TARGETED KILLINGS AND INTERNATIONAL LAW

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Targeted killings are increasingly the manner in which some of the militarily most powerful States in the world project violence around the globe. This article examines whether such actions are consistent with international law using the well-established parameters of State responsibility and the obligations found under international humanitarian and human rights law. The appraisal of targeted killings is based on principles of international law that are rarely disputed, but often ignored in the consideration of targeted killings due to reasons of political convenience. In the process of considering this central issue, the article also examines the intricate and sometimes misunderstood relationship between these two areas of law as well as the legal justifications that States have or may put forward in defense of their actions. This evaluation concludes that rarely, if ever, are States that conduct targeted killings acting with respect for international law. Moreover, these States, which often base their justifications on political interests related to the national security of their people, may even be jeopardizing the very security of their populations that they are think they are protecting.

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Targeted killings are the use of force expressly intended to take the life of a specific person because of the perceived threat that person poses to national security. These killings are the consequence of a State's conscious decision to kill a particular individual. Such actions are controversial and have been condemned by most international lawyers, but some governments continue to use them as a means of conducting foreign relations.

In recent years several countries, most notably Israel and the United States, have significantly enhanced their use of targeted killings. In doing so they exposed...
themselves to State responsibility under international law for an internationally wrongful act. These States often seek to justify targeted killings based on reasons of political expediency ignoring international law even though it is the lowest common denominator among States for evaluating such actions. Disregarding international law – the ultimate foundation of the international community, can plunge the international community into a downward spiral of inhumanity. This can further lead to a situation where carnage and disorder replace peace and stability. Conversely, international law can help us avoid such a fate by providing rules that, if observed, allow us all to co-exist with a certain degree of peace and security.

Even the supporters of targeted killings do not want us to slip back into an international community where the powerful enslave and oppress the weak and where the use of force becomes a means of conducting foreign policy as it was less than a century ago. The supporters of targeted killings just don’t believe that this will be the consequence of their actions or sometimes, perhaps more often, they merely don’t seem to care. This ignorance or intentional lack of concern for international law is dangerous. When we elevate the expediency of short-term geopolitical concerns above the rule of international law we create a vacuum in international relations in which our most cherished values, such as human rights, come under attack. Respect for the rule of law is essential to securing an international community in which current and future generations can live peacefully and without fear for their basic human rights. This is especially the case when the most basic human rights, especially the right to life, is threatened by actions of States — the entities that are supposed to be the principle guarantors of our most fundamental human rights.

This Article describes the application of international law in regards to targeted killings. The key question that this Article attempts to answer is whether

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2 See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/HRC/14/24/Add.6 (28 May 2010) (by Philip Alston) [hereinafter the “Alston Report”], at 8-9, ¶23-26, pointing out that Russia has also adopted the practice “emulating Israeli and US actions”; Id. at 9, ¶25.

3 Many other States have used targeted killings including Russia, the United Kingdom, Switzerland, Pakistan, and Iraq. See MEZLER, N., TARGETED KILLING IN INTERNATIONAL LAW, 463-444 (2008).

4 Id. Based on the author’s doctoral thesis, this book considers targeted killings in light of international law and arrives at the nuanced conclusion that targeted killings are usually illegal, but might sometimes be legal. This conclusion invokes reminiscences of the International Court of Justice’s Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (8 July), a decision which Judge Rosalyn Higgins termed a non liquet opinion due to its inconsistencies. Id. at 583.


7 See, for e.g., A. Dershowitz, US Attack on bin Laden validates targeted killing, 15(16) JEWISH REPORT (2011).
or not targeted killings are generally prohibited by international law. To answer this question the Article is divided into seven Parts, including this Introduction. First, a targeted killing is defined based on several non-exhaustive, but instructive, criteria (Part II). Second, the State responsibility for targeted killings is examined generally with special attention to issues of attribution, one of the principle elements of State responsibility (Part III). Third, specific legal obligations, the other element of State responsibility, relevant to targeted killings, are examined under both international human rights law and international humanitarian law (Part IV). The relationships between these two corpus of law, as well as *jus ad bellum*, are important for determining the legal obligations that apply to targeted killings, these relationships are examined (Part V). Having determined how State responsibility applies to targeted killings, the possible justifications that States might put forward for their otherwise internationally wrongful acts are also considered (Part VI). And finally, some conclusions are drawn about the consequences of targeted killings under international law (Part VII). Rather than providing an evaluation of individual cases of targeted killings, this Article provides a general legal framework for how targeted killings should be evaluated when applying international law.

II. WHAT CONSTITUTES A TARGETED KILLING?

Although States have long targeted and killed those who they did not like, the phrase 'targeted killing' only emerged as a term of art in international law in the 21st Century. It is used to describe the intentional killing of a human being by a government. It was sometimes used without legal import and is sometimes used to describe such killings as illegal or as contrary to international law. In 2010, UN Special Rapporteur Philip Alston still considered that "[d]espite the frequency with which it is invoked, "targeted killing" is not a term defined under international law." Although there is no agreed definition of what constitutes a targeted killing, efforts have been made to describe some relevant characteristics. A recent effort was made by the United Nations Human Rights Council's Special Rapporteur on extrajudicial, summary or arbitrary executions, Professor Philip Alston, that states “[a] targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law,

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8 See, for e.g., M. M. Maxwell, *Rebutting the Civilian Presumption: Playing Whack-A-Mole Without a Mallet*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 31, 34-36 (C. Finkelstein et al. eds., 2012) describing the recent history of targeted killings.
9 See Alston Report, supra note, at 4, ¶7.
10 See, for e.g., F. Allhoff, *The War on Terror and the Ethics of Exceptionalism*, 8(4) J. MIL. ETHICS 265-288 (2009), arguing that targeted killings are morally acceptable.
11 See, for e.g., Stein, Y., *Response to Israel's Policy of Targeted Killings: By Any Name Illegal and Immoral*, 17(1) ETHICS & INT'L AFFAIRS 127-137 (2003).
12 Alston Report, supra note, at 4, ¶7.
or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”

A few years before Alston concluded his study, academic Nils Melzer had suggested criteria for determining what constitutes a targeted killing. He identified five distinct characteristics. Although the characteristics used by Melzer are very similar to Alston's, the former's more extended discussion of each characteristic provides for a better point of comparison. The consideration of these characteristics is a useful starting point for understanding what types of actions are being dealt with when applying international law to targeted killings.

**A. FIVE CHARACTERISTICS OF TARGETED KILLINGS**

Nils Melzer, using a definition of targeted killings similar to Alston's, identifies five characteristics of the term 'targeted killing' under international law in his book entitled Targeted Killing in International Law. Despite the book's title, it is questionable whether all the characteristics are relevant to the application of international law. As will be argued below, some may not be applicable. Nevertheless, the five characteristics provide some insight into what action is generally understood to be a targeted killing.

The first characteristic is the use of deadly force to kill a human being. This characteristic is self-evident and has implications for both the right to life under international human rights law, as well as the prohibition of willful killing of non-combatants under international humanitarian law. There is no need for there to be an intention to kill, but merely that the use of force may be reasonably expected to kill a human being keeping in mind the sensitivities of that particular person. Thus, what constitutes a deadly force against one person might not constitute a use of deadly force against another. Nevertheless, an effort to kill a human being or take action that might reasonably be expected to kill a human being is an important characteristic of targeted killing that is relevant to international law. The means by which the deadly force might be conveyed are many and the Alston Report enumerates a few that have been used as “sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison.”

The second characteristic is the intention to kill. Roland Otto, like Melzer, points out that “the main aim and purpose [of a targeted killing] is the death of the targeted person.” Thus, “[t]he death of the targeted person is

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13 Id. at 3, ¶1.
14 *MELZER*, *supra* note , at 3, 4.
15 Id. at 3.
17 Id. at 4.
18 *OTTO, R.*, *TARGETED KILLINGS AND INTERNATIONAL LAW: WITH SPECIAL REGARD TO HUMAN
directly intended, with dolus directus of the first degree ....”\textsuperscript{19} The intention of the State to kill a particular person is something that sets targeted killings apart from some, but not all, other forms of State violence. The death penalty, for example, is an intentional killing by a State, but is not generally considered a 'targeted killing' under international law.\textsuperscript{20} While intention may be a characteristic of targeted killings, as will later be explained, it is not a necessary condition of State responsibility under international law.

The third characteristic is the targeting of a specific person.\textsuperscript{21} While this is often a constituent of targeted killings, it is not a necessary condition of State responsibility. For instance, even the killing of persons, that a State did not know were present, where it ordered a bomb to be detonated in a civilian area, or provided support to an armed group carrying out targeted killings of its enemies without concern for whether or not they were civilians may give rise to State responsibility if, for example, the State did not take reasonable precautions to ensure that killings did not take place.

The fourth characteristic is the lack of physical custody.\textsuperscript{22} The question of physical custody may be a characteristic of a targeted killing, but more important for determining questions of State responsibility is the State’s control over the instruments that commit the willful killing. The killing of people, not in the physical custody of the State, will incur State responsibility if it is carried out through instrumentalities over which the State has control or should have control.

Melzer identifies as a last characteristic the attribution of an act to a State.\textsuperscript{23} As is described below,\textsuperscript{24} State responsibility for an internationally wrongful act requires an act attributable to a State. Indeed attribution is very important to the application of international law as it is one of the two constituent elements of State responsibility. Despite its important legal relevance, this characteristic is usually not difficult to establish as States frequently admit that they have carried out targeted killings.

As is evident from Melzer's five characteristics, not all the characteristics of a targeted killing are relevant to international law. This is perhaps one reason why governments often appear to make decisions about targeted killings based on political considerations. It is not, however, a reason to exclude the application of international law. The application of this law provides safeguards for every individual, which are essential to an international society based on the rule of law and respect for basic human rights. The basic framework for applying international

\textsuperscript{19} Id.
\textsuperscript{20} The legality of the death penalty, however, has been challenged under both international human rights law and international humanitarian law.
\textsuperscript{21} OTTO, supra note .
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} See, infra, Part III(ı), discussing the requirement of attribution of State responsibility.
law to targeted killings is the law of State responsibility which provides a widely accepted standard of accountability for all States.

III. STATE RESPONSIBILITY FOR TARGETED KILLINGS

Although, it is often portrayed as a very complicated affair, State responsibility under international law is a long considered concept for which the basic principles have been widely agreed upon by States and leading international lawyers around the world.25 The two elements of State responsibility are (i) an act attributable to a State, and (ii) that the act is inconsistent with a legal obligation that the State has undertaken.26 When these two requirements are present a State is responsible for an internationally act.27

A. ATTRIBUTABILITY

Refers to the fact that an act is attributable to a State, i.e. the act has been carried out in such a way that the State is responsible for its consequences. The requirement of attributability is satisfied when an act or omission has been carried out or ordered by a person representing a State.28 An act may also be attributable when the State could have acted but did not (an omission) or when a State controlled or should have controlled the entity carrying out the act. In the oft-cited Trail Smelter arbitration between the US and Canada, the act causing harm was carried out by a private company, the Consolidated Mining and Smelting Company of Canad Limited, which had obtained a charter of incorporation from Canada, nevertheless, Canada did not contest its responsibility.29 Similarly in the Nicaragua Case, some of the acts for which the United States was responsible, were carried out by rebels operating out of Honduras.30 Because international law is based on State sovereignty, and despite the fact that all actions must be initiated by individual human beings, it is the State that is recognized as the “real organized entity, a legal person with full authority to act under international law.”31 Thus for

27 The issue of justification for an internationally wrongful act is dealt with in Part IV below.
29 Train Smelter Arbitration (U.S. v. Can.) 3 RIAA 1908, 1917 (Train Smelter Arb. Trib. 1938). The Smelter had originally been established by the United States in 1896, but sold to the Canadian company in 1906, but importantly, between 1925 and 1927 two smoke stacks were built that greatly increased the population coming from the plant.
30 See Nicaragua Case supra, note , at 21, ¶20; 51, 86.
31 ILC Draft Articles, supra note 25, at 35, ¶5.
the application of international law it is essential that an act be attributable to a State.\textsuperscript{32}

At the same time it makes no difference whether the State actor or actors knew the attributable act was wrong or illegal or even intended to act as they did.\textsuperscript{33} A soldier who falls asleep at the control panel and thereby accidentally launches a drone attack commits an act that is attributable to the State. Similarly, a soldier who is following orders in launching an attack resulting in a targeted killing, commits an act that is attributable to the State. Moreover, for the purpose of attribution the “State is treated as a unity” and any “event that is sufficiently connected to conduct” by any person acting under the control of the State is attributable to the State.\textsuperscript{34}

Slightly more complicated might be attacks carried out by private contractors or civilians acting on behalf of a State and either physically confronting the person or acting at a distance through the operation of a drone or other such weapon. In such cases the actor is not formally a State organ, but has some authorization to exercise State authority. The crucial test is whether the entity carrying out the targeted killing has been “empowered by internal law to exercise governmental authority.”\textsuperscript{35} Such cases are considered in article 5 of the ILC Draft Articles.

What is perhaps more complicated is when a government instrumentality is used (such as an aerial drone or any other type of government military equipment) it is unlikely that a private person could have had access to such deadly equipment without government approval. As targeted killings are serious matters and often require complex equipment, it is unlikely that such acts are done without State approval. Moreover, often a targeted killing also serves a government interest and not a private interest.\textsuperscript{36} In any event, targeted killings whether carried out by State or non-State actors on behalf of the State have usually been explicitly—although not always publicly—authorized by the State.\textsuperscript{37} In many cases, States have acknowledged that they carried out a targeted killing.\textsuperscript{38} When a State acknowledges its actions, attribution can usually be proven based on this acknowledgment. Such

\begin{itemize}
  \item \textsuperscript{32} Id. at 38, ¶1.
  \item \textsuperscript{33} Id. at 42, ¶13, pointing out that as concerns a State actor, “[i]t is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State.”
  \item \textsuperscript{34} Id. at 35, ¶6.
  \item \textsuperscript{35} Id. at 42, ¶1.
  \item \textsuperscript{36} An act of targeted killing or assassination carried out by a private individual not acting on behalf of a State would, of course, be murder or another similar offense punishable under domestic penal law. However, a States’ failure to punish a private actor carrying out a targeted killing raises an issue of international law.
  \item \textsuperscript{38} Id.
\end{itemize}
an admission by a State is a statement against that State’s interest and thus, strong
evidence of attributability. Other proof of attributability may include the means
used. For example, when military weapons or poisons that are under the control of
the State are used, this will indicate prima facie that the act is attributable to the
State.

Attribution is relevant to obligations under both international human
rights law and international humanitarian law. As concerns international human
rights law, Professor James Crawford, the last UN International Law Commission
Rapporteur on State Responsibility before the Draft Articles were finalized, has
eloquent described how the rules of State responsibility apply to human rights.39
Human rights tribunals have also applied the general rules of state responsibility.40
As concerns international humanitarian law the International Committee of the
Red Cross, in its noted review of the rules of customary international humanitarian
law, concludes that:

“[i]t is a long-standing rule of customary international law” that:
[a] State is responsible for violations of international humanitarian law attributable to
it, including:
(a) violations committed by its organs, including its armed forces;
(b) violations committed by persons or entities it empowered to exercise elements of
governmental authority;
(c) violations committed by persons or groups acting in fact on its instructions, or under
its direction or control; and
(d) violations committed by private persons or groups, that it acknowledges and adopts
as its own conduct.”41

It is not significantly disputed that conduct attributable to a State may
incur the responsibility of a State for an internationally wrongful act if it is contrary
to a legal obligation of the State under either international human rights or
international humanitarian law.42

39 Crawford, J., Human Rights and State Responsibility, 12th Raymond & Beverly Sackler Distinguished
Lecture Series at the Thomas J. Dodd Research Centre of the University of Connecticut delivered on
12 June 2012. Also see Odello M., Fundamental Standards of Humanity: A Common Language of
International Humanitarian Law and Human Rights Law, in Arnold, R. and Quénivet, N.,
INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW TOWARDS A NEW MERGER IN
INTERNATIONAL LAW 15, 47 (2008).
40 See, for example, Loizidou v. Turkey, 23 E.H.R.R. 513, Appl. No. 15318/89 (1997) at ¶49.
41 HENCKAERTS, J-M & DOSWALD-BECK, L., CUSTOMARY INTERNATIONAL LAW 1-24 (Vol. I,
2005).
42 Although only these two areas of law are considered, the principle is equally applicable to all
other State obligations under international law. For example, the targeted killing of a refugee may
violate international refugee law as well and the targeted killing of an aircraft or ship passenger may
violate international law concerning air or sea passage.
B. LEGAL OBLIGATION

The legal obligations of a State may emanate from any treaty that a State has signed or from customary international law. Every State possesses capacity to conclude treaties.\(^{43}\) A treaty is binding upon the parties to it and must be performed by them in good faith.\(^{44}\) On the other hand, customary international law may bind a State even without its express consent. When an overwhelming majority of States agrees that there is a legal obligation incumbent upon all States, and no State has objected from the time of the very creation of the rule, customary international law may be created if this opinion of States is supported by their general practice. Customary international law is perhaps harder to determine than treaty law, but as has been noted by a United Nations publication, “[c]ustomary international law is as legally binding as treaty law.”\(^{45}\)

Furthermore, relevant legal obligations may emanate from different fields of law that may be applicable depending on the circumstances in which a targeted killing takes place. As the Alston Report notes, “[w]hether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the inter-state use of force.”\(^{46}\) Two of the most relevant fields of law that apply to the situations described by Alston are international humanitarian law and international human rights law. Each of these provide for similar, sometimes even overlapping obligations. It is therefore necessary to explore the obligations that both international humanitarian law and international human rights law provide to determine whether a targeted killing is illegal. This task is undertaken in the next Part in which the legal obligations under international human rights law and under international humanitarian law are considered using a set of four questions that are asked concerning each corpus of law.

IV. LEGAL OBLIGATIONS CONCERNING TARGETED KILLINGS

As noted above, legal obligations concerning targeted killing may emanate from any source of international law, especially treaties or customary international law, and further, may be found in any field of international law that is relevant to targeted killings. Also, in this contribution, the discussion focuses on international human rights law and international humanitarian law. Within these two fields of law the primary concern is with the many treaties that have been widely ratified.

Below the inquiry proceeds by asking four questions, namely:


\(^{44}\) Id. at art. 26.


a. When does the law apply?
b. How does the law apply?
c. To whom does the law apply?
d. What rules of law apply?

Each of these questions is discussed in relation to these two specific areas of law.

A. INTERNATIONAL HUMAN RIGHTS LAW

The application of international human rights law can be examined by responding to four questions:

a. When does international human rights law apply?
b. How does international human rights law apply?
c. To whom does international human rights law apply?
d. What rules of international human rights law apply?

Each of these questions is addressed below in the context of human rights focusing on several internationally protected human rights that may be implicated in situations of targeted killings. These rights include principally, the right to life, but also the prohibition of cruel or inhumane treatment or punishment, the right to the security of person, and the right to a fair trial.

1. WHEN DOES INTERNATIONAL HUMAN RIGHTS LAW APPLY?

In general international human rights law applies all the time, in both peacetime and during an armed conflict to protect individuals against targeted killings.\(^{47}\) Although States, may under limited circumstances, derogate from some human rights in a case of “public emergency that threatens the life of the nation,”\(^ {48}\) States have rarely done so. Moreover, more recent treaties, such as the most widely ratified human rights treaty, the Convention on the Rights of the Child\(^ {49}\) and the regional African Charter on Human and Peoples’ Rights\(^ {50}\) do not allow any derogation for any reasons from any of the rights contained therein.\(^ {51}\) In


\(^{51}\) The Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States, Council of Europe Doc. H(95) 7 rev. (1998), also does not contain a general derogation provision although, in accordance with article 2(4), the “[d]eprivation of life shall not
any event, the right to life, the focus of attention here, is exempt from derogation, as is the prohibition of cruel or inhumane treatment or punishment in the International Covenant on Civil and Political Rights. A State party to the ICCPR may derogate from the rights to a fair trial and security, but not the right to life. Moreover, in the case of fair trial, the core elements of the right remain non-derogable, according to the UN Human Rights Committee.

The conclusion may be drawn that international human rights law will usually apply to all targeted killings carried out in peacetime or wartime. Thus, the restrictions that this law imposes will almost always have to be taken into account by States carrying out a targeted killing and the failure of a State to do so may lead to State responsibility of an internationally wrongful act.

2. HOW DOES INTERNATIONAL HUMAN RIGHTS LAW APPLY?

International human rights law is largely based on treaties that provide for the means of the implementation of their provisions. International human rights law, especially as compared to international humanitarian law, has much more developed forums for ensuring its implementation. These forums are also often accessible to both States and non-state actors. Regional human rights treaties in Africa, the Americas, and Europe all provide potential forums that both States

be regarded as inflicted in contravention of the provisions of this Article when it results from the use of force solely in such cases of extreme necessity and necessary defenses are provided for in national legislation.”

52 ICCPR, supra note 48, at art. 6.
53 See, for e.g., ICCPR, supra note 48, at art. 4(2), Also see ACHR, supra note 48, at art. 27(2), and ECHR, supra note 48, at art. 15(2) (“except in respect of deaths resulting from lawful acts of war”) in respect of the right to life and the prohibition of torture in the Inter-American and European human rights treaties.
54 ICCPR, supra note 48, at art.7.
55 Id. at art. 14.
56 Id at art. 9.
and non-State actors—usually individuals, but in some cases non-governmental organizations—can use to ensure respect for human rights. In each of these forums there is a Court that can make legally binding determinations as to a State's responsibility for a violation of international human rights law.

In addition to the regional legally binding mechanisms in the Americas, Africa, Asia, the Arab world, and among Islamic States, instruments also exist whereby bodies with non-legally-binding authority may review cases and make recommendations concerning the application of international human rights law. Similarly, the United Nations has an extensive network of non-legally binding, but still authoritative human rights mechanisms that can be used to promote the protection of human rights. Within the United Nations, examples of human

are parties within the time stipulated by the Court and to guarantee its execution.”

59 See ACHR, supra note 48, creating the Inter-American Court of Human Rights (art. 33) and whereby States agree to abide by its decisions (art. 68).

60 See ECHR, supra note 48. The European Court of Human Rights’ jurisdiction is compulsory for all States of the Council of Europe that are required to ratify this treaty to joint the Council of Europe. The Court, was created by article 19 and States “undertake to abide by the final judgment of the Court in any case to which they are parties” in article 46.


66 See, for example, the Standard Minimum Rules for the Treatment of Prisoners, adopted 30 August 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of
rights mechanisms that have dealt with targeted killings include the special mandate holders of the Human Rights Council, the Human Rights Council itself during the Universal Periodic Reviews of countries using targeted killings, and the treaty bodies. The expert and authoritative recommendations, conclusions, and views of these bodies contribute to interpreting the law. They also offer a more independent and impartial interpretation of the law than that of the States that have carried out targeted killings. The majority of these international expert bodies have determined that targeted killings violate international human rights law.

While some of these international human rights bodies have been timid in applying these protections, others have been quite outspoken. And while most of these bodies—but not all—provide non-legally-binding outcomes, both their individual authority and the cumulative effect of their determinations can have a significant influence on how international law is applied and whether targeted killings are contrary to this law.

3. TO WHOM DOES INTERNATIONAL HUMAN RIGHTS LAW APPLY?

International human rights law applies to all persons under the jurisdiction of a State. This may include persons outside the territory of the State concerned when that State exercises jurisdiction and/or control over the instrumentality of the violation of the human rights of others. While some regional human rights bodies have suggested that such responsibility is only owed to people within the specific region to which a human rights treaty applies, such an interpretation of international human rights law runs contrary to the fundamental principle of non-discrimination on the basis of nationality and other similar grounds and has been


67 See, for example, UN Press Statement, UN Counter-Terrorism Expert to launch inquiry into the civilian impact of drones and other forms of targeted killing, dated 22 January 2013 (stating that “[t]he United Nations Special Rapporteur on human rights and counter-terrorism, Ben Emmerson, will formally launch on Thursday 24 January 2013 an inquiry into the civilian impact of the use of drones and other forms of targeted killing, focusing on the applicable legal framework, a critical examination of the factual evidence concerning civilian casualties, with a view to making recommendations to the UN General Assembly”).


70 See, for example, Banković and Others v. Belgium and 16 Other Contracting States, Grand Chamber, Appl. No. 52207/99, at ¶¶54-82 (19 December 2001).
explicitly rejected by both regional\textsuperscript{71} and universal human rights bodies.\textsuperscript{72} Such a restrictive interpretation of international human rights law would also be contrary to the object and purpose of international human rights law, which is to provide as much protection to individuals' human rights as possible and to not encourage the violation of human rights anywhere in the world. If States were allowed to violate with impunity the human rights of individuals in regions outside their own, when they could not do so in their own regions, this would contribute to dividing the world into individuals of different worth. The basis of international human rights law is the equal value of all individuals. Thus, such a limitation to the application of international human rights law must be rejected, as it is incompatible with the law. The view that a State is responsible for instrumentalities over which it exercises effective control is also good policy because it encourages States to ensure that their instrumentalities do not contribute to breaches of international law. It is also consistent with State responsibility for internationally wrongful acts where the effective control standard has been repeatedly articulated as the standard for attributing responsibility to a State.\textsuperscript{73}

It is therefore, reasonable to conclude that international human rights law applies to targeted killing undertaken by States both within the country concerned, as well as to those who are abroad and who are targeted using an instrumentality that is under the control of a specific State concerned.

4. WHAT RULES OF INTERNATIONAL HUMAN RIGHTS LAW APPLY?

The principle human right protecting individuals from targeted killings is the right to life. The right to life is found in numerous human rights treaties,\textsuperscript{74} and


\textsuperscript{72} See, for example, Burgos v. Uruguay, Communication No. 52/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1 at 88 (1984), ¶12.3 (stating "...it would be unconscionable to so interpret the responsibility under article 2 of the Covenant [of Civil and Political Rights] as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.").


\textsuperscript{74} See, for example, supra note 48; art. 6, ICCPR, supra note 48; art. 4, ACHR, supra note 48; art. 4, ACHPR, supra note 50; art. 2, ECHR, supra note 48. Also see art. 2 of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States, Council of Europe Doc. H(95)7 rev. (1998); and art. 6 of the Convention on the Rights of the Child, supra.
is part of customary international law. While there are some differences in how the right is stated, it is always considered a fundamental and inherent human right.\textsuperscript{75} The UN Human Rights Committee, which has been entrusted by the 167 States party to the International Covenant on Civil and Political Rights, in interpreting the right to life contain in this treaty, has stated that it is “the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.”\textsuperscript{76} The Committee has further noted that “the law must strictly control and limit the circumstances in which a person may be deprived of his life” by State authorities.\textsuperscript{77} Based on its appreciation of the importance of the right to life, the Committee drew the conclusion that it “is a right that should not be interpreted narrowly.”\textsuperscript{78} Other international bodies and writers have also lauded the essential nature of the right to life.\textsuperscript{79} For example, after the International Court of Justice confirmed that the right to life applies even to consideration of nuclear weapons, Judge Christopher Weeramantry referred to the right to life as the “irreducible core of human rights.”\textsuperscript{80} And Nihal Jayawickrama calls it “the most fundamental of all rights”\textsuperscript{81} a right that cannot be “taken away by the state or waived, surrendered or renounced” by a person.\textsuperscript{82}

Three UN Special Rapporteurs, including two successive UN Special Rapporteurs on extrajudicial, summary or arbitrary executions, have concluded that targeted killings generally violate the right to life under international law.\textsuperscript{83}

The differences in the quality of the right to life in different treaties are important to the extent that it has been the subject of dispute. The Universal Declaration of Human Rights\textsuperscript{84} and the American Declaration of the Rights and Duties of Man,\textsuperscript{85} both, which reflect customary international law,\textsuperscript{86} consider all life note 49.

\textsuperscript{75} An example of the differences are that the both Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man, which reflect customary international law, consider all life sacrosanct without qualification and the ECHR, supra note 48, considers all “intentional” killings prohibited and the ACHR considers, while the ICCPR, supra note 48, and the ACHR, supra note 48, consider all “arbitrary” killings prohibited.

\textsuperscript{76} ¶1 of the UN Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 127 (2003).

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{79} See generally, THE RIGHT TO LIFE IN INTERNATIONAL LAW (B. G. Ramcharan ed., 1985);

\textsuperscript{80} Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, supra note , at 506 (Dissenting Opinion of Judge Christopher Weeramantry).

\textsuperscript{81} Jayawickrama, supra note 68, at 243.

\textsuperscript{82} Id. at 256.

\textsuperscript{83} Alston, supra note , at 11, ¶33; Heyns, C., Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. No. A/68/382 at 8, ¶35 (13 September 2013); and Emmerson, B., Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. No. A/68/389 at 17, ¶60 (18 September 2013).

\textsuperscript{84} UNGA Res. 217, UN Doc. A/810 at 71 (1948), at art. 3.

\textsuperscript{85} OAS Res. XXX, adopted by the 9th International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS Doc.
sacrosanct without qualification. In fact, in the process of adopting the Universal Declaration of Human Rights when each article was voted upon the article containing the right to life received unanimous approval. The European Convention for the Protection of Human Rights and Fundamental Freedoms, on the other hand, considers all “intentional” killings prohibited. The American Convention on Human Rights and the International Covenant on Civil and Political Rights interpret the right to life to prohibit all “arbitrary” taking of life. The term ‘arbitrary’, however, has been understood broadly to encompass the taking of life without a fair trial.

International human rights bodies have had to apply the right to life to cases of targeted killings. In one of the most frequently cited cases concerning the right to life the European Court of Human Rights had to consider whether targeted killing of three suspected terrorists by British special police violated the right to life. The Court found that the summary executions were due to a United Kingdom government policy of instructing its police forces to shoot to kill. As a consequence, the Court found for the first time, State responsibility for a violation of the right to life in article 2 of the European Convention on Human Rights. The Court held that the act of ordering the killings was attributable to the United Kingdom and that this State had a legal obligation to ensure the right to life in article 2 of the European Convention on Human Rights, which it had violated. Furthermore, the UK government's alleged justification, namely that it believed the three persons were terrorists about to carry out an attack, was not found to be adequate.

The right to life “also implies a positive obligation incumbent on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual,” although this does not require the State to take extraordinary measures in most circumstances. Where a

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86 See, for example, Jayawickrama, supra, note 68, at ¶25-43 and Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Inter-American Court, Advisory Opinion OC-10/89 (14 July 1989).

87 See Jayawickrama, supra, note 68, at ¶36. Also see Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports ¶23 (1951) where the Court appears to refer to the right to life, by implication as a principle underlying the Genocide Convention as customary international law.

88 See, art. 2, ECHR, supra note 48.

89 See art. 6, ICCPR, supra note 48.

90 OEA/Ser.L.V/II.82 doc.6 rev.1, 17 (1992), at art. 1.

91 Id. at ¶213-214.

92 Jayawickrama, supra note 48, at 261.

93 See, for example, X v. United Kingdom and Ireland, (1985) 8 E.H.H.R. 49 where the European Commission held that ordinary police measures were sufficient and that the UK did not have to take extraordinary measures to protect its citizens from alleged threats of terrorism and X v. Ireland, Appl. No. 6040/73, 44 Collection of Decisions of the European Commission 121 (1973) where the provision of a body guard for an extended period of time was not required.
person announces his intention to kill, the State is obliged to at least take usual police actions needed to protect the public.\textsuperscript{94} But while the State must protect its citizens, it has no duty to take extraordinary steps such as targeted killings. When the State does take extraordinary actions against a person suspected of an intention to violate the right to life, it may violate that person's human rights unless, it can adequately explain why it was necessary to take the actions. Indeed, because of the inherent and non-derogable human right to life that all people enjoy, including terrorists, the State is absolutely prohibited from taking life in the arbitrary manner that targeted killings imply, even if it is protecting others, unless the threat to others' lives or the fundamental well-being is serious and imminent. In other words, the prohibition against 'arbitrary' killing prohibits any killing by State actors, which is not in self-defense to a direct attack or an immediate threat of attack or subsequent to a judicial process.\textsuperscript{95}

When a State undertakes a targeted killing outside the strict limitations imposed by international law, it may also violate the right to life if it does not adequately investigate the killing.\textsuperscript{96} Such an investigation must be public and impartial.\textsuperscript{97} Till date, most targeted killings have either not been investigated or any such investigation has not been made public. As the investigations have often been undertaken by the same branch of government that carried out the targeted killing, they are often not impartial. Both inadequate investigations and investigations which are not impartial create situations wherein the State may be violating a person's right to life.

From the above description of obligations concerning the right to life under international human rights law, it may be concluded that targeted killings are prima facie prohibited by international law as violations of the right to life. Whether they can still be justified will be considered in Part IV below. Finally, it is

\textsuperscript{94} Osman v. United Kingdom, 29 E.H.R.R. 245 (1998).

\textsuperscript{95} In cases where a State has undertaken to abolish the death penalty, for example, by signing or ratifying the Second Optional Protocol to the ICCPR, the death penalty is absolutely prohibited. See Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, U.N. G.A. Res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), entered into force 11 July 1991.


important to recognize that other human rights are relevant to targeted killings. Among these are the prohibition of inhumane treatment, the human rights to security of person and to a fair trial.

B. INTERNATIONAL HUMANITARIAN LAW

While international humanitarian law is often claimed to be applicable to targeted killings, substantiating this claim is more difficult than it might appear at first glance and the conclusion is not so evident when one carries out a legal examination of the law. To determine the relevance of international humanitarian law to targeted killings, the same four questions as asked about international human rights law are relevant, namely:

a. When does international humanitarian law apply?
b. How does international humanitarian law apply?
c. To whom does international humanitarian law apply?
d. What rules of international humanitarian law apply?

Each of these questions is addressed in the four subsections below. It should be noted that the fourth question is only relevant if in the specific circumstances the first three responses support the application of international humanitarian law to a situation of targeted killing.

1. WHEN DOES INTERNATIONAL HUMANITARIAN LAW APPLY?

The right to life under international human rights law applies at all times; in contrast, international humanitarian law applies only during an armed conflict with a few exceptions. Thus, a preliminary consideration for the application of international humanitarian law is, whether an 'armed conflict' exists in the situation in which a targeted killing takes place.

98 See, for example, supra note 48; art. 7, ICCPR, supra note 48; art. 3, ECHR, supra note 48; art. 5, ACHR supra note 50; art. 5 ACHPR. Also see generally the Convention against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (1987); the Inter-American Convention to Prevent and Punish Torture, O.A.S.T.S. No. 65 (1985), and the European Convention for the Prevention Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. No. 126 (1987).
99 See, for example, supra note 48 (art. 9, ICCPR, art. 5, ECHR, art. 7, ACHR), and, the ACHPR, supra, note 50, art. 6.
100 See, for example, supra note ; art. 14, ICCPR, art. 6, ECHR, art. 8, ACHR, and, supra, note , art. 7 ACHPR.
101 See, e.g., United States Department of Justice, White Paper: Memorandum on the Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa‘ida or an Associated Force, at 2 (Nov. 8, 2011) (claiming that the US is engaged in an armed conflict—the war against terrorism—everywhere in the world and that thus international humanitarian law applies to its targeted killings in this context).
102 The exceptions relate to the protection of the Red Cross and Red Crescent emblems in peacetime and some provisions relating to occupation, but are not of essential relevance to our analysis, so they are not considered here.
A layman’s definition of armed conflict might be that of Peter Wallensteen and Margreet Sollenberg, who define an armed conflict as “a contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a State, results in at least 25 battle-related deaths.”\textsuperscript{103} One of the first efforts at a definition under international law describes an armed conflict as “a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.”\textsuperscript{104} And one of the most elaborate efforts to define armed conflict identified only two agreed, but vague, criteria, namely, “the existence of organized armed groups” and that they are “engaged in fighting of some intensity.”\textsuperscript{105} Although the definition of an armed conflict is not universally agreed upon, as the International Law Association has suggested, what is agreed is “that whether or not armed conflict exists depends on the satisfaction of objective criteria.”\textsuperscript{106} It is therefore important to look more closely at what constitutes an armed conflict.

Several dimensions of an armed conflict are readily apparent.

First, the term ‘armed conflict’ is intentionally used to describe the situations to which humanitarian law applies because it is broader than the term ‘war’.\textsuperscript{107} As the International Law Association recognizes “in international law the term “war” no longer has the importance that it had in the pre-Charter period.”\textsuperscript{108} Indeed, even international humanitarian law normally uses the term “armed conflict” to describe the situation to which this law applies. The leading example being the four Geneva Conventions\textsuperscript{109} and their Protocol I, which uses the term ‘armed conflict’.\textsuperscript{110} Even Article 1(2) of Protocol II to the four Geneva Conventions extends the definition to situations where it applies\textsuperscript{111}

\begin{itemize}
  \item \textsuperscript{104} OPPENHEIM’S INTERNATIONAL LAW: A TREATISE 202 (H. LAUTERPACHT ed., Pt. II, 1952).
  \item \textsuperscript{106} Id. at 4.
  \item \textsuperscript{107} J. PICTET, COMMENTARY (IV) ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSON IN TIME OF WAR 20 (1958).
  \item \textsuperscript{108} Supra note 105, at 8.
  \item \textsuperscript{110} See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(3) June 8 1977, 1125 UNTS 3 (hereinafter Additional Protocol to the Geneva Conventions).
  \item \textsuperscript{111} See id. art. 1, extending the situation to which the Protocol applies to “all armed conflicts which are not covered by Article 1 of …” (Protocol I)... and which take place in the territory of a High
distinguishes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” Thus, there is a threshold of violence over which a situation must pass to be considered an armed conflict under international law.

Second, the definition of armed conflict often focuses on conflicts between States. This is not surprising considering that under international law the focus has traditionally been on the responsibility of States or bodies akin to States in armed conflicts or wars. Moreover, the principle of State sovereignty has guided and continues to guide, the creation and application of international law. Thus, under contemporary international law the focus continues to be on States, despite the extension to a limited number of other types of armed conflicts. Even in situations such as the United States’ proclaimed war on Al-Qaeda, it is unreasonable to acquaint the United States’ ability to control its armed forces or to do damage to mankind in general, with that of a group like Al-Qaeda.

Third, as Jean Pictet has recognized in his Commentary to the Red Cross Conventions, there are criteria for determining the existence of an armed conflict within the treaties themselves that have been agreed upon by States. Focusing on the case of insurgents, Pictet identifies the following criteria for determining the existence of an armed conflict:

(1) That the Party in revolt against the de jure Government possesses an organized military force; an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
(3) (a) that the de jure Government has recognized the insurgents as belligerents; or
(b) that it has claimed for itself the rights of a belligerent; or
(c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

112 Id.
113 See, e.g., GENTILI, A., DE JURE BELLII (1598); GROTIIUS, H., DE JURE BELLII AC PACIS (1625).
114 PICTET, J., COMMENTARY (III) ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF PRISONERS OF WAR 36 (1960).
(4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
(b) that the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory.
(c) that the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
(d) that the insurgent civil authority agrees to be bound by the provisions of the Convention.

While some of the above criteria point to an extended understanding of armed conflict—one that goes beyond intra-State conflicts to conflicts involving non-State entities—for purposes of the application of international humanitarian law to targeted killings, they all still require the involvement of at least one State party. This confirms that the targeted killings that are of primary concern to international law are those carried out by States.

Fourth, there appears to be an understanding among international bodies as to the criteria for determining if an armed conflict is taking place. Thus, while there is some ambiguity among writers, especially among American writers as to what constitutes an international armed conflict, international bodies have made this determination. The Appellate Chamber of the International Criminal Tribunal for the Former Yugoslavia, for example, has determined that an armed conflict as existing “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”

It went on to hold that “[i]t is indisputable that an armed conflict is international if it takes place between two or more States.” It further clarified that a State exercising overall control over an armed group to the extent of assisting in the planning of military activity may thereby involve itself in an international armed conflict. The Appellate Chamber, also held that whenever the threshold of an armed conflict is reached, the rule of international humanitarian law applies to all the territory under the jurisdiction of any party involved.

The International Court of Justice has made a determination of the existence of an armed conflict in the context of the right to exercise self-defense.

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115 See, e.g., Watkin, K., *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98(1) A.J.L.I. 1, 3-6 (2004) (discussing some of the various views with a basis towards the views of United States or allied writers).
118 *Id. at ¶131, 145.*
120 See Nicaragua Case, *supra* note 11, at 119-122, ¶229-236.
In this context, the Court was mainly concerned with whether certain acts constituted an armed attack that could give rise to the exercise of self-defense. The Court first distinguished between an armed attack and *prima facie* prohibited use of force, finding that the latter was committed by the United States when it placed mines in Nicaraguan waters and bombed Nicaraguan ports, oil installations and a naval base. The Court then turning to the justification of use of force by the United States held that “an intermittent flow of arms” to insurgents by Nicaragua and the isolated border incursion by Nicaragua into other States were not sufficient to be an armed attack. The Court also considered the timely characterization of events by the concerned States. The Court’s language suggests that perhaps States can characterize events as an armed attack by their representations, but this suggestion must be viewed with cautious deference to the fact that the Court was only considering evidence by affected States in support of established factual evidence.

International human rights bodies that have considered whether an armed attack exists, have come to mixed conclusions. The non-binding Inter-American Commission on Human Rights has also held that an armed conflict can be found to exist in a situation emanating from a prison riot. This case eventually made its way to the Inter-American Court that decided that the Commission could find the State liable for its violations of international human rights law, but not international humanitarian law. In making this decision the Court avoided the determination of whether or not an armed conflict existed. Importantly, it also clarified that irrespective of whether or not an armed conflict is taking place, international human rights law continues to be the principle law taken into account by the Court.

Recently the UN Human Rights Council’s independent international commission of inquiry on the Syrian Arab Republic has suggested that “the intensity and duration of the conflict [taking place in Syria during 2012], combined with the increased organizational capabilities of anti-Government armed groups, had met the legal threshold for a non-international armed conflict.” The

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121 Id. at 118, ¶227.
122 Id. at 119-120, ¶231.
123 Id. at 120-123, ¶232-237.
124 Id. at 118-123, ¶227-237. The Court states that it “is entitled to take account, in judging the asserted justification of the exercise of collective self-defence … the actual conduct of..., [States]... at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack....” Id. at 120, ¶232. It is also important to note that in the *Nicaragua Case* the Court was not making a determination of the existence of an armed conflict for purposes of applying *jus in bello*, but for the purpose of determining questions of *jus ad bellum*.
Commission of Inquiry, however, did not explain what the legal threshold for a non-international armed conflict was exactly. Moreover, the engagement of Western governments in supplying weapons and logistics to the rebels\textsuperscript{128} indicates that this conflict has become an international armed conflict.

Thus, in contrast to ordinary usage, international humanitarian law has had to develop an understanding of armed conflict that not only considers objective factors such as the level of violence or killing involved, but also the views of the participants in a targeted killing.

Moreover, the term ‘armed conflict’, in addition to the consideration of the definition indicated above, is understood in terms of two types of armed conflicts, namely international and non-international. A crucial question is, therefore, whether a situation in which targeted killings take place is an armed conflict and thereby entails the application of international humanitarian law to the State responsible for the targeted killing? Three situations might be envisioned: First, a situation when two States are at war with each other. Second, a situation in which a State and a non-State entity are involved in an armed conflict. And third, a situation in which there is no active armed conflict or a situation of peacetime.

In the first situation,—two States are at war with each other—an international armed conflict exists. The four Geneva Conventions, which are the leading instruments of international humanitarian law having each been ratified by 194 States, imply a broad definition of an armed conflict between States as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”\textsuperscript{129} The \textit{Commentary} to this article, which is common to all four Geneva Conventions, confirms this broad application stating, “[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.”\textsuperscript{130} States most certainly agreed just after World War II when they adopted the four Geneva Conventions, that an armed conflict involved only States.\textsuperscript{131} This view has been reiterated by the International Committee of the Red Cross,\textsuperscript{132} international tribunals,\textsuperscript{133} and by numerous writers.\textsuperscript{134}


\textsuperscript{129} Geneva Conventions, supra note 109, art. 2 (1), common to all four Geneva Conventions.

\textsuperscript{130} Pictet, J., supra note 107, at 32.

\textsuperscript{131} Id. at 18-21.

\textsuperscript{132} International Committee of the Red Cross (ICRC), \textit{How is the Term "Armed Conflict" Defined in International Humanitarian Law?}, Opinion Paper, 1 (March 17 2008).

\textsuperscript{133} Prosecutor v. Dusko Tadić, supra note 117.

\textsuperscript{134} See, e.g., GREEN, L.C., \textit{THE CONTEMPORARY LAW OF ARMED CONFLICT}, Ch. 3 (2000);
Determining whether an international armed conflict exists will be straightforward when two States declare their involvement in a war. For example, the armed attacks by a United States-led coalition on Iraq in 1991 and 2003 clearly involved two or more States who at least implicitly declared they were at war with each other. Similarly, it would appear that the United States' attack on Afghanistan in 2001 and the United States-led attack on Libya in 2011 were also international armed conflicts even if they were initially non-international armed conflicts. In an international armed conflict the fuller regime of international humanitarian law will apply.

In contrast to an international armed conflict involving only States, a non-international armed conflict involves non-State actors as at least one of the participants. In such conflicts generally, a more limited set of rules apply. This is due in part to the reluctance of States to allow any rules of international law to apply to affairs that are within the domestic jurisdiction of a State. Non-international armed conflicts, by their very nature are usually within a single State. The ICRC notes that non-international armed conflicts are “between governmental forces and non-governmental armed groups, or between such groups only.”135 It also notes that there are at least two distinct types of non-international armed conflicts and that the distinction is based in law.

The first type of non-international armed conflict is described by common Article 3 of the four Geneva Conventions.136 This Article states that it applies to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.”137 In such conflicts only the very sparse provisions of common Article 3 apply. These provisions provide protection from violence to life, hostage taking, attacks on personal dignity, fair trial, and the right to adequate medical care.138

The second type of non-international armed conflict is that described by Article 1 of the Second Protocol additional to the four Geneva Conventions.139 This definition of a non-international armed conflict is narrower than a definition in that it requires territorial control by the non-State actor and does not apply to conflicts that do not involve a State, according to the Appeals Chamber of the ICTY in the Tadic Case.140 This second form of non-international armed conflict requires that the armed conflict takes place between a State’s “armed forces and dissident armed forces.”141 The non-state actors must meet the requirements of


136 See Geneva Conventions, supra note 109, art. 3.
137 Id.
138 Id.
139 Additional Protocols to Geneva Convention supra note 110, at art. 1.
140 Prosecutor v. Dusko Tadić, supra note 133, at 4.
141 Geneva Conventions, supra note 109, at art. 1.
being “organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.” In such cases, the rules embodied in the Second Protocol additional to the four Geneva Conventions will apply. This Protocol has been ratified by 166 States.

Finally, when there is no active armed conflict, there is a situation of peace. In such a situation, international humanitarian law, with very few exceptions that are relevant to the consideration of targeted killings, will not apply.

2. How does international humanitarian law apply?

When an international armed conflict is found to exist, international humanitarian law will usually apply because the States concerned have ratified at least the four Geneva Conventions and/or other instruments of international humanitarian law or because customary international law is applicable. The legality of armed conflict and which State is at fault for initiating the armed conflict will not prevent the application of international humanitarian law. Indeed, the principles of pacta sunt servanda and pacta tevtiis nec nocent nec prosunt emphasize, as do the four Geneva Conventions, that States that have ratified a treaty are bound by it as a matter of international law. A targeted killing that takes place during an international armed conflict must not be contrary to the obligations of States under international humanitarian law.

Unlike international human rights law, international humanitarian law has developed certain accountability mechanisms. The International Committee of the Red Cross, a Swiss non-governmental organization, plays a role in encouraging respect for the law, but has no power to ensure accountability. There exists a Fact-Finding Commission created by Article 90 of the First Additional Protocol to the four Geneva Conventions to examine situations of international armed conflict to which international humanitarian law applies. This Commission, however, has never been called into action by the 72 States that recognize its competence.

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142 Id.
143 See ICRC website listing the ratifying State parties, available at http://www.icrc.org/. Although many important countries such as China, Russia, Brazil and South Africa, have ratified this treaty, the United States, which has used force more than all other countries combined in the last 100 years, remains unwilling to sign or ratify this treaty.
144 As almost every single State in the international community have ratified all four Geneva Conventions, the question of the application of customary international is largely academic. It gains more relevance, however, in the context of the some of the more specific protections provided by the first two protocols to the four Geneva Conventions, some of which are discussed below in this section.
145 Meaning that States that have agreed to international obligations in treaties are bound by them. See Vienna Convention on the Law of Treaties, art. 26, 1155 U.N.T.S. 331 (1980).
146 Id. at art. 34, Meaning that treaties generally do not create obligations for States that have not ratified them. Also see, SHAW M.N., INTERNATIONAL LAW 834 (2007).
147 See, e.g., Pictet, supra note 107, at 19-20.
Instead, the application of international humanitarian law depends very much on the conscience of States. Common Article 1 of all four Geneva Conventions obliges the States parties to “undertake to respect and to ensure respect for the present Convention in all circumstances.”

Issues concerning the relationship between international humanitarian law and international human rights law are dealt with in Part V below.

C. TO WHOM DOES INTERNATIONAL HUMANITARIAN LAW APPLY?

International humanitarian law applies first and foremost to States. However, it also, creates obligations for individuals and a corresponding responsibility for States to punish individuals who have violated some of the basic rules of international humanitarian law.

In non-international armed conflicts, those armed conflicts that are wholly within and involving only one State, there is a general rule of customary international law requiring that a distinction be made between combatants and civilians and a rule providing that civilians shall never be subject to attack. Common Article 3 of the four Geneva Conventions further provides protections to any “[p]ersons taking no active part in the hostilities,” including those who were combatants, but for any reason have ceased to be combatants because they no longer participate in hostilities.

A similar distinction exists in the international humanitarian law applicable to international armed conflicts. The Third Geneva Convention provides an often cited indirect definition of combatants by defining those who may be taken as prisoners of war. According to Article 4 of the Third Geneva Convention, combatants include members of a State's military or those with some special connection to a State's military or militias or volunteer corps and other organized forces under a command hierarchy, that distinguish themselves, carry their weapons openly, and abide by the basic laws of war. Other special cases of combatants include those persons who have a special status such as those who are

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148 Geneva Conventions, supra note 109, at art. 1.
149 For example, international criminal law treaties such as the Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (1998), provide for the punishment of individuals for violations of international humanitarian law or war crimes. See C.F.J. DOEBBLER, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2007).
150 For example, under international humanitarian law treaties such as article 146 of the Fourth Geneva Convention, supra note 109, States are obliged enact penal laws prohibiting the grave breaches in article 147 (that include wilful killing), to search for perpetrators, and to prosecute them or turn them over to another State that will prosecute them as well as to “take measures for the suppression of all acts contrary” to the Convention.
152 See e.g., F. KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 28-29 (1991).
154 Id.
levée en masse, i.e. those “who on the approach of the enemy spontaneously take up arms to resist the invading forces.”\textsuperscript{156} However, care must be taken when referring to Article 4 as it also includes persons who are clearly not combatants but who may be detained as prisoners of war, for example, persons who were former soldiers in an occupied States’ army.\textsuperscript{157} The distinction between combatants and civilians in international armed conflicts is clarified with the adoption of the First Additional Protocol (Protocol I) to the four Geneva Conventions, which in Article 50, paragraph 1, states that “[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2) (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol...”\textsuperscript{158} Even more importantly, Article 50 states that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”\textsuperscript{159}

Furthermore, the definition of who is a civilian under international humanitarian law is crucial, because the law regarding the protection of civilians from both targeted and even collateral killing is very strict. Under international humanitarian law, targeted killing is only lawful when the targeted person is a combatant.

Of course, civilians and civilian populations may become involved in an armed conflict. However, generally, it is prohibited to attack civilians or civilian populations.\textsuperscript{160} The ICJ called this rule one of the “cardinal principles contained in the texts constituting the fabric of humanitarian law.”\textsuperscript{161} The only exception to the immunity of civilians is when civilians participate in active hostilities in an armed conflict. They will then lose their immunity from attack “unless and for such time” as they take a direct part in hostilities.\textsuperscript{162} The Geneva Conventions do not recognize other categories of persons who do not enjoy any protections under international humanitarian law,\textsuperscript{163} but civilians are not among them.

Not considered in this contribution is the application of international humanitarian law to individuals through the mechanisms of international criminal law. Suffice it to say that individuals can and have been held responsible for

\textsuperscript{156} Third Geneva Convention, supra note 109 at art. 4(A)(6).
\textsuperscript{157} Third Geneva Convention, supra note at art. 4(B)(1). \textit{Also see}, art. 33 (for the special situation of religious and medical personnel).
\textsuperscript{158} Additional Protocol to Geneva Conventions, supra note 110.
\textsuperscript{159} Id.
\textsuperscript{160} The prohibition of attacking civilians is found in Additional Protocol to Geneva Convention, supra note 110 at art. 48, 51(2) & 52(2), and Protocol II, supra note 110, art. 13(2), It was considered the first rule of customary international humanitarian law in the ICRC’s seminal study on this law. \textit{See} HENCKAERTS, J-M \& DOSWALD-BECK, L., \textit{CUSTOMARY INTERNATIONAL LAW 1-24} (Vol. I, 2005).
\textsuperscript{161} Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, supra note , at 257, ¶78.
\textsuperscript{162} See, Additional Protocol to Geneva Conventions, supra note 110 at art. 51(3).
\textsuperscript{163} Exceptional special categories include spies, \textit{see}, \textit{e.g.}, Hague Regulations annexed to the Convention (No. IV) Respecting the Laws and Customs of War on Land, art. 29-31, 36 \textit{Stat.}, 2277, 1 \textit{Bevans} 631 (Oct. 18 1907), \& Fourth Geneva Convention, supra note 109, at art. 5, 68.
violations of international humanitarian law by *ad hoc* tribunals created to deal with certain problems and by the International Criminal Court that has the potential ability to hold any individual responsible for violations of international humanitarian law.

4. **What rules of international humanitarian law apply?**

There may be numerous rights that are provided under international humanitarian law that are relevant in situations of targeted killings. Among these may be the obligation not to attack civilians and facilities that are necessary to civilians or extremely dangerous to them, the need to take precautions in an attack, the right to a fair trial, and the right to life or the prohibition of the willful killing of persons who are not combatants or who are protected persons. All of these restrictions on State action in an armed conflict, are part of customary international law today. The focus below will be on attacks against civilians and the precaution that must be taken when attacks against combatants take place.

The four Geneva Conventions, and their Protocol I, absolutely forbid the willful killing of non-combatants, which is anyone who is not actively engaged in combat activities. This includes civilians, injured combatants, or prisoners of war.

The prohibition of targeted killings of non-combatants can be traced back to the prohibition of assassinations - the Lieber Instructions drafted for the American civil war in 1863. These instructions state in Article 148, which is the sole article in Section IX entitled 'Assassinations', that

> [t]he law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. **Civilized nations look with horror upon offers of reward for the assassination of enemies as relapses into barbarism.**

Today, the prohibition of willfully killing a person who is not an active combatant can very likely be considered customary international law. The general proposition—that neither non-combatants nor combatants may be arbitrarily

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165 Additional Protocol to Geneva Conventions, supra note 110 at art. 11 & 85.
167 Id. at art. 148.
killed—has several times been reiterated in modern international instruments. Article 6(b) and (c) of the Charter of the Nuremberg Tribunal reiterated that murder constitutes both a war crime and a crime against humanity.\textsuperscript{168} The prohibition of willful killing of non-combatants is a grave breach of all the four Geneva Conventions.\textsuperscript{169} As a principle of customary international law, this prohibition applies not only to States that are parties to relevant treaties, but to all States.

Article 51 of Protocol I, for example, obliges military forces to refrain from direct attacks on civilians stating unambiguously that “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations...”\textsuperscript{170} and that the “civilian population as such, as well as individual civilians, shall not be the object of attack.”\textsuperscript{171} Paragraph 3 of Article 51 makes it clear that “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take direct part in hostilities.”\textsuperscript{172} In their Commentary on Protocol I, Yves Sandoz, Christopher Swinarski and Bruno Zimmermann conclude that “Article 51 est l’un des plus important du Protocole.”\textsuperscript{173}

Moreover, any attack must be absolutely necessary to a legitimate military end and the force used against them must be proportionate to any anticipated military advantage. Attacks that constitute reprisals for past behavior that are directed against civilians, are absolutely prohibited. Article 23 (b) and (c) of the Hague Regulations also prohibits the treacherous killing or wounding of individuals who are part of an enemy’s army or belonging to a hostile nation.\textsuperscript{174}

While combatants may kill each other during an armed conflict this 'license to kill' ends as soon as the battle ends. The killings of wounded, captured soldiers or soldiers who are otherwise prevented or unable to take part in combat is also prohibited.

Again, like the right of life under international human rights law, the prohibition of willful killings or murder is only one of the various rights of an individual that are protected under international humanitarian law. Other rights that are interfered with by targeted killings include the grave breaches of inhumane

\textsuperscript{170} Additional Protocol to the Geneva Conventions \textit{supra} note 110, at art. 51(2).
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.} at art. 51(3).
\textsuperscript{173} \textsc{Sandoz Y. et al.}, \textit{Commentaire des Protocoles additionnels du 8 juin 1977 aux conventions de Genève du 12 août 1949 629} (1986). Translated to English by author: “Article 51 is one of the most important of the Protocol.”
\textsuperscript{174} \textit{Supra} note 163.
treatment; willfully causing great suffering or injury to body or health; and willfully depriving a protected person of a fair or regular trial.\textsuperscript{175}

International humanitarian law provides significant fair trial protections to persons who are under the control of the enemy. Targeted killings are attempts to ignore these protections in cases where capture or detention is often possible, but has not been tried.

Being neither allowed nor obliged to take action that could include targeted killings, States will only be able to justify their actions as consistent with their obligations under international human rights law if they have a legal justification. The relevant possible justifications are considered below.

\section{V. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND HUMANITARIAN LAW}

The fact that international human rights law and international humanitarian law may apply to situations of targeted killings, does not adequately explain the relationship between these two fields of law. It is essential to understand how the two fields of law relate to each other. There are at least three possible relationships relating to the application of these fields of law that require closer consideration.\textsuperscript{176} These are:

i) International humanitarian law applies to the exclusion of international human rights law in situations amounting to armed conflicts thus the right to life is interpreted only in accordance with international humanitarian law;

ii) Both international humanitarian law and international human rights law apply concurrently, but international human rights law must be interpreted in light of the provisions of international humanitarian law to restrict the application of the right to life; or

iii) International humanitarian law applies side by side with international human rights law each providing separate protections and providing the individual the cumulative protection of both corpora of law.

Each of these three options is briefly considered below in respect of the right to life that is protected under both corpora of international law.

\section{A. THE RIGHT TO LIFE IS INTERPRETED ONLY IN ACCORDANCE WITH INTERNATIONAL HUMANITARIAN LAW}

The International Court of Justice's decision in its \textit{Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons} is sometimes cited in support of the

\textsuperscript{175} See, e.g., Fourth Geneva Convention, supra note 109 at art. 147.

\textsuperscript{176} See Legal Consequences of the Construction of a wall in the Occupied Territory, supra note , at 178, ¶106, using a similar list of three possibilities, namely, “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.
application of international humanitarian law to the exclusion of international human rights law.  

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.  

According to supporters of this 'exclusive interpretation', the important word is “only” and the important quality of international humanitarian law is its "lex specialis" character. It is claimed that these terms or phrases imply that only international humanitarian law applies. It is a view popular among military writers. Ian Henderson, for example, while admitting that international human rights law may be relevant to situations of targeting, even in an armed conflict, goes on to mainly discuss international humanitarian law. Professor William Schabas has described this argument as “convenient and relatively straightforward,” but he also points out “that it results in a level of tolerance of serious violations of human rights, including killings of civilian non-combatants.”  

However, to claim international humanitarian law to the exclusion of international human rights law, would not appear to be consistent with some of the most basic principles of international law, many of which the defenders of targeted killings cited as justification. For example, respect for the principle of State sovereignty means that all States are entitled to enter into international agreements. To claim that international humanitarian law prevents the application of international human rights law would seem to impose a limitation on the sovereign right of a State to undertake certain legal obligations, which while not incompatible with each other, would otherwise apply cumulatively. Moreover, the treaty principle of pacta sunt servanda and the general principle of respect for the rule of international law, strongly dictate against an understanding of the law whereby a treaty obligation or an obligation under customary international law would

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177 See Paust, J.J., Beyond the Law: The Bush Administration’s Unlawful Responses in the “War” on Terror 34-35 (2007) claiming this to be the case and citing numerous other writers, although he does not take this view himself.

178 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, supra note 240, ¶26.


disappear merely because a weaker or more limited obligation was undertaken. Not only would this contribute significantly to legal uncertainty, but also it could very likely undermine the very nature of the 'binding' character of international law.

It might be concluded that the exclusive application of international humanitarian law to the exclusion of international human rights law, would be much more problematic and much less attractive to any entity seeking to protect individuals' basic rights, than would be the concurrent application of both these types of law.

B. INTERNATIONAL HUMAN RIGHTS LAW MUST BE INTERPRETED IN LIGHT OF THE PROVISIONS OF INTERNATIONAL HUMANITARIAN LAW

In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court makes this statement immediately after it has stated unambiguously that international human rights law continues to apply in an armed conflict. The Court's interpretation, if understood broadly, could effectively exclude the interpretation of international human rights law in situations of armed conflict—being contrary to the basic premise of the international human rights law that the Court itself applies. Judge Weeramantry makes this argument eloquently in his Dissenting Opinion focusing on the particularities of nuclear weapons. To claim this law applies and that one of its most basic provisions is effectively excluded or very much limited in application would appear inconsistent. Second, the Court's statement applies to its application of Article 6 of International Covenant on Civil and Political Rights, a provision that expressly prohibits the “arbitrary” taking of life. As we have seen above, other provisions of international human rights law do not contain broad modifiers but prohibit all takings of life unless there is a specific justification. Third, international human rights bodies have interpreted the right to life to create for States “the supreme duty to prevent wars, acts of genocide, and other acts of mass violence causing arbitrary loss of life,” continuing by instructing States that “every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.” And fourth, to allow a country to initiate the use of force by undertaking a targeted killing as anticipatory self-defense, as it has been justified, would be to allow a State to start an armed conflict so as to lower the burden of its responsibilities. Such efforts by States have been resoundingly

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182 Supra note 4, at 593.
183 Schabas, supra note 181, at 593.
184 See, supra note 4, at 506-508.
185 See infra Part IV.
186 U.N.H.R.C., General Comment 6 (1982), supra, note 76.
rejected under international human rights law, even in cases where international humanitarian law has been used to interpret international human rights law.  

C. INTERNATIONAL HUMANITARIAN LAW APPLIES SIDE BY SIDE WITH INTERNATIONAL HUMAN RIGHTS LAW

The UN Human Rights Committee has taken the position that international humanitarian law applies side by side with international human rights law, each providing separate protections and providing the individual the cumulative protection of both corpora of law. It has stated,

[that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including Article 4 which covers situations of public emergency that threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under Article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.]

This parallel application is expressly recognized in the preamble of the Second Protocol to the four Geneva Conventions that recalls that “international instruments relating to human rights offer a basic protection to the human person” in wartime as well as in peacetime. This savings clause, known as the Martens Clause, is found in the leading treaties of international humanitarian law. It ensures the protections of human rights law, especially the right to life, whenever such protection goes further than what is provided by international humanitarian law itself.

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188 See, e.g., Las Palmas Case (Preliminary Objections), Inter-American Court on Human Rights (Feb. 4 2000). Also see U.N.H.R.C., General Comment 6 (1982), supra note 76.


190 Protocol (II), supra note 110.

It is important to note that although international humanitarian law applies side by side with international human rights law, it may be that there is no forum with the jurisdiction to interpret and implement international humanitarian law, while it may be possible to apply international human rights law. The *Las Palmaras Case* before the Inter-American Court on Human Rights is an example of a case in which a human rights body recognized that while international humanitarian law may be relevant, the Court only has a mandate to apply international human rights law.\(^{192}\)

According to this option, international humanitarian law applies during wartime to prohibit the targeted killing of civilians. The principle of distinction is essential to this protection as is the definition of a combatant. Civilians are in fact defined by the latter definition. In other words, whoever is not a combatant, is a civilian. Equally important to note is that although international humanitarian law may be relevant to the interpretation of international human rights law, this will not be the case when the party is seeking to justify a use of force. Although international humanitarian law will apply even when the use of force is illegal, the lower threshold of responsibility that is often inherent in international human rights law will also continue to apply for the parallel application of that law. Thus States are obliged to provide the greatest protection that either international human rights law or international humanitarian law provides. An interpretation of the law that allows a State to only apply international humanitarian law, would have the perverse consequence of encouraging a State seeking to use force in violation of individuals’ human rights to create the inhumane situation of armed conflict. As Anicée van England reminds us, the “role of international humanitarian law is to regulate the conduct of conflict and to protect civilians and hors de combat, not to facilitate war.”\(^{193}\) And as the Inter-American Court of Human Rights has unambiguously stated, human rights treaties must be “interpreted in favor of the individual, who is the object of international protection, as long as such an interpretation does not result in a modification of the system.”\(^{194}\)

It may thus be concluded from this brief consideration of this option, that while international humanitarian law may be used to interpret international human rights law, as the International Court of Justice suggests, this does not mean that the right to life in international human rights law is restricted. International humanitarian law, must instead fill-in ambiguities and it cannot not replace clear treaty obligations under the guise of effecting the interpretation of the law. International humanitarian law can only add to the protection provided by international human rights law. Any other interpretation results in using the two

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\(^{192}\) See, e.g., *Las Palmeras Case*, *supra* note 126.


special corpora of international law to undermine their common purpose: the protection of individuals from the inhumane acts of other individuals. Thus, although the right to life under international human rights law applies during an armed conflict, as indicated above, there is a parallel application of international humanitarian law applying only in armed conflicts, which adds to the protection of individuals during these times of the greatest inhumanity.

VI. JUSTIFICATIONS FOR AN INTERNATIONALLY WRONGFUL ACT

From the above discussion of international human rights and humanitarian law it would appear that targeted killings prima facie interfere with the right to life under both sources of law. In such circumstances a State will have committed an internationally wrongful act for which it is responsible. Nevertheless, despite the fact that the basic requirements of State responsibility have been met; it might be possible for a State to proffer a justification for its action. The International Law Commission's Draft Articles on State responsibility reflect several justifications that have been recognized under customary international law and are often found in treaties. As justifications for an internationally wrongful act, they are exceptions; and thus must be interpreted restrictively so as not to interfere with the rights of the victims.

A. SELF-DEFENSE AND COMBATING TERRORISM

Perhaps the most common reason given for targeted killings is self-defense. Indeed, the right to self-defense is recognized as a justification for an otherwise wrongful act not only in the ILC Draft Articles, but also in the Charter of the United Nations.

The United States, the United Kingdom, and Israel all claim that their targeted killings are done in the name of combating terrorism. This is problematic for several reasons.

195 ILC Draft Articles, supra note , at art. 21.
196 U.N. Charter art. 51.
199 See, e.g., Amnesty Int’l, Israel and the Occupied Territories: State assassinations and other unlawful killings, 1, AI Index No. MDE 15/005/2001 (Feb 21, 2001) quoting Israel's Deputy Defence Minister Ephraim Sneh as stating that Israel “will continue … [its]... policy of liquidating those who plane or
First, even when one is a confirmed terrorist, it is not lawful to arbitrarily and summarily kill them. Israel’s killing of a blind, wheelchair-bound cleric was justified on these grounds, but its irrationality is proven by the fact that Sheik Ahmed Yassin had been arrested by Israel several times before he was killed. In other words, there were other less onerous and, in the case of the illegally occupied Palestinian Territories, less, illegal forms of action. In fact the killing was condemned as an “extra-judicial killing,” thus illegal by the European Union. The United Nations Secretary-General, the UN Under-Secretary-General and High Commissioner for Human Rights, and the UN Special Rapporteur on extrajudicial, summary, and arbitrary executions also condemned the targeted killing. Eleven States in the UN Security Council voted to condemn the killing as illegal, but they were blocked by the single dissenting vote of the veto wielding United States.

Second, the definition of who is a terrorist varies greatly as do the definitions of what acts constitute terrorism. The references to acts that terrorize in humanitarian law generally apply to State terrorism more than individual terrorism. When States have tried to outlaw individual acts of terrorism, they have usually instead ended up outlawing acts that are already prohibited by specific treaties. On the other hand, United States law makes a person seeking to protect animals a terrorist if her or his actions interfere with the rights, including the mere commercial rights, of others. Most writers who have tried to define these terms have conceded defeat. For example, Robert Friedlander’s effort to define these terms for the prestigious Encyclopedia of Public International Law concludes that terrorism “exists in the mind of the beholder, depending on one’s political views, and national origins.” Sometimes writers just ignore the question of defining who is a terrorist altogether, preferring merely to use the vague term as an

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201 See, e.g., Fourth Geneva Convention, supra note 109, at art. 33. Also see Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Parliamentary Papers, Cmd. 2201, Misc. No. 14, pp. 15-16, art. 22 (1924), (although never adopted by States so as to become legally binding) referred to in LAUTERPACHT, H., OPPENHEIM’S INTERNATIONAL LAW, supra note 104 at 519, as a reflecting customary international law.
emotional rallying cry to achieve their own ends of putting human beings beyond the protection of the law.\textsuperscript{205}

Third, discovering a State's intention may be extremely difficult and unreliable as States have extraordinary means of creating the impression of whatever intention they wish. Because international law depends on States actions and \textit{opinio juris}, most States are careful to justify their action on the basis of an existing principle of international law. The usual justification of the United States is self-defense.\textsuperscript{206} The basis of this defense depends on whether or not another State has attacked the United States or whether an imminent attack can be expected.

And finally, governments make mistakes based on their own erroneous information—or perhaps based on the malicious intentions of State actors—and target and kill people who are innocent.\textsuperscript{207} Determining whether a government has made a mistake, and if so, why and how, is often extremely difficult. Governments do not regularly open themselves to scrutiny in such situations, especially when alleged terrorists are involved. A striking example is the United Kingdom's targeted killing of Jean Charles de Menezes in cold blood in a London Underground Station. The United Kingdom police had suspected him of being a terrorist, but as it turned out to he was completely innocent of any wrongdoing.\textsuperscript{208} Despite an inquiry that cleared Mr. Menezes of any wrongdoing, the UK government, upheld by its courts, refused to prosecute any of the policemen involved for the wrongful killing.

As suggested in this Part, the designation of a person as a terrorist is an extremely flawed concept. Nevertheless, it is this concept that drives the actions of States that carry out targeted killings. At the same time it is a concept that has little to do with the law. Nowhere in international law is a terrorist defined.

\textsuperscript{205} See, e.g., Kellogg D. E., \textit{International Law and Terrorism}, MIL. L. REV. 50 (2005) which argues that international law can be used as weapon to allow the “civilized nations” to kill terrorists without ever defining who is a terrorist.


\textsuperscript{208} See MELZER, supra note , at 442-443, with a description of this case.
B. Necessity

It is also sometimes argued that targeted killings are necessary. This argument usually does not rely on the legal understanding of necessity. This is evident because a legal understanding of necessity would require not only that a government carrying out a targeted killing had no other alternative to protect a vital national interest, but also was not interfering with a vital national interest of another country. Furthermore, well-established principles of international law preclude a State from relying upon actions that prima facie violate international law, especially when it has contributed to creating the situation to which it is reacting. The International Law Commission, in a statement that reflects customary international, makes this clear in Article 25 of its Draft Articles on State Responsibility that explains that:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
   (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   (a) the international obligation in question excludes the possibility of invoking necessity; or
   (b) the State has contributed to the situation of necessity.

Applying these well-established principles of international law it is hard to see how targeted killings could ever be tolerated as they would fall foul of one or more of the above conditions. To satisfy these conditions, a State carrying out a targeted killing must show that it has adequately evaluated alternatives. This means that the burden rests upon the State carrying out the targeted killing, to provide a detailed description of its procedure for determining necessity, and to allow this procedure to be examined by an impartial and independent body operating in a transparent manner. Such a State could not hide behind concerns of national security as its actions are prima facie in violation of one or more individuals' rights.

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209 Also see Case Concerning Gabčíkovo-Nagymaros Project (Hung. v. Slovak), 1997 I.C.J. 7, 40 (Sept. 25) for a consideration of the exceptional nature of necessity, and M/V Saïga (No. 2) (St. Vincent v. Guinea), Case No. 2, Order of July 1, 1999, 120 ITLOS Rep. 143, 191-2 highlighting the requirement that an essential interest of the State must be in grave and imminent danger for necessity to apply.

210 In this regards it is relevant to remember that United States trained Osama Bin Laden to commit acts such as the one for which they later killed him. The United States and the United Kingdom creates the situations of violence in Afghanistan and Iraq by an illegal use of force to which they are now reacting with targeted killings. And Israel maintains an illegal occupation of Palestine, which it claims makes targeted killings of Palestinians necessary.
to life as well as another State's solemn international obligation to protect this right. The State thus, seeking to justify its action must carry the burden of proof. Even more difficult will be the burden of proving that the essential interest of another State or States' is not seriously impaired. Although the modifier 'seriously' might allow some room for maneuvering, it is a heavy burden to overcome.

For this reason, the authors who support targeted killing use a political understanding of necessity. They interpret it as allowing action when the law, in their view is inadequate or when the law merely does not cover the allegedly sui generis situations of terrorism or asymmetrical warfare. Either effort to deny the existence, or emphasize the inadequacy, of international law is troubling.

Although no law can cover every conceivable situation, there is very possibly no other situation than the protection of human life, where international law has been constructed to give as broad protection as possible. This in effect has been recognized by authors who correctly note that both human rights and humanitarian law apply to persons involved in an armed conflict. Both these corpora of laws are intended to protect human life; however inadequate they may be for this purpose.

VII. CONCLUSIONS

Much has written about targeted killings, but no writer has been convincingly able to justify targeted killing as consistent with international law. Instead they suggest that the law is not yet adequate, that the killings are politically justified, or that their own confused assessment of unclear law makes targeted killings acceptable. Instead, as indicated above, there is in fact sufficient evidence that most targeted killings violate international law. Still a small minority of States continue to carry out target killings as part of their foreign relations.

Since 2011, the United States alone has killed more people by targeted killings in Pakistan alone, then were killed by the combined acts of violence in New York and Washington, D.C. in September 2001. Almost all of the people whom the United States killed, must be assumed to have been innocent as hardly any of them had been convicted by a court of law. Moreover, the State's killing of thousands of people without any judicial process is an even more serious act than any criminal or terrorist attack, because the State is supposed to safeguard the rule

\[\text{211} \quad \text{Schöndorf R.S., Extra-State Armed Conflict: Is there a need for a new legal regime?, 42 N.Y. Univ. J.I.L. 
& Pol. 697, 698 (2004).}\]

\[\text{212} \quad \text{Id. at 697, ff. 5.}\]

\[\text{213} \quad \text{U.N.H.R.C. General Comment No. 6, supra note 76 where the right has been called the}
\quad \text{"supreme right," and Center for Housing Rights and Evictions v. The Sudan, Comm. No. 279/03 and}
\quad 296/05, ACHPR ¶146 (2009), stating that the right to life \text{"is basic to all human rights and}
\quad \text{without it all other rights have no meaning."}\]

\[\text{214} \quad \text{See, e.g., Schabas W., supra note 179, at 237.}\]

\[\text{215} \quad \text{See US Senator says 4700 killed in drone strikes, 21 February 2013, available at:}
\quad \text{http://www.aljazeera.com (quoting the estimate of US Senator Lindsey Graham).}\]
of law. A State that carries out targeted killing betrays the trust that comes with sovereignty and sets a bad example that may be followed by many more people compared to the acts of a private criminal.

Since the State is the guardian of the rule of law, when it carries out a targeted killing, the burden of proof lies upon the State to show that its action was justified. Legally this justified because a targeted killing is a willful act of killing, a prima facie grave breach of both international human rights law and international humanitarian law protecting the right to life. A State may further be responsible for violating the right to life if it fails to adequately investigate a targeted killing. Similarly, the failure to search for, investigate, prosecute, and, if convicted, adequately punish any person involved in a targeted killing are all acts that give rise to State responsibility for an internationally wrong act in addition to the responsibility for the actual killing.

The United Nations’ Human Rights Council has investigated whether targeted killings are consistent with international law. Three separate UN Special Rapporteurs between 2010 and 2013 have found that in general, targeted killings violated international human rights law.216 In 2013, Amnesty International and Human Rights Watch also produced reports on targeted killings in Pakistan and Yemen, which arrived at a similar conclusion, although admitting that they did not have enough information to make definitive determinations because the US has withheld needed details about its targeted killings.217 Although, these investigations come too late to save the lives of hundreds of victims of targeted killings, they can still contribute to upholding the integrity of international law. For this to happen, those in positions of responsibility must apply international law leaving behind the inevitable bias they have acquired in an international community where violence is increasingly perpetuated by government actors in the alleged name of upholding international law or in the name of necessarily preserving national security.

Applying international law to most instances of targeted killings, it is likely to lead to the conclusion that these killings are internationally wrongful acts attributable to the State that undertakes them and contrary to its international obligations. The State will thus be responsible for an internationally wrongful act and the consequences under international law. There may be exceptional circumstances that justify a targeted killing, but such justifications must be interpreted in a very restrictive manner, as exceptions to the general rules of international law. Together the collage of international human rights and humanitarian law form a seamless web of protection for individuals’ right to life that allows only enumerated exceptions. Any decision to target an individual to be killed must come within these exceptions, if that is possible.

216 See supra note 83.
Even when a targeted killing is justified, it does not mean that the rules of international law can be ignored. In other words, even when a targeted killing is justified, it must be conducted in accordance with international law. For example, when situations arise during armed conflict, the rules of international humanitarian law will apply. Thus, when a combatant has been identified as a target to be killed, the manner in which the attack on the combatant takes place must still comply with rules prohibiting certain weapons and with the requirement that the attacker bears the burden of proving that there was no alternative to the killing.

In peacetime, it will be quite different. It is quite unusual, if not impossible, that a targeted killing can be carried out during peacetime. The State will have a much higher burden of proving that it had no other means of apprehending a person who is a threat to others. It is most unlikely that this can ever be done in a situation where the contemplative planning of a killing takes place. Thus, even designating a person to be killed in peacetime will most certainly be a prime facie violation of the right to life.

Also, it must not be forgotten that targeted killings also have the consequence of justifying the person being targeted having the right to kill his or her attacker or attackers. The application of the rule of international law to targeted killings requires that those who are targeted, whether combatants or common criminals, have the same right of self-defense—the right to kill their attacker or potential attacker. The right to kill a potential attacker could be permissible even from thousands of kilometers away. Moreover, the person exercising self-defense against a potential attacker might have a lesser burden of restraint under international law because he or she may have less capacity to take precautions. It does not take too much creativity to understand how such a situation might spiral in an even graver threat to the security of a State than the targeted killing might ensure.

Similarly, even a successful targeted killing might cause more human carnage than it was intended to prevent. The US aggression against the people of Iraq and Afghanistan was aimed at killing Osama Bin Laden. However, it ended up killing an estimated three million Iraqis and Afghans, not to mention more that four thousand American soldiers lost their lives as well. The number of Americans killed in the September 2011 attacks pales in comparison to the huge number of Iraqis and Afghans killed in response. It is also very likely that the number of people killed in just these two instances is much higher than the number of deaths they could have conceivably prevented. It is even likely that the attacks will cause many more deaths than they prevent even a decade after they began due to the situation of animosity they created and the spiral of violence they perpetuated.