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TARGETED KILLINGS AND INTERNATIONAL HUMANITARIAN LAW

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Exercise Solo Flight

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**TARGETED KILLINGS AND INTERNATIONAL HUMANITARIAN
LAW**

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TARGETED KILLINGS AND INTERNATIONAL HUMANITARIAN LAW

Dr Boaz Ganor, director of the International Institute for Counter-Terrorism, discusses the “democratic dilemma in counter-terrorism” that he describes as the desire to strike a balance between efforts to maximize counter-terrorism effectiveness, with a country’s “liberal-democratic character and values.”¹ This balance, or more accurately, the perception that the relationship is out of balance, has driven much debate about the so-called “targeted killings” of the last decade. These operations have served as the example in the media of the kinetic expression of the Global War on Terror. Very public operations such as the Deliberate Action against Osama bin Laden in May 2011 and the September 2011 “drone strike” against US citizen Anwar al-Awlaki in Yemen have served to divide the public and experts on whether these types of operations are lawful and effective.

Generally, opponents of targeted killings contend that they violate international humanitarian law (also referred to as the Law of Armed Conflict). They argue that targeted killings are extra-judicial executions that violate principles of distinction, necessity and proportionality. There is further conjecture that these operations are not congruent with basic principles of a counter-terror/counter-insurgency campaign, and that they are quite simply ineffective. This paper will discuss the challenges of targeted killings in international humanitarian law and demonstrate that within certain parameters, they could be perceived as lawful. Terrorists are civilians but there is room within the principle of distinction to target terrorists based on their direct participation in hostilities.

¹ Boaz Ganor, “Identifying the Enemy in Counterterrorism Operations - A Comparison of the Bush and Obama Administrations,” *International Law Studies* 90 (2014), 342.

Lethal force is appropriate as there is no requirement to first attempt capture in an armed conflict. Proportionality will be challenging due to higher intelligence requirements, but should not be considered differently than any other military operation.

The first question about the LOAC and targeted killings is whether the LOAC applies. There were traditionally two types of parties in an armed conflict as described in international humanitarian law: combatants and civilians. The approach was binary; someone was either a combatant or a civilian. If they were a combatant, then certain rights and privileges applied. They were protected from liability for any damage they caused to life or property, as long as it was within a lawful application of force under the LOAC. They would be afforded protections on capture and would be returned to their state at the end of hostilities. They equally had obligations such as agreeing to apply the principles of LOAC themselves, carry arms openly and wear distinctive insignia. As a combatant, they also became a lawful target of the armed forces of the opponent. Contrarily, civilians have a protected status and much of the most recent expressions of international humanitarian law have aimed to protect civilians in armed conflicts. They could not be lawfully attacked and basic principles of humanity would be applied to civilians by occupying or attacking armed forces. If however, they engaged in hostilities, they would not be afforded the protections of a combatant and could be held criminally liable for any death and destruction that they cause. Modern armed conflicts, however, have blurred the distinction; there are actors who may be primary parties to the conflict who move between combatant and non-combatant status.

Opposition to human targeting operations focus on the idea that these threat actors are not combatants but rather civilians who have temporarily lost their protected status, or

they are criminals and should be subject to an arrest and a judicial process. Referring to the Bush Administration's Post-9/11 approach to these threats as a war rather than as a criminal investigation, Kenneth Roth writes, "The Bush administration has used war rhetoric precisely to give itself the extraordinary powers enjoyed by a wartime government to detain or even kill suspects without trial. In the process, the administration may have made it easier for itself to detain or eliminate suspects. But it has also threatened the most basic due process rights."² In defence of this position, in another article, Roth restricts the application of LOAC to "traditional battlefields", thereby suggesting that unless the threat actor is comporting himself in the way that combatants traditionally have and is on the battlefield, he is not a valid target.³

Amnesty International, not surprisingly, has been highly critical of these operations invoking the notion that international humanitarian law only applies if it is the only remaining option to prevent an imminent threat of death;⁴ this speaks directly to the argument about self-defence discussed below. The American Civil Liberties Union (ACLU) shares this perspective and is concerned about the applicability of LOAC outside of "armed conflict zones" unless it is "a last resort against a concrete, specific, and imminent threat of grave harm."⁵

One major court case offering insight into arguments about the status of so-called terrorists is *The Public Committee against Torture in Israel et al. v. The Government of*

² Kenneth Roth, "The Law of War in the War on Terror," *Foreign Affairs* (January/February 2004), np.

³ Ruth Wedgwood and Kenneth Roth, "Combatants or Criminals? How Washington Should Handle Terrorists," *Foreign Affairs* (May/June 2002), np.

⁴ Amnesty International, *United States of America 'Targeted Killing' Policies Violate the Right to Life*, (London, UK: Amnesty International Publications, 2012), 5-6.

⁵ American Civil Liberties Union, Targeted Killing, <https://www.aclu.org/issues/national-security/targeted-killing>, accessed 18 Apr 2015.

Israel et al. The Israeli Supreme Court decided that terrorists were civilians rather than combatants but that they of course lost their protected status by directly participating in hostilities. The decision was important in that it offered a very broad definition of what activities could be included in “directly participating.”⁶

The issue of status is further complicated with numerous articles about whether combatants, in the case of *al Qaeda* for example, are “lawful combatants” as opposed to “unlawful combatants” or “civilians.” Notwithstanding the Israeli Supreme Court decision, this distinction only has real relevance when considering what to do with these actors when they are *hors de combat*; are they to be treated as a criminal and therefore liable for damage to life and property or are they a Prisoner of War and not liable for their lawful actions?⁷ This argument does not have implications for legality of targeting them when they are directly participating in hostilities if an armed conflict exists. As such, debates about their status that only has implications after their capture are irrelevant to a targeting discussion. A civilian, taking a direct role in hostilities, becomes a lawful target.⁸ This is articulated in Article 51 of Additional Protocol I to the Geneva Conventions that states that a civilian loses their protected status if he takes direct part in hostilities, and this was the principle affirmed in the Israeli Supreme Court decision.

The determination of combatant status, as was previously defined for a century, may be becoming somewhat anachronistic. Traditionally, a combatant acted on behalf of

⁶ The Supreme Court of Israel, HCJ 769/02, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Section 35, np.

⁷ Brian M. Christensen, “Extending Hamdan v. Rumsfeld to Combatant Status Review Tribunals,” *Brigham Young University Law Review* 2007, no. 5 (2007), 1384-85.

⁸ Knut Dormann, “The legal situation of “unlawful/unprivileged combatants””, *International Committee of the Red Cross* 85, No 849 (March 2003), 46.

a state and this was an easy way of gaining combatant status.⁹ In the modern context and from a targeting perspective, the fact that the enemy does not necessarily carry arms openly, nor confine themselves to a traditional battlefield as a part of a state's armed forces should not preclude their treatment as the same as a combatant, as long as they are a direct participant in hostilities. "Targeted killing" operations are not without precedent, but the contemporary challenge is that they do not look the same as historical examples because the targets do not necessarily behave in the same way. A compelling comparison can be made between the shoot-down of Admiral Yamamoto in April 1943 and a CIA "drone strike" on an *al Qaeda* commander who was directly connected to the bombing of the USS Cole.¹⁰ In the former, the target was a military officer who was in the uniform of his country's armed forces, flying in an aircraft of the country's armed forces and in command of elements of the armed forces. In the latter, he was not in a uniform, was not a member of the armed forces of a state, the strike was conducted by an intelligence agency and it occurred in a country in which it is unclear whether the US was a party to the armed conflict. In both cases, however, the targets were combatants as both directly participated in hostilities. Intelligence was developed on both targets and a strike force was specifically deployed to kill each target. In the second instance though, there is something different that some commentators find distasteful when compared with the case during the Second World War. Clearly though, someone who had planned and coordinated an attack on a US military target, regardless of their non-affiliation with the

⁹ Kenneth Watkin, "Warriors Without Rights? Combatants, Unprivileged Belligerents and the Struggle over Legitimacy," *Program on Humanitarian Policy and Conflict Research Occasional Paper Series* Winter 2005, no 2. (Harvard University Press: 2005), 5.

¹⁰ Gary Solis, "Targeted Killing and the Law of Armed Conflict," *Naval War College Review* 60, no 2 (Spring 2007), 130.

armed forces of a state or their lack of carrying arms openly has lost their non-combatant protection. He was as much directly participating in the hostilities as was Yamamoto.

While it is recognized that a civilian loses his protections as a non-combatant once he directly participates in hostilities, some academics argue that he can regain the protections of a civilian once his participation in hostilities has ended. They specifically quote Additional Protocol I, Article 51 that says “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” The challenge is the words “and for such time” that could suggest that they regain their protected status as long as they cease the hostile activity. This is different from that of a combatant who gets protection (from attack) only when he is *hors de combat*; *hors de combat* means more than simply not participating in hostilities but rather the combatant is unable or unwilling (wounded or surrendered) to participate in hostilities. The Israeli decision offers that the amount of time between the activities has a bearing on whether the civilian has any protections. The more often the civilian participates directly, and the shorter the amount of time between each instance, the more enduring is his loss of protection to the point at which he could no longer have it at all.¹¹

Assuming that the target has been determined to have combatant status, or at least, to not have protected non-combatant status, the question then is why lethal force is the appropriate tool to apply. This question is apt in contemporary operations where there are rarely the armed forces of two opposing states in conflict and when law enforcement options may be also be considered. These situations are generally either a non-international armed conflict or internationalized armed conflict. The former means that

¹¹ *The Public Committee against Torture in Israel et al. v. The Government of Israel*, Section 39, np.

there are government forces combating non-government affiliated forces in a single territory. The latter describes a situation where there are allied government parties supporting a government in a non-international armed conflict. In both cases, even when there is no armed conflict between states, international humanitarian law applies. The exception is when the level of violence does not meet a certain threshold for a state of armed conflict to exist, in which case international human rights law would apply rather than international humanitarian law. If an armed conflict does exist then the use of lethal force is deemed appropriate under international humanitarian law in so far as the principles of *necessity*, *proportionality* and *distinction* are applied. Nowhere in international humanitarian law, in the context of discussing the amount of force to be applied against a belligerent, is force limited beyond the three principles above. The authority to attack under the LOAC does not force a belligerent to attempt to injure or capture rather than kill.¹²

To be clear, during COIN and CT operations it is simply not possible, nor necessarily effective to pursue these actors as criminals and seek arrest and prosecution. The evidentiary bar may be too high, or as is often the case the target may not be accessible, or there is too much risk to force for an assault force to capture him. The threat these actors pose to public safety exceeds that of otherwise common criminals. Even the worst serial killers in history fail to come close to matching the death and destruction of a single modern insurgent terrorist attack in the markets of Baghdad or Kabul.

¹²Geoffrey S. Corn, Laurie R. Blank, Chris Jenks and Eric Talbot Jensen, "Belligerent Targeting and the Invalidity of a Least Harmful Means Rule," *International Law Studies* 89, no 536 (2013), 582.

There is an argument about the lawful use of targeted killings in self-defence. While the US, for example, has publicly stated that they would not conduct or endorse an “assassination”, they differentiate “assassination” from “targeted killing” based on the self-defence imperative. Whereas an assassination is the killing of an individual for political or ideological reasons, a targeted killing is the killing of an individual for self-defence.¹³ Article 51 of the UN Charter grants every state the right to self-defence. Recognizing the so-called “non-linear, non-contiguous” nature of modern warfare and terrorism, self-defence does not necessarily require geographic proximity when actors are spread across the world and targeted killings could indeed be an expression of this imperative.¹⁴

With a defined target who is confirmed to be directly participating in hostilities, or a combatant, the issue becomes one of proportionality. The pursuit of these targets must not violate this key tenet of international humanitarian law for two reasons: Firstly, and as described at the beginning of this article, the legitimacy of the liberal-democratic system depends on our adherence to these laws. Secondly, and much more pragmatically, the minimization of destruction while still achieving the effect may better enable success on other lines of operation when prosecuting a CT or COIN campaign. It ensures the maximum amount of public support both at home and in the theatre of operations. The principle of proportionality is highly relevant during targeting operations. “The LOAC’s unambiguous objective is to facilitate the ability of armed forces to achieve their strategic military objective while mitigating, to the extent feasible,

¹³ Thomas B. Hunter, “Targeted Killing: Self-Defense, Preemption, and the War on Terrorism,” *Journal of Strategic Security* 2, no. 2 (2009): 5

¹⁴ *Ibid.*, 7-8.

the humanitarian suffering resulting from armed conflict.”¹⁵ In modern COIN/CT warfare, the risk of excessive collateral damage is highest during targeted killing operations.

The proportionality test though, is no different in a targeted killing than in any other military operation. The military advantage must be directly proportional to the incidental death and destruction caused by the attack. Proportionality therefore is also driven by excellent intelligence and discussion of it is limited then, after Battle Damage Assessment, due to the intelligence. Success at achieving an acceptable degree of proportionality is difficult to measure, particularly before the strike. Not only do we not necessarily know what a terrorist or an insurgent leader may do next, their place of vulnerability is very likely to be in a place where they feel safe, where they are surrounded by families, and combatants and non-combatants alike. Reports of collateral damage will vary widely, as different groups skew the numbers for their own purposes. There are comments for example that the US program is not successful whatsoever rating a 1 in 7 success of killing a militant in US drone strikes in Pakistan.¹⁶

There is disagreement in the political and academic community about whether targeted killings are an effective COIN/CT tool. Criticism against the practice tends to argue one of two points of view: either that while it may seem to be tactically effective, it tends to become the sole expression of a counter-terrorism strategy and this will certainly lead to failure, or that the conduct of these types of operations are highly inflammatory to the local population and create new generations of

¹⁵ Geoffrey S. Corn *et al*, “Belligerent Targeting and the Invalidity of a Least Harmful Means Rule,” 542.

¹⁶ Peter Bergen and Katherine Tiedemann, “Washington’s Phantom War,” *Foreign Affairs* 90, no. 4 (Jul/Aug 2011), 12.

revolutionaries/terrorists. Numerous studies in the last decade have attempted to highlight the inadequacy of targeting operations but there is no consensus.

Audrey Cronin writes that it was difficult to find an example of a group whose activities were halted after the death of their leader.¹⁷ Contrarily, empirical researcher and political scientist Patrick Johnston has published an article in which he argues that his data, “suggest that leadership decapitation (1) increases the chances of war termination; (2) increases the probability of government victory; (3) reduces the intensity of militant violence; and (4) reduces the frequency of insurgent attacks.”¹⁸

It is, however, difficult to see how if operationalized as part of a campaign and appropriately managed and messaged, targeted killings cannot directly contribute to success in CT and COIN efforts. The challenges to a successful campaign are numerous, but the most important is to ensure that the military force and their government are on a firm international legal footing that provides the basis for a CT policy, of which targeted killings may be a component. A deep understanding of the intelligence problem so that the government can ascertain the status of the targeted belligerents is the most important step in developing a successful targeting campaign. The issue of whether a terrorist can be a combatant, while already decided in Israel, could still be further addressed by a federal court in any country. While it has greater implications for detention operations, a targeting campaign will need to address the nuance of this status and how it applies to the network of moneymen, facilitators, buyers, drivers and human sources that are just as vital to a terrorist network’s lethality as any shooter.

¹⁷ Audrey Cronin, *How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns*, (Princeton: Princeton University Press, 2009), np.

¹⁸ Patrick Johnston, “Does Decapitation Work: Assessing the Effectiveness of Leadership Targeting in Counterinsurgency Campaigns,” *International Security* 36, no. 4 (Spring 2012), 50.

The justification for the use of lethal force will have to be tight because it will be publicly challenged by those who oppose military force in any circumstance, and also by those who are concerned about the extra-judicial appearance of this “execution.” Nevertheless, international humanitarian law has provided a broad enough foundation that even without combatant status, a civilian directly participating in hostilities can be lawfully targeted with lethal force. Attention to the aftermath of a targeted killing operation will require public affairs excellence, an effort to be transparent in describing why, while protecting the classified means through which the individual’s military necessity as a target was determined. Lastly, ascertaining with any certainty the appropriate proportionality test, and measuring the effectiveness of the operation will be difficult because of the human element of these networks. It is not possible to know what was going to happen, nor is it possible to know what didn’t happen as a result of a successful targeting operation. These operations require tactical excellence in the intelligence and operations domains; they also require excellence in the legal and public affairs sphere as military operations continue to move into areas that remain not fully defined and tested by law.

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