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SHOULD CANADA SANCTION TARGETED KILLINGS?

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JCSP 40

Exercise Solo Flight

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EXERCISE *SOLO FLIGHT* – EXERCICE *SOLO FLIGHT*

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Word Count: 1883

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SHOULD CANADA SANCTION TARGETED KILLINGS?¹

The law is essentially discovered, not made. Law is a systemic discovery process involving the historical experiences of successive generations.

-- Edward W. Younkins, *The Evolution of Law*²

Introduction

The legality of targeted killings has been a controversial issue, particularly with respect to how the United States has implemented this tactic following its declared War on Terror since the events of September 11, 2001. The significance of resolving the issue has not diminished in light of the current events in the Levant region. In light of Canada's contribution to the American led military intervention against the Islamic State of Iraq and Syria (ISIS), consideration should be given to the legal basis for using targeted killings as a method of warfare. A review of existing humanitarian law demonstrates that targeted killing in the context of terrorist activities does not easily fit within the confines of what or who can legally be targeted.³ Given that contemporary humanitarian law

¹ The opinions in this essay are those of the author alone and do not represent the official legal or policy positions of the Canadian Judge Advocate General.

² Edward W. Younkins, "The Evolution of Law," *Le Quebecois Libre*, no. 65, August 5, 2000, <http://www.quebecoislibre.org/000805-11.htm>.

³ For the purpose of this paper, it is assumed that ISIS fits within the definition of a terrorist group. The definition of "terrorist activity" is adopted from the *Criminal Code of Canada* at s. 83.01:

an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

developed mainly in the wake of the conventional wars of last century, the justification for targeted killings represents an evolutionary flexibility born from the particular challenges of defeating asymmetric adversaries. Canada's ability to defend against the on-going and imminent threats arising from the actions of ISIS and other like-minded organizations requires an expanded interpretation of existing laws of armed conflict while remaining true to their original intent, to protect humanity from the scourge of war.⁴ This paper will address two possible avenues through which targeted killings can be justified in Canadian operations. Terrorists can be viewed as combatants in certain circumstances, or they can be viewed as unlawful combatants, resulting in the loss of civilian immunity from attack.

What is a Targeted Killing?

The term "targeted killings" encompasses a wide variety of situations. In the context of this paper, its use will be restricted to the planned killing of a specific human being by any means where that person has been designated a military objective. This definition is supported by American military doctrine in which a target is "an entity (person, place or

(C) causes a serious risk to the health or safety of the public or any segment of the public, (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C), and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counseling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law. R.S.C., 1985, c. C-46.

⁴ "Charter of the United Nations," 24 October 1945, Preamble, last accessed 24 May 2015, <http://www.un.org/en/documents/charter/>.

thing) considered for possible engagement or action to alter or neutralize the function it performs for the adversary." This may include "a person or persons who provide a function that contributes to a target system's capability."⁵

Targeted killings in times of conflict are not new. Sun Tzu made reference to assassination as a tool of warfare.⁶ Although the word "assassination" has been adopted by some modern commentators in reference to the targeting of terrorists,⁷ its use in this context is not neutral. For example, the United States prohibits assassination.⁸ Canadian military doctrine also prohibits assassination, which it defines as "the killing or wounding of a selected non-combatant for a political or religious motive."⁹ Article 51(2) of Additional Protocol I is cited as the underlying authority for the prohibition.¹⁰ Since Additional Protocol I addresses the protection of civilian persons in time of war, a distinction must be drawn between unlawful civilian assassinations and lawful military targeted killings. From a Canadian perspective, this is reflected in doctrine which permits

⁵ Department of Defense, JP 3-60, *Joint Targeting* (Washington, D.C.: Joint Chiefs of Staff, 2013), I-1.

⁶ "Whether the object be to crush an army, to storm a city, or to assassinate an individual, it is always necessary to begin by finding out the names of the attendants, the aides-de-camp, and door-keepers and sentries of the general in command. Our spies must be commissioned to ascertain these." Lionel Giles, "Sun Tzu on the Art of War: The Oldest Military Treatise in the World," 1910, Chapter 13, para 20, last accessed 29 May 2015, <http://www.chinapage.com/sunzi-e.html>.

⁷ Michael Rubin, "A Defence of Assassination," *Canadian International Council, Open Canada.org* (15 December 2011), <http://opencanada.org/features/a-defence-of-assassination/> and Gal Luft, "The Logic of Israel's Targeted Killing," *Middle East Quarterly* 10, no. 1 (Winter 2010).

⁸ National Archives, *Executive order 12333 -- United States Intelligence Activities*, December 4, 1981, <http://www.archives.gov/federal-register/codification/executive-order/12333.html#2.1>.

⁹ Department of National Defence, B-GJ-005-104/FP-021, *Law of Armed Conflict at the Operational and Tactical Levels* (Ottawa: DND Canada, 2003), art. 612.

¹⁰ *Ibid.*, and Office of the Judge Advocate General, "Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I) - 1977," in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., ed. Directorate of Law Training (Ottawa: DND, 2005), 149-150.

members of the armed forces "to kill, by sudden attack, a person who is a combatant."¹¹

Therefore, one possible justification for targeted killings in a Canadian military counter-terrorist operation would require that the targeted individual be brought within the definition of combatant.

International Humanitarian Law

In order for members of ISIS to be considered combatants, and therefore lawful targets, there must first exist an armed conflict. A conflict can be international as between states or wars of national liberation,¹² or it can be non-international as in civil wars.¹³ Situations of internal conflict where foreign states become involved may give rise to some hybrid situation where the conflict has become internationalized. Where a terrorist organization is the focus of the conflict, the demarcation is not always clear. What is clear is that while conventional state on state warfare may continue to exist, the prevalence of irregular or hybrid wars has increased in recent decades and will likely continue to represent the majority of conflicts in which Canada will be involved.¹⁴ An approach must be found to address these threats while acting within the rules and principles found in international humanitarian law.

¹¹ *Law of Armed Conflict at the Operational and Tactical Levels*, art. 612.

¹² Office of the Judge Advocate General, "Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War - 1949," in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., ed. Directorate of Law Training (Ottawa: DND, 2005), 118-138, art. 2 and Additional Protocol I, art 1.

¹³ Additional Protocol II, art. 1 and Geneva Convention IV, art. 3.

¹⁴ Frank G. Hoffman, *Conflict in the 21st Century: The Rise of Hybrid Wars* (Arlington, VA: Potomac Institute for Policy Studies, December 2007), last accessed 28 May 2015, http://www.projectwhitehorse.com/pdfs/HybridWar_0108.pdf and Sir Lawrence Freedman, "Regular and Irregular War," *Canadian International Council, Strategic Datalink*, no. 1 (August 2008), last accessed 28 May 2015, <http://docs.google.com/viewer?url=http://opencanada.org/wp-content/uploads/2011/05/CIC-SD-1-Freedman-English.pdf>.

There is no doubt that Canada has engaged in a conflict with ISIS. In October 2014, the House of Commons approved a motion permitting Canada to join a multinational coalition in an armed intervention against ISIS in Iraq and Syria.¹⁵ It has been dubbed Op IMPACT, and is broadly outlined on the Canadian Armed Forces operations website.¹⁶ The views held by other states with respect to the nature of the conflict are also persuasive support for the existence of an armed conflict of an international character. In light of the declaration made by ISIS that it considers itself a caliphate seeking to conquer the world, Iraq's foreign minister described the war with ISIS as World War III and stated that all the world's major capitals are now under threat.¹⁷ While this view may lie at one end of the spectrum and is not necessarily representative of a moderate approach, the perception of an existing conflict is reasonable. Given Canada's involvement in the armed conflict against ISIS, which is of an international character, Geneva Convention IV and Additional Protocol I apply.¹⁸

¹⁵ Kenneth Chan, "Parliament Approves Motion to Send 600 Canadian Soldiers, CF-18 Jets to Iraq War Against ISIS," *Vancity Buzz*, 7 October 2014, last accessed 15 May 2015, <http://www.vancitybuzz.com/2014/10/house-commons-votes-send-600-canadian-soldiers-cf-18-jets-iraq-fight-isis/>.

¹⁶ Canadian Armed Forces, "Operational Update - May 2015," last accessed 27 May 2015, <http://www.forces.gc.ca/en/operations/update.page>.

¹⁷ "Fight Against Islamic State is World War 3 - Iraqi Foreign Minister," *Reuters*, 1 February 2015, <http://www.reuters.com/video/2015/02/01/fight-against-islamic-state-is-world-war?videoId=363066236>.

¹⁸ Even should there be some doubt as to how to classify the conflict in which Canada is now involved, members of the Canadian Armed Forces are obliged to follow the laws of armed conflict in all international operations, as a minimum standard of behaviour, see *Law of Armed Conflict at the Operational and Tactical Levels*, Annex B, Code of Conduct, s. 11, Department of National Defence, B-GJ-005-000/FP-001, *Canadian Forces Joint Publication 01* (Ottawa: DND Canada, 2009), art. 233-240, and Calgary Highlanders, "Canadian Forces Code of Conduct with Examples Drawn from Regimental History," last accessed 29 May 2015, <http://www.calgaryhighlanders.com/recruiting/codeofconduct.htm>.

A fundamental principle of the law of armed conflict is that of distinction between combatants and civilians.¹⁹ Under the laws of armed conflict, combatants are entitled to participate in hostilities and are legitimate military targets.²⁰ Civilians, in contrast, shall not be the object of attack.²¹ Combatants may be members of a state's armed forces or they can be members of a militia or volunteer corps who meet four requirements: they must be commanded by a person responsible for his subordinates; they must wear a fixed distinctive emblem which is recognizable from a distance; they must carry arms openly; and they must conduct operations in accordance with the laws and customs of war.²² Following a strict interpretation of the Geneva conventions, terrorist groups such as ISIS would not qualify as combatants because they tend not to abide by these requirements. In particular, they typically conceal themselves amongst the civilian population so that they cannot be easily distinguished.²³ The conclusion drawn from this reasoning is that such groups are civilians and may never be targeted. To do otherwise would be to weaken the moral underpinnings of the principles protecting civilians and would invite abuse essentially amounting to murder.²⁴

In contrast to the strict interpretation, some analysts have argued that the definition of combatant should be expanded in recognition of the fact that modern armies do not

¹⁹ Additional Protocol I, art 48.

²⁰ *Ibid.*, art 43(2), 44(1).

²¹ *Ibid.*, art 51(2).

²² Office of the Judge Advocate General, "Hague Convention (IV) Respecting the Laws and Customs of War on Land - 1907, Annex, art. 1," in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., ed. Directorate of Law Training (Ottawa: DND, 2005), 15. There are other categories of combatants, such as levée en masse, but they do not pertain to the present discussion.

²³ Claire Finkelstein, Jens David Ohlin and Andrew Altman, eds. *Targeted killings: Law and Morality in an Asymmetrical World* (Oxford University Press 2012), 2.

²⁴ Jeremy Waldron, "Justifying Targeted Killing with a Neutral Principle?" in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Claire Finkelstein, Jens David Ohlin, and Andrew Altman, 112-131 (Oxford: Oxford University Press, 2012).

necessarily wear distinctive uniforms or carry their weapons openly.²⁵ In the case of ISIS, the self-declared Islamic State militants arguably bear greater similarity than differences to armed and organized troops. Examples include their size, their apparent command structure, military professionalism and their ability to wage battle on several fronts and the same time.²⁶

Labeling ISIS militants combatants could be problematic in terms of how far to expand the definition and the resulting potential for uncertainty, over-inclusiveness and abuse. An alternate view is to identify members of ISIS as civilians who become unlawful combatants and legitimate targets for such time as they take a direct part in hostilities.²⁷ As a matter of policy, Canada has acknowledged the concept of such individuals as a separate category of participants in hostilities.²⁸

The most problematic aspect of this categorization is how to define what constitutes a direct part in hostilities and how to situate that behaviour within a time frame. A very narrow interpretation would result in a targetable unlawful combatant actively engaging in hostile activities at one moment, and reverting to the status of untouchable civilian the next, potentially vacillating between these two states indefinitely so as to inflict the most

²⁵ Milena Sterio, "The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International Law," *Case Western Reserve Journal of International Law* 45 (2012): 206.

²⁶ Patrick Cockburn, "War with ISIS: Islamic Militants Have Army of 200,000, Claims Senior Kurdish Leader," *The Independent*, 30 May 2015, <http://www.independent.co.uk/news/world/middle-east/war-with-isis-islamic-militants-have-army-of-200000-claims-kurdish-leader-9863418.html>.

²⁷ Additional Protocol I, art 51(3).

²⁸ Col. Kenneth Watkin, "Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing," *Duke Journal of Comparative & International Law* 15 (2005): 283 and *Law of Armed Conflict at the Operational and Tactical Levels*, art. 318.

damage while limiting exposure by using civilian status as a shield.²⁹ The black letter application of the law would defeat one of its fundamental purposes: to protect innocent civilians by allowing them to be distinguished from combatants who trade the ability to be identified for the right to engage in hostilities.

In order to resolve this issue the interpretation of "for such time as they take a direct part in hostilities" must be broadened.³⁰ There has been much debate as to whether this should properly be considered from a functional perspective or a status perspective. In the case of conventional militaries, who meet the criteria of combatant by distinguishing themselves, obeying the laws of armed conflict and so forth, any military member is a legal target at all times during conflict. By analogy, since ISIS is a terrorist organization involved in a conflict, any individual claiming membership with ISIS is a legal target. This approach has been criticized for its over-inclusiveness.³¹ For example, would it include self-identified members who do not actually take up arms, but who simply espouse the values of ISIS? Given the legal presumption in favour of civilian status, the answer must be no. The key lies in the phrase "direct part in hostilities." A functionality test broad enough to include not just the terrorist throwing the grenade, but any member

²⁹ Col. Mark Maxwell, "Rebutting the Civilian Presumption: Playing Whack-a-Mole Without a Mallet?" in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Claire Finkelstein, Jens David Ohlin, and Andrew Altman, (Oxford: Oxford University Press, 2012), 46.

³⁰ Additional Protocol I, art .51(3) and Additional Protocol II, art. 13(3). For a fascinating comparison of the language used in the treaties, military manuals and national legislation of numerous states, see also International Committee of the Red Cross, "Practice Relating to Rule 6. Civilians' Loss of Protection from Attack," last accessed 28 May 2015, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule6.

³¹ Milena Sterio, "The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International Law," *Case Western Reserve Journal of International Law* 45 (2012), 207-208 and Gary Solis, "Targeted Killing and the Law of Armed Conflict," *Naval War College Review* 60, no. 2 (Spring 2007), 137-142.

who is actively engaged in the planning and execution of hostilities would avoid both over-inclusion and disingenuous use of civilian status.

Some support for this position can be found internationally in the Israeli High Court of Justice decision in the Targeted Killings Case.³² Against the backdrop of the Second Intifada, which began in February 2000, the court was asked to rule on the legality of Israel's "preventative strikes" against terrorists in the surrounding territories of Judea, Samaria, the Gaza Strip and within Israel.³³ As a starting point, the court held that Israel was engaged in an international armed conflict with terrorist organizations and that the law of armed conflict applied.³⁴ Further, the terrorists that were engaged in the conflict did not come within the legal definition of combatant, but were found to be unlawful combatants.³⁵ While the court did not find that this constituted a third category of persons,³⁶ the result of civilians taking part in hostilities was nevertheless a loss of protection against attack.³⁷ The distinction between taking a direct part in hostilities, in which case protection is forfeited, and indirect hostilities where protection is maintained, was found to be a question of fact to be assessed in the circumstances.³⁸ The phrase "for such time" was similarly found to be subject to interpretation and its meaning dependent on the circumstances surrounding each case.³⁹

³² *Public Committee against Torture in Israel v. Government of Israel*, [2005] H.C.J. 769/02, http://www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf.

³³ *Ibid.*, para 2.

³⁴ *Ibid.*, para 21.

³⁵ *Ibid.*, para 24-25.

³⁶ *Ibid.*, para 28.

³⁷ *Ibid.*, para 33.

³⁸ *Ibid.*, para 34-37.

³⁹ *Ibid.*, para 39.

Conclusion

The Targeted Killings case in Israel demonstrates support for the proposition that targeted killings are not always forbidden. The conclusion that they are permissible in certain circumstances is logical within the context of Canada's role in the conflict against ISIS as well. Having established a viable legal framework for permitting targeted killings against ISIS members who act as unlawful combatants, the application of the framework must also be lawful. The relevant safeguards of distinction, necessity and proportionality continue to apply.⁴⁰ Adequate and accurate intelligence will be fundamental to avoid mistaken targeting of innocent civilians as well as informing the appropriate methods for successful implementation of the operation. Provided Canada's targeting practices abide by these fundamental principles, targeted killing could be a valuable weapon in its arsenal in the fight against ISIS.

⁴⁰ *Law of Armed Conflict at the Operational and Tactical Levels*, art. 202, 204, 417, Additional Protocol I, art. 57 and Laurie R. Blank, "Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications," *William Mitchell Law Review* 38, no. 5 (2012), 1665.

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