

Focus on terrorism – Articles

The limits of targeted killing in counter-terrorism operations: An international law perspective

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Abstract

Despite criticism of targeted killing of suspected terrorists, states continue to justify extensive bases for lethal-force responses to terrorism by arguing that rigid adherence to prescriptive law cannot always be observed in the context of clear and present danger. But, while seemingly cogent, this view wrongly presumes the mutual exclusivity of security considerations and the imperatives of law. It risks exceeding the limits of permissible use of lethal force prescribed in conventional and customary international law. A contrary and more balanced view is advanced in this article. It argues that current international law protecting individuals against intentional killing offers sufficient and practicable guidance for states confronting terrorism. Systematic legal criteria are thus expounded to clarify the legality and admissible limits of targeted killing of suspected terrorists in three contexts: law enforcement, self-defence and armed conflict. With reference to treaties, policy documents and state practice, the article critically examines the preconditions for lawful state-sanctioned killings in counter-terrorist operations. It also identifies the legal challenges and policy implications of resorting to targeted killing. Using comparative case law and operational practice, a legal basis is offered on which Kenya and other nations can effectively tackle the spectre of terrorism within the fair strictures of the law.

Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with.¹

¹ *The Public Committee against Torture in Israel v The Government of Israel*, HCJ 5100/94, Judgment of 14 December 2006, para 61 (hereinafter *Targeted killings*).

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1. Introduction

During the past decade, the incidence of terrorist attacks of varying scales and typologies for which responsibility is claimed by, or traceable to, militant armed groups has risen sharply.² Faced with the ever-escalating threat of violent armed attacks, states are increasingly turning to more aggressive counter-terrorist measures, including targeted killing, in order to protect their nationals and their territorial integrity.³ Targeted killing, a core component of most contemporary counter-terrorist strategies, is defined in the work of the United Nations (UN) Special Rapporteur on extrajudicial, summary or arbitrary executions as

the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.⁴

This definition is used in this article to denote the legal concept of targeted killing which entails the purposeful direction of lethal force by a subject of international law against a specified individual in the context of a counter-terrorist operation or policy. It excludes judicial execution or other types of authorised killing that presuppose the existence of physical custody. Hence, the present analysis focuses on the targeted killing of individually selected persons in the context of counter-terrorist operations in which the death of the targeted persons is the actual objective of that operation.

The use by states of lethal force as part of a counter-terrorism policy is neither a surprising nor novel development as it has been employed for that purpose for years.⁵ The more important issue concerns the legality of the killing by state agents of individuals in the execution of state-sanctioned counter-terrorist operations. A growing number of states have adopted national laws and policies setting out permissive bases for using lethal force against suspected terrorists,

² Trapp KN, 'Can non-state actors mount an armed attack?' in Weller M (ed), *The Oxford handbook of the use of force in international law*, Oxford University Press, Oxford, 2015, 679.

³ Gunneflo M, *Targeted killing: A legal and political history*, Cambridge University Press, Cambridge, 2016, 1; Otto R, *Targeted killings and international law*, Springer, Heidelberg, 2011, 2-8; Alston P, 'The CIA and targeted killings beyond borders' 2 *Harvard National Security Journal*, 2011, 283.

⁴ Alston P, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions – Study on targeted killings, UN Doc A/HRC/14/24/Add.6, 28 May 2010, 3; Krasmann S, 'Targeted killing and its law: On a mutually constitutive relationship' 25 *Leiden Journal of International Law*, 2013, 668.

⁵ Alston, *Study on Targeted killings*, 5-9 analysing the state practice of Israel, United States and Russia; *Targeted killings*, para 2.

and it is here that the problem lies.⁶ States such as Israel, Russia and the United States (US) use targeted killing as part of declared state policy against terrorism.⁷ While the respective state policies are not identical, an essential similarity is the suggestion from their content that current international law is insufficient to adequately respond to terrorist threats.⁸ Such state-specific policies tend to be far more permissive of the use of lethal force than the universal normative constraints of international law would allow.

Perhaps the most problematic aspect of the emerging practice of adopting state-specific policies to justify intentional use of lethal force in counter-terrorist actions is the fragmentation of legal standards for lawful deprivation of life.⁹ State-specific policies tend to promote legal exceptionalism,¹⁰ whereby some states consider themselves bound by their national laws and policies to the exclusion of established universal norms. This can weaken the international legal standards for the protection of human life when states adopt broad interpretations of the exculpatory circumstances in which preservation of national security would justify targeted killing. Recognising that international law does not categorically prohibit the intentional use of lethal force against suspected terrorists¹¹ and in order to promote a more cohesive approach, it becomes necessary to set out the conditions for lawfully using such force so as to clarify the parameters of permissible killing. This article pays particular attention to the legality of lethal force against suspected terrorists in the contexts of law enforcement, self-defence and armed conflict, circumstances in which targeted killing all too often occurs.

Instead of focusing on specific national practices, this article offers an analytical framework that enables an objective review of the legality of a targeted killing in terms of universal norms. Where relevant, however, reference is made to the practice of Israel and the US, two jurisdictions that explicitly use targeted killing and also contribute the most to the discourse of ethical, moral, legal and

⁶ Otto, *Targeted killings*, 6-8; Aloyo E, 'Just assassinations' 5 *International Theory*, 2013, 347.

⁷ Crawford E, 'Terrorism and targeted killings under international law' in Saul B (ed), *Research handbook on international law and terrorism*, Edward Elgar, Cheltenham, 2014, 252.

⁸ Report of the Special Rapporteur (Executions) Addendum of 26 March 2006 UN Doc. E/CN.4/2006/53/Add.1; Israeli Ministry of Foreign Affairs, Cabinet Communique, 1 September 2003.

⁹ Strauser BJ, *Killing by remote control: The ethics of an unmanned military*, Oxford University Press, Oxford, 2013, 82.

¹⁰ Ralph J, *America's war on terror: The state of the 9/11 exception from Bush to Obama*, OUP, Oxford, 2013.

¹¹ *Targeted killings*, para 60: 'It cannot be determined in advance that every targeted killing is prohibited according to customary international law.'

operational limits of using targeted killing.¹² The article's main objective is to clarify, with reference to selected illustrative practice, the norms of general international law that restrain the circumstances under which state agents may intentionally and deliberately kill selected individuals in counter-terrorist operations. It focuses on elaborating the legal limits of targeted killing, explaining the sources of those limits and illustrating their practical application.

2. Lethal-force responses to terrorism and the applicable normative regime: A contextual overview

That states consider themselves legally permitted to use lethal force against suspected terrorists is confirmed in national judicial decisions and the practice of states.¹³ From an international law perspective, therefore, the issue is not whether a lethal-force response to terrorism is legitimate, but whether its exercise or scope is limited by operation of law or principle.¹⁴ A 2015 report by Kenya National Commission on Human Rights, an independent constitutional commission, documented 121 cases of egregious human rights violations, including 25 extrajudicial killings and 81 forced disappearances of youth living in Kenya's Somalia-frontier counties.¹⁵ This has been suggested to be in the context of the state's lethal-force response to mounting crime and terrorism.¹⁶ Kenyan security forces have been much criticised for violating constitutional due process guarantees that prohibit arbitrary killings and issuance of shoot-to-kill orders.¹⁷

As with their Kenyan counterparts, both Israeli and the US security agencies have been criticised for violating both domestic and international legal protections in the course of their extensive targeted killing operations.¹⁸ But unlike Kenya, the governments of the Israel and the US have sought to coherently explain and justify the legal bases of their use of lethal force against suspected terrorists. In 2010, the State Department Legal Advisor publically elucidated the US position on the limits of targeted killing, stating that lethal-force operations

¹² Gunneflo, *Targeted killing*, 1.

¹³ *Targeted killings*, para 22-23; *Al-Anaqi v Obama*, 727 F.Supp.2d 1, 8 (D.D.C 2010); Fisher WJ, 'Targeted killing, norms, and international law' 45 *Columbia Journal of Transnational Law*, 2007, 739, 757.

¹⁴ Gunneflo, *Targeted killing*, 1.

¹⁵ Kenya National Commission on Human Rights, *The error of fighting terror with terror: Preliminary report of KNCHR Investigations on human rights abuses in the ongoing crackdown against terrorism*, 2015.

¹⁶ Nyabola N, 'Kenya's vicious war against its youth', foreign policy, 14 March 2016.

¹⁷ Independent Medico-Legal Unit, 'Report on deaths from police bullets from January to December 2015', available at: <http://www.imlu.org/2011-06-30-23-44-4/2011-08-04-18-06-26/news/item/122-report-on-deaths-from-police-bullets-from-january-to-december-2015.html> on 15 August 2017.

¹⁸ Alston, *Study on targeted killings*, 5-9.

were justified by: an ongoing armed conflict with terrorist groups; such force being consistent with the inherent right to self-defence; and the targeting decisions being based on the principles of distinction and proportionality.¹⁹ Similar arguments are restated by the Israeli Government.²⁰ Despite such efforts, the legality of targeted killings remains contentious. In particular, it is not settled whether: (a) such killings should be assessed as part of an ongoing war against terrorist entities, thus assessed according to international law relative to self-defence or the law of armed conflict; or (b) the counter-terrorist operations are to be evaluated within a law enforcement framework, thus implicating international human rights law.²¹

In reviewing the legal limits of targeted killing in international law, it is necessary to advert to the relevant provisions of specific regimes relating to the use of lethal force. Three branches of international law are pertinent: (a) international law on the use of force; (b) human rights law; and (c) international humanitarian law (IHL).

International law on the use of force regulates the right of states to embark on an armed conflict.²² But the assessment of the legality of targeted killing under international law turns on the circumstances under which such force is used. When used in the context of self-defence in the face of external aggression or in a manner that may infringe on the sovereignty of another state, the international law of interstate force applies.²³ The provisions of Articles 2(4) and 51 of the Charter of the United Nations (UN Charter) restrict the use of armed force only to cases of legitimate self-defence.²⁴

In the context of peacetime operations designed to restore, re-establish and uphold law and public order, the applicable legal framework is that of human rights law.²⁵ When targeted killing is used as part of the conduct of hostili-

¹⁹ Koh H, 'The Obama administration and international law' 104 *ASIL Proceedings*, 2010, 214; Chesterman S, Johnstone I and Malone DM, *Law and practice of the United Nations: Documents and commentary*, Oxford University Press, New York, 2016, 296.

²⁰ Nolte G, 'Targeted killing' in Wolfrum R (ed), *The Max Planck Encyclopaedia of International Law*, Oxford University Press, 2008.

²¹ Crawford, 'Terrorism and targeted killings', 250.

²² *Military and paramilitary activities in and against Nicaragua (Nicaragua v US)* [1986] ICJ Rep 14, para 188-201.

²³ Blum G and Heymann PB, *Laws, outlaws, and terrorists: Lessons from the war on terrorism*, Massachusetts Institute of Technology Press, Cambridge, 2013, 69-91.

²⁴ Charter of the United Nations, 24 October 1945, 1 UNTS XVI; *Nicaragua*, 109-10.

²⁵ *Zambrano-Vélez et al. v Ecuador*, IACtHR Judgment of 4 July 2007 (Merits, Reparations and Costs), para 90; Kretzmer D, 'Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence?' 16 *European Journal of International Law*, 2005, 171.

ties in the context of an armed conflict, the relevant normative framework for determining its international lawfulness is IHL and human rights law.²⁶ The fact that IHL rules have been more specifically developed to apply in armed conflict does not necessarily preclude their conjunctive application with human rights law; both laws may apply coextensively and simultaneously.²⁷ In its *Wall* Advisory Opinion, the International Court of Justice (ICJ) clarified the dual applicability of these bodies of law: some rights may be exclusively matters of IHL or human rights law, but others may be matters of both branches of international law.²⁸ Moreover, the ICJ adverted to the more specialised character of IHL as the regulatory framework when determining the normative standards that should govern a specific concrete situation.²⁹

The specialised nature of IHL has erroneously been used by some actors to justify a generalised approach whereby, in determining the lawfulness of conduct in the context of armed conflict, rules of IHL always override those of human rights law. However, a more convincing reading of *lex specialis* recognises the mutual complementarity of rules of IHL and human rights law, and giving preference to the more protective rule.³⁰ This eliminates the fixation on the preferential application of IHL, and the purported mutual exclusivity of human rights law and IHL. It also improves accountability by limiting the ability of states to deny that human rights law is inapplicable in armed conflict.³¹ While the complementarity-based reading of *lex specialis* is widely accepted,³² some states – notably Israel and the US – consistently object to the applicability of human rights law in wartime, and more so its extraterritorial effect.³³ Such views are, however, er-

²⁶ *Bámaca Velásquez v Guatemala*, IACtHR Judgment of 25 November 2000 (Merits), para 208; *Democratic Republic of Congo v Republics of Burundi, Rwanda and Burundi*, ACmHPR Comm. 227/99, Decision of 29 May 2003, paras. 79-87.

²⁷ Oberleitner G, *Human rights in armed conflict*, Cambridge University Press, Cambridge, 2015, 105.

²⁸ *Legal consequences of the construction of a wall in the occupied Palestinian territory (advisory opinion)* [2004] ICJ Rep 139, para 106.

²⁹ *Wall*, para 106.

³⁰ Graf-Brugère AL, 'A *lex favorabilis*? Resolving norm conflicts between human rights law and humanitarian law' in Kolb R and Gaggioli G (eds), *Research handbook of human rights and humanitarian law*, Edward Elgar, Cheltenham, 2013, 251-270.

³¹ Case of the 'Mapiripán Massacre' v Colombia, IACtHR Judgment of 15 September 2005 (Merits, Reparations, and Costs), para 171.

³² *Armed activities on the territory of the Congo (Democratic Republic of Congo v Uganda)* [2005] ICJ Rep 28, para 216.

³³ UN Human Rights Committee, *Concluding observations: Israel*, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para 11; Committee on Economic, Social and Cultural Rights, *Second periodic report of Israel*, E/1990/6/Add.32, 16 October 2001, para 5; UN Human Rights Committee, *Concluding observations: United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev.118, 18 December 2006, para 10; UN

roneous, in the minority and increasingly isolated; and this is evident in the work of human rights monitoring bodies and in the more recent state practice of the objectors.³⁴

3. Targeted killing in the context of law enforcement

Security operations that are mounted outside the context of an armed conflict and which aim to maintain or restore “public security, law and order” or to exercise “authority or power over individuals in any place or manner” constitute law enforcement measures.³⁵ Despite the absence of definition in international law,³⁶ the above characterisation of law enforcement can be derived from the functions of law enforcement officials as outlined in domestic law and other non-binding instruments.³⁷ If lethal force is used by state agents in the context of a law enforcement operation, the normative restraints under both domestic law and international human rights law apply.³⁸ Where lethal force is used against any person, including a suspected terrorist, in a manner contrary to these normative restraints, the resulting loss of life is unlawful. It is useful to note at the outset that international human rights law narrowly permits intentional killing to the extent that it is absolutely necessary to protect life and is the unfortunate outcome rather than ‘the sole objective of an operation’.³⁹ Thus, unlike the case in armed conflict, targeted killing is only permissible in law enforcement operations in very exceptional circumstances.⁴⁰

Human Rights Committee, *United States (fourth periodic report)*, CCPR/C/USA/4, 30 December 2011, para 506.

³⁴ Siatitsa IM and Titberidze M, ‘Ten years of affirmative state practice within United Nations resolutions’ 3 *Journal of International Humanitarian Legal Studies*, 2012, 233-262.

³⁵ Melzer N, *Targeted killing in international law*, Oxford University Press, Oxford, 2008, 88-89.

³⁶ Marauhn T and Ntoubandi ZF, ‘Armed conflict, non-international’ in Lachenmann F and Wolfrum R (eds), *The law of armed conflict and use of force: The Max Planck encyclopedia* (2017) 58, 59: ‘[F]ew instruments explicitly refer to law enforcement, let alone include a definition of law enforcement. One of the few treaties referring to law enforcement is the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction (‘Chemical Weapons Convention’; 1974 UNTS 45).’

³⁷ Melzer, *Targeted killing*, 85, 86 citing Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, annex to ECOSOC resolution 1989/65.

³⁸ *Suarez de Guerrero v Colombia*, CCPR Comm. No. 45/1979 (31 March 1982), para 13.1; *Myrna Mack-Chang v Guatemala*, IACtHR Judgment of 25 November 2003 (Merits, Reparations, and Costs), para 153.

³⁹ Alston, *Study on targeted killings*, 11.

⁴⁰ Crawford, ‘Terrorism and targeted killings’, 266.

The right to life is considered the most basic of all rights, but it is not absolute.⁴¹ In fact, it can be justifiably limited in few exceptional circumstances. Certain conditions can plausibly justify the intentional use of lethal force to kill individuals and exculpate those responsible for operations resulting in (un)intentional death. These conditions are identifiable by analysing how the right to life is qualified in the text of the major human rights treaties: the International Covenant on Civil and Political Rights (ICCPR);⁴² the European Convention on Human Rights (ECHR);⁴³ the American Convention on Human Rights (ACHR);⁴⁴ and the African Charter on Human and Peoples' Rights (ACHPR).⁴⁵ An analysis of these instruments will reveal the standards of permissible deprivation of life.⁴⁶ In the following section, focus is placed on the content of the normative restrictions on the use of lethal force in law enforcement operations as prescribed in treaty instruments of international human rights law.

3.1 *The right to life in international law and its possible limitation*

Law enforcement operations, such as counter-terrorist actions, involving the use of lethal force are governed by norms drawn from international human rights treaties. All the major human rights treaties prescribe the standards for permissible deprivation of life, but not all are stated in identical terms. The right to life in the ICCPR, the ACHR and the ACHPR, is prescribed in terms of protection against *arbitrary deprivation*. Thus, the limits of permissible killing depend on the meaning of arbitrariness, and the degree of arbitrariness reflects the difference between what is restrictively permitted and what is absolutely prohibited.⁴⁷ It establishes 'a general standard, which functions both as a limitation on the right to life and a guarantee against unjustified killing'.⁴⁸ Instructive insights can be gained by reviewing how the word 'arbitrary' is interpreted in practice. But in order to avoid duplicity,⁴⁹ it is sufficient to state briefly that the practice of the

⁴¹ Ramcharan BG, 'The concept and dimensions of the right to life' in Ramcharan BG (ed), *The right to life in international law*, Martinus Nijhoff, Leiden, 1985, 6, 11 and 15.

⁴² Article 6(1), *International Covenant on Civil and Political Rights*, 23 March 1976, 999 UNTS 171.

⁴³ Article 2, *European Convention on Human Rights*, 3 September 1953, 213 UNTS 221.

⁴⁴ Article 4(1), *American Convention on Human Rights*, 18 July 1978, 1144 UNTS 123.

⁴⁵ Article 4, *African Charter on Human and Peoples' Rights*, 21 October 1986, 1520 UNTS 217.

⁴⁶ Sang B, 'The right to life in international law: Emanation of a unitary concept in comparative adjudicatory practice' *Africa Nazarene University Law Journal*, 2015, 1.

⁴⁷ Nowak M, *Introduction to the international human rights regime*, Brill, Leiden, 2003; Article 6, para 13.

⁴⁸ Boyle CK, 'The concept of arbitrary deprivation of life' in Ramcharan, *The right to life in international law*, 221.

⁴⁹ For a detailed comparative review, see Sang, 'The right to life in international law', 8-39.

UN, the Inter-American and the African human rights systems shows that death occurring in the context of a law enforcement operation may be arbitrary if:

- (i) it lacks a sufficient basis in domestic law;
- (i) it results from the use of (potentially) lethal force that is prohibited or not justified by a legitimate aim, such as defending any person against unlawful violence, effecting a lawful arrest or preventing the escape of a suspect, and repressing unlawful riots;
- (ii) it results from the use of force that is more than absolutely necessary or where the force used is disproportionate to the legitimate aim sought;
- (iii) even where the use of force is permissible, there is a further requirement that the force should only be used when strictly necessary and only to the extent reasonably warranted by the circumstances; and
- (iv) the relevant deprivation of life is not followed by an effective and independent investigation within a reasonable time.⁵⁰

The ECHR differs from other human rights treaties as regards how it formulates the right to life in two ways. First, it protects individuals against ‘*intentional*’ as opposed to ‘*arbitrary*’ deprivation of life.⁵¹ Second, unlike other human rights treaties, it outlines an exhaustive list of the permissible exceptions to the right to life.⁵² The text of Article 2(2) ECHR provides:

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;
- a) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- b) in action lawfully taken for the purpose of quelling a riot or insurrection.

Given the difference in the formulation of the right to life in the ECHR and in other human rights treaties, it may appear that the content of the right to life differs in these treaties. But a review of European human rights case law on the meaning of lawfulness in terms of Article 2 of the ECHR, which elaborates the standards of lawful deprivation of life, demonstrates otherwise.⁵³ Any killing resulting from the use of lethal force is generally unlawful unless such force is

⁵⁰ Melzer, *Targeted killing in international law*, 118.

⁵¹ Article 2(1) ECHR.

⁵² Article 2(2) ECHR.

⁵³ *Juan Humberto Sánchez v Honduras*, IACtHR Judgment of 7 June 2003, para 112; Sang, ‘The right to life in international law’, 20; Melzer, *Targeted killing in international law*, 118-19.

used only to secure one of the legitimate aims stated in Article 2(2) ECHR. And even if lethal force is permissible by reason of a legitimate aim, it should only be used when absolutely necessary because non-lethal means would be ineffective.⁵⁴ Further, the degree of permissible force should be strictly proportionate to the legitimate aim sought, and no more.⁵⁵ The standards identified above are useful indicia of the elements of unlawfulness when examining deprivations of life in the context of law enforcement.

3.2 *Unity of norms on justifiable killing in law enforcement*

Systematic comparative analyses of both adjudicatory jurisprudence and non-judicial practice of the respective supervisory mechanisms of the ICCPR, the ECHR, the ACHR and the ACHPR on the right to life and the legality of killing and in the context of law enforcement have shown that the notions of ‘arbitrary’ deprivation of life and ‘unlawful’ deprivation of life are essentially similar.⁵⁶ There is clear evidence that the elaboration of the standards for lawfulness in Article 2, ECHR, and non-arbitrariness in Article 6, ICCPR, Article 4, ACHR, and Article 4, ACHPR, yield the same result.⁵⁷

On this basis, it has been argued that, ‘but for the variation of expression, both lawfulness and non-arbitrariness practically refer to a unitary notion of justifiable deprivation of life’.⁵⁸ This has two mutually supportive roles: setting out permissible limits to the right to life while guaranteeing against unjustified killing.⁵⁹ The legal standards for both lawful and non-arbitrary deprivation of life, as shown in practice, prohibit state conduct that unjustly or unnecessarily interferes with the inherent right to life.⁶⁰ This negative obligation is complemented by a positive duty⁶¹ enjoining states to actively take all practicable steps necessary to safeguard the right to life against interference,⁶² including from non-state entities.⁶³

⁵⁴ *Andonicon and Constantinou v Cyprus*, ECtHR Judgment of 9 October 1997, para 193.

⁵⁵ *Perisan and Others v Turkey*, ECtHR App. No. 12336/03, Judgment of 20 May 2010.

⁵⁶ Sang, ‘The right to life in international law’, 30; Boyle, ‘The concept of arbitrary deprivation’, 228.

⁵⁷ Romer J, *Killing in a gray area between humanitarian law and human rights: How can the national police of Colombia overcome the uncertainty of which branch of international law to apply?* Springer, Heidelberg, 2010, 99.

⁵⁸ Sang, ‘The right to life in international law’, 29.

⁵⁹ *Chumbivilcas v Peru*, IACmHR Case 10.599 (1996), para 136; Nsereko, ‘Arbitrary deprivation of life’, 248.

⁶⁰ Melzer, *Targeted killing in international law*, 118.

⁶¹ *Onédraogo v Burkina Faso*, ACmHPR Comm. 204/97 (2001), para 3.

⁶² *CCPR General Comment No. 6, Article 6, (The right to life)*, 30 April 1982, para 3.

⁶³ *Suarez de Guerrero v Colombia*, HRC Comm. 45/79 (1982), para. 13.3.

3.3 *Legal standards for justifiable killing*

This section discusses the specific legal standards for lawful killing as prescribed in international human rights law treaties. An examination of the various universal and regional treaties reveals certain common standards for justifiable killing. In order for States to lawfully conduct targeted killings in conformity with human rights guarantees, they have to satisfy certain minimum requirements, including: sufficient legal basis; legitimate purpose; absolute necessity; strict proportionality; and precaution, control and organisation. In the following subsections, these standards are discussed.

3.3.1 Sufficient legal basis

The right to life must be adequately protected by law and cases of permissible deprivation of life must have specific written law as their basis. The sufficient legal basis standard requires killings by state agents in the context of law enforcement to be premised on domestic law that is in line with international law.⁶⁴ Legal norms defined in domestic law must thus strictly control and limit the circumstances in which a person may be killed by state agents.⁶⁵ This standard derives from treaty and customary law obligations of states to protect the right to life from undue interference, and also to ensure that permissible use of lethal force is strictly limited by operation of law.⁶⁶ On this basis, national law that does not strictly control the use by law enforcement authorities of lethal force facilitates, by such omission, arbitrary killings and so violates the right to life.⁶⁷ For states confronted with terrorism, it is necessary to have a domestic legal framework that offers a sufficient degree of legal safeguards against potential or intentional lethal force.⁶⁸ Additionally, even where lethal force is permissible, international law further restricts its use by demanding a case-by-case judgment of whether it is actually justifiable in the circumstances.⁶⁹

3.3.2 Legitimate purpose

The standard of sufficient legal basis implies that any lawful killing by state agents must be triggered by a legitimate or lawful purpose.⁷⁰ Legitimacy as a con-

⁶⁴ *Myrna Mack Chang v Guatemala*, IACtHR Judgment of 25 November 2005, para 153.

⁶⁵ Romer, *Killing in a gray area*, 108.

⁶⁶ *Baboeram et al v Suriname*, HRC Comm. 146/83 (1984), para 14.3.

⁶⁷ *McCann and others v the United Kingdom*, ECtHR Judgment of 27 September 1995, para 154.

⁶⁸ *Makaratzis v Greece*, ECtHR Judgment of 20 December 2004, para 71.

⁶⁹ *Kurt v Turkey*, ECtHR Judgment of 25 May 1998, para 107.

⁷⁰ Romer, *Killing in a gray area*, 109.

dition for the legality of using lethal force depends on its justifiability in general law. It is widely accepted that lethal force may be justified where it is used: in self-defence or the defence of others against imminent threat of unlawful violence; in effecting a lawful arrest or to prevent the escape of a lawfully detained person who poses a threat of unlawful violence against innocent persons; and in action lawfully taken for the purpose of quelling a riot or insurrection.⁷¹ Lethal force is therefore only justifiable if the threat posed is, in fact and in law, unlawful and capable of causing death or serious injury to law enforcement officials or other innocent persons.⁷²

3.3.3 Absolute necessity

Pursuit of a legitimate purpose may not conclusively justify loss of life in the context of a law enforcement operation.⁷³ Rather, lethal force must further be justified by absolute necessity; that is, any less lethal means would be incapable of securing the legitimate aim that renders the use of lethal force lawful.⁷⁴ Thus the test of absolute necessity is to be judged by the efficacy of the means used to achieve a legitimate purpose and the inevitability of its use. It is widely accepted, in both domestic and international law, that the use of lethal force is only absolutely necessary and the loss of life justifiable where the individual against whom such force is applied actually endangers human life or creates the risk of serious injury.⁷⁵ In order to be justifiable, the use of lethal force should be objectively indispensable to the achievement of a legitimate purpose.⁷⁶

The use of lethal force is therefore prohibited if there is no threat and as a result no necessity. It is on this basis that the UN Human Rights Committee, commenting on Israel's practice of targeted killing, concluded that 'before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted'.⁷⁷ On this reading, the use of lethal force may be unjustified if a terrorist attack can practicably, and without excessive danger to the operating forces, be thwarted by non-lethal means. It must, however, be borne in mind that ambiguity persists as

⁷¹ *Inter-American Commission on Human Rights fifth report on the situation of human rights in the Guatemala*, 6 April 2001, para 50.

⁷² Sang, 'The right to life in international law', 37.

⁷³ Nowak, *Introduction to the international human rights regime*, Article 6, para 14.

⁷⁴ *Andronicou and Constantinou*, para 193.

⁷⁵ *Nachova v Bulgaria*, ECtHR Judgment of 6 July 2005, para 95.

⁷⁶ Romer, *Killing in a gray area*, 103.

⁷⁷ UN Human Rights Committee, *Concluding observations: Israel*, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para 15.

to what constitutes exhausting all non-lethal measures prior to the use of lethal force, leading to the suggestion that this remains to be evaluated on a ‘case-by-case basis in concrete cases.’⁷⁸

3.3.4 Strict proportionality

The use of lethal force may be judged absolutely necessary in light of the circumstances of a specific case, but it would still be unjustifiable if the means (degree of force) used to achieve a legitimate aim exceeds the minimum necessary to secure that aim.⁷⁹ International law only permits deprivation of life to the extent that it leads to the achievement of a legitimate aim, and to the extent that such a measure is absolutely necessary. This indicates that the justifiability of death resulting from lethal force in a particular case must be weighed against the urgency or criticality of the lawful objective at issue.⁸⁰ Proportionate lethal force is that which is objectively indispensable or strictly unavoidable in relation to the legitimate object sought to be secured.⁸¹

The UN Basic Principles on the Use of Firearms elaborate the standard of proportionality by stating that, even where the use of lethal force is unavoidable, law enforcement agents must still exercise ‘restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved.’⁸² But it is notable that this standard is not static and has to be determined on a case-by-case basis.⁸³ It can, nonetheless, be stated that a loss of life is always arbitrary where it is caused by ‘excessive force or disproportionate force’ by law enforcement officials.⁸⁴

3.3.5 Precaution, control and organisation

The preceding standards of justifiable killing illustrate that the permissible use of lethal force for intentional killing is always exceptional. This clarifies that the use of lethal force, even in justified law enforcement cases, must be strictly controlled and limited. For instance, loss of life resulting from a counter-terrorist

⁷⁸ Crawford, ‘Terrorism and targeted killings’, 269.

⁷⁹ *X v Ireland*, ECmHR Application 6040/73 (1973), para 116.

⁸⁰ *Guerrero*, para 13.3; Boyle, ‘The concept of arbitrary deprivation of life’, 239.

⁸¹ Sang, ‘The right to life in international law’, 38.

⁸² *UN basic principles on the use of firearms by law enforcement officials*, UN Resolution 45/121, 14 December 1990, Provision 5.

⁸³ *Faurisson v France*, HRC Comm. 550/1993, Individual opinion of Elizabeth Evatt and David Kretzmer, para 8.

⁸⁴ *Report on terrorism and human rights*, para 92.

operation may be unlawful if the lethal force used could have been avoided by taking precautionary measures that were reasonable at the time. Loss of life from counter-terrorist operations may conceivably amount to violations of the right to life if the operation was not carefully planned so as to avoid the unnecessary use of lethal force.⁸⁵ And if it is possible to achieve a legitimate purpose by non-lethal means at an early stage of a counter-terrorist operation, this should be the more preferable course.⁸⁶ Additionally, law enforcement operations should always be designed in a manner that allows for the de-escalation of violence. A suitable example of this is the use of tactical means that can accommodate the surrender of suspects and their subsequent arrest. Thus, deaths occurring in the context of a law enforcement operation may violate the right to life if the relevant operation was not carefully planned and controlled in order to avoid the use of lethal force and to prevent the escalation of violence.⁸⁷

The standard of precaution also restricts the use of lethal force by requiring law enforcement officials to use lethal force only when there is a high degree of certainty as to the identity of a suspect and the unlawful nature of his conduct or intent.⁸⁸ It has also been emphasised that suspicion is not in and of itself sufficient to sanction resort to lethal force.⁸⁹ Precaution further entails an obligation to verify the facts which inform the ultimate decision concerning whether or not to use lethal force.⁹⁰ However, this standard is flexible and takes account of the likelihood of incomplete or imperfect intelligence; it rules that a deprivation of life resulting from the use of lethal force in pursuit of a legitimate purpose would not violate the right to life if it was based on an honest though, ultimately, erroneous belief.⁹¹

4. Targeted killing in the context of national self-defence

States confronting terrorist threats (or attacks) face grave challenges as regards their observance of, and respect for, rules of international law. New threats of armed attacks, especially by non-state actors such as terrorist organisations, raise doubts as to whether current *jus ad bellum* (norms on the legality of recourse to armed force) can effectively deal with such threats. Contemporary *jus*

⁸⁵ *Andronicou and Constantinou*, para 186.

⁸⁶ *McCann*, para 194.

⁸⁷ Romer, *Killing in a gray area*, 111.

⁸⁸ UN Special Rapporteur (Execution) E/CN.4/2006/53, para 50.

⁸⁹ *Guerrero*, para 13.1.

⁹⁰ *McCann*, para 193.

⁹¹ *McCann*, para 200.

ad bellum is embedded in Article 2(4) of the UN Charter, which provides that all states ‘shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state’, or in any other manner contrary to the objectives of the UN.⁹² Article 2(4) is widely held to reflect a customary norm,⁹³ and some even elevate its status to that of a prescriptive norm from which no derogation is allowed under international law.⁹⁴

Nevertheless, recourse by states to armed force is permissible on UN Security Council authorisation for purposes of maintaining international peace and security,⁹⁵ or in the exercise of the inherent right to individual or collective self-defence if an armed attack occurs against a member of the UN.⁹⁶ Resort to lethal force under the international law of inter-state use of force is governed by certain legal standards, including necessity, proportionality and imminence. These standards cumulatively operate to set out the parameters of permissible use of force and to determine the legality of using such force. The limitations to using lethal force in self-defence are discussed below.

4.1 Necessity in self-defence

Necessity in *jus ad bellum* is concerned with whether force must be used.⁹⁷ This implies that other less forceful measures must have been considered and found to be insufficient.⁹⁸ The necessity condition presupposes the absence of less severe measures⁹⁹ and may be subdivided into two tests: (a) the ‘means’ test which means the adversary has, or is imminently about to possess, the capability to cause harm; and (b) the ‘intent’ test which means the adversary is known to possess the intention to use such means against the state.¹⁰⁰ In the absence of less lethal means, the use of lethal force is permissible. But caution needs to be taken since necessity is a question of fact and must be analysed on a case-specific basis

⁹² Article 2(4), UN Charter.

⁹³ *Nicaragua*, 190.

⁹⁴ Ronzitti N, *Diritto internazionale dei conflitti armati*, 4ed, 2011, 33.

⁹⁵ Articles 42 and 51, UN Charter.

⁹⁶ Article 51, UN Charter.

⁹⁷ Schachter O, *International law in theory and practice*, Martinus Nijhoff, Dordrecht, 1991, 1633-34.

⁹⁸ Schmitt MN, ‘Targeted killing and international law: Law enforcement, self-defense, and armed conflict’ in Arnold R and Quéniwet N (eds), *International humanitarian law and human rights law: Towards a new merger in international law*, Martinus Nijhoff, Leiden, 2008, 525-554.

⁹⁹ Guiora AN, ‘Targeted killing as active self-defence’ 36 *Case Western Reserve Journal of International Law*, 2004, 325.

¹⁰⁰ White ND, ‘Defending humanity: When force is justified and why by George P Fletcher and Jens David Ohlin’ 10 *Melbourne Journal of International Law*, 2009, 383.

in light of the ruling circumstances.¹⁰¹ In practice, deep contestation has arisen over the justification of lethal force on the ground of necessity in at least two issues: first, what conduct amounts to ‘armed attack’ triggering the right of self-defence; and second, whether lethal force can be used against non-state actors (such as terrorist groups) in the exercise of the right to self-defence.¹⁰²

The first pertinent issue concerns whether isolated attacks by terrorists can meet the threshold of ‘armed attack’ within the meaning of Article 51 of the UN Charter, which is the precondition for the lawful use of lethal force in self-defence.¹⁰³ The case law of the ICJ indicates that only the most serious forms of use of force will constitute an armed attack and force may not be used in response to aggregated individual attacks.¹⁰⁴ Also, states must have found all non-forceful means insufficient to resolve their disputes before taking recourse to armed force,¹⁰⁵ but this may be less practical in the case of counter-terrorism.¹⁰⁶ Legal commentators have thus argued that states may use force not in response to each single attack, but to the whole series of attacks that may collectively amount to an armed attack.¹⁰⁷ The main thesis is that, for terrorist attacks to reach the level of an armed attack, each incident would have to form part of a consistent pattern of violent actions rather than being merely isolated or sporadic attacks.¹⁰⁸ It is further contended that the requirement for the use of force as a means of “last resort” suggests strongly that isolated incidents of terrorist attacks would not sanction the use of force in self-defence.¹⁰⁹

However, some argue that the above explanations may be theoretically sound but are ‘out of touch with the realities of state practice’ and the threat posed by terrorism.¹¹⁰ A single isolated attack, for instance the 9/11 attacks, as well as a series of sporadic attacks may have similarly devastating effects that may

¹⁰¹ *Targeted killings*, para 60.

¹⁰² Crawford, ‘Terrorism and targeted killings’, 252-253.

¹⁰³ O’Connell ME, ‘Lawful self-defence to terrorism’ 63 *University of Pittsburgh Law Review*, 2002, 898.

¹⁰⁴ *Oil Platforms (Iran v United States)* [2003] ICJ Rep, 64; *Nicaragua*, 191; Eritrea/Ethiopia Partial Award 1-8, *Ius ad Bellum*, 2006 ILM 430.

¹⁰⁵ Gray C, *International law and the use of force*, Oxford University Press, Oxford, 2008, 145.

¹⁰⁶ Schmitt, ‘Targeted killing’, 534.

¹⁰⁷ Kenya High Commission, Joint Communique – Operation Linda Nchi, 16 October 2011; Cannizaro E, ‘Contextualising proportionality: *Jus ad bellum* and *jus in bello* in the Lebanese War’ 88 *International Review of the Red Cross*, 2006, 782.

¹⁰⁸ Cassese A, ‘The international community’s “legal” response to terrorism’ 38 *International and Comparative Law Quarterly*, 1989, 576.

¹⁰⁹ O’Connell ME, ‘Remarks: The resort to drones under international law’ 39 *Denver Journal of International Law and Policy*, 2010, 593.

¹¹⁰ Dinstein Y, *War, aggression and self-defence*, Cambridge University Press, Cambridge, 2005, 202.

warrant a state's recourse to the use of lethal force as a matter of necessity.¹¹¹ The above explanations adopt a narrow approach to determining necessity by examining the number of attacks, as opposed to a broad approach encompassing the 'scale and effects' of the attacks and the nature of the attacker.¹¹² Therefore, from a holistic perspective (absent feasible alternatives), an isolated attack as well as a series of small scale attacks which indicate a concerted effort of ongoing armed activity may satisfy the necessity precondition for resorting to lethal force in self-defence.¹¹³ This view can be inferred from the position taken by the ICJ in *Oil Platforms* where the international tribunal did not exclude the possibility that single armed attacks of sufficient gravity may trigger the right to self-defence.¹¹⁴

As regards the issue of whether lethal force can be used against non-state actors in the context of self-defence two schools of thought have emerged because of the absence of a unified or authoritative view from international courts. The first holds that self-defence is only valid if the relevant armed attack that triggered it can be attributed to a state,¹¹⁵ while the second maintains that state attribution is not a precondition for lawful use of force in self-defence.¹¹⁶ In order to determine the proper position, it is essential to return to the Treaty. Article 51 of the UN Charter recognises the existence of an inherent right of self-defence 'if an armed attack occurs against a Member of the United Nations'. It makes no mention of a further requirement of attribution of the armed attack to a state. This view was concisely stated in the separate opinion of Judge Pieter Kooijmans in *Armed Activities*, where he noted that 'it would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacking State, and the [UN] Charter does not so require'.¹¹⁷ This argument is supported by the inherent nature of the right of states to self-defence and is in line with the institutional practice of UN organs.¹¹⁸

¹¹¹ *Oil Platforms*, 161, para 72.

¹¹² Nabati M, 'International law at a crossroads: Self-defense, global terrorism, and preemption (A call to rethink the self-defense normative framework)' 13 *Transnational Law and Contemporary Problems*, 2003, 780.

¹¹³ Crawford, 'Terrorism and targeted killings', 252.

¹¹⁴ *Oil platforms*, paras 64-72.

¹¹⁵ *Wall*, 139; *Nicaragua*, 195.

¹¹⁶ Glennon MJ, 'The fog of law: Self-defence, inherence, and incoherence in Article 51 of the United Nations Charter' 25 *Harvard Journal of Law and Public Policy*, 2002, 550.

¹¹⁷ *Armed activities*, Separate opinion of Judge Kooijmans, 30.

¹¹⁸ Crawford, 'Terrorism and targeted killings', 253.

4.2 Proportionality in self-defence

Proportionality concerns itself with how much force is necessary after force is deemed necessary. It poses some challenges for counter-terrorism by restricting the scale, scope and intensity of lawful defensive force to that reasonably required to frustrate an anticipated attack or defeat an on-going one.¹¹⁹ An analysis is contingent upon whether the attack has already taken place, or is merely imminent.¹²⁰ If the attack is considered imminent, proportional force is limited to that degree that is reasonably necessary to stop the attack, as measured against the anticipated gravity of an impending attack.¹²¹ In the case of an actual terrorist attack, proportionality may be viewed in relation to the actual damage that results from the attack, as well as the deterrence of future attacks by the terrorist organisation.¹²²

Any strategy that involves lethal force in self-defence must be based primarily on the current terrorist threat and not on punishing past conduct. It is noteworthy, however, that preventing grave threats with imminent future implications may also be a justified reason for using lethal force.¹²³ While it is neither “a necessary nor a possible condition” for states to determine precisely the extent of the casualties and damage of an attack, there must nevertheless be some symmetry between the degree of unlawful force initially used and that which is subsequently used to counter it.¹²⁴ In the opinion of the present author, it may be useful for states defending themselves and their nationals against terrorist attacks to clarify in their policy documents or internal rules of engagement what the appropriate test of proportionality is. An example of this is the publication by Kenya Defence Forces of a book explaining that its military action in Somalia was triggered by a series of Al Shabaab attacks in Kenya, and that its defensive use of force is proportionate because it seeks to destroy the armed group’s logistical capacity to mount further attacks on Kenyan nationals and interests.¹²⁵

¹¹⁹ Schmitt, ‘Targeted killing’, 534.

¹²⁰ Müllerson R, ‘Jus ad bellum and international terrorism’ 79 *International Law Studies*, 2003, 116-119, 122.

¹²¹ Schmitt, ‘Targeted killing’, 534.

¹²² Brown D, ‘Use of force against terrorism after September 11th: State responsibility, self-defense and other responses’ 11 *Cardozo Journal of International and Comparative Law*, 2003, 35.

¹²³ Schmitt, ‘Targeted killing’, 534.

¹²⁴ Printer NG, ‘The use of force against non-state actors under international law: An analysis of the US predator strike in Yemen’ 8 *UCLA Journal of International Law and Foreign Affairs*, 2003, 343.

¹²⁵ KDF, *Operation Linda Nchi: Kenya’s military experience in Somalia*, Kenya Literature Bureau, Nairobi, 2014.

4.3 Imminence in self-defence

Immediacy in *jus ad bellum* is analysed by the ‘imminence test’ which requires the anticipated attack to be so imminent and of such magnitude that it would be impossible or imprudent for a state to wait for the first blow; that is, the necessity of the defensive use of force should be ‘instant, overwhelming, leaving no choice of means and no moment of deliberation.’¹²⁶ Imminence of the threat determines when defensive operations may be mounted; either pre-emptively in anticipation of an attack or following an attack.¹²⁷ It is useful to note that unlike the case of inter-state use of force where the imminence criterion for self-defence was understood in temporal terms, the defensive use of force against non-state actors, particularly terrorists, may require a different approach.¹²⁸ States confronting terrorism deal with a threat whose identity or location may be unknown, but whose lethal capabilities are all too clear. And so, due to the exceptionally high risk they pose and which are largely premised on surprise and anonymity, the traditional temporal view of the criterion of immediacy is likely to be ineffectual¹²⁹ as it would place an unduly heavy burden on states to the extent of negating their inherent right of self-defence.

The US’ view, as elaborated by former Attorney-General, Eric Holder, is that the test of imminence depends on the ‘relevant window of opportunity to act, the possible harm that missing the window would cause civilians, and the likelihood of heading off future disastrous attack on the US.’¹³⁰ Accordingly, the modern concept of the immediacy criterion includes both temporal and non-temporal aspects. The shift toward the non-temporal elements appears to have developed as a response to the particular nature of terrorism, and it cannot be excluded that it may be in the process of gaining acceptance as a customary norm. It must, however, be noted that this expansion of the imminence test, while supported by the atypical nature of terrorism, must be founded on existing treaty or customary law. This is confirmed by recent developments in the interna-

¹²⁶ Kretzmer D, ‘The inherent right to self-defence and proportionality in *Jus ad bellum*’ 24 *European Journal of International Law*, 2013, 248; Cook ML, ‘Ethical and legal dimensions of the Bush “preemption” strategy’ 27 *Harvard Journal of Law and Public Policy*, 2004, 810.

¹²⁷ Barela SJ, ‘The question of “imminence”’: A historical view on anticipatory attacks’ in Barela SJ (ed), *Legitimacy and drones: Investigating the legality, morality and efficacy of UCAVs*, Routledge, Abingdon, 2016, 139.

¹²⁸ Schmitt, ‘Targeted killing’, 536.

¹²⁹ Barela, ‘The question of “imminence”’, 140.

¹³⁰ Chesterman, Johnstone, Malone, *Law and practice of the United Nations*, 296-97 citing Eric Holder, Remarks at Northwestern University School of Law, 5 March 2015.

tional law of self-defence, where the customary imminence test espoused in the *Caroline* incident has been found to be capable of modification to accommodate anticipatory defensive actions.¹³¹

In sum, it would seem that the condition of imminence, read together with necessity and proportionality, enjoins states neither to act too early (as it would be pre-emptive) nor too late (as it would be retaliatory).¹³² Both of these responses are prohibited in international law. And as stated by the ICJ in the *Oil Platforms* case, for a self-defence situation to arise the threat must be of a certain threshold of severity; this view is also accepted by the Eritrea-Ethiopia Claims Commission.¹³³ Thus, the determination of imminence of the threat must always be guided by its severity and additionally should be an objective question of fact assessed on a case-specific basis. If this is not observed it may set an unprincipled precedent.¹³⁴

5. Targeted killing in the context of armed conflict

Besides the international law of human rights and the international law on the use of force, targeted killing is also regulated by international humanitarian law, which is the law applicable to the conduct of belligerents in armed conflict. This law permits the use of lethal force against adversary combatants, but limits the extent to which such force may be applied. Some specific standards regulate the conduct of hostilities whereby lethal force is applied to specifically targeted individuals in pursuance of legitimate military objectives. These include the principle of distinction; the principle of military necessity; the principle of proportionality; and the principle of precaution. These will be discussed in the sections that follow.

5.1 *The principle of distinction*

The law governing the targeting of individuals derives from the rule of distinction which requires parties to the conflict to, at all times, distinguish between

¹³¹ UN Secretary-General, *In larger freedom: Towards development, security, and human rights for all*, UN Doc. A/59/2005, para 124; Dinstein Y, *War, aggression and self-defence*, Cambridge University Press, Cambridge, 2011, 203-204.

¹³² Melzer, *Targeted killing*, 69: 'Targeted killing cannot be an instrument of retributive punishment'.

¹³³ Eritrea-Ethiopia Claims Commission, Partial Award, *Ius ad Bellum*, para 11.

¹³⁴ White ND, 'Self-defence, Security Council authority and Iraq' in Burchill R, White ND and Morris J (eds), *International conflict and security law: Essays in memory of Hilaire McCoubrey*, Cambridge University Press, Cambridge, 2005, 255.

civilians and combatants, and, further, that attacks may only be directed against combatants and not civilians.¹³⁵ Civilians are protected from direct attack, but combatants are lawfully subject to direct attack at any time, either as individuals or in groups, unless they are incapacitated because of injury, illness or captivity.¹³⁶ Combatants, under IHL governing international armed conflict, are those persons entitled ‘to participate directly in hostilities’ and include members of the armed forces of a party to a conflict other than medical personnel and chaplains.¹³⁷ This implies the designated arms-bearing fighting forces of a belligerent.

However, the rule of distinction is less clear in non-international armed conflict.¹³⁸ And the reason for this is that combatant status in international armed conflict entails immunity from prosecution for warlike activities which though permissible under IHL are criminalised under municipal law.¹³⁹ But this rule does not apply in non-international armed conflicts where organised armed groups are fighting against an established government. Upon capture such non-state fighters are liable to be punished for their warlike conduct under municipal law.¹⁴⁰ Despite the absence of combatant status in non-international armed conflict, the targeting principles apply in similar terms to all armed conflicts. Hence, as with combatants in international armed conflict, members of organised armed groups performing combatant roles may be targeted at any time and any place, unless they are incapacitated or otherwise protected from direct attack.¹⁴¹ This would arguably apply to members of organised armed groups that are designated as terrorist groups who perform functional combatant roles within that organisation.

IHL, applicable to both international and non-international armed conflict protects civilians against direct attack on condition that they do not participate in hostilities.¹⁴² Civilians are thus lawfully subject to attack if they ‘take a direct

¹³⁵ Henckaerts JM and Doswald-Beck L, *Customary international humanitarian law*, Cambridge University Press, Cambridge, 2005, Rule 1.

¹³⁶ Article 43(1) Additional Protocol I; Kretzmer, ‘Targeted killing’, 198.

¹³⁷ Article 43(2), Additional Protocol I. See also US Department of the Navy, *The commander’s handbook on the law of naval operations* NWP-14M, USDN, 1995, 5-2.

¹³⁸ Crawford, ‘Terrorism and targeted killings’, 256.

¹³⁹ Schmitt MN, ‘The law of targeting’ in Wilmshurst E and Breau S (eds), *Perspectives on the ICRC study on customary international humanitarian law*, Cambridge University Press, Cambridge, 2007, 144.

¹⁴⁰ *Ex Parte Quirin*, 317 US 1 (1942), para 30-31; Dörmann K, ‘The legal situation of “unlawful/unprivileged combatants”’ 85 *International Review of the Red Cross*, 2003, 46.

¹⁴¹ Sang B, ‘Clearing some of the fog of war over combating terrorists on the frontiers of international law: Targeted killing and international humanitarian law’ *African Yearbook on International Humanitarian Law*, 2011, 29; Schmitt, ‘Targeted killing’, 544.

¹⁴² MacDonald SD, ‘The lawful use of targeted killing in contemporary international humanitarian law’ 2 *Journal of Terrorism Research*, 2011, 131.

part in hostilities'.¹⁴³ International law governing both international and non-international armed conflict protects civilians 'unless and for such time as they take a direct part in hostilities.'¹⁴⁴ Even when they participate in hostilities, civilians may not be attacked without further consideration.¹⁴⁵ Some additional legal constraints, including proportionality, precaution, and prohibition of indiscriminate attack further restrict the right of belligerents to use lethal force.¹⁴⁶ But the most contentious aspects in the context of counter-terrorist operations are: (a) the conduct that amounts to direct participation in hostilities; (b) the extent to which membership of organised armed groups indicates direct participation; and (c) the duration of such participation. This is because engagement in conduct constituting direct participation in hostilities or membership of armed groups taking part in hostilities makes one subject to direct attack. However, the extent of such membership or participation needs to be clarified further. These are examined, in turn, below.

5.1.1 Conduct amounting to direct participation in hostilities

Direct participation in hostilities is not clearly defined under treaty law and this has led to uncertainty as to its constitutive conduct.¹⁴⁷ In operational practice, a distinction is often made between direct participation and contributions to the general war effort.¹⁴⁸ Direct participation entails activities that result in direct adverse impacts on the enemy and are related to traditional combat activities, such as attacking the enemy and its military infrastructure or gathering military intelligence in the area of hostilities.¹⁴⁹ By contrast, contributions to the general war effort include activities of a more general kind that do not result in any direct harm on the enemy such as media campaigns, political lobbying or other forms of non-military decision-making.¹⁵⁰ Despite this general distinction, it is not clear what activities, besides active combat operations, comprise direct participation

¹⁴³ *Targeted killings*, para 30; Sassoli M, 'Terrorism and war' 4 *Journal of International Criminal Justice*, 2006, 956.

¹⁴⁴ Article 51(3) First Protocol Additional to the 1949 Geneva Conventions (hereinafter "AP I"); Article 13(3) Second Protocol Additional to the 1949 Geneva Conventions (hereinafter "AP II").

¹⁴⁵ Melzer, *Targeted killing*, 78.

¹⁴⁶ *Nuclear weapons*, para 78; Goldman RK, 'America Watch's experience on monitoring internal armed conflicts' 9 *American Journal of International Law*, 1993, 60.

¹⁴⁷ Henckaerts and Doswald-Beck, *Customary IHL*, 22.

¹⁴⁸ Sandoz Y, Swinarski C and Zimmerman B, *Commentary on additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Leiden, 1987, para 1679.

¹⁴⁹ Schmitt, 'Targeted killing', 545.

¹⁵⁰ Schmitt, 'Targeted killing', 545.

in hostilities.¹⁵¹ Recognising this problematic grey area,¹⁵² the International Committee of the Red Cross (ICRC) identified the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (*threshold of harm*), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (*direct causation*), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).¹⁵³

The above cumulative conditions for establishing direct participation are useful, but their practical utility in individualised lethal-force operations has been contested by some scholarly commentary.¹⁵⁴ To overcome this, an alternative approach has been proposed:

[T]he civilian must have engaged in action that he knew would harm (or otherwise disadvantage) the enemy in a relatively direct and immediate way. The participation must have been part of the process by which a particular use of force was rendered possible, either through preparation or execution. It is not necessary that the individual foresaw the eventual result of the operation, but only that he knew their participation was indispensable to a discrete hostile act or series of related acts.¹⁵⁵

As regards states engaged in armed conflict situations against non-state entities, particularly terrorist groups, the above-described approach offers an objective standard to ascertain whether or not a particular conduct amounts to direct participation. It is also narrow enough to protect civilians and maintain the meaning of the principle of distinction, while broad enough to meet the

¹⁵¹ Melzer, *Targeted killing*, 336.

¹⁵² *Targeted killings*, para 34; Fenrick WJ, 'The *Targeted killings* judgment and the scope of direct participation in hostilities' 5 *Journal of International Criminal Justice*, 2007, 336; Cassese A, 'On some merits of the Israeli judgment on targeted killings' 5 *Journal of International Criminal Justice*, 2007, 343.

¹⁵³ Melzer N, *Interpretive guidance on the notion of direct participation in hostilities*, ICRC, 2009, 46; Melzer, *Targeted killing*, 46.

¹⁵⁴ Crawford E, *Identifying the enemy: Civilian participation in armed conflict*, Oxford University Press, Oxford, 2015, 48.

¹⁵⁵ Schmitt MN, 'Humanitarian law and direct participation in hostilities by private contractors or civilian employees' 5 *Chicago Journal of International Law*, 2005, 534.

legitimate need of the armed forces to respond to the means and methods of warfare that might be used by civilians.¹⁵⁶

This test for direct participation has been explicitly endorsed in the national judicial practice of Israel, where the *Targeted killings* Court observed that:

the ‘direct’ character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take a ‘direct part’. The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct....¹⁵⁷

The above reasoning may offer plausible justification for the targeted killing of individual members and officials of terrorist groups, particularly those who are commanders and strategists of enemy forces. This was arguably the rationale on which Japan’s Admiral, Isoroku Yamamoto, the architect of the Pearl Harbour attack against the US, was individually targeted.¹⁵⁸ Even so, it is crucial that the additional restrictions on the permissible conduct, including the strict observance of military necessity, the avoidance of prohibited weapons and minimisation of incidental harm are taken into full account. In the opinion of the present author, depending on the circumstances of the case, individuals who engage in hostilities on behalf of non-state armed groups with terrorist objectives may be classified as civilians directly participating in hostilities or combatants. What is critical as the decisive criterion for distinguishing between these two possibilities is ‘the degree of involvement’ in the non-state armed group.¹⁵⁹

A pertinent illustration from Nigeria may help put in context the importance of making a well informed decision relating to one’s involvement in an armed group and how it impacts decisions relating to their targetability. In 2009, Mohammed Yusuf, a Nigerian Muslim scholar and founder of Boko Haram, was killed by Nigerian security agents while in police custody.¹⁶⁰ A question surrounding his killing was whether he was directly participating in hostilities. One answer may be that his fiery speeches constituted directing the attacks by his fol-

¹⁵⁶ Quéguiner JF, *Direct participation in hostilities under international humanitarian law*, ICRC, 2005, 3.

¹⁵⁷ *Targeted killings*, para 37.

¹⁵⁸ Mencini D, ‘Blast from the past: Using history to shape targeted strikes policy’ 2 *Georgetown Security Studies Review*, 2014, 84; Chun CKS, *The Doolittle raid 1942: America’s first strike back at Japan*, Oxford University Press, Oxford, 1991, 7-17.

¹⁵⁹ Otto, *Targeted killings*, 242.

¹⁶⁰ Statement by the Attorney-General of the Federation of Nigeria and Minister of Justice at the UN Human Rights Council, Geneva, 13 August 2009; Amnesty International, *Our job is to shoot, slaughter and kill: Boko Haram’s reign of terror in North-East Nigeria*, 2015, 10.

lowers; another may be that he advocated non-violent means and his teachings were subverted by more radical elements in the group.¹⁶¹ A similar incident is the targeted killing by Israel of the spiritual leader of Hamas, Sheik Ahmed Yassin, whose killing resulted in UN condemnation.¹⁶² The point here is that it is crucial to carefully consider the individual circumstances of each case before concluding that particular conduct amounts to direct participation.

5.1.2 Temporal scope of direct participation in hostilities

Questions relating to when direct participation begins and ends, or how long it lasts are contentious. The ICRC outlines the temporal scope of direct participation in hostilities as follows: ‘Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.’¹⁶³ The ICRC commentaries to Article 51(3) of the First Protocol additional to the 1949 Geneva Conventions (AP I) and Article 13(3) of the Second Protocol additional to the 1949 Geneva Conventions (AP II) concur with the above view and offer explanations that are substantially similar.¹⁶⁴ This may suggest a ‘specific acts’ approach where a civilian loses protection against direct attack for exactly as long as each specific hostile act that amounts to direct participation in hostilities.¹⁶⁵ But the application of the specific acts approach would be unrealistic where states engage non-state armed actors, including terrorist groups, which co-mingle with a sympathetic civilian population and only conduct hostilities in a sporadic manner.¹⁶⁶ In such cases, armed militants would have the unfair benefit of being civilian by day and fighters by night, and this ‘revolving door’ will be too formidable a weapon for their state adversaries.¹⁶⁷

A better alternative is the ‘affirmative disengagement’ approach, where an individual who directly participates in hostilities is considered a legitimate military target until such time as he unambiguously opts out of hostile engagements

¹⁶¹ Amnesty International, *Our job is to shoot*, 10-11.

¹⁶² UN Secretary-General, Press Release SG/SM/9210, 22 March 2004; UN High Commissioner for Human Rights, Press Release of 22 March 2004.

¹⁶³ Melzer, ‘Interpretive guidance’, 46-47; Melzer, *Targeted killing*, 65.

¹⁶⁴ Sandoz, Swinarski and Zimmerman, *Commentary on additional protocols*, at para 1943-44 and 4789.

¹⁶⁵ Melzer, *Targeted killing*, 347-48; Sang, ‘Clearing some of the fog of war’, 27.

¹⁶⁶ Melzer, *Targeted killing*, 348.

¹⁶⁷ Watkin K, ‘Humans in the cross-hairs: Targeting and assassinations in contemporary armed conflict’ in Wippman D and Evangelista M (eds), *New wars, new laws? Applying the laws of war in 21st century conflicts*, Transnational, Ardsley, 2005, 167; Sang, ‘Clearing some of the fog of war’, 27.

by way of ‘extended nonparticipation or an affirmative act of withdrawal.’¹⁶⁸ In view of the noted difficulty to ascertain whether or not an individual has disengaged from previous hostile conduct, it is widely accepted as a matter of military practice that such persons bear the risk of direct attack resulting from the other party’s mistake or lack of knowledge regarding the cessation of previous hostile conduct.¹⁶⁹ This was justified by the Israeli Supreme Court in *Targeted killings* as an important ‘incentive for civilians to remain as distant from the conflict as possible’ so as to prevent wrongful targeting.¹⁷⁰

5.1.3 Significance of membership of non-state armed groups

To what extent does membership of, or affiliation to, organised armed groups determine one’s liability for direct attack? Many states confronted with military hostilities from organised armed actors, including terrorist groups, consider membership of such organisations to result automatically in loss of any protection against direct attack for the entire duration of such membership.¹⁷¹ This ‘membership’ approach is used to distinguish, on the one hand, unorganised individuals taking part in hostilities sporadically and who may later be immunised against direct attack after renouncing the hostile activity from individuals who have become members of organised armed groups, on the other.¹⁷² The observation of the Israeli Supreme Court in its *Targeted killings* judgment is relevant to elaborate the membership approach:

On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a *civilian who has joined a terrorist organization which has become his ‘home’, and in the framework of his role in that organization* commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack ‘for such time’ as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility (emphasis added).¹⁷³

This explanation makes two important points. First, it clarifies that individual membership of organised armed groups effectively suspends civilian status for the entire period of membership, a view that is confirmed in international

¹⁶⁸ Schmitt, ‘Targeted killing’, 510.

¹⁶⁹ Schmitt, ‘Targeted killing’, 510.

¹⁷⁰ *Targeted killings*, para 34.

¹⁷¹ Melzer, *Targeted killing*, 350; Sang, ‘Clearing some of the fog of war’, 28.

¹⁷² Cassese, ‘On some merits’, 343-44; Goldman, ‘Americas Watch’s experience’, 67.

¹⁷³ *Targeted killings*, para. 39.

jurisprudence.¹⁷⁴ The membership approach is also operationally sound because it upholds the equality of all belligerents and effectively locks the ‘revolving door of participation in hostilities’.¹⁷⁵ Secondly, the explanation makes clear that individual roles or functions in an organised armed group are decisive in determining one’s targetability.¹⁷⁶ Referred to as the functional membership approach,¹⁷⁷ the focus on individual role takes a more deliberate view of membership of armed groups which restricts the cohort of persons subject to direct attack at all times to its fighting personnel.¹⁷⁸ Besides membership, actual engagement in the hostile conduct becomes an additional criterion for distinguishing civilians directly participating in hostilities from combatants for ‘purposes of the principle of distinction.’¹⁷⁹

The above approach holds true for non-international armed conflict. And it is evident in the practice of the US’ counter-insurgency operations according to which those members of insurgent organisations who ‘do the actual fighting’ are considered to be combatants.¹⁸⁰ Moreover, this trend in state practice is further illustrated by examples of non-international armed conflicts in Chechnya, Colombia, Sri Lanka and Uganda where members of armed groups have been attacked even while not visibly engaging in hostilities.¹⁸¹ Nonetheless, it is notable that in the case of terrorist organisations, some of which are decentralised or loosely organised in affiliations, actual application of the functional membership approach faces much difficulty.¹⁸²

5.2 *The principle of military necessity*

Even where it has been determined that a particular individual can lawfully be targeted, other complementary constraints of IHL operate to minimise unnecessary suffering, injury, death, destruction and other adverse effects. Derived from the maxim ‘*necessaria ad finem belli?*’, the principle of military necessity sug-

¹⁷⁴ *Tadic* (Judgment of 7 May 1997), para 639.

¹⁷⁵ Melzer, *Targeted killing*, 351.

¹⁷⁶ MacDonald, ‘The lawful use of targeted killing’, 132.

¹⁷⁷ Melzer, *Targeted killing*, 315-16; Lubell N, ‘Challenges in applying human rights law to armed conflict’ 87, Number 860, *International Review of the Red Cross*, December 2005, 748.

¹⁷⁸ Melzer, *Targeted killing*, 352.

¹⁷⁹ Henckaerts and Doswald-Beck, *Customary IHL*, Rule 3, at 11; Kretzmer, ‘Targeted killing’, 197.

¹⁸⁰ US Department of the Army, Field Manual-Interim (FMI 3-07.22): *Counterinsurgency operations*, USDA, 2004, Section 1-7.

¹⁸¹ Melzer, *Targeted killing*, 317.

¹⁸² Waxman M, ‘The structure of terrorism and the laws of war’ 20 *Duke Journal of Comparative and International Law* (2010) 447-51.

gests that necessity should limit the permissible degree of force in war. Contemporary interpretation of military necessity is strongly influenced by Article 14 of the Lieber Code, which provides that '[m]ilitary necessity, as understood by modern civilised nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.' Similarly, the preamble of the 1868 St Petersburg Declaration provides that 'the only legitimate object which States endeavour to accomplish during war is to weaken the military forces of the enemy.'

Military necessity permits the use of force where: (a) the force used is essential to achieving the objective of the war; and (b) the force used is in accord with the rules and general principles of conventional and customary IHL. Thus, the concept of military necessity in the modern law of armed conflict requires that all military action carried out in an armed conflict must be necessary, and must regulate the manner, kind and degree of force used in order that such action is aimed solely at the achievement of a legitimate military purpose.¹⁸³

Adjudicatory rulings and the evidence of practice contained in military manuals of various states indicates that military necessity has a permissive and a restrictive function. It permits parties to an armed conflict to use that kind and degree of force that is not otherwise prohibited by the law of armed conflict, and which is necessary to secure the earliest submission of the enemy with the least possible expenditure of time, life and physical resources.¹⁸⁴ It also distinguishes three kinds of choices of means (weapons) and methods (tactics) in the conduct of hostilities: (a) those that are prohibited: (b) those that are permissible under the law of armed conflict; and (c) those that are actually required to achieve military success in a concrete operation.¹⁸⁵ Under this function, military necessity is tempered by humanity and therefore prohibits conduct which would engender casualty or destruction, which can be 'otherwise avoided in achieving the same military goal.'¹⁸⁶ The humanity-based rationale for this restrictive aspect has been explained as follows:

Humanity demands capture rather than wounds, and wounds rather than death; that non-combatants shall be spared as much as possible; that wounds shall be inflicted as lightly as

¹⁸³ Dinstein Y, *The conduct of hostilities under the law of armed conflict*, Cambridge University Press, Cambridge, 2004, 18; Doswald-Beck L and Vité S, 'International humanitarian law and human rights law' 293 *International Review of the Red Cross*, 1993, 98.

¹⁸⁴ Sang, 'Clearing some of the fog of war', 32.

¹⁸⁵ MacDonald, 'The lawful use of targeted killing', 136.

¹⁸⁶ Jachee-Neale A, 'End justifies the means? - Post 9/11 contempt for humane treatment' in Arnold and Quéniévet (eds), *International humanitarian law and human rights law*, 68.

circumstances permit, in order that the wounded may be healed as painlessly as possible; and that captivity shall be as bearable as possible.¹⁸⁷

The legal implication of the dual functions of military necessity is two-fold: (a) a specific operation that contravenes the laws and customs of armed conflict cannot be justified on grounds of military necessity; and (b) even though a specific operation is not otherwise prohibited under IHL, such an operation would be unlawful if there is manifestly no military necessity for its execution. This has been confirmed by the ICTY in *Kordić & Čerkez* where it was held that ‘the unnecessary or wanton application of force is prohibited and that “a belligerent may only apply that amount and kind of force necessary to defeat the enemy.”’¹⁸⁸ The import of the above discussion is that military necessity is not a valid exculpatory ground for breaches of the laws and customs of war. Also, the absence of an express prohibition of particular conduct in the course of hostilities does not necessarily imply that its commission will not attach criminal responsibility, particularly if no military advantage was being sought.

What this means in practice, as concisely summed up by the Israeli Supreme Court in *Targeted killings*, is that one must choose the military means whose harm to the human rights of the harmed person is smallest and thus, ‘if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.’¹⁸⁹ Also, it is a legal requirement that targeted killings must yield a definitive military advantage; the killings of Fadi Zar-kani and Ibrahim Attah Mahmoud are examples of targeted killings that failed to satisfy this requirement.¹⁹⁰

5.3 *The principle of proportionality*

The principle of proportionality is a norm of customary international law which establishes a restraint on the conduct of hostilities by evaluating the harmful effects of a legitimate attack on protected persons and objects in relation to the intended military objective of the attack. It requires ‘weighing the interests arising from the success of the operation against the possible harmful effects

¹⁸⁷ Hays-Parks W, ‘Direct participation in hostilities study: No mandate, no expertise, and legally incorrect’ 42 *New York University Journal of International Law and Policy*, 2010, 785.

¹⁸⁸ *Prosecutor v Kordić and Čerkez*, ICTY Judgment of 26 February 2001, para 686.

¹⁸⁹ *Targeted killing*, para 40.

¹⁹⁰ Melzer, *Targeted killing*, 397.

upon protected persons and objects on the other.¹⁹¹ Codifying this principle, Article 51 (5) (b) of AP I prohibits launching an

attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive* in relation to the concrete and direct military advantage anticipated.

Thus, the general rule of proportionality which applies in conventional warfare turns on the utilitarian calculation of the incidental civilian casualty and destruction of property vis-à-vis the military advantage sought to be attained.

As regards targeted killing in the context of counter-terrorist operations, the proportionality test focuses on the extent of incidental civilian harm. This contrasts sharply with the focus on the specific damage or harm caused to targeted persons in law enforcement operations under human rights law.¹⁹² In practical terms, proportionality permits killing in the context of the conduct of hostilities to the extent that it is necessitated by what is reasonable for the achievement of a legitimate military objective. However, the permissive function of proportionality is qualified by the other restraints imposed by complementary principles of IHL, including necessity, distinction and precaution. Hence, proportionality limits the degree of force used and also requires that the only lawful object of an attack should be a resultant weakening of the enemy's military force.¹⁹³ The ICRC concurs with this position in its commentary on Article 51 AP I:

[T]he attacks must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; *moreover*, even after these conditions are fulfilled, the incidental civilian losses and damages must not be excessive (emphasis in original).¹⁹⁴

Under IHL, killing in the context of armed conflict is permissible to the extent that it is militarily necessary or contributes in concrete terms to the attainment of military success. Proportionality requires that an attack should be clearly kept within the necessity of such action.¹⁹⁵ Hence, although an individual may be a legitimate target, the permissibility of attacking that person depends in

¹⁹¹ Green, *Contemporary law of armed conflict*, 351.

¹⁹² Melzer, *Targeted killing*, 359.

¹⁹³ *Nicaragua*, para. 78; Article 35(1), AP I: 'In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited'.

¹⁹⁴ Sandoz Y, Swinarski C and Zimmerman B, *Commentary on additional protocols*, at para 1979.

¹⁹⁵ Kolb and Hyde, *Introduction to the law of armed conflict*, 48; Rodin D, *War and self-defence*, Oxford University Press, Oxford, 2002, 41.

large part on the extent to which the relevant attack will yield concrete military advantage.¹⁹⁶ This has been confirmed in the judicial practice of Israel in the *targeted killings* judgment;¹⁹⁷ the Court observed that, irrespective of the legitimate nature of a specific military target, the degree of force used must remain within reasonable proportion of the anticipated military advantage.¹⁹⁸ In international¹⁹⁹ and national adjudicatory practice,²⁰⁰ the legal assessment of proportionality is taken to presuppose a complementary relationship to the principle of distinction which legitimises the use of force against a specific target to the extent justified by military necessity.²⁰¹

Proportionality is, however, difficult to apply in practice, and more so in cases of deliberate killing.²⁰² For practical purposes, therefore, in the context of counter-terrorist operations, the proportionality assessment may require a permissive aspect. Indeed, in practice some margin of appreciation, to be applied in good faith, is allowed in favour of military commanders and others involved in planning attacks.²⁰³ As a result, rather than being judged on the basis of a backward-looking assessment of the actual loss of life as against the resulting military advantage gained from the operation, the more commonly used proportionality test is one of ‘expected loss of life and/or damage to civilian property weighed against the anticipated military advantage.’²⁰⁴

As with military necessity, the principle of proportionality has both permissive and restrictive aspects. Proportionality *prohibits* attacks that are excessive in relation to the anticipated concrete and direct military advantage to a greater degree than it *permits* attacks that are ‘proportionate to’ their incidental effects.²⁰⁵ This balance is the consequence of a deliberate recognition of the primacy of the principle of humanity in the law of armed conflict.²⁰⁶ Hence, applied to

¹⁹⁶ Rodin, *War and self-defence*, 41.

¹⁹⁷ *Targeted killings*, para 41-44.

¹⁹⁸ Report of the Special Rapporteur (Executions), Study on *Targeted killings*, 28 May 2010, 10.

¹⁹⁹ *Nuclear weapons* (Dissenting Opinion of Judge Higgins), para 20.

²⁰⁰ *Beit Sourik Village Council v The Government of Israel et al* (judgment of 30 June 2004) HCJ 2056/04, para 37.

²⁰¹ Melzer, *Targeted killing*, 359, fn 260.

²⁰² Kretzmer, ‘Targeted killing’, 200-01; Gardam JG, *Necessity, proportionality and the use of force by states*, Cambridge University Press, Cambridge, 2004, 391.

²⁰³ McCormack TLH and Mtharu PB, ‘Cluster munitions, proportionality and the foreseeability of civilian damage’ in Engdahl O and Wrangé P (eds), *Law at war: The law as it was and the law as it should be*, Martinus Nijhoff, Leiden, 2008, 196.

²⁰⁴ McCormack and Mtharu, ‘Cluster munitions’, 196.

²⁰⁵ Sang, ‘Clearing some of the fog of war’, 36.

²⁰⁶ Gardam, *Necessity, proportionality and the use of force*, 406.

the legality of killings, the restrictive aspect of proportionality coupled with the primacy of humanity indicates that ‘even a legitimate military target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack’.²⁰⁷ This restrictive aspect of proportionality was held to be a customary rule in *Kupreskic*.²⁰⁸

5.4 *The principle of precaution*

Besides the requirement of proportionality, persons responsible for planning counter-terrorist operations involving the use of lethal force are further obliged to take constant care to minimise incidental death, injury and destruction of property.²⁰⁹ The basic rule of precautions provides that:

In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.²¹⁰

This basic rule is supplemented by specific treaty law obligations for those charged with the planning and deciding the details of an attack, and also for those who actually carry out the attack.²¹¹ Specifically, Article 57 (2) (a) directs those charged with the planning of attacks to observe the following precautions:

do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives ...; take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

These obligations are, however, restricted to the precautions that are practicable in view of all relevant circumstances ruling at the time, including those of a humanitarian or military nature.²¹² In *Targeted killings*, the Israeli Supreme Court explained that feasible measures include, to the extent reasonably possi-

²⁰⁷ *Nuclear weapons advisory opinion* (dissenting opinion of Judge Higgins), para 20.

²⁰⁸ *Prosecutor v Kupreskic*, ICTY Judgment of 14 January 2000, para 524.

²⁰⁹ Schmitt, ‘Targeted killing’, 547.

²¹⁰ Henckaerts and Doswald-Beck, *Customary IHL*, Rule 15.

²¹¹ Article 57 AP I.

²¹² Sandoz Y, Swinarski C and Zimmerman B, *Commentary on additional protocols*, at para. 2198.

ble, robust intelligence gathering, effective verification of accuracy of information, and objectively estimating of collateral damage.²¹³ With specific regard to permissible killing, the rule of precaution demands verification of the identity of the individual and ascertainment of the fact that such an individual can lawfully be targeted.²¹⁴ Also, deliberate care must be taken by attackers to minimise excessive incidental injury and collateral damage. This view is confirmed in international jurisprudence which emphasises that ‘reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness.’²¹⁵

The requirement of precaution in cases of intentional killing can hardly be overstated since the effect of mistakes is irreversible. The mistaken killing of an innocent Afghani shepherd who resembled Osama bin Laden in the criticised *Tall man* incident illustrates this,²¹⁶ and has led to a move towards more stringent standards of verification. An example of this is the insistence by the Israeli Supreme Court in *Targeted killings* that information regarding ‘the identity and activity’ of an individual sought to be targeted must be ‘most thoroughly verified’.²¹⁷ Subsequent practice of the US such as the targeted killings by security personnel of suspected terrorists after considerable surveillance also shows the recognised importance of verifying the identity of the intended legitimate target.²¹⁸ Also relevant to the requirement of precaution is the need to use weapons or tactics that may cause the least incidental death, injury or collateral damage.²¹⁹ However, the attacker need only choose from weapons and tactics that are capable of producing a comparable likelihood of killing the intended target.

Another aspect of precaution is provision of effective advance warning of attacks to civilian populations in zones where such attacks may take place. But the practical application of this requirement is rare in operations of individualised attack ‘since advance notice would guarantee the absence of the target.’²²⁰

²¹³ *Targeted killings*, para. 40.

²¹⁴ Article 57(2) (a) (i) AP I; Henckaerts & Doswald-Beck, *Customary IHL*, Rules 15 and 16.

²¹⁵ *Kupreskic*, para 524.

²¹⁶ Singer PW, ‘Ethical implications of military robotics’ (2009): “‘what do you do when you kill someone that you didn’t intend to kill, such as the three times we thought we got Osama Bin Laden with a Predator drone strike, and we got someone else instead? In one case, it was an Afghan civilian who was just unlucky enough to look like Osama Bin Laden when viewed through the soda straw of a Predator drone.’”

²¹⁷ *Targeted killings*, para. 40.

²¹⁸ Sang, ‘Clearing some of the fog of war’, 39.

²¹⁹ Article 57(2) (a) (ii) AP I; Henckaerts and Doswald-Beck, *Customary IHL*, Rule 17.

²²⁰ Schmitt, ‘Targeted killing’, 548.

In such cases, provision is made in treaty IHL for the party planning the operation to argue that the circumstances do not permit compliance with all requirements of the precautionary rule without prejudicing the mission.²²¹ Even where advance warning is issued, the attacker is not discharged from distinguishing between military targets and civilians because it is well known that civilians may have little choice or mobility regarding the decision to evacuate in times of conflict situations.²²²

6. Concluding observations

The resort to targeted killing as a means to tackle terrorism is deeply controversial and is a topic of increasing relevance for both domestic and international law in an age of unprecedented transnational threats. Some non-state armed groups with overt terrorist agendas are as capable as, or exceed, states in their capacity to project military capabilities. Such groups, including Islamic State of Iraq and the Levant (ISIL), Boko Haram and Al Shabab, have left a harrowing catalogue of horrors in the wake of their terrorist campaigns.²²³ This has led some states to express doubt as to the capacity of international law to address sufficiently the imperatives of national security. Doubt has since given way to state-centric initiative, resulting in the pervasive use by states of aggressive and frequently extra-legal means to combat terrorism. One of the more prominent methods employed in this regard is targeted killing; it is a strategic and tactical approach that some states have officially declared while the majority use it informally for purposes of plausible deniability.

Regardless of whether or not targeted killing is officially acknowledged, a common feature of most state policies or related practice is to expansively interpret the exculpatory circumstances permitting the use of lethal force against suspected terrorists. Problems often arise when reports emerge that a number of individuals have been killed on suspicion of involvement in or in order to thwart terrorist-related activities. Frequently, emotion and other vested interests obscure the objective analysis of targeted killing in the context of counter-terrorist operations. Two crucial points must be borne in mind whenever the question of the legality of targeted killing arises. First, international law does not categorically prohibit targeted killing; rather, it subjects it to principled limitations. Secondly,

²²¹ Schmitt, 'Targeted killing', 548.

²²² Alston, ... Study on *Targeted killings*, para 78.

²²³ LaFree G and Dugan L, 'Global terrorism and the deadliest groups since 2001' in Backer D and Huth P (ed), *Peace and conflict 2016*, Routledge, New York, 2016, 70.

efforts to thwart terrorist attacks by killing suspected terrorists should not be lightly dismissed since ‘such measures can and do save many lives.’²²⁴ This means that the critical question that must guide assessment of the legality of targeted killing in counter-terrorist operations is to what extent such killing is within the legal limits of what is permissible.

While it is not easily disputed that the resort to targeted killing may result in lives saved, injuries avoided and property preserved, it is imperative to demand that such counter-terrorist approaches be governed by law. It has to be ensured that there is law which authorises targeted killing and constrains it within the realistic confines of what the specific exigencies may require. A strong case can therefore be made that domestic counter-terrorist legislation must provide a clear normative and regulatory framework for lethal-force responses to terrorist attacks. Even if such legislation may be criticised as deficient, it will offer much needed operational clarity. This is not only vital for legal accountability but also for practical efficacy because:

unless realistic standards of conduct for states involved in armed conflicts with terrorist groups exist, they will act in an environment infected by the lawlessness that characterizes terrorism. The danger of this lawlessness is such that however imperfect these standards may be, they are preferable to no standards at all.²²⁵

In light of the increasing use of state-sanctioned lethal-force responses to counter terrorism, this article has analysed the legality and normative limits of targeted killing from an international legal perspective. Its principal objective was to outline, with reference to illustrative case law and practice, the norms of general international law that restrain the circumstances under which state agents may justifiably kill selected individuals in the context of law enforcement, self-defence and armed conflict. The analysis has shown that much progress has been made in elaborating the legality of the use of lethal force against suspected terrorists in targeted killing operations. In spite of this, it has also been clearly demonstrated that not all legal issues surrounding the lawfulness of targeted killing are settled. In particular, it is still not beyond dispute whether and when international human rights law or IHL should provide the appropriate legal framework for confronting terrorism by way of lethal force.²²⁶ Also less clear is whether

²²⁴ Gross E, ‘Democracy’s struggle against terrorism: The powers of military commanders to decide upon the demolition of houses, the imposition of curfews, blockades, encirclements and the declaration of an area as a closed military area,’ 30 *Georgia Journal of International and Comparative Law*, 2002, 244.

²²⁵ Kretzmer, ‘Targeted killing’, 212.

²²⁶ Crawford, ‘Terrorism and targeted killings’, 270.

domestic counter-terrorism law should subordinate human rights standards to those of IHL or strive to merge the two. These unsettled areas remain very much 'work in progress'.

Nevertheless, by discussing the minimum conditions for permissible killing in light of their judicial and operational application, this article reaffirms that legal standards exist for evaluating the legality of targeted killings by states in the context of countering terrorism. The standards identified are universal and arguably constitute general principles of law because they form part of the domestic legal framework of almost all nations. But, as stated above, there is some fragmentation currently being witnessed in the formulation and operationalisation of these standards, more so in the text of state-specific anti-terrorism laws and policies. This reinforces the case for restating the international legal norms on the protection of human life from arbitrary killing in order to establish the touchstone by which state policy and conduct must be evaluated.

States have a legitimate responsibility to defend and protect their nationals and territories against the dangers posed by terrorist activities, including by way of targeted killing. However, as has been argued in this article, such actions may only be defensible and justifiable if they are limited by the principled standards on the lawful use of lethal force under international law, namely (a) international human rights law; (b) international law of self-defence; and (c) international humanitarian law. Targeted killing conducted in the context of law enforcement may be permissible if it is: based in domestic law which authorises and restricts it in line with international legal standards; intended to exclusively protect human life from terrorist attack; absolutely necessary and strictly proportionate in relation to the legitimate aim sought to be secured; executed with due precaution, control and organisation so as to minimise unnecessary use of lethal force.

Counter-terrorist operations involving targeted killing may also be permissible in the context of national self-defence. In order to be permissible under the international law of self-defence, a particular targeted killing must be triggered by an 'armed attack' within the meaning of Article 51 of the UN Charter. This includes an actual or imminent use of force. The legal limits on targeted killing in self-defence also require that the defensive use of force be directed at the state responsible for that armed attack, or because that state is unwilling or unable to stop 'armed attacks against the targeting state from being carried out within its territory.'²²⁷ Further conditions for the international lawfulness of defensive tar-

²²⁷ Crawford, 'Terrorism and targeted killings', 251.

geted killing are that the lethal force must be necessary to stop or prevent further armed attack, and must be proportionate.

A targeted killing operation may also be permitted if it is part of the conduct of hostilities in the context of armed conflict subject to the following legal limits. First, the targeted individual must not be protected against direct attack, and the specific use of lethal force must be likely to contribute effectively towards a concrete and direct military advantage. Second, those planning the operation must take precautionary steps to avoid and in any event minimise incidental death, injury and destruction caused by erroneous targeting. Third, those executing the operation must be combatants as opposed to covert operatives feigning civilian or non-combatant status, and they must not use prohibited weapons, including poison and booby-trapped devices. Lastly, the targeted killing operation must be suspended once the targeted individual either surrenders or is rendered incapacitated.

The above standards represent the minimum universal conditions for the lawful resort to targeted killing and may be useful in guiding state legislation and policy-making. It is sensible to advocate for closer integration and complementarity between emerging anti-terrorism laws and policies, on the one hand, and the universal norms on the use of lethal force, on the other. It is also prudent to encourage a systematic review of the domestic jurisprudence of nations that are specially affected by terrorism in order to develop a structured basis for constructive critique and progressive reform proposals. Another practical step that has been suggested by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions is the need for states that elect to utilise targeted killing as a means to counter terrorism to: (a) publicly identify the rules of international law that they rely on as bases for targeted killing; (b) specify the legal rationale for targeted killing rather than using less lethal measures; and (c) outline, in appropriate cases, the procedural safeguards that ensure targeted killing operations comply with the law, as well as the remedial measures available in case unlawful killings result.²²⁸

These standards and practical steps are not only useful but they also have the normative force of universal acceptance. Thus even where states adopt state-specific targeted killing policies, the greatest effort should be expended to ensure that such policies are as closely modeled after the universal standards as possible. This will offer an informed backdrop against which to make the case that it is

²²⁸ Alston, *Study on targeted killings*, para 93.

possible for states to effectively combat terrorism within the strictures of the law. It may thus be reasonable to argue that, if properly implemented, the international legal standards governing targeted killing may likely bring greater stability to states confronting terrorism in the longer term. The more divergent the state-specific targeted killing standards are from universal norms, the more likely that intended or incidental loss of life would be 'more readily associated with criminal behaviour than with acceptable government policy.'²²⁹

²²⁹ Melzer, *Targeted killing*, 435.