup> Moreover, the right to life entails not only a negative obligation on the part of States, but also a positive obligation. Thus, States are not only under obligation to refrain from unlawful killing of human beings but also have positive obligation to

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<sup>27</sup> Noam Lubell & Nathan Derjko, “A Global Battlefield? Drones and the Geographical Scope of Armed Conflict,” at p. 8, available at <http://www.ssrn.com/abstract/22121835> (last accessed on 20 August 2013).

<sup>28</sup> Tom Ruys, “Licence to Kill: State Sponsored Assassination Under International Law”, (May 2005), Institute for International Law Working Paper No. 76, Available at <http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP76e.pdf> (last accessed on 12 August 2013).

<sup>29</sup> See e.g., Article 6 of the International Covenant on Civil and Political Rights (hereinafter ICCPR); Article 3 of the Universal Declaration of Human Rights (hereinafter UDHR); Article 4 of the African Charter on Human and Peoples’ Rights (hereinafter ACHPR); Article 2 of the European Convention for the Protection of Human Rights and fundamental Freedoms (hereinafter ECHR); Article 4 of the American Convention on Human Rights (hereinafter ACHR).

<sup>30</sup> Christof Heyns & Sarah Knuckey, “The Long-Term International Law Implications of targeted Killing Practices”, (2013) 54 Harvard International Law journal at p. 107; Nils Melzer, *supra* note 3, at p. 91.

<sup>31</sup> See Human Rights Committee, General Comment No. 29 on Article 4 of the ICCPR, 31 August 2001, CCPR/c/21/Rev.1/Add.11, at p.6 para. 15.

prevent the violation of the right to life.<sup>32</sup> It is worthy to note that this obligation cannot be escaped by extraterritorial action of a State. Hence, use of lethal force against an individual in the territory of another State brings the individual under the jurisdiction of the targeting State.<sup>33</sup> A distinction must however be made between positive and negative obligation. While the former applies territorially the latter applies universally.<sup>34</sup> Thus, in extraterritorial use of lethal force, a State may not be under obligation to prevent unlawful deprivation of life, but it is under obligation not to arbitrarily deprive an individual of his life.

Notwithstanding the universal recognition of the inherence of the right to life and its importance, right to life is not an absolute right. What is prohibited by international human rights instruments and under customary international law is arbitrary and/or intentional deprivation of life. Thus, the lawfulness or otherwise of taking of life is dependent on the interpretation of the term “arbitrary or intentional”.<sup>35</sup>

Flowing from the provision of Article 6 of International Covenant on Civil and Political Rights (ICCPR), it could be inferred that deprivation of the right to life can be justified in two instances; viz., (a) by imposition of capital punishment by a competent court “only for the most serious crimes in accordance with the law in force at the time of the commission of the crime”; and (b) in self defence. Neither the ICCPR nor the African Charter on Human and Peoples’ Rights (ACHPR) or the American Convention on Human Rights (ACHR) contains an explanation of the meaning of the word ‘arbitrary’. However, European Convention on Human Rights (ECHR) provides circumstances that could be taken to be exceptions to arbitrary taking of human life. Hence, Article 2 of the ECHR while providing that “no one shall be deprived of his life intentionally” provides also justifiable grounds upon which lethal force can be employed. According to Article 2 of the ECHR “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: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful

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<sup>32</sup> See Human Rights Committee, General Comment No. 6 on Article 6 of ICCPR (Sixteenth Session, 1982), UN Doc. HRI/GEN/1Rev.5 (2001), at para. 5.

<sup>33</sup> Noam Lubell, “Extraterritorial Use of Force Against Non-State Actors”, Oxford University Press, 2010, at pp. 227-37.

<sup>34</sup> *Ibid*, at p. 229.

<sup>35</sup> *Ibid*, at p. 177; Nils Melzer, *supra* note 3, at pp. 92-93.

arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purposes of quelling a riot or insurrection”.<sup>36</sup>

The European Court on Human Rights (ECtHR) was faced with the issue of the legality of use of lethal force against three suspected terrorists by the British law enforcement officials in the case of *Mc Cann & Ors. v. United Kingdom*.<sup>37</sup> The ECtHR held to the effect that the text of Article 2 of the ECHR, read as a whole, shows that paragraph 2 does not provide instances where it is permissible to kill intentionally, but provides the circumstances where it is permissible to use force which may caused, though unintended, deprivation of life. The use of force however must be no more than absolutely necessary for the realization of one of the aims set out in the subparagraphs (a), (b), or (c).<sup>38</sup> The ECtHR further interpreted the term “absolutely necessary” as used in Article 2 of the ECHR strictly and posited that the force used must be strictly proportionate to the realization of the purposes set out in subparagraphs (a), (b) and (c) of Article 2 of the ECHR.<sup>39</sup>

Consequently, under International Human Rights Law (IHRL), use of lethal force must be necessary, proportionate and the intended force must be strictly necessary to protect against imminent threat to life. When there is possibility of apprehending the suspect and there is no imminent threat to life by trying to apprehend the suspect, use of lethal force must never be resorted to. Use of lethal force must therefore neither be used against an individual who no longer posed imminent threat to life nor based on the past activities of the individual.<sup>40</sup> Use of lethal force must therefore be justified by the prevailing circumstances at the time the force is employed based on the existing facts. Thus, use of lethal force that is not absolutely necessary and proportionate to the threat posed by the suspect which resulted in the loss of life, amounts to arbitrary deprivation of life.

Standards regulating use of force were also set out in some soft law instruments.<sup>41</sup> For example, Article 3 of the UN Code of Conduct for Law

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<sup>36</sup> Article 2 of the ECHR, supra note 29.

<sup>37</sup> *Mc Cann & Ors. V. United Kingdom*, ECtHR, Application No. 18984/91 (1995).

<sup>38</sup> *Ibid*, at para 148.

<sup>39</sup> *Ibid*, at para 149.

<sup>40</sup> Inter-American Commission on Human Rights, Report on ‘Terrorism and Human Rights’’, (2002), at p.74 para 91 OEA/Ser.L/v/11/116, Doc. 5 Rev.1 corr., 22 October 2002, available at <http://www.cidh.org/Terrorism/Eng/toc.htm> (last visited on August 20, 2013).

<sup>41</sup> UN Office of the High Commission for Human Rights, Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979; Basic Principles

Enforcement Officials provides that the law enforcement officials may use force only when “strictly necessary and to the extent required for the performance of their duty”.<sup>42</sup> Similarly, Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials calls for the adoption and usage of non-lethal force “with a view of increasingly restricting the application of means capable of causing death or injury to individuals”.<sup>43</sup> Moreover, the Basic Principles also sanction the use of firearms except where appropriate and also that firearms are to be used in the manner likely to decrease the risk of unnecessary harm.

Lastly, the rule of law entails that there should be a mechanism through which States’ obligations must be evaluated. To this end, there is a duty incumbent on States to conduct effective official investigation whenever use of lethal force is employed. All major human rights bodies have held that the obligations flowing from the right to life necessarily entail a duty on States to investigate deprivation of life on the part of its agents and non-compliance with this duty amounts to a violation of the right to life.<sup>44</sup> It is worthy of note that this duty to investigate also extends from the traditional law enforcement to deprivation of life occurring in counter-terrorism operations as well as in the conduct of hostilities under Non-International Armed Conflict (NIAC).<sup>45</sup> As aptly noted by the UN Special Rapporteur on Extrajudicial, summary or arbitrary executions: “The human rights obligation to investigate alleged violations of the right to life promptly, thoroughly and effectively through independent and impartial bodies does not cease to apply during armed conflict”.<sup>46</sup>

It is therefore imperative that every use of lethal force that resulted to loss of life must be investigated. The aim of such investigation is to ensure that laws protecting the right to life are adequately implemented and that States are held accountable for death that occurred under their responsibility.

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on the Use of Force and Firearms by the Law Enforcement officials, UN Doc. A/CONF. 144/28/Rev. 1, 1990.

<sup>42</sup> Article 3 Code of Conduct for Law Enforcement officials, *supra* note 42.

<sup>43</sup> Basic Principles on the Use of Force and Firearms by the Law Enforcement officials, *supra*.

<sup>44</sup> Nils Melzer, *supra* note 3, at p. 431.

<sup>45</sup> *Ibid*, at p. 432.

<sup>46</sup> Report of the Special Rapporteur (Executions) 8 March 2006, E/CN.4/2006/53, at p. 60 by Philip Alston.

## 1.2 The Applicability of Law Enforcement Paradigm to Targeted Killing

The legality of targeted killing under the law enforcement paradigm has been contentious. The contentions of the proponents of law enforcement paradigm to targeted killing which dispel the applicability of targeted killing under law enforcement and their classification of such operation as illegal and arbitrary deprivation of life will also be discussed herein. A brief analysis of the views of commentators who dispel the propriety of law enforcement paradigm to targeted killing will also be considered. It will be finally summed up that IHRL does not totally prohibit the applicability of targeted killing under law enforcement paradigm but rather subjects the legality of such practice to stringent IHRL principles of necessity and proportionality.

Many international human rights institutions, such as Amnesty International,<sup>47</sup> United Nations bodies<sup>48</sup> and many legal scholars<sup>49</sup> have criticised the practice of targeted killing on the ground that it violates the right to life. It is the contention of the proponents of IHRL regime that IHRL is the most applicable regime to the fight against terrorism.<sup>50</sup> Hence, the principles and rules of law enforcement paradigm should apply in combating terrorism. It is therefore the view of these commentators that every suspected terrorist should be presumed innocent, arrested, detained and interrogated with due process of law. Moreover, use of force should only be used if it is absolutely necessary and it is not of lethal nature if a lesser degree of force can be effective.<sup>51</sup>

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<sup>47</sup> Amnesty International, USA: An Extrajudicial Killing by the CIA, last modified, 18 May 2008, available at <http://www.amnesty.org/en/library/asset/AMR51/079/2005/en/beffa8d-d4ea-11dd-8a23-d58a49c0d652/amr510792005n.html> (last accessed on 20 August 2013); Amnesty International, Israel and the Occupied Territories: State Assassinations and other Unlawful Killings, available at <http://www.amnesty.org/en/library/asset/MDE15/005/2001/en/84859e22-dc4b-11dd-a4f4-6fo67ed3e68c6/mde150052001en.html> (last accessed on 20 August 2013).

<sup>48</sup> See, e.g., Commission on Human Rights, Resolution 2003/6, P22, UN Doc. E/CN.4/2003/L.11 (2003), condemning Israeli military actions against individual terrorists as 'Extrajudicial executions' as constituting 'a violation of human rights norms'; Commission on Human Rights, "Question of the Violation of Human Rights in the Occupied Arab Territories including Palestine", P 61 UN Doc. E/CN.4/2001/121, March 16, 2001; General Assembly Resolution ES-10/13, P2, UN GAOR, 10<sup>th</sup> Emergency session on 21 October 2003, UN Doc. A/Res/ES-10/13, condemning Israeli 'targeted killing' as extrajudicial killing and calling for their end; General Assembly Resolution 56/62, P2, UN GAOR 56<sup>th</sup> Session, UN Doc. A/Res56/62, 10 December 2001, referring to Israeli actions against individual terrorists as extrajudicial killing and demanding that they stop immediately.

<sup>49</sup> See, eg., Expert Opinion of Antonio Cassese on Whether Israeli Targeted Killings of Palestinian Terrorists are Consistent with International Humanitarian Law, on behalf of Petitioners in Public Committee Against Torture in Israel V. Government of Israel, HCJ 769/02; Yael Stein, "By Any Name Illegal and Immoral", (2003) 17 Ethics & International Affairs, pp. 127-28; Vincent-Joel Prouvix, "If the Hat Fits, Wear it, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists", (2005) 56 Hasting Law Journal 801.

<sup>50</sup> Jason Fisher, *supra* note 21, at p. 718.

<sup>51</sup> *Ibid*, at p.719.

It was therefore argued that targeted killing which is an intentional, premeditated and a deliberate killing by law enforcement officials can never be legal under IHRL because it has never been permissible for killing to be the sole objective of an operation under law enforcement paradigm.<sup>52</sup> Therefore, targeted killing which sanctions the use of lethal force without due process, imminence, and absolute necessity is illegal as such amounts to arbitrary deprivation of life.<sup>53</sup> Targeted killing was also characterized by Yael Stein as “Illegal and based on shaky moral grounds”.<sup>54</sup> She argues that the term “targeted killing” is unknown in international law<sup>55</sup> and as such the policy is illegal under public international law, hence it constitutes an arbitrary violation of the right to life protected under IHRL.<sup>56</sup>

On the other hand, there are views that totally displaced the applicability of IHRL regime to targeted killing. The main premise of the proponents of these views is that there exists armed conflict between a state and terrorist group and that the law enforcement paradigm is too restrictive and inadequate to combat today’s challenges and dangers posed by terrorist groups. According to Daniel Statman, what led U.S. to define its campaign against terrorists as war is premised on the gravity of the threat posed by terrorists presently and the impracticability of coping with the threat by conventional law enforcement paradigm.<sup>57</sup>

Notwithstanding the contestations of the above commentators, it is pertinent to note that international law does not categorically prohibit targeted killing in the context of law enforcement, but rather subjects the lawfulness of targeted killing to strict conditions of necessity and proportionality.<sup>58</sup> Consequently, for targeted killing to be lawful, it must pass through the litmus test of the following criteria; namely: there must be a very and compelling test of necessity; there must be proportionality between the targeting State’s response and the threat; and the targeting State must also take into account all feasible alternative to the use of lethal force.

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<sup>52</sup> Philip Alston, *supra* note 13, at p.11.

<sup>53</sup> Orna Ben-Naftali & Keren R. Michaeli, “We Must Not Make a Scarecrow of the Law: A legal Analysis of the Israel Policy of Targeted Killings”, (2003) 36 *Cornell International Law Journal* 233 at pp. 284-85.

<sup>54</sup> Yael Stein, *supra* note 49, at p.127.

<sup>55</sup> See, eg., Philip Alston, *supra* note 13, at p. 4, where he posited that “targeted killing is not a term defined under international law. Nor does it fit neatly into any particular legal framework”.

<sup>56</sup> Yael Stein, *supra* note 49, at p.129.

<sup>57</sup> Daniel Statman, *supra* note 2, at p. 183.

<sup>58</sup> See, eg., Christof Heyns & Sarah Knuckey, *supra* note 30, at p.106; Nils Melzer, *supra* note 3, at p. 423.

In conclusion, the general views of the proponents of the applicability of law enforcement paradigm to targeted killing could be sum up thus: the policy and practice of targeted killing must comply with human rights standards and principles. This entails that every targeted killing must comport with the principles of absolute necessity, proportionality and judicial review.

### 1.3 The Principle of Absolute Necessity

The principle of absolute necessity is one of the cardinal principles of IHRL framework. This principle subjects the use of lethal force to that which is absolutely necessary to avert imminent threat to life and to restore law and order. When applied to targeted killing, use of lethal force will only be justifiable when it is used to defend potential victim of terrorists' acts against imminent threat to life or serious injury or when less lethal means are inadequate to avert the imminent threat.<sup>59</sup>

Heymann & Keyyem proposed three cumulative factors that could justify use of lethal force to be absolutely necessary and lawful. Accordingly, they posited that for the force to be "necessary" there must be no other feasible alternative; to be "reasonably imminent" there must be an actual danger that any delay in order to develop an alternative means would greatly expose operating officials to the risk of the lethal attack; and to be "preventive", means that the use of lethal force was not solely adopted as punitive measure, but to prevent future attack.<sup>60</sup>

However, the practical application of the principle of absolute necessity does not lend itself to predictability. If there is compelling evidence that a group of terrorists are planning to attack a given State and there is no other reasonable means of averting such threat, targeting them may not necessarily be unlawful.<sup>61</sup> According to David Kretzmer, such planned attack might not be "imminent" but the necessity of the use of lethal force might be "immediate".<sup>62</sup> This position undoubtedly adopts a liberal approach to the principle of absolute necessity. Flowing from this approach, it therefore means that when there is a threat which is

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<sup>59</sup> Basic Principle on the Use of Force and Firearms by Law Enforcement Officials, *supra* note 42, at para. 9; Philip Alston, *supra* note 13, at p. 11; Nils Melzer, *supra* note 3, at pp. 227-32.

<sup>60</sup> Philip Heyman and Juliet Keyyem, "Long-Term Strategy project for Measuring Security and democracy Freedoms in the war on Terrorism, Joint-Project of John F. Kennedy School of Government and Harvard Law School (April 2003- Nov. 2004) available at [http://belfercenter.ksg.harvard.edu/files/tlts\\_final\\_5\\_3\\_05.pdf](http://belfercenter.ksg.harvard.edu/files/tlts_final_5_3_05.pdf) (last accessed on 20 August 2013) at p.67.

<sup>61</sup> David Kretzmer, *supra* note 6, at p. 182.

<sup>62</sup> *Ibid.*

very serious and it involves a great threat to life, the use of force may be justified even though the threat is not imminent.

However, Chris Downes vehemently opposed such approach. According to him, that does not fulfil the requirement of absolute necessity. In his words: “the absence of imminent threat to lives and absence of terrorist attack or even specific threat point to a flagrant breach of international law. For those leaders determined to utterly defeat terrorists, ‘targeted killing’ remains at least for the time being, an illegal and unacceptable option”.<sup>63</sup> Hence, use of lethal force cannot be absolutely necessary if the threat posed is not imminent.

Notwithstanding the differences that may exist in the interpretation given to the principle of absolute necessity, the fact remains that this is a cardinal principle of IHRL and the consequence of any attempt to water it down could be worse than the actual threat that may be posed by terrorists presently. To avoid this, the principle must be strictly interpreted and applied in targeted killing policy.

#### **1.4 Principle of Proportionality**

By virtue of the principle of proportionality under IHRL, the permissible level of force to be employed is limited based on the threat posed by the suspected terrorists to potential victims.<sup>64</sup> Whenever the threat posed is not of the scale that could justify use of lethal force, use of lethal force cannot be justified in such circumstance. According to Human Rights Committee, by virtue of the principle of proportionality, derogations cannot be justified when “the same aim could be achieved through less intrusive means”.<sup>65</sup> Moreover, David Kretzmer posited that the test for proportionality “should be based on balancing of three factors: 1.the danger to life posed by the continued activities of the terrorists; 2. the chance of the danger to human life being realized if the activities of the suspected terrorists are not halted immediately; and 3. the danger that civilians will be killed or wounded in the attack on the suspected terrorist.”<sup>66</sup>

Targeted killing as practiced by most States constitutes a clear violation of the principle of proportionality because IHRL framework forbids use of lethal force except where it is highly unavoidable to save life from unlawful attack.<sup>67</sup> Thus,

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<sup>63</sup> Chris Downes, *supra* note 6, at p. 294.

<sup>64</sup> Philip Alston, *supra* note 13, at para 32.

<sup>65</sup> Human Rights Committee, *supra* note 31, at para 3.

<sup>66</sup> David Kretzmer, *supra* note 6, at p. 203.

<sup>67</sup> Nils Melzer, *supra* note 3, at pp. 232-35.

where States employ lethal force when there are other feasible means of curtailing the threat and there is no risk to human life, the requirement of proportionality is undoubtedly not met. Since proportionality under IHRL entails that the use of force must be proportionate to actual threat posed by the terrorists and not evaluated based on collateral damage, use of lethal force while there are other less lethal means which are proportionate to the threat posed is highly unjustifiable.

### 1.5 Principle of Judicial Review

This is also another basic principle regulating the use of force under IHRL framework. As was noted earlier, the principle of judicial review provides that whenever a State agent is involved in the use of lethal force, it is incumbent on the State to conduct an independent investigation in order to determine if the action was in conformity with the State's obligation to respect and ensure the protection of the right to life. This principle when applied to targeted killing means that every targeted killing should be subjected to a comprehensive and satisfactory legal investigation.

This is clearly a very crucial principle of IHRL which should be strictly, at all times, held applicable to every case of targeted killing. This is imperative considering lack of transparency and accountability that are inherent in targeted killing policy. This concern is evidenced in the arguments of the Petitioners in *The Public Committee against Torture & Ors. V. Government of Israel (hereinafter Targeted Killing Case)* where it was argued thus: "the entire targeted killings policy operates in a secret world in which the public eye does not see the dossier of evidence on the basis of the targets are determined. There is no judicial review: not before or after the targeted killing".<sup>68</sup>

The importance of this principle is also exemplified by the instances where there were errors in the identity of suspected terrorists. There have been instances where there were mistakes in identity and persons with names similar to the wanted terrorists, who lived in the same village, were killed.<sup>69</sup> The principle of judicial review serves the need of investigating such killings and bringing the culprit[s] to justice and making of reparation to the victims and/or to their relatives.

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<sup>68</sup> Judgement of the Israeli Supreme Court sitting as the High Court of Justice on the case of *The Public Committee Against Torture & Ors. V. The Government of Israel & Ors.* HCJ 796/02, Judgement of 14 December 2006, at para. 8.

<sup>69</sup> *Ibid.*

In sum, IHRL framework seeks to protect and uphold the right to life as a fundamental and non-derogable right. This basic right of man can and will only be adequately protected if its principles are interpreted and applied to targeted killing policy in good faith.

## CHAPTER TWO

# TARGETED KILLING UNDER INTERNATIONAL HUMANITARIAN LAW

International humanitarian law is the legal framework, as *lex specialis* that regulates the conduct of armed conflict. It aims primarily to protect and minimize civilian casualties and avoidance of unnecessary suffering even to legitimate military target, by regulating the means and methods of warfare. The existence of an armed conflict is therefore a condition precedent for the applicability of International Humanitarian Law (IHL). According to the Appeal Chambers of the International Criminal Tribunal for the former Yugoslavia (ICTY), an armed conflict exists “whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.<sup>70</sup>

The laws of armed conflict are basically divided into two: those relating to international armed conflict (IAC) and those relating to non-international armed conflict (NIAC).<sup>71</sup> This division is evidenced in the existence of two distinct protocols of 1977 additional to the four Geneva Conventions of 1949 and also the distinct qualification of war crimes in the Rome Statute of the International Criminal Court (ICC).<sup>72</sup> Thus depending on the kind of armed conflict, IHL recognizes two different kinds of rules applicable to either IAC or NIAC.

International armed conflict is generally recognized as conflict between two or more States.<sup>73</sup> According to ICTY, an armed conflict is international if it takes place between two or more States. Also an internal conflict may become internationalized if another State intervenes and/or some of the participants in the internal conflict act on behalf of that other State.<sup>74</sup> This type of conflict, i.e. IAC, is

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<sup>70</sup> *Prosecutor v. Dusko Tadic*, Decision on the Defence for Interlocutory Appeal on Jurisdiction, ICTY, 20 October 1995 at para 70.

<sup>71</sup> Noam Lubell, *supra* note 33, at p. 92.

<sup>72</sup> See Article 8 of the Rome Statute of the ICC.

<sup>73</sup> David Kretzmer, *supra* note 6, at p.189; Nils Melzer, *supra* note 3, pp. 246-52; Noam Lubell, *supra* note 33, at pp. 94-99.

<sup>74</sup> *Prosecutor v. Dusko Tadic*, Judgement, 15 July 1999, ICTY Appeal Chambers, at para 80.

most regulated by law<sup>75</sup> and as such the rules relating to IAC are adequate to deal with contemporary inter-state armed conflict.<sup>76</sup>

However, NIAC which is not adequately regulated like IAC because it has fewer rules applicable to it.<sup>77</sup> The type of NIAC contemplated under IHL framework is a conflict between the authorities of a State and insurgents or rebels in its territory.<sup>78</sup> However, contemporarily, NIAC is defined in contra-distinction to a conflict between States, whether or not it is restricted to the territory of a particular State. Hence, NIAC 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 are not inter-state in character.<sup>79</sup> Flowing from the above, the conditions precedent for the existence of NIAC are the intensity of the armed violence and how sufficiently organized the armed groups are for them to be able to plan and execute sustained and concerted military operations. It can therefore be comfortably said that the rules of NIAC are the applicable rules to the armed conflict between a State and non-state actors.<sup>80</sup>

As noted earlier, NIAC is not sufficiently regulated like IAC. For example, there is no express rule, either in Additional Protocol I (AP I) to the Geneva Conventions or in Article 3 common to the four Geneva Conventions, that neither prohibit indiscriminate attack<sup>81</sup> nor prohibition of choosing means and methods of warfare that cause unnecessary suffering.<sup>82</sup> Notwithstanding the above, according

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<sup>75</sup> Both 1899 and 1907 Hague Convention, the four Geneva Conventions of 1949 as well as the 1977 first Additional Protocol to the Geneva Conventions all, inter alia, apply to IAC.

<sup>76</sup> According to ICRC, IHL rules applicable to IAC are on the whole adequate to deal with present day inter-state armed conflict and for the most part have withstood the test of time “because they were drafted as a careful balance between the imperative of reducing suffering in war and military requirements” See ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflict”, 28<sup>th</sup> Int’l Conference of the ICRC, Geneva 2003, at p.8 available at [http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_1103.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_1103.pdf) (last accessed on 20 August 2013).

<sup>77</sup> Non-International Armed Conflicts are covered by Article 3 common to the Geneva Conventions of 1949; by Second Protocol Additional to the Geneva Conventions; and by customary international law.

<sup>78</sup> See, Common Article 3 which refers to “The case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties...”; Article 1(1) of the AP II states that the protocol applies only to NIAC that “take place in the territory of a High Contracting Party between its armed forces and the dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the protocol”; see also *Hamdan v. Rumsfeld* US Supreme Court 548 US (2006) at pp.67-69 where the court was of the view that the ‘conflict not of international in character’ in Article 3 common to the Geneva Conventions has a literal meaning and is used in contradistinction to a conflict between nations.

<sup>79</sup> Nils Melzer, supra note 3, at p.261.

<sup>80</sup> Noam Lubell, supra note 33, at pp. 99-104.

<sup>81</sup> See, Article 51 of the AP I.

<sup>82</sup> See, Article 35(2) of the AP I.

to the International Committee of the Red Cross (ICRC) study on customary international humanitarian law, vast majority of IHL rules apply equally to NIAC.<sup>83</sup> Apart from the Prisoner of War (POW) status, prohibition against indiscriminate attack and limitation on means and methods of warfare apply equally to NIAC.

In sum, in a bid to regulate the conduct of hostilities, the international community has developed sets of norms for regulation of both IAC and NIAC.<sup>84</sup> Due to the wide scope of these instruments and also in line with the aims of this research work, the research will make use of the provisions of these instruments but only as they directly apply to deprivation of life.

## 2.1 The Right to Life under International Humanitarian Law

The right to life has been recognized as a *jus cogens* norm and as such it is also applicable even during armed conflict. However, the right to life during armed conflict is determined by IHL as *lex specialis*.<sup>85</sup> Hence, during armed conflict, the lawfulness of deprivation of life is determined by reference to IHL as *lex specialis*.<sup>86</sup> Consequently, a person could be taken to have been deprived of his right to life if the acts that led to his death were done in violation of the principles and rules of IHL.<sup>87</sup> It is also important to add that IHL does not totally prohibit killing, but it only limits those that can be killed to combatants and civilians who directly participate in hostilities.

Having noted that deprivation of life during armed conflict is regulated the rules of IHL; it is pertinent to discuss these principles. The first of these principles is the rule of distinction. This is a basic and a core principle in the heart of IHL. This principle provides to the effect that all parties to the hostilities must distinguish between persons who can be legitimately attacked and those who are protected from direct military attack.<sup>88</sup> Hence, in conduct of hostilities, one must either be a legitimate military objective or a protected person. While attack against

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<sup>83</sup> J. Henckaerts & L. Doswald-beck, "Customary International Humanitarian Law" Vol. 1: Rules (Cup: Cambridge, 2005); see also *Tadic*, supra note 70, at para. 96-127 where ICTY stated to the effect that under customary international law, much of the essence of the laws regulating IAC applies also to NIAC.

<sup>84</sup> This set of norms includes, inter alia, the four Geneva Conventions of 1949 and the 1977 Additional Protocol I & II to the Geneva Conventions.

<sup>85</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, ICJ Rep. 226 at para 25.

<sup>86</sup> Nils Melzer, supra note 3, at p. 81.

<sup>87</sup> Fausto Pocar, "Human Rights Under the ICCPR and Armed Conflicts", in Lal Vohrah et al. eds., *Man's Inhumanity to Man: Essay on intentional law in honour of Antonio Cassese* (The Hague: 2003) 729-740 at p. 734.

<sup>88</sup> See Articles 48-58 of the AP I.

the former is legitimate, intentional attack against the latter is highly prohibited and as such amounts to a war crime if such attack is launched.<sup>89</sup>

Who and what qualifies as legitimate targets? The answer to the question is that it is only “combatants” or “fighters” and “military objects” that are subject to military attack. Combatants under IHL are members of armed forces of a State or irregular groups that fight alongside them, who meet the following four criteria: “(a) being under a responsible command; (b) wearing a fixed distinctive sign; (c) carrying arms openly; and (d) conducting their operations in accordance with the law and custom of war”.<sup>90</sup> Thus, individuals that do not meet the above criteria are non-combatants and are therefore not to be directly attacked. It is worthy of note that combatants are not everlastingly subject to direct attack by the adversary. Hence, combatants who fall hors de combat are no longer subject to direct attack unless and until they commit hostile acts harmful to the adversary.<sup>91</sup> In relation to non-State actors, it is only those who belong to the military wing of the non-State actors and exercise continuous combat function that are regarded as “fighters” and as such qualify as legitimate targets.<sup>92</sup>

On the other hand, “military objects”, which are also constituent of military objectives, means objects which are by their very nature, location, purpose or use contribute effectively to military actions.<sup>93</sup> Consequently, such objects are legitimate military targets insofar as such action will lead to a legitimate military advantage.

Thus far, it is established that combatants enjoy the privilege to fight and it is also lawful to directly target them. However, civilians are not allowed to engage in hostilities and any civilian who participates in hostilities may be tried and punished. In as much as the participation of a civilian does not qualify him as a combatant, he however loses his immunity from direct attack and thus becomes a legitimate target.<sup>94</sup>

In sum, an individual may be deprived of his right to life depending on his status as either a combatant or a civilian. It is against this clear division that parties to armed conflict are sternly urged not to use weapon that is incapable of

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<sup>89</sup> See Article 8(2)b i-ii of the Rome Statute; Article 85(5) AP I.

<sup>90</sup> See Article 4(1) of the Third Geneva Convention; Article 43 of the AP I.

<sup>91</sup> Nils Melzer, *supra* note 3, at pp.302-03; Article 41 of the AP I.

<sup>92</sup> See chapter 4, *infra*.

<sup>93</sup> See Article 52(2) of the AP I.

<sup>94</sup> *Targeted Killing Case*, at para 31.

respecting this clear division between combatants and civilians. In this regard, the International Court of Justice (ICJ) in its advisory opinion on *The Legality of the Threat or Use of Nuclear Weapon*, stated thus: “States must never make civilians the object of the attack and must consequently never use weapons that are incapable of distinguishing between civilians and military targets”.<sup>95</sup>

Another important principle of IHL regulating the use of lethal force and its consequential result of death is the principle of proportionality. This principle entails that in the course of use of force; there should be an adequate evaluation as to whether the harm likely to be caused by the intended use of force is proportionate in view of the expected military advantage.<sup>96</sup> Thus, principle of proportionality under IHL arises where the military operation was taken against legitimate military targets, yet civilians were also harmed. In this regard, the principle of proportionality requires a proper proportionate balance between the military objective and the incidental harm to civilians.

Unfortunately there is no definite formula under IHL for the assessment of proportionality. According to Nils Melzer, “proportionality assessment is not based on a strict numerical balance..., but the relative military importance of a target and its military target value.”<sup>97</sup> To him, “higher value targets will justify greater collateral damage than low value targets.”<sup>98</sup> Hence, assessment of proportionality is made against the background of military advantage. This means that whenever civilian casualties outweigh the military advantage, a case of disproportionality is therefore established. By virtue of Article 57(2) of the AP I, military advantage must be “direct and concrete”.<sup>99</sup> Consequently, military advantage cannot be based on a long term or speculative assumptions of defeating terrorism in the world.

In conclusion to this part, IHL has evolved to regulate the conduct of armed conflict and most importantly to protect life and objects of protected persons from unlawful attacks. Accordingly, any deprivation of life in violation of the principles discussed herein is a breach of IHL and thus amounts to arbitrary deprivation of life. To be clearer, use of lethal force would be unlawful under IHL if it is: (a) directed against civilians or civilian objects; (b) used indiscriminately without

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<sup>95</sup> *Nuclear Weapon Advisory Opinion*, supra note 86, at para. 257.

<sup>96</sup> Nils Melzer, supra note 3, at p.357.

<sup>97</sup> *Ibid*, at p.362.

<sup>98</sup> *Ibid*.

<sup>99</sup> See also *The Targeted killing Case* at para. 48.

distinguishing between military objectives and civilians; or (c) used where it is obvious that the expected collateral damage would be excessive in relation to the concrete and direct military advantage anticipated.<sup>100</sup>

## 2.2 The Applicability of Armed Conflict Paradigm to Targeted Killing

It is the view of some scholars that armed conflict may exist between a State and terrorist group and that targeted killing is a legal and effective method of combating terrorism.<sup>101</sup> In fact, it has been stated by one commentator that since it is legal to kill a combatant, it is also legal and moral to execute targeted killing operation on members of organized armed group.<sup>102</sup>

It should be noted that for armed conflict paradigm to be applicable, there must be an armed conflict. It is therefore appropriate to examine whether armed conflict can actually exist between a State and an organized armed group. According to the Appeal Chambers of ICTY, an armed conflict exists whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.<sup>103</sup> Also Richard Erickson considered the two approaches of law enforcement and armed conflict paradigm to terrorist attacks and posited that armed conflict paradigm is most apt to apply when terrorist attacks inflict large scale violence.<sup>104</sup>

Flowing from the above, it is evident that a protracted armed violence between a State and terrorist group constitutes an armed conflict and as such IHL is applicable by virtue of being the legal framework that is specifically designed to regulate conducts of hostilities. Hence, IHL applies as *lex specialis* during armed conflicts. In clarifying the concept of *lex specialis* application of IHL in armed conflicts, the ICJ stated thus:

“In principle, the right not to arbitrarily be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life is however then falls to be determined by the applicable *lex*

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<sup>100</sup> Nils Melzer, *supra* note 3, at pp. 426-27.

<sup>101</sup> See, eg., David Kretzmer, *supra* note 6, at p.179; Amos Guiora, “Targeted Killing as Active Self-Defence”, (2004) 36 *Case Western Reserve Journal of International Law* 319 at p. 319; Steven David, “Fatal Choices: Israel’s Policy of Targeted Killing”, (2002) 51 *Mideast Security & Policy Studies*; etc.

<sup>102</sup> Daniel Statman, *supra* note 2.

<sup>103</sup> *Prosecutor v. Dusko Tadic*, *supra* note 70, at para.70.

<sup>104</sup> Richard Erickson, “Legitimate Use of Military Force Against State-Sponsored International Terrorism” *Alabama: Air University*: 1989 at pp. 57-84.

specialis, namely the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [the ICCPR] can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself”.<sup>105</sup>

It is also necessary to determine the type of armed conflict that applies to organized armed group. IHL provides for two types of armed conflicts: IAC and NIAC. IAC is considered to be armed conflict involving two or more opposing States. The threshold that must be crossed to trigger the existence of such conflict is lower compared to NIAC which is very high.<sup>106</sup> On the other hand, by virtue of Common Article 3, all other armed conflicts that are not international in character are therefore considered as NIAC. Hence, contemporarily, NIAC is regarded to include all situations of sufficiently intense or protracted armed violence between State and organized armed groups, irrespective of where they occur, provided they are not of inter-State in character.<sup>107</sup>

While Israeli Supreme Court in the *Targeted Killing case* held that what exists between Israel and Palestine terrorists groups is IAC, the U.S. Supreme Court in *Hamden case* held that what exists between U.S. and Al Qaeda is NIAC. The view of the US Supreme Court is preferred on the ground that IAC is conventionally understood to be armed conflict between States. Since terrorists groups are not states, IAC cannot exist between such groups and States.

However, for there to be NIAC between a State and a terrorist group, the two cumulative criteria of intensity of the armed violence and the terrorist group being sufficiently organized must be satisfied. From the definition of armed conflict by ICTY, *supra*, for there to be armed conflict between a State and a terrorist group, the armed violence must be “protracted” and thus excludes situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence. Also, the ICTY in *Prosecutor v. Haradinaj & Ors* was of the view that the term

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<sup>105</sup> *Nuclear Weapon Advisory Opinion*, *supra* note 86, at para. 25.

<sup>106</sup> Noam Lubell, *supra* note 33, at p.94.

<sup>107</sup> Nils Melzer, *supra* note 3, at p. 261.

“protracted” is to be interpreted as referring more to the intensity of the armed violence than its duration.<sup>108</sup>

Moreover, the existence of parties to armed conflict is essential for there to be an armed conflict. Thus, to purportedly assert that there is armed conflict against a group that is loosely defined and that can endlessly encompass new groups in many places is a kind of conflict that knows no boundary. To avoid this anomaly, NIAC can only exist against armed group that is sufficiently organized with an existence of a command structure, headquarters and the ability of the armed group to plan and execute sustained and concerted military operations. In nut shell, to be ‘organized’ denotes that the armed group must be armed, organized and to be under a command structure responsible to one of the parties to the conflict.<sup>109</sup>

This leads us to the issue of extraterritorial use of force outside the zone of active battlefield. Under NIAC, battlefield is generally the location where the condition precedent of “protracted armed conflict” between the governmental authorities and the organized armed groups or between such groups exists.<sup>110</sup> Under what circumstances can a State be justified to employ targeted killing extraterritorially? A State could be justified to, inter alia,<sup>111</sup> use force in the territory of another State if such force constitutes part of on-going hostilities between the State carrying out the attack and the targeted individual is a member of an opposing armed group.<sup>112</sup>

The above is what Noam Lubell<sup>113</sup> described as “nexus requirement” which entails that conduct of hostilities and its attendant application of IHL as *lex specialis*, is not territorially limited but however focuses on the “nexus” between an individual’s conducts and an existing armed conflict. Therefore, if the conduct of such individual is not part of on-going hostilities and he is not under the same command structure of a party to the on-going hostilities, the targeting State must prove that there exists a separate armed conflict between the State and the

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<sup>108</sup> *Prosecutor v. Haradinaj & Ors.*, Judgement, ICTY, Case No. IT\_04-84-T, April 3, 2008 at para 49.

<sup>109</sup> Nils Melzer, *supra* note 3, at p.319.

<sup>110</sup> Noam Lubell & Nathan Derejko, *supra* note 27, at p. 9.

<sup>111</sup> See chapter three of this research work, *infra*, for other justifications.

<sup>112</sup> Noam Lubell, *supra* note 33, at p.107.

<sup>113</sup> Noam Lubell, *supra* note 27, at p.11.

targeted armed group<sup>114</sup>. Anything short of this renders armed conflict paradigm inapplicable to such targeted killing operation.

It has thus far been established that armed conflict paradigm is the legal framework that applies to armed conflict. It has also been established that the type of armed conflict that exists between an organized armed group and a State is NIAC. Consequently, the armed conflict paradigm applies in this context and every targeted killing must therefore comply with the rules of armed conflict paradigm. However, under NIAC, where the threshold of armed violence and organization are not met, IHL will not be applicable, leaving IHRL principles to govern the situation.<sup>115</sup>

### 2.3 Combatants

The status of members of non-State actors has been highly contested. Are members of non-State actors to be classified as combatants? According to Article 13 of the first and second Geneva Conventions and Article 4 of the third Geneva Convention, combatants encompass the armed forces that satisfy particular conditions, like, being commanded by a person responsible for his subordinates, having a fixed distinctive emblem, carrying arms openly and conducting their activities in accordance with the law and custom of war. Some are however of the view that once the threshold requirements of NIAC are crossed, the members of armed forces and terrorist group will be regarded as combatants.<sup>116</sup> However, the closest possible instance where members of non-State actors could be described as combatants is if there is IAC and the non-State actors is fighting as part of a militia or organization belonging to one party to the armed conflict.<sup>117</sup> Even at this, it is still problematic.

On the other hand, the Israeli Supreme Court in the *Targeted Killing case* held that members of transnational terrorist organization “are not combatants according to the definition of that term in international law”.<sup>118</sup> This position is supported by the fact that members of non-State actors do not meet the criteria for being classified as combatants. Members of non-State actors do not belong to the

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<sup>114</sup> Ibid at p. 13.

<sup>115</sup> Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Report on Drones by Christof Heyns, UN Doc. A/68/382, 13 September 2013, at para 58.

<sup>116</sup> Nils Melzer, *supra* note 3, at p.65.

<sup>117</sup> Noam Lubell, *supra* note 33, at p. 138.

<sup>118</sup> *Targeted Killing case*, *supra* note 68, at para. 25.

armed forces of any State; they do not have a fixed emblem recognisable from a distance; and they do not conduct their operations in accordance with the law and custom of war. Hence, members of organized armed group cannot be classified as combatants in the strict sense of the term under international law.

### 2.3 Unlawful Combatants

Can members of organized armed group be then classified as “unlawful combatants” since they do not meet the criteria of combatants? The term “unlawful combatants” is commonly used to describe those who, though not combatants, yet they still take active part in hostilities.<sup>119</sup> According to Inter-American Commission of Human Rights, an unlawful combatant is “a person who does not have the combatant’s privileges but nevertheless directly participates in hostilities.”<sup>120</sup> In classifying the status of four German soldiers that were landed in U.S. coast during the World War II, the U.S. Supreme Court held that by entering U.S. in order to damage military targets without wearing uniform or other emblem to identify their belligerent status or by removing that means of identification after entry, such persons become “unlawful belligerents” that could be tried and punished in accordance with the existing law.<sup>121</sup> Also Dinstein, while describing who qualifies as an unlawful combatant states thus: “a person who engages in military raids by nights while purporting to be an innocent civilian by day, is neither a civilian or lawful combatant. He is an unlawful combatant”.<sup>122</sup> While applying the term to Al Qaeda, Joseph Bialke concludes thus: “Because Al Qaeda as an entity does not meet the standards of lawful belligerency (and therefore as entity lacks lawful combatant’s status and combatant’s privileges), classifying Al Qaeda as unlawful combatant is a factual accurate collective administrative determination”.<sup>123</sup> He conceded that though the term is neither used in any international treaties regulating conduct of hostilities, but according to him, it is impliedly contained in them.<sup>124</sup>

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<sup>119</sup> David Kretzmer, *supra* note 6, at p. 190.

<sup>120</sup> Inter-American Commission on Human Rights, *supra* note 41, at para 69.

<sup>121</sup> *Ex Parte Quirin et al.*, 317 US (1942) 1.

<sup>122</sup> Y. Dinstein, “The Conduct of Hostilities Under the Laws of International Armed Conflict”, (Cup: Cambridge, 2004) at p.29.

<sup>123</sup> Joseph Bailke, “Al Qaeda & Taliban Unlawful Combatants Detainees, Unlawful Belligerency and the International Laws of Armed Conflict” (2004) 55 *The Air Force Law Review*1 at p. 17.

<sup>124</sup> *Ibid.*

There are views that however displaced the existence of the term “unlawful combatants”. According to Noam Lubell, “the instruments of international law do not contain any defined legal category other than combatants and civilians”. Hence, individuals can only be classified under one of these two categories: combatants or civilians.<sup>125</sup> Michael Gross was also of the same view. He stated that in view of the fact that neither the Geneva Conventions nor the Protocols recognize the term “unlawful combatants”, individuals can therefore either be a legal combatant or a civilian and nothing more.<sup>126</sup> Moreover, the Israeli Supreme Court in the *Targeted Killing case*, while rejecting the term “unlawful combatants” states thus: “It is difficult for us to see how a third category [unlawful combatants] can be recognized in the framework of the Hague and Geneva Conventions. It does not appear to us that we were presented with data sufficient to allow us to say, at present time, that such a third category has been recognized in customary international law”.<sup>127</sup>

What is discernible from the above two divergent views is “description”. While the first view, as presented herein, describes individuals who are actually combatants but who lose their combatant status because of their conducts, the second view relates to civilians who lose their civilian protection by their conducts.<sup>128</sup> Consequently, the use of the term which appears to be more descriptive should not be conflated with legal categories recognized and defined in international law. Therefore, the term “unlawful combatants” can only be legitimately used insofar as it is purely descriptive, but not to be used to create a third category which is inexistent in law.

## 2.5 Civilian Directly Participating in Hostilities

The basic rule is that civilians shall and will always be protected from direct military attack. However, any civilian who commits acts of combat does not lose his civilian status, but as long as he is taking a direct part in hostilities he does not enjoy, for such time he participates, the protection granted to civilians. Consequently, in the words of Nils Melzer, “IHL contains neither a privilege for, nor

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<sup>125</sup> Noam Lubell, *supra* note 33, at pp.143-45.

<sup>126</sup> Michael Gross, “Assassination and Targeted Killing: Law Enforcement Execution or Self-Defence?” (2006) 3 *Journal of Applied Philosophy* Vol. 23, 231 at p.329.

<sup>127</sup> *Targeted Killing Case*, *supra* note 68, at para. 28.

<sup>128</sup> Noam Lubell, *supra* note 33, at p.144.

a prohibition of, direct participation in hostilities”.<sup>129</sup> However, civilians are encouraged to stay away, as far as possible from hostilities.<sup>130</sup> This basic rule of protection is provided for under Article 51 of the AP I which provides, inter alia, that “civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities”.

There is a consensus among scholars that a civilian who directly participate in hostilities loses his protection from direct military attack as a necessary consequence of such acts. To this end, Dieter Fleck posited thus:

“What are the consequences if civilians do engage in combat? Such persons do not lose their legal status as civilians. However, for factual reasons they may not be able to claim the protection guaranteed to civilians, since anyone performing hostile act may also be opposed, but in the case of civilians, only for so long as they take part directly in hostilities”.<sup>131</sup>

Before proceeding further, it is pertinent to identify what constitutes “hostilities” to which a civilian participation would entail loss of immunity from direct attack. According to the Israeli Supreme Court in the *Targeted Killing case* “The accepted view is that hostilities are acts which by nature and objective are intended to cause damage to the army [opposing party]”.<sup>132</sup> The ICRC Commentary to the Additional Protocols to Geneva Conventions similarly provides that “Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces”.<sup>133</sup> According to David Kretzmer, the above definition of hostilities is narrow and as such “would exclude terrorist acts, which by definition are intended to cause harm to civilians”.<sup>134</sup> Hence, hostilities are not restricted and should not be restricted to harmful acts against the armed forces of States alone.<sup>135</sup>

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<sup>129</sup> Nils Melzer, supra note 3, at p.331.

<sup>130</sup> *Targeted Killing Case*, supra note 68, at para.34.

<sup>131</sup> Dieter Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford: 2000) at p. 142.

<sup>132</sup> *Targeted Killing Case*, supra note 68, at para. 33.

<sup>133</sup> Yves Sandoz et al. (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 1949* (ICRC: Geneva, 1987) at para.1348 at para.1942 (Additional Protocol Commentary).

<sup>134</sup> David Kretzmer, supra note 6, at p. 192.

<sup>135</sup> Karinne Coombes, “Balancing Necessity and Individual Rights in the Fight Against Transnational Terrorism: “Targeted Killings” and International Law”, (2009) 27 *Windsor Yearbook of Access to Justice* 285.

Moreover, Nils Melzer posited that hostilities are not applicable only when a civilian makes use of weapons. To him, hostilities include all violent and non-violent acts that are designed and intended to directly cause harm to the military operation and capacity of another party.<sup>136</sup> He also stated that activities that are merely designed to harm the adversary indirectly, like provision of finance, do not constitute hostilities within the meaning of IHL.<sup>137</sup> Consequently, for acts to constitute hostilities, such acts must reach certain threshold of harm, there must be direct causation and there must be a belligerent nexus to the conflict.<sup>138</sup>

It is now imperative to inquire into what constitute “direct participation in hostility”. This is very crucial considering the fact that the international instruments regulating the conduct of hostilities require civilians to refrain from taking a direct part in hostilities. So, what constitute direct participation in hostilities? It is unfortunate that notwithstanding the legal consequence of direct participation in hostilities, neither the Geneva Conventions nor their Additional Protocols provide a definition of what constitutes direct participation in hostilities or its duration. At present, there is no universally agreed definition of what constitute direct participation in hostilities.<sup>139</sup>

According to ICRC Commentary to AP I, direct participation “implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity occurs”.<sup>140</sup> Also, the Israeli Supreme Court in the *Targeted Killing* case held that “A civilian bearing arms [openly or concealed] who is on his way to the place where he will use them against the enemy, at such place, or on his way back from it is a civilian taking an active part in the hostilities”.<sup>141</sup> Consequently, any act that does not, by its very nature and purpose, intended to cause actual harm to the personnel and/or equipment of the armed forces and which constitutes an immediate military threat that is uninterrupted and indispensably part of the hostilities is not a direct participation in hostilities.<sup>142</sup> According to Inter-American Commission on Human

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<sup>136</sup> Nils Melzer, *supra* note 3, at p. 275.

<sup>137</sup> *Ibid.*, at p. 276.

<sup>138</sup> *Ibid.*

<sup>139</sup> See, eg., *Targeted Killing Case*, *supra* note 68, at para. 34; Henckaetts & Doswald-Beck. Eds., *Customary International Humanitarian Law* ( Cambridge: Cambridge University Press, 2005 at p.23.

<sup>140</sup> Yves Sandoz, *Additional Protocols Commentary*, *super* note 136 at para 1679.

<sup>141</sup> *Targeted Killing Case*, *supra* note 68, at para. 34.

<sup>142</sup> ICRC, “Direct Participation in Hostilities Under International Humanitarian Law”, at p. 142, summary report December 2005, available at

Rights, “Civilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the course of one of the parties or even more clearly, failing to act to prevent an incursion by one of the armed parties do not involve acts of violence which pose an immediate threat of actual harm to the adverse party”.<sup>143</sup>

There are scholars that interpreted “direct participation” narrowly and there are also those that interpreted it liberally. According to Antonio Cassese, “A civilian who is engaging in a military deployment preceding the launching of an attack, in which he is to participate, is to be considered as participating in combat insofar as he carries arms openly during the military deployment”.<sup>144</sup> Antonio Cassese further argued that a civilian may not be directly attacked if: (a) he is not operating within a legitimate military objective, or (b) he is not carrying arms openly.<sup>145</sup>

On the other hand, the desire to protect combatants and the desire to protect innocent civilians lead to a liberal interpretation of “direct participation”.<sup>146</sup> It has been argued by Michael N. Schmitt that “narrow interpretation of direct participation in hostilities in fact might increase the risk to the civilian populations since in modern combat activities, far from the battlefield [acts outside battlefield] may be as important perhaps moreso than actually pulling the trigger”.<sup>147</sup> It is therefore advocated by proponents of liberal interpretation of direct participation in hostilities that an individual is directly participating if he is performing an indispensable function in making possible the application of force against the other party to the hostilities.<sup>148</sup>

Lastly, another important area that needs consideration is the duration of participation in hostilities because it is vital for efficient protection of civilians from direct attack. While combatants remain lawful targets for the entire duration of the

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<http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205> (last accessed on 20 August 2013).

<sup>143</sup> Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Columbia”, 26 February 1999 OEA/Ser.L/V/11.102, December 9, rev.1, Chapter 4 para 56.

<sup>144</sup> Antonio Cassese, Expert Opinion on Whether Israel’s Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law, *Public Committee Against Torture in Israel*, at p.7, available at <http://www.stoptorture.org.il/en/node/761> (last accessed on 30 August 2013).

<sup>145</sup> *Ibid*, at p.8.

<sup>146</sup> *Targeted Killing Case*, supra note 68, at para 34.

<sup>147</sup> Michael N. Schmitt, “Direct Participation in Hostilities” and 21<sup>st</sup> Century Armed Conflict”, at p.529, available at <http://www.michaelschmitt.org/images/directparticipationpageproofs.pdf> .

<sup>148</sup> *Targeted Killing Case*, supra note 68, at para 35.

hostilities, whether they directly participate or not, this does not apply to civilians who are legitimate targets only for such time as they actively participate in hostilities. Pursuant to Article 51(3) of the AP I, a civilian who is taking a direct part in hostilities loses his immunity from direct attack “for such time” as he is taking direct part in hostility. Once such time elapsed, the protection reverts back to the civilian.

While acknowledging the inherent difficulty, it has been expressed that “maintaining this temporal requirement ‘for such time’ is supportable because it would restrict the ability of States to target suspected terrorists only when they pose a continuing threat to the State and is in consonant with Common Article 3 to the Geneva Conventions, which protects persons taking no active part in the hostilities”.<sup>149</sup> Similarly, the ICRC Commentary provides that direct participation includes “preparations for combat and return from, but once the individual ceases to participate, the protection automatically revert to him”.<sup>150</sup>

It has been argued that such narrow interpretation could create a “revolving door” whereby protected status is regained once a specific act ends regardless of the fact that the individual may be determined to commit future attack.<sup>151</sup> It is understandable that such narrow interpretation is to protect civilians who are no longer engaged in the conduct of hostilities. Consequently, broad interpretation could pose a grave danger to innocent civilians. According to David Kretzmer, such broad interpretation would be too permissive because States would enjoy almost unlimited power to target persons they claim to be members of terrorist groups.<sup>152</sup>

On ending note, it could be safe to state that all members of non-State actors<sup>153</sup> cannot be properly classified as combatants, unlawful combatants and/or civilians directly participating in hostilities. Members of non-State actors cannot be classified as combatants because they, inter alia, do not carry out their operations in line with the law and custom of war. They cannot also be classified as unlawful combatants because such term does not exist in international instruments regulating conduct of hostilities, or under customary international law. Lastly, “all

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<sup>149</sup> Karinne Coombes, *supra* note 135, at p.313.

<sup>150</sup> Yves Sandoz, *Additional Protocols Commentary*, *supra* note 133, at para 1943 & 1944.

<sup>151</sup> David Kretzmer, *supra* note 6, at p. 193.

<sup>152</sup> *Ibid*, at pp. 198-201.

<sup>153</sup> According to 2004 U.S Field Manual Interim on Counter-Insurgency Operations (FM13-07.22), an insurgent organization consists of four elements: Leadership, Combatants, Cadre and the Mass base.

members” of non-State actors cannot be classified as civilians directly participating in hostilities. What is then the status of members of organized armed group?<sup>154</sup>

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<sup>154</sup> See Chapter 4, *infra*, for the status of members of organized armed group.

## CHAPTER THREE

### THE RIGHT TO SELF-DEFENCE AGAINST NON-STATE ACTORS

The legality of use of force against non-State actors could be assessed in two instances: *jus in bello* and *jus ad bellum*. The latter assesses whether the use of force is or is not in violation of a State's sovereignty, by determining the level of compliance with the rules of inter-State use of force. The former concerns itself with assessing the legality of use of force in the context of on-going armed conflict, by determining whether the force used comports with the rules of International Humanitarian Law (IHL).<sup>155</sup> It is against this clear dichotomy that this research distinguishes between use of force as actions taken in an already existing armed conflict and use of force as an act of self-defence.

In view of the fact that use of force in the context of *jus in bello* has been examined in the preceding chapters, this chapter will therefore proceed to examine the exercise of right to self-defence against non-State actors. To this end, the following questions will be answered: first, whether the right to self-defence applies to non-State actors; does a right of anticipatory self-defence against non-State actors exist; can a State legitimately respond to an armed attack from non-State actors, if answered in affirmative, how?<sup>156</sup>

#### 3.1 Can armed violent acts of non-State actors qualify as armed attacks?

Use of force against non-State actors on ground of self-defence has been controversial. It has been argued that a State cannot use force in self-defence against non-State actors because the United Nations (UN) Charter authorizes self-defence only over an armed attack that emanates from another State or that the armed attack can legitimately be imputed to that State.<sup>157</sup> However, there are those who think otherwise.<sup>158</sup>

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<sup>155</sup> Christof Heyns and Sarah Knuckey, *supra* note 30, at p. 108; Noam Lubell, *supra* note 33, p 92.

<sup>156</sup> Philip Alston, *supra* note 13, at para 39.

<sup>157</sup> See e.g., Ian Brownlie, "International Law and the Use of Force by States", (6<sup>th</sup> ed.) (2003) Oxford University Press at p.713; Bruno Simma, et al., (3<sup>rd</sup> ed), (2012) "The Charter of the United Nations: A Commentary" (Oxford University Press) at pp. 1414-1418.

<sup>158</sup> Christine Gray, *International Law and the Use of Force*, 3<sup>rd</sup> ed., Oxford University press, 2008, at pp. 199-202; see also views expressed by commentators in Chatham House, "Principles of International Law on the Use of Force by States in Self-Defence", ILP WP 05/01 at pp. 20-33.

Whilst Article 2(4) of the UN Charter<sup>159</sup> prohibits use of force in the territory of another State, Article 51 of UN Charter provides for the inherent right of States to use force in self-defence against armed attack. Article 51 provides thus:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...”<sup>160</sup>

It is accepted that Article 51 serves as an exception to Article 2(4) of UN Charter by authorizing use of force in self-defence to repel or stop an armed attack. Consequently, according to the International Court of Justice (ICJ), the existence of an armed attack is a condition precedent for exercise of the right to self-defence.<sup>161</sup> In the context of non-State actors, it is noteworthy that it is not all armed violence that constitutes an armed attack. The armed attack must reach the threshold of large scale with a substantial effect.<sup>162</sup> Thus, in the words of ICJ,

“...an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.”<sup>163</sup>

Proceeding from the premise that under Article 51 of the UN Charter, exercise of the right to self-defence must be predicated on the existence of an armed attack, the question now is: can acts of non-State actors qualify as armed attacks which can trigger the exercise of the right to self-defence? The ICJ in the *Wall Advisory Opinion* was of the view that an armed attack must come from States and as such self-defensive actions cannot be legally taken against non-

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<sup>159</sup> Article 2(4) of the Charter provides thus “All members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any State or in any manner inconsistent with the purpose of the United Nations.”

<sup>160</sup> Charter of the United Nations , Article 51.

<sup>161</sup> *Nicaragua v. United States of America*, Merits, Judgement. I.C.J. Reports 1986, p. 14 at para 227.

<sup>162</sup> Christof Heyns and Sarah Knuckey, supra note 30, at p 107.

<sup>163</sup> *Nicaragua Case*, supra note 161, at para 195.

State actors, unless the armed attack can be imputed to a State.<sup>164</sup> It means therefore that armed violence from non-State actors does not qualify as armed attack and as such States cannot take any self-defensive action based on this ground. On the other hand, it was the view of some scholars that large scale armed violence by non-State actors constitutes an armed attack that gives rise to the right of self-defence, even if the armed attack cannot be imputed to any State.<sup>165</sup>

The possibility of existence of an armed attack from non-State actors and its consequential right of self-defence was highly exemplified by the devastating effect of September 11, 2001 (9/11) attack by Al Qaeda and the swift response of the international community in acknowledging the right to self-defence against non-State actors in two separate UN Security Council resolutions. In the wake of 9/11 attack, the UN Security Council through its resolutions 1368 (2001)<sup>166</sup> and 1373 (2001),<sup>167</sup> without imputing the attack to any State, recognized the “inherent right” to self-defence and referred to the attack as “a threat to international peace”<sup>168</sup> and call on States to take “all necessary steps to respond to the terrorist attacks of September 11, 2001”.<sup>169</sup> It is worthy of note that the resolutions did not impute the 9/11 attack to any State when the resolutions were passed and also to take “all necessary steps” inferably include the use of force in self-defence to repel and/or to halt the armed attack from the non-State actors that were involved in the 9/11 attack.<sup>170</sup>

It is now evident that large scale armed violence by non-State actors constitutes armed attack analogous to the armed attack provided for in Article 51 of the UN Charter. Consequently, it would be unreasonable to deny the attacked State the right of self-defence merely because the attack is not from a State and the Charter does not expressly require such.

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<sup>164</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I. C.J. Reports 1996, p. 226 at para 139; see also, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168; Noam Lubell, supra note 33, at p. 31; Ian Brownlie, supra note 157, at p. 713; Christine Gray, supra note 158, at pp. 117-118.

<sup>165</sup> Noam Lubell, supra note 33, at p 33; Nils Melzer, supra note 3, at p 52; Daniel Bethlehem, “Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors”, (2012) 106 *The American Journal of International Law* 770 at p 772; See also, separate opinion of Judge Kooijmans in *Wall Advisory Opinion* at para 35.

<sup>166</sup> UN Security Council Resolution 1368, 12 September 2001.

<sup>167</sup> UN Security Council Resolution 1373, 28 September 2001.

<sup>168</sup> UN Security Council Resolution 1368, 12 September 2001.

<sup>169</sup> *Ibid.*

<sup>170</sup> See Christine Gray, supra note 158, at pp. 193-199.

### 3.2 Responding to an Armed Attack Against non-State Actors

Having determined that armed attack can emanate from non-State actors and that it would be unreasonable to deny States the right to defend itself for such attack, it is now necessary to determine when, how and in what manner can a State legitimately defend itself from armed attack that comes from non-State actors. It has been noted that Article 51 of UN Charter serves as one of the exceptions to Article 2(4) of the UN Charter and therefore constitutes part of *jus ad bellum* of modern international law. It should be further noted that use of force against non-State actors has its peculiar attributes. These attributes are, first, the level of violence required to trigger self-defensive action against non-State actors is higher.<sup>171</sup> Secondly, if the armed attack comes from non-State actors, the attacked State ought to first request the territorial State to take measures to stop the attack that is coming from its territory. It is on failure of the territorial State in this regard that the attacked State can take out self-defensive action against the non-State actors.<sup>172</sup> This may however not be applicable if the necessity to use force is imminent and failure to act will adversely affect the “very survival” of the State.

Moreover, self-defensive action can be taken against non-State actors if the territorial State is “unwilling or unable” to stop the terrorist activities within its territory.<sup>173</sup> While it is still problematic and unclear as to what constitutes “unwilling or unable” and who determines it;<sup>174</sup> it is however agreeable that it is permissible to use force against non-State actors in the territory of another State where the territorial State is “unwilling or unable” to prevent the use of its territory for violent

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<sup>171</sup> Chatham House, *supra* note 158, at p. 11.

<sup>172</sup> Noam Lubell, *supra* note 33, at p 46.

<sup>173</sup> Daniel Bethlehem, *supra* note 165 at p 776; Philip Alston, *supra* note 13, at para 35.

<sup>174</sup> Dire Tladi, “An Assessment of Bethlehem’s Principles on the Use of Force Against Non-State Actors in Self-Defence in the Light of Foundational Principles of International Law”, (2013) 107 *American Journal of International Law*, Forthcoming 22pp; However, for a detailed discussion on “Unwilling or Unable” see, Ashley S. Deeks, “‘Unwilling or Unable’: Towards a Normative Framework for Extraterritorial Self-Defence”, (2012) 52 *Virginia Journal of International Law*, 483. Ashley Deeks was of the view that a State that directly provide support to non-State actors is certainly “unwilling” to put an end to the threat posed by the non-State actors. Also, a State is “unable” if it lacks the military capacity to combat highly sophisticated non-State actors that operate from its territory. He however proposed five factors that will guide State practice in this regard, viz.: that States must “attempt to act with the consent of or in cooperation with the territorial state; ask the territorial state to address the threat itself and provide adequate time for the latter to respond; assess the territorial state’s control and capacity in the relevant region as accurately as possible; reasonably assess the means by which the territorial state proposes to suppress the threat; and evaluate its prior (positive and negative) interactions with the territorial state on related issues.”.

acts against another State.<sup>175</sup> Consequently, if the territorial State fails to prevent its territory to be used by non-State actors to carry out hostile acts against other States, the attacked States have the right to take self-defensive actions against the non-State actors within the borders of the territorial State.<sup>176</sup> The territorial State cannot complain that its territorial sovereignty has been violated because it has failed in its duty correlative to its right of territorial inviolability. Lastly, States can take out self-defensive action against non-State actors in the territory of another State based on Security Council authorization and/or if the armed attack can be imputed to the territorial State.

### 3.3 The Right of Anticipatory Self-Defence Against non-State Actors

In the words of Noam Lubell, “anticipatory self-defence is at the heart of the founding formulation of self-defence in international law, as it appears in the case of the *Caroline*”.<sup>177</sup> It is worthy of note therefore that the *Caroline* case is in support of use of force in self-defence against non-State actors.<sup>178</sup> Anticipatory self-defence is the use of force by a State, which sees itself as being under imminent risk of armed attack, to repel such attack from occurring and not to wait passively for the armed attack to occur before taking any defensive action.<sup>179</sup>

There is no consensus among scholars on the permissibility of anticipatory self-defence. Ian Brownlie was of the view that the right of anticipatory self-defence is not permissible under Article 51 of the UN Charter when he stated that “armed attack has a reasonable clear meaning, which necessarily rules out anticipatory self-defence”.<sup>180</sup> Also, there is a view that regards “Article 51 to exclude any self-defence, other than that in response to an armed attack, referring, above all, to the purpose of the UN Charter, i.e. to restrict as far as possible the use of force by individual States.”<sup>181</sup> It has been the view of the proponents of strict interpretation of Article 51 of the UN Charter that due to the inherent risk of abuse of anticipatory right to self-defence which assuredly

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<sup>175</sup> Nils Melzer, *supra* note 26, at p 22.

<sup>176</sup> *Ibid.*

<sup>177</sup> Noam Lubell, *supra* note 33, at p 56.

<sup>178</sup> Jordan Paust, Jordan Paust, “Self-Defence, Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan”, (2010)19 *Journal of Transnational Law and Policy*, 237, at pp 241-42.

<sup>179</sup> Stanimir Alexandou, “Self-Defence Against the Use of Force in International Law”, (1996) Hague: Kluwer Law International at p. 149.

<sup>180</sup> Ian Brownlie, *supra* note 157, at p.700.

<sup>181</sup> Bruno Simma, et al., (3<sup>rd</sup> ed), (2012) “The Charter of the United Nations: A Commentary” (Oxford University Press) at p. 1404.

undermine the restrictions provided in Article 2(4) of the UN Charter, there is need to interpret Article 51 restrictively so as to prohibit any measure taken in anticipatory manner.<sup>182</sup>

Taking into consideration the modern capabilities in warfare, there are some scholars that interpreted Article 51 of the UN Charter liberally. The proponents of liberal approach opined that it will be highly unreasonable for a State that is faced with imminent threat of attack to passively wait for the attack to occur before it could take any defensive action.<sup>183</sup> Consequently, it was strongly canvassed by Amos Guiora that rather than a State to wait for an armed attack to occur; the State should be able to act anticipatorily.<sup>184</sup> In the context of non-State actors, Amos Guiora posited that for State to sufficiently defend itself, the State “must be able to take the fight to the terrorist before the terrorist takes the fight to it”.<sup>185</sup>

It could be said therefore that the requirement of armed attack in Article 51 of the UN Charter represents the expediency of pre-Charter era and not the current dispensation, considering the modern capabilities in warfare. Hence, the failure of a State to act anticipatorily might be too detrimental to the State. Also, in view of the fact that the phrase “if an armed attack occurs” was used “illustratively” and not “exhaustively” and also by virtue of the phrase “inherent right of self-defence”, it could be confidently stated that the Charter preserves the pre-existing customary right of anticipatory self-defence as formulated in the Caroline incident of 1837.<sup>186</sup>

Flowing from the above, it therefore means that Article 51 of the UN charter does not displace the pre-existing customary right of anticipatory self-defence but rather supplements the existing customary rights. Hence, it was stated that: “Article 51 of the UN Charter, through its reference to ‘inherent’ right of self-defence, preserves the earlier customary international law right to self-defence. The Charter does not take away pre-existing rights of States without express provision.”<sup>187</sup> Article 51 does not replicate the customary rights of self-defence but

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<sup>182</sup> Ibid; see also, Christine Gray *supra* note 158, at p. 118.

<sup>183</sup> Michael Glennon, “The Fog of Law: Self Defence, Inherence, and Incoherence in Article 51 of the United Nations Charter”, (2002) 25 *Harvard Journal Law and Public Policy* at p. 553; D. Bowett, “Self-Defence in International Law”, (1958) Manchester University Press, at pp 191-92

<sup>184</sup> Amos Guiora, *supra* note 12, at p 324.

<sup>185</sup> Ibid.

<sup>186</sup> Noam Lubell, *supra* note 33, at p 58; *The Caroline (United Kingdom v. United States) 1837*, 2 Moore 409, in exchange of correspondence between UN Secretary of State, Daniel Webster with British Foreign Minister, Henry Fox, Webster responded that the right of self-defence could only be claimed if “necessity of self-defence is instant, overwhelming, leaving no choice of means, and no moment for deliberation.”

<sup>187</sup> Christine Gray, *supra* note 158, at p.117.

requires the existence of an armed attack before the right to self-defence can be activated. However, the requirement of an armed attack does not extinguish the pre-existing rights recognized under customary international law.

It however needs to be emphasized that the exercise of the right of anticipatory self-defence must be exercised within the strict confines of “Caroline requirements of necessity and immediacy”.<sup>188</sup> Consequently, there is no justification for “pre-emptive strike” as propounded by the United States of America.<sup>189</sup> It will lead to total disruption of world legal order if States should be allowed to take a pre-emptive strike against threat that is vague and remote.<sup>190</sup> It is therefore apposite to end by noting that for a State to legally carry out an anticipatory self-defence, the defensive measures must relate to an armed attack which is imminent and there is no other suitable means to neutralize the threatened attack other than taking such defensive measures. Also the force employed must be proportionate to the threatened attack.<sup>191</sup> Anything short of this is illegal and as such amounts to acts of aggression against the territorial State.

Having examined the exercise of the right to self-defence as it specifically relates to non-State actors, it is also note worthy that “as far as measures of self-defence against acts of organized armed groups ... are carried out on the territory of another State, the principles of proportionality and necessity must be strictly respected”.<sup>192</sup> Hence, forceful actions taken in self-defence must satisfy the rules of necessity and proportionality, whether taken against another State or against non-State actors.

### **3.4 Requirement of Necessity under Self-Defence**

The requirement of necessity is one of the key principles that serves as a check on the use of force and also prevents unwarranted forceful measures in another State territory. Hence, for use of force to be lawful, it must comply, inter alia, with the requirement of necessity.<sup>193</sup> Forceful actions taken in self-defence cannot be “necessary” if there are other alternatives through which the State can

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<sup>188</sup> Ibid at p 59.

<sup>189</sup> See “The National Security Strategy of the United States of America”, The White House, September 15, 2002 available at <http://www.state.gov/documents/organization/63562.pdf> (last assessed on 15 October 2013).

<sup>190</sup> Daniel Bethlehem, *supra* note 165, at pp 771-72.

<sup>191</sup> See, 2004 Report of the Secretary General’s High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2004 at para 188.

<sup>192</sup> Bruno Simma, *supra* note 181, at p. 1418.

<sup>193</sup> Philip Alston, *supra* note 13, at para 43; David Kretzmer, *supra* note 6, at pp 187-88.

effectively respond and repel the armed attack.<sup>194</sup> In the same vein, military actions cannot be legally taken when they are retaliatory or punitive in nature, under the guise of self-defence.

Consequently, in the context of non-international armed conflict (NIAC), necessity entails the responsibility of States to examine whether they have other alternatives by which they can defend the armed attack than employing armed force.<sup>195</sup> It could be stated that if a State has the capacity of apprehending the terrorist or other less lethal means that can effectively put an end to the armed attack, such alternatives should be seriously considered.

The facts that determine what measures that are necessary for State to defend itself should be considered on a case-by-case basis. However, there is a compelling call that States should employ diplomatic and non-forceful measures, like requesting the territorial State to stop the armed attack before resorting to forceful measures.<sup>196</sup> It is only when not employing the forceful measure will adversely affect the State that the use of force could be necessary. The above could be regarded as the requirement of necessity and anything short of this, notwithstanding the scale of the armed attack, fails to satisfy the requirement of necessity.

### **3.5 The Requirement of Proportionality under Self-Defence**

The principle of proportionality is not an easily attainable principle. States tend to use disproportional force, may be to show off their military capabilities, and not necessarily employing force that is defensively aimed at protecting the State from further attack.<sup>197</sup> Nevertheless, the principle of proportionality entails that States should only use force defensively and the force used should be to the extent required to attain the defensive objectives of the State.<sup>198</sup> Hence, the force used must be proportional to the armed attack which the attacked State suffered.

Proportionality could be determined “in terms of a required relation between the alleged initiating coercion and the supposed responding coercion”.<sup>199</sup> Thus, for force to be proportional the force employed must be commensurate, in term of the

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<sup>194</sup> Noam Lubell, *supra* note 33, at p 45.

<sup>195</sup> Philip Alston, *supra* note 13, at para 43.

<sup>196</sup> Noam Lubell, *supra* note 33, at p 46.

<sup>197</sup> David Kretzmer, *supra* note 6, at p 188.

<sup>198</sup> Philip Alston, *supra* note 13, para 43.

<sup>199</sup> Myres McDougall & Florentino Felicaano, “Law and Minimum World Public Order”, (1961) Yale University Press, at p 241.

scale and harm, to the initial attack.<sup>200</sup> A heavy aerial bombardment cannot be proportionate to irregular borders incursion.

Since proportionality is used to evaluate the legality of force used in self-defence, Noam Lubell posited two instances under which proportionality of self-defensive action could be measured thus:

“(a). That self-defence actions are measured in proportion to the events preceding them, with particular reference to the armed attack that gave rise to the self-defence;

(b). That the proportionality of self-defence is measured in relation to the threat that is being faced and the means necessary to end the attack.”<sup>201</sup>

The first criterion entails that force used should be proportional in scale and harm to the attack preceding the use of force. This is not always the case. It has been argued that proportionality is not measured on the initial armed attack, but on balancing the need necessary to put an end to the armed attack.<sup>202</sup> To this end, Roberto Ago stated that

“It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the defensive action, and not the forms, substance and strength of the action itself.”<sup>203</sup>

Notwithstanding that the principle of proportionality is one of the cardinal principles of inter-State use of force; the practical application of the principle is not always achievable. This problem is a huge one in the context of NIAC. However, no matter how difficult it is to practically apply this principle, it would rather be unfortunate that States will be given unfettered power to employ force, regardless of how disproportionate it might be, insofar as it is aimed at achieving a “legitimate aim” of putting an end to the armed attack as posited by Roberto Ago. Disproportionate force cannot be legal notwithstanding how legitimate the aim is in putting a halt to the armed attack.

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<sup>200</sup> Ibid.

<sup>201</sup> Noam Lubell, *supra* note 33, at 64.

<sup>202</sup> Ibid at p 66.

<sup>203</sup> Roberto Ago, quoted from Noam Lubell, *supra* note 33, at p 65.

## CHAPTER FOUR

### HUMANIZING INTERNATIONAL HUMANITARIAN LAW IN THE AREA OF TARGETED KILLING

There are some who have expressed the view that the harsher the war is the shorter it lasts. Accordingly, Francis Lieber advocated thus: “The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.”<sup>204</sup> It was also expressed that over humanization of IHL “might exceed the limits acceptable to armed forces, provoke their resistance and thus erode the credibility of the rules”.<sup>205</sup> However, this is not always the case. For instance, the devastating effect surrounding the killing of Salah Shehadah in 2002 by Israeli warplane when it dropped a one-tonne bomb on Shehadah’s residence which killed him with a lot of civilian casualties showed that there are instances where extreme use of force does not necessarily bring about immediate end to hostilities.<sup>206</sup> The manner in which the operation was carried out made Shehadah a martyr with many people pledging their allegiance to him and promising to fight for his course. This of course resulted to a lot of suicide bombing against Israel in retaliation.<sup>207</sup> Hence, nothing was brief in this regard.

There is therefore a need to reiterate the foundational basis of humanitarian law which is the “basic consideration of humanity”.<sup>208</sup> It is giving effect to this basic consideration of humanity that the principles of proportionality and necessity were propounded. It is also to the same effect that prohibition of weapons that cause unnecessary suffering and incapable of distinguishing between civilians and combatants were also fashioned out.

In the context of non-international armed conflict (NIAC), it is imperative to humanize the operations of States considering the problems inherent in the conflict, which, inter alia, include inefficient means of making clear decision of who is a combatant and a civilian. The driving force should not be the attainment of

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<sup>204</sup> Francis Lieber, Cited in Theodor Meron, “The Humanization of Humanitarian Law (2000) 94 The American Journal of International Law 239 at p 241.

<sup>205</sup> Theodor Meron, “The Humanization of Humanitarian Law”, (2000) 94 American Journal of International Law 239 at p 241.

<sup>206</sup> See, e.g., Laura Blumenfeld, “In Israel, a Divisive Struggle over Targeted killing”, The Washington Post 27 August 2006; CNN, Israeli General Apologies for Civilian Deaths , 23 July 2003 available at <http://www.cnn.com> (last assessed on 20 September 2013).

<sup>207</sup> Steven David, “Fatal Choices: Israel’s Policy of Targeted Killing” (2002) 51 Mideast Security and Policy Studies at p 11.

<sup>208</sup> Nils Melzer, supra note 3, at p 278.

military advantage, at all cost, but rather a balance should always be struck between military necessity and the requirement of humanity.<sup>209</sup> This should be achieved by States observing strictly the principles of humanitarian law. Hence, it is an imperative consideration of humanity that States should refrain from launching targeted killing operations where the expected civilian casualties will be high and the identity of the target is not firmly established. Also, where the target is not a legitimate target in line with the criteria discussed in this research. In the same vein, not to use prohibited weapons and weapons that are incapable of distinguishing between civilians and combatants.

Moreover, bearing in mind that humanization of IHL is “a process driven to a large extent by human rights”,<sup>210</sup> beyond the context of IHL, the conduct of hostilities should be humanized by the rules of IHRL. The humanization of the conduct of hostilities by the rules of IHRL is not however to diminish the rules of IHL which apply as *lex specialis*, but due the fact that the contemporary conduct of hostilities in the context of NIAC has drawn IHL towards the direction of IHRL, humanization of the conduct of hostilities by the rules of IHRL is imperative. Hence, by virtue of this humanization process, lethal force should not be employed when there is feasible means of apprehending a suspected terrorist and when force is to be used it must be commensurate with the threat posed by the suspected terrorist. The rest of this chapter will dwell on modalities that will enhance the basic consideration of humanity in all targeted killing operations.

#### **4.1 The Status of Members of non-State Actors**

Some scholars are of the view that once the threshold of NIAC is crossed, all members of non-State actors will be regarded as combatants akin to armed forces of States.<sup>211</sup> The supporters of this view premised their argument on Common Article 3 to the Geneva Conventions and Article 1(1) of 1977 Additional Protocol II to the Geneva Conventions.<sup>212</sup> They therefore opined that just as it is permissible to direct attack against armed forces of States so also is permissible to attack members of non-State actors.<sup>213</sup> However, Tom Ruys contends against attacks on

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<sup>209</sup> Ibid at 287.

<sup>210</sup> Theodor Meron, *supra* note 205, at p.239.

<sup>211</sup> Nils Melzer, *supra* note 3, at p 65; David Kretzmer, *supra* note 6, at p 198.

<sup>212</sup> Article 1(1) of Additional Protocol II made reference to the existence of armed conflict between armed forces of State and organized armed group.

<sup>213</sup> Daniel Statman, *supra* note 2, at p 186.

members of non-State actors based solely on membership. It is the view of Tom Ruys that a direct attack should be based on active participation of members of the non-State actors.<sup>214</sup> David Kretzmer also expressed his dissatisfaction to this membership approach.<sup>215</sup>

It is against this background that the International Committee of Red Cross (ICRC) in its interpretive guidance of 2009 on “Direct Participation in Hostilities” provides categorization of members of non-State actors. According to the ICRC, members of non-State actors who engage in “continuous combat function” cease to be civilians as long as they engaged in combatant function.<sup>216</sup> Hence, members of the non-State actors who engaged in continuous combat function are not civilians and are therefore legitimate military targets throughout the conduct of the hostilities; by virtue of belonging to the “military wing” of the non-State actors.<sup>217</sup> It is also the view of Nils Melzer that to avoid “erroneous and arbitrary targeting”, that decision to attack should be based on the actual role assumed by each member of the non-State actors.<sup>218</sup> He further posited that those members who assumed “functional combatants” roles cannot alternate between civilians and legitimate military target, but will remain legitimate target as long as they assumed combatant function in the military wing of the non-State actors.<sup>219</sup>

While Philip Alston extolled the work of the ICRC that it based its categorization on “function” rather than “status” (membership), he however expressed concern over targeting individuals who have disengaged from combatant functions.<sup>220</sup> To remedy this, he expressed that there is high evidentiary burden on States to show that such individuals still engage in combatant function and have not disengaged.<sup>221</sup> Moreover, to give credence to the notion of “continuous combat function” States must be willing and able to respect the clear dichotomy between those who engage in continuous combat function and those who engage in sporadic attacks and should direct attack on those who engage in sporadic attacks only “for such time” they engage in the

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<sup>214</sup> Tom Ruys, “License to Kill? State-Sponsored Assassination under International Law” (2005) 44 *Military Law and Law of War Review*, at p. 35.

<sup>215</sup> David Kretzmer, *supra* note 6, at pp 201-202.

<sup>216</sup> ICRC, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law” (2008) 90 *International Review of the Red Cross*, 872.

<sup>217</sup> Noam Lubell, *supra* note 33, at pp 150-51.

<sup>218</sup> Nils Melzer, *supra* note 3, at p 321.

<sup>219</sup> *Ibid* at p. 328.

<sup>220</sup> Philip Alston, *supra* note 13, at para 65.

<sup>221</sup> *Ibid* at para 66.

sporadic attacks.<sup>222</sup> Lastly, Philip Alston opined that those who do not form part of the “military wing” of the non-State actors should not be subject of direct attack.<sup>223</sup> Hence, such individuals will be regarded as civilians who will only be attacked “for such time” they directly participate in the conduct of the hostilities.

The basic consideration of humanity really demands that there should be such categorization, as has been seen above. To this end, in giving effect to the protection accorded to civilians under humanitarian law, all members of non-State actors cannot be regarded as “fighters” subject to direct attack at any time and any place throughout the duration of the hostilities. The ICRC guidance serves to avoid undue inequalities that would have existed had all members of non-State actors been classified as civilian directly participating in hostilities. But at the same time, maintained the protection afforded to civilian by interpreting direct participation in hostilities strictly. This the ICRC achieved by separating members of non-State actors who exercise continuous combat function from those who do not and describe such individuals as civilians who the rules of direct participation in hostilities should apply to in its strict narrow form.<sup>224</sup> Thus it is only those who engage in continuous combat function that can be subject to direct military attack at all times throughout the conduct of the hostilities.

#### **4.2 The Principle of Accountability and its Application to Targeted killing**

The principle of accountability is another principle that safe guards and enhances the basic consideration of humanity in any operation that involves use of lethal force. Though being a principle of IHRL, it has been recognised as an established principle of IHL.<sup>225</sup> Accountability was defined by Grant and Keohane as a mechanism through which “some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in the light of these standards, and to impose sanctions if they determine that these responsibilities have not been met”.<sup>226</sup> It therefore implies that in every use of lethal force there must be an independent investigation to verify the level of compliance on the part of those that were responsible for the use of force. Hence,

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<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Noam Lubell, *supra* note 33, at pp. 147-155.

<sup>225</sup> See, e.g., Articles 86 & 87 of AP I; The Appeal Chambers Decision in *Prosecutor v. Tadic*, *supra* note 74, at para 96-127.

<sup>226</sup> Grant and Keohane, cited in Philip Alston, “The CIA and Targeted killing Beyond Borders”, (2011) 2 *Harvard National Security Journal* 283 at pp. 308-309.

accountability in the usages and processes leading to the use of lethal force “is not a matter of choice or policy; it is a duty under domestic and international law”.<sup>227</sup>

Targeted killing that is shrouded in secrecy raises accountability concern and affects the restraints on use of force.<sup>228</sup> The application of the principle of accountability and transparency to targeted killing entails that States should be able to publically proclaim, inter alia, the criteria they use in enlisting individuals into the “kill-lists”. The process through which an individual is included in the “kill-lists” was extensively discussed by Gregory McNeal.<sup>229</sup> Gregory McNeal was of the view that inclusion on the kill-lists is not solely based on membership but “in accordance with a doctrine known as effects based targeting”.<sup>230</sup> The effects based doctrine is evaluated on four factors: the value of the target in the organization; the depth of his involvement; the time and resources it will cost the organization to recover from the absence of the target; and how the death of the individual will affect the functional capacity of the organization.<sup>231</sup>

It is worthy of note that no matter how plausible the internal mechanism in the process of including individuals on kill-lists, the mechanism is internal and it is not open to public scrutiny. Just as Philip Alston aptly noted that no matter how good the internal procedures are, they must be “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.”<sup>232</sup> Israel and U.S. have neither disclosed the detail guidelines on which they base their decision on who is to be included in the kill-lists, nor allow public access to the relevant information on how the kill-lists are prepared.

Moreover, the principle of accountability requires from State to investigate the proportionality of force used in its targeted killing operations. Accountability in this regards will be based on investigating whether there was collateral damage; was the collateral damage proportional to the anticipated military advantage; was

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<sup>227</sup> Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011, 115 at para 425 available at [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf) (last assessed on 30 October 2013).

<sup>228</sup> Christof Heyns & Sarah Knuckey, supra note 30, at pp.111-112.

<sup>229</sup> Gregory McNeal, “Kill-Lists and Accountability”, at pp 21-51, electronic copy available at <http://www.ssrn.com/abstract=1819583> (last assessed on 15 September 2013).

<sup>230</sup> Ibid at p. 28.

<sup>231</sup> Ibid at p. 36.

<sup>232</sup> Philip Alston, “The CIA and Targeted killing Beyond Borders”, (2011) 2 Harvard National Security Journal 283, at p. 317.

the collateral damage expected; what was the measure taken to minimize collateral damage?<sup>233</sup> Consequently, any action that kills wrong person and/or cause excessive collateral damage automatically trigger a duty to conduct independent investigation. Hence, it is advised that State should be efficient in its intelligence gathering and sharing and be wary of choice of weapons and most importantly be able to abort a strike when there is apparent error in intelligence and the expected collateral damage will outweigh the anticipated military advantage.<sup>234</sup>

Lastly, States should ensure that their mechanisms adopted for accountability are functional and effective in enforcing compliance on those in charge of targeted killing operations. It is important considering the concern expressed by Philip Alston that despite the number of mechanisms to ensure accountability within CIA operations, but none of them has functioned effectively in targeted killing operations.<sup>235</sup> Moreover, there is a need to trust the whole processes of targeted killing to an institution that will be able to disclose to the public its policies and guidelines in execution of targeted killing and that is easily accessible to the public.

On ending note, States should be able to account for who has been killed in targeted killing operation and the basis for the killing. Also, account for civilian casualties. Lastly, the whole essence of accountability is to expose wrongdoers and also to deter them by holding them accountable for their wrongdoings.<sup>236</sup> Consequently, States are required to conduct an effective investigation about the lawfulness or otherwise of every targeted killing operation, except where however it involves an obvious legitimate target.<sup>237</sup>

#### **4.3 New Law or Interpretive Guidance?**

This section will evaluate the arguments of those who call for new law that will deal with contemporary armed conflict. It will be concluded with, whether what we might need is actually new law or interpretive guidance. It is beyond doubt that the September 11, 2001 attack totally disrupted the world legal order in the area of armed conflict. Terrorism has been in existence prior to 9/11 attack, but the

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<sup>233</sup> Gregory McNeal, *supra* note 229, at p 117.

<sup>234</sup> Philip Alston, *supra* note 13, at para 89.

<sup>235</sup> Philip Alston, *supra* note 232, at p 405.

<sup>236</sup> Gregory McNeal, *supra* note 229, at p 120.

<sup>237</sup> Nils Melzer, *supra* note 26, at p 41.

devastating effect of 9/11 attack changed the perception of terrorism.<sup>238</sup> Prior to the attack, terrorism was generally viewed as a criminal act and has been comfortably dealt with in respective States' criminal justice system. However, after the 9/11 attack, U.S and some commentators<sup>239</sup> expressed inappropriateness of categorizing terrorism as a crime that will be combated only with law enforcement paradigm. To this effect, "war on terror" was proclaimed by the U.S. In continuing defence of the "war on terror", President George W. Bush in his 2004 State of Union address stated thus:

"I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the world Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations and drawing up more ambitious plans. After the chaos and carnage of September the 11<sup>th</sup>, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got."<sup>240</sup>

Consequently, it was the view of some that there exists a new form of hostilities; hence there is a need to have new law that will govern this new phenomenon. Roy Schondorf classified these "new hostilities" as "extra-state armed conflicts".<sup>241</sup> In support of new law, Alberto Gonzales, counsel to President Bush stated that in this "new kind of war" many part of the Geneva Conventions are "rendered obsolete and quaint" thus there is a need for new law.<sup>242</sup> Also, United Kingdom Secretary of State for defence stated thus: "I believe we need now to consider whether we – the international community in its widest sense – need to re-examine these conventions. If we do not, we risk continuing to fight a

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<sup>238</sup> Stella Rimington, former D.G of British Security Service stated thus: "I'm afraid that terrorism didn't begin on 9/11 and it will be around for a long time. I was very surprised by the announcement of a war on terrorism because terrorism has been around for thirty-five years." Stella Rimington, cited in G. Dyer, *War: The New Edition* (Canada: Random House Canada, 2004) at p 416.

<sup>239</sup> See, e.g., Daniel Statman, *supra* note 2, at p 183; David Kretzmer, *supra* note 6, at p 179.

<sup>240</sup> President George W. Bush, State of Union Address, January 20, 2004.

<sup>241</sup> Roy Schondorf, "Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?" (2004) 37 *New York University of International Law and Politics* 1.

<sup>242</sup> Alberto Gonzales, "Memorandum dated 25 January 2002, reprinted in K. Dratel & J. Greeberg (eds), *The Torture Papers: The Road to Ghraid*", CUP: New York, 2005, 118-121.

21<sup>st</sup> century conflict with 20<sup>th</sup> century rules.”<sup>243</sup> In the same vein, Sri Lanka President, President Mahinda Rajapaksa stated that due to the “asymmetrical nature of conflicts initiated by non-State actors” there is a need to revise the Geneva Conventions.<sup>244</sup>

In support also, Roy Schondorf asked “whether it is more worthwhile to insist on deals that will not be respected by states in practice or to work towards a more pragmatic arrangement of the law”.<sup>245</sup> Roy Schondorf is therefore of the view that the continual insistence on a legal regime and not recognizing the emergence of new hostilities will lead to total abandonment of the whole legal regime.<sup>246</sup> It was therefore the contention of the proponents of new law that since there is a new armed conflict which is outside the scope of the existing categories under international law, there is a need to develop new law that will govern this new armed conflict.<sup>247</sup>

The contention of the above proponents calling for a new law cannot, with due respect, be supported because there is no legal void in the conduct of hostilities between States and non-State actors. The fact that we are faced with new elements in the conduct of hostilities does not mean that the law is not there to regulate conduct of the hostilities.<sup>248</sup> In the words of Noam Lubell, “A new factual situation does not automatically call for new laws to regulate it – the question that must first be answered is whether existing laws can adequately handle a new situation.”<sup>249</sup> This question Tom Ruys affirmatively answered stating that international law provides a clear normative framework that governs armed conflict between States and non-State actors and a proposal to modify the existing regime threatens the rule of law and as such must be rejected.<sup>250</sup> Philip Alston was also of the view that “the rules as they currently exist offer more than sufficient guidance to the existence and scope of an armed conflict.”<sup>251</sup> Conceding

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<sup>243</sup> Reid Addresses Rusi on “20<sup>th</sup>-Century Rules, “21<sup>st</sup>-Century Conflicts” 3 April 2006, available at [http://www.responsibilitytoprotect.org/files/UK\\_SecretaryofState\\_Speech\\_Apr\\_2006.pdf](http://www.responsibilitytoprotect.org/files/UK_SecretaryofState_Speech_Apr_2006.pdf) (last assessed on 5 October 2013).

<sup>244</sup> President of Sri Lanka Mahinda Rajapakse, President’s Speech at UN, 27 September 2010, available at <http://www.slmission.com/index.php/statements/unga-statements/477-presidents-speech-at-un> (last assessed on 13 September 2013).

<sup>245</sup> Roy Schondorf, *supra* note 241, at p 21.

<sup>246</sup> *Ibid* at p 22.

<sup>247</sup> See, e.g., Noam Lubell, *supra* note 33, p 121.

<sup>248</sup> M. Schmitt, “Targeted Killing and Humanitarian Law: Current Issues”, (2004)34 *Israel Yearbook on Human Rights* 59 at pp 100-104.

<sup>249</sup> Noam Lubell, *supra* note 33, at 126.

<sup>250</sup> Tom Ruys, *supra* note 214, at p 39.

<sup>251</sup> Philip Alston, *supra* note 13, at para 49.

that the contemporary counter-terrorism operations are taking place in a new context, but that does not mean that the law is inexistent to govern the hostilities.

The challenges with counter-terrorism operations are not necessarily lack of applicable law; rather, it is the disagreements and uncertainty on how to qualify and identify the applicable laws.<sup>252</sup> Hence, there is a need to differentiate between a call for new law from the need for interpretive guidance to address the disagreements and uncertainties. Noam Lubell is of the view that international law provides for contemporary hostilities between States and non-State actors and that NIAC is most suited for it. Consequently, it has been expressed that a call for new law should be distinguished from the need to construe the existing laws in a realistic and flexible manner that will adapt and contain the present realities.<sup>253</sup>

In this regard, Michelle Mallette-Piasecki advised to maintain the present Geneva Conventions in their current forms and provide interpretive guidance as the need arises.<sup>254</sup> This she considers “less burdensome and just as beneficial to continue addressing issue within the law by publishing interpretive guidance when necessary, in order to meet advances in technology and military tactics.”<sup>255</sup> The interpretive guidance, as asserted by Roy Schondorf, will “recommend introducing rationales that are derived from the law of peace [IHRL]... into the laws regulating extra-state hostilities [armed conflict].”<sup>256</sup> Therefore, in furtherance of consideration of humanity in counter-terrorism operations, the interpretive guidance will not only be located in-between IHL and IHRL, but will lean more in favour of IHRL.

It worthy to end this section with words of Charles Allen where he stated thus:

“I don’t think that there is a need for revision of the Geneva Conventions. We believe that the existing law provides an entirely satisfactory legal framework for warfare as it occurs in modern world,

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<sup>252</sup> Final Report of Poelgeest Seminar, “Counter-Terrorism Strategies, Human Rights and International Law: Meeting the Challenges”, Grotius Centre for International Legal Studies, Lieden University, April 2007, at p. 2 available at [http://www.researchgate.net/publication/28649548\\_Counter-Terrorism\\_Strategies\\_Human\\_Rights\\_and\\_International\\_Law\\_Meeting\\_the\\_Challenges\\_Final\\_Report\\_International\\_Expert\\_Seminar](http://www.researchgate.net/publication/28649548_Counter-Terrorism_Strategies_Human_Rights_and_International_Law_Meeting_the_Challenges_Final_Report_International_Expert_Seminar) (last assessed on 20 August 2013).

<sup>253</sup> Noam Lubell, supra note 33, at p 126.

<sup>254</sup> Michelle Mallette-Piasecki, “Missing the Target: Where the Geneva Conventions Fall Short in the Context of Targeted Killing”, (2012-13)76 Albany Law Review 263 at p 294.

<sup>255</sup> Ibid at p 295.

<sup>256</sup> Roy Schondorf, supra note 241, p.29.

and specifically for war on terrorism. What we need is a better compliance with the existing laws, not new laws.”<sup>257</sup>

It can now be comfortably concluded that instead of calling for new law, the answer lies on us accepting the interpretation of the existing laws.<sup>258</sup> What is needed is for States to comply with the laws as they currently exist and as have been interpreted by international bodies.<sup>259</sup> At most, what is needed to be done is to provide interpretive guidance on controversial areas of IHL, and definitely not a new law.

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<sup>257</sup> Excerpt from interview with Charles Allen, Deputy General Counsel for International Affairs, US Department of Defence by Anthony Dworkin, December 16, 2002, available at <http://www.crimesofwar.org/onnews/news-pentagon-trans.html> (last assessed on 2 October 2013).

<sup>258</sup> Noam Lubell, *supra* note 33, p. 133.

<sup>259</sup> Philip Alston, *supra* note 13, para 49.

## CONCLUSION

The contemporary level of sophistication and military capabilities of non-State actors to plan and execute high level military operations have shaken an already established world legal order; in the area of armed conflicts. Prior to September 11, 2001, it was an incontestable norm that States can legally resort to use of force only in accordance with UN Charter, Geneva Conventions and their Additional Protocols and also in accordance with customary international law. After the 9/11 attacks the laws regulating use of force came under heavy attack, on their propriety and applicability to targeted killing operations.

Consequently, there has been contestation on whether the existing laws are adequate to contain the present day threats posed by transnational terrorism. The legal regime that applies to targeted killing operations has also been contentious. This research has endeavoured to establish that the laws as currently exist provide adequate and satisfactory regulations for every targeted killing operations. Thus, the arguments about the inappropriateness and/or inadequacy of the current laws could be said to have been caused by States' overreactions to terrorist attacks, thereby coming up with measures that are not compatible with the existing laws. Therefore, in the bid to justify these incompatible measures, the existing laws were challenged on the ground that they are not adequate to contain these measures taken by States to combat contemporary transnational terrorism.

However, it has been established by this research that the laws as currently exist provide a clear and satisfactory regulations for all targeted killing operations, both under the law enforcement paradigm, armed conflict paradigm and the inter-State use force. Hence, notwithstanding how wise, legitimate and compelling the use of force might be, it must be grounded on rule of law by meeting the requirements of the applicable laws. If States are sincere and resolute to uphold and maintain the primacy of rule of law, States' targeted killing operations should always comply with the requirements of laws that regulate use of force in international law. Moreover, to maintain and preserve the sanctity of right to life and prevention of intentional and premeditated killing by States through their targeted killing operations, the limitations imposed by applicable laws shall never be undermined.

Lastly, while agreeing with Philip Alston that "non-international armed conflict rules would benefit from development", this research tends to posit that the development would not be to have a new law but providing interpretive guidance

on controversial areas of the applicable laws. This is against the background that the existing laws are adequate to deal with targeted killing when construed and interpreted in a manner that will take into consideration the specificities of the new challenges. In this regard, the research calls for interpretive guidance by the relevant institutions on the requirements of an armed attack, the principles of proportionality and necessity, and also the extent of States' right to self-defence against non-State actors. The list is not however exhaustive, but these are the areas that need urgent attention by providing an authoritative interpretive guidance that will guide State practice in targeted killing operations.

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