

TARGETED KILLING UNDER INTERNATIONAL HUMANITARIAN LAW

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Summary. The present article analyses the phenomenon of targeted killing. This controversial practice is widespread and has most notoriously been applied by Israel, the USA and Russia. However, the limited scope allows only to focus on the problems of targeted killing under international humanitarian law (law of armed conflict) even though targeted killing can be analysed under various legal regimes, including international human rights law, the right of self-defence under Article 51 of the UN Charter.

For the purpose of the article, targeted killing is defined as 'the premeditated killing of a specific target (person(s)) suspected of terrorism, with explicit or implicit governmental approval.' The advantage of using the term 'targeted killing' is that it is free from pre-conceived issues of legality, in contrast to such notions as 'extrajudicial execution' or 'assassination'. The starting point is that when committed in the course of an armed conflict a legal analysis of targeted killing shall be based on all applicable rules of international humanitarian law. In that respect the principle of distinction between civilians and combatants remains of the utmost importance, in particular the notion of a civilian taking direct part in hostilities. Furthermore there is no necessity to introduce or to elaborate any new specific rules regarding targeted killing. On the one hand, targeted killing during armed conflict is covered by already existing rules of international humanitarian law. On the other hand, easing down the regime by inventing new rules for targeted killing might not serve the role of law. This would merely exacerbate the discussion on what targeted killing is and what it is not. Disagreement among legal scholars and practitioners, as well as the famous decision of the Israeli Supreme Court in 2006 shows that no general answers can be given and every case of targeted killing should be assessed according to all particular circumstances in each different situation.

Keywords: targeted killing, international humanitarian law, law on armed conflict, terrorism, combatant, civilian.

INTRODUCTION

The aim of the present article is to analyse the phenomenon of targeted killing. However, the limited scope of the article at hand allows only to focus on the problems of targeted killing under international humanitarian law (law of armed conflict) even though targeted killing can be ana-

lysed under various legal regimes, including international human rights law, the right of self-defence under article 51 UN Charter.

The object of the research are international legal sources, including treaties, jurisprudence of international and national courts and tribunals, writings of scholars that regulate or analyse targeted killing and related practices.

Methods of the research: analysis of the legal sources, systematic analysis, comparative analysis, theological analysis, historical analysis.

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1. TARGETED KILLING IN PRACTICE

Various means of eliminating persons designated as terrorists have been employed by states long before George W. Bush famously declared the 'war on terror'. One such measure is referred to as targeted killing. This controversial practice is widespread and has most notoriously been applied by Israel, the USA and Russia.

Israel openly pursues a policy of targeted killing against suspected terrorist organizations and their members in Judea, Samaria and the Gaza Strip, where at least ever since the first intifada a continuous situation of armed conflict has existed. In a recent example, in January 2008, Israeli Defense Forces (IDF) in a joint cooperation with Shin Bet (Israel Security Agency) tracked down and killed Walid Obeidi, the Islamic Jihad's top military commander in the West Bank. He was killed in clashes with soldiers from the elite undercover Duvdevan Unit, who raided a home where he was hiding in the village of Kabatiya, near Jenin [1].

Another notorious example of this practice took place on November 9, 2000. At around 11:00 a.m. alleged Fatah/Tanzim activist, Hussein Abayat drove his vehicle on one of the crowded streets of his village, in Area A in the West Bank, when a helicopter of the IDF fired three laser-guided missiles at him, killing him and wounding his deputy [2]. Two women, waiting for a taxi in that neighbourhood, also perished. The use of an IDF Apache helicopter did not allow deniability, resulting in the Israeli claiming responsibility for this and other such killings. In that respect, about the Abayat case, an IDF spokesman stated that 'the action this morning is a long-term activity undertaken by the Israeli Security Forces, targeted at groups responsible for the escalation of violence' [3]. As such, it was publicly admitted that these actions occurred under governmental order. Furthermore, it can be derived from the quotation that targeted killing is the reflection of a deliberate state policy [4, p. 239]. The Israeli human rights organisation B'Tselem, contents that since the outbreak of the Al-aqsa intifada, out of the 3,944 Palestinians killed in the Occupied Territories at least 210 were the object of such an attack [5].

The USA also relies on the method of targeted killing in its struggle with the international terrorist organisation, infamous under the name al-Qaeda. On November 3, 2002, a car travelling through the Governorate of Ma'rab, a remote part of the Yemeni desert was utterly obliterated after it was struck by a missile launched from a Predator drone [6, p. 277-278]. Six people in the vehicle, all suspected members of al-Qaeda were killed. Amongst them Abu Ali al-Harithi, who is said to have played a pivotal role in the terrorist assault on the warship USS Cole off Aden killing 17 sailors in October 2000 [7]. Notwithstanding the US did not publicly acknowledge responsibility for the strike, certain US officials have made it perfectly clear that the attack, eventually labelled 'a very successful tactical operation', was carried out by the Central Intelligence Agency and not by the US Armed forces [8].

How many comparable attacks, whether successful or

not, have been conducted since the one in Yemen, and in which countries, is ill documented because of the secrecy involved. However, it has been asserted by several US officials that at least 19 such attacks have occurred [9]. Another example is the attempt on the life of Ayman Al-Zawahiri on January 13, 2006. US ranked him on top of their list of 'the most wanted terrorists' [10]. Intelligence concerning his latest whereabouts pointed in the direction of Damadola, a small village, located in Pakistan. In the subsequent attack, three missiles, supposedly launched again from a drone, destroyed the village, and reportedly 18 innocent people found a sudden death, including four children and at least two women. The technology guiding the missiles might have been faultless, however the evidence gathered by the CIA appeared not to be watertight, since amongst the remnants of the corpses there was no sign at all of the wanted al-Qaeda activist.

Russia is allegedly targeting and killing individuals suspected of terrorist attacks on its territory, which the Kremlin has said, relate to the on-going armed conflict in Chechnya. On February 13, 2004, an explosion stirring up the Qatari capital Doha caused by a car bomb, ripped apart the vehicle of the former Chechen rebel leader Zelimkhan Yandarbiyev, killing him and badly injuring his young son [11]. Within only a few months, a Qatari court accused Russia of being behind this killing. Allegations which were predicated on the apprehension of three members of the Russian Federal Security Service (FSB) in the emirate's capital, shortly after the detonation, and more profoundly on the longstanding history of difficulties and armed confrontations between Russia and Chechnya [12].

On July 10, 2006 another Chechen rebel and alleged terrorist Shamil Basayev found a sudden death, when the fortified truck carrying him across the border with Chechnya was destroyed completely in an explosion. The involvement of the Russian FSB, was almost immediately acknowledged by its director Nikolai Patrushev, stating that the operation had disrupted plans for terrorist attacks in southern Russia, intended to coincide with a G8 Summit. The Russian President and the former FSB director, Vladimir Putin declared that the death of the country's most wanted man was a 'just retaliation' [13].

2. DEFINITION OF TARGETED KILLING AND RELATED PRACTICES

From the examples above it is clear that the practice of targeted killing is employed in various different circumstances. E.g., Obeidi, Al - Zarqawi, Abayat or Basayev were killed in an on-going armed conflict, whereas the Yemen and Pakistani strikes were conducted in peacetime. Moreover, the latter two situations also differ from one another, in that Yemen gave its consent for the operation to take place on its territory, whereas Pakistan heavily protested similar air strikes as an attempt on Zawahiri [14]. Another legal difficulty concerns the actors involved in the targeted killing. In most of the examples, the actors were

military personnel using military equipment, such as attack helicopters, drone planes and missiles. In contrast to these situations, Yandarbiev was killed by an explosive device, allegedly mounted under his car by undercover FSB agents, and thus not by military personnel.

Further exacerbating the task of a crystal clear legal analysis of such operations is that in some cases governments have acknowledged their involvement, whereas in other cases they have fiercely denied any connection to the killings. It is clear that all these differences entail numerous legal questions, some of which unfortunately are falling outside the limited scope of the article at hand.

Even if only some of those issues are taken into account, it is still virtually impossible to discuss all legal problems surrounding targeted killing, without a tangible and coherent working definition. The task of formulating such a definition comprehending all the examples mentioned above is quite challenging. This is related to the fact that a variety of other terms has been applied as well, instead of 'targeted killing' to describe the same events. These include inter alia following examples: assassination, targeted or state-sponsored assassination, targeted thwarting, preventive killing, also arbitrary, extrajudicial and summary execution. The manner in which these notions are used through one another seems to indicate that those words are synonymous and smoothly interchangeable (for instance, see the various descriptions of the US Yemen Predator Strike [6, p. 279]).

In our opinion, this is not the case. In fact, choosing one particular term over another, in describing the same killing, usually sheds a light on the manner in which a person justifies or otherwise condemns a policy or action of killing. Taking these semantic differences, and subsequent differing legal meanings into account, the following part provides the framework for distinguishing from one another those terms most often used as substitute for 'targeted killing' (From a moral point of view, see for instance D. Statman [15, p. 179–198], from the perspective of political science, see T. Ward [16, p. 105–133]).

2.1. Assassination

Although assassination is not a relatively new activity (for an overview of early commentators and theorists, see [17, p. 615–644], scholars have not been able to reach a consensus on an accepted definition. Nevertheless, agreement exists on the view that two types of assassination can be discerned: one occurring in peacetime and the other in wartime. For both it is also widely agreed, however not universally, that it concerns illegal killing. (There is a general agreement, although not universal, that assassination is illegal. For a notable exception see: L. Beres [18, p. 231–250]). Although some similarity between these two forms of assassination exists, their definition and analysis is slightly different.

Peacetime assassination encompasses three cumulative elements [19, p. 5] Firstly, it concerns intentional and pre-

meditated killing, which is murder. Hence assassination is always illegal. Secondly, the victim has to be a specifically targeted figure. Thirdly, the motive for the assassination has to be of a political nature. This last condition appears to be a bit unclear, in that it seems to entail that victims can only be political figures or public officials. Conversely, the murder of a private person, as long as carried out by political motives, may constitute an act of assassination. Furthermore, it might be easier to recognize, and probably in some circumstances even required to constitute assassination, if the attack was executed via covert means [20, p. 4]. A notable example could be the awkward polonium-murder in London of the former KGB/FSB Agent Litvinenko [21].

Concerning wartime assassinations it is quintessential to note that, as compared to peacetime situations, the political component has been eliminated from the analysis. This has to be understood in the sense that 'war is not a mere act of policy, but a true political instrument, a continuation of political activity by other means' [22, p. 7]. In other words, from the moment war is waged, every death can be viewed as politically motivated, since it is quite difficult to distinguish political intent from other acts [23, p. 682]. Nevertheless, this kind of assassination still requires cumulative fulfilment of following two elements: (1) targeting of an individual and (2) the use of treacherous means [24, p. 632]. Because of the latter, this type of assassination is also illegal. It includes some form of deceiving the victim, via the breach of confidence. This is prohibited by the rules of international humanitarian law as a form of perfidy. We will come back to more specific wartime assassination issues later on in this article.

2.2. Extrajudicial Execution

Another term applied in describing the examples above, is extrajudicial execution. Other terms include: summary, extralegal, illegal, unlawful or arbitrary. Amnesty International has defined extrajudicial executions as 'unlawful and deliberate killings carried out by order of a government with its acquiescence' [25]. Still according to Amnesty International, these killings can be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to apprehending them and bringing them to justice. These executions take place outside any judicial framework.

This definition cannot be applied *mutatis mutandis* to 'summary' or 'extralegal'. First, as regards 'summary execution', it might be helpful to refer to the concept of 'summary justice'. This is the informal punishment of suspected offenders without recourse to a formal trial under the legal system. Derived from this, a summary execution is any execution whereby a person suspected of subversive or other criminal activity is killed, often at the time and place of them being discovered, and as such usually without any meaningful inquiry or investigation. Second, it should be noted that 'extrajudicial' does also not entirely coincide with the substance of 'extralegal'. The latter implies that a certain ac-

tion was not regulated or sanctioned by law. This reflects the scope of the authority to use force under human rights norms [26, p. 18–19]. Extralegal and ‘non-legal’ are synonymous, whereas the ‘illegality’ or ‘unlawfulness’ of an action means that the action is explicitly prohibited by law.

Finally it should be noted that extrajudicial is sometimes substituted by the expression arbitrary execution. This derives from the fact that the notion ‘extrajudicial’, seems to have its genesis in human rights documents, [26, p. 18–19] including the International Covenant on Civil and Political Rights (ICCPR) [27]. In that respect Article 6 ICCPR, concerning the right to life, should be mentioned. It defines the right to life, on the one hand, by prohibiting arbitrary deprivation of life, and on the other hand by permitting of judicially sanctioned killing in certain respects, such as the death penalty. Hence, an execution in violation of the right to life can also be referred to as an ‘arbitrary execution’.

2.3. Targeted Killing

2.3.1. Two elements

This term is usually applied by the governments involved [28, p. 173]. Via the introduction of this military parlance, supposing this is done so deliberately, these governments, presumably, albeit, in an implicit way, show their preference to have their action assessed under a legal regime governed by military principles or in a broader sense the laws of war, rather than have it analysed under human rights standards. This issue will be dealt with later. First a closer look will be given to the notion targeted killing as such.

That notion comprises two elements: targeted and killing. First, relying again on military terminology, ‘target’ is to be seen as a specific object of attack. Consequently the action of ‘targeting’ has to be construed as the directing of operations toward the attack of a target [24, p. 609]. Second, in connection with the conjugated verbs ‘targeted’ or ‘targeting’, a variety of terms has been used, in order to explain the purpose of the action. One such example is ‘targeted thwarting’, which in fact is Israel’s favourite phrase describing its own controversial policy [29]. A designation, which seems to imply that it simply concerns foiling terrorist attempts. However, this is not always the case, since often, however fiercely denied, some kind of retaliation for past terrorists attacks, is involved as well. Furthermore that notion has been castigated for having too positive connotations in presenting the action as ‘chirurgical’, harming only the intended target [30]. In the same vein, eliciting the same critiques, Israel also refers to its policy as ‘targeted pre-emptive killings’ [25]. This would mean, striking before the terrorist can actually conduct his attempt.

2.3.2. No preconception on legality

This article will use the term of targeted killing. Admittedly, the adjective ‘killing’ leaves no room for discussion as regards the purpose of the targeting. As such, one

could reasonably argue that, the term ‘execution’ in the notion ‘extrajudicial execution’ or the word ‘assassination’, are clear in their purpose as well, the taking of a life. However, there is a difference from the legal perspective.

For instance as regards assassination certain learned voices have considered that killing terrorists during armed conflict is a lawful exercise of military activity, and therefore no assassination. This contention is merely bypassing difficult legal questions of combatant status and issues of perfidy, both to be determined under the rules of international humanitarian law [31, p. 875]. Beyond the context of war, killing of terrorists has been considered lawful, and thus according to that view is not peacetime assassination [6, p. 280]. Bringing in mind again that the latter concerns the removing of political leaders for political purposes, one could argue that indeed, terrorists are figures evidently outside any political hierarchy. Does this mean, however, that there is no political purpose at all? The underlying problem is that it has been notoriously difficult to define the concepts of terrorists or ‘terrorism’. Nevertheless, there have been various attempts. One example describes terrorism as ‘the deliberate causing of death, or other serious injury, to civilians for political or ideological ends’ [28, p. 175]. From this it follows that terrorists are largely viewed as such due to their political engagement. Hence, the argument that their elimination is apolitical and therefore not assassination is of dubious merit [6, p. 280]. It should be clear that stating that a certain killing does not constitute assassination, whether it is during wartime or peacetime, immediately implies that this killing is legal. By contrast, targeted killing is not laden with some kind of pre-formed understanding of legality or non-legality, as is the case with the notions of ‘assassination’ or ‘extrajudicial killing’. Thus from a legal perspective there is a conceptual difference between targeted killing on the one hand and other forms such as extrajudicial execution or assassination on the other hand.

We contend that the legality of eliminating or killing a terrorist, applying methods as exemplified in the first part of this article, should not merely be derived from semantics, and subsequent preconception on legality, but from an objective and profound analysis under international law. However, before establishing the framework for such a legal assessment, a tangible working definition of targeted killing is required.

2.3.3. Definition

Literature does not provide a commonly accepted definition. For instance, it has been defined as ‘the intentional slaying of a group or individuals undertaken with explicit governmental approval’ [29]. Yet, in our view this definition is falling short of two major elements. Firstly, it should contain reference to the actual targets, namely persons suspected of terrorism. Secondly, it lacks reference to the fact that in the examples given above there was premeditation associated with ‘targeted killings’ [6, p. 280]. In the article at hand the definition of targeted killing to be applied is the following: ‘the premeditated killing of a specific target

(person/persons) suspected of terrorism, with explicit or implicit governmental approval’.

The question to turn to next is to what extent the targeted killing of suspected terrorists is or is not justifiable under rules of international law. Consequently a certain legal regime or part of international law has to be applied to make such an assessment. It is interesting to note that such targeted killings can be analysed under various legal regimes, including international human rights law, the right of self-defence under Article 51 of the UN Charter and international humanitarian law. The limited scope of the article at hand allows us only to focus on the latter [for an analysis on human rights law and targeted killing, see 32, p. 13–49].

3. LEGALITY OF TARGETED KILLING UNDER INTERNATIONAL HUMANITARIAN LAW

The applicability of international humanitarian law depends on the situation where ‘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 one State’ [33, para. 70]. The discussion whether or not the so-called ‘war on terror’ constitutes such an armed conflict will not be discussed here. However as a starting point it will be assumed that targeted killing of suspected terrorists will be assessed under international humanitarian law in at least three different situations.

First international humanitarian law will be applicable in an existing international or non-international armed conflict and second, when the conflict between a State and a terrorist group within its territory reaches the threshold of an armed conflict [34, p. 292–296]. Thirdly, it should be emphasized that international humanitarian law would also apply in cases of counterterrorism force against actions of the terrorist organisation, attributable to another State, on the territory of that State. In any case, if international humanitarian law is applicable a variety of rules can be invoked to examine the legality of a targeted killing of a suspected terrorist. The legality of targeted killing depends on a number of circumstances such as when, where and how the act was committed.

3.1. Targeted killing and Perfidy

First of all when it can be established that a targeted killing was performed by resort to treacherous means or perfidy, the legality of the action will be undermined. Most likely it will constitute a wartime assassination, which is per se illegal. However, wartime assassination shall be separated from related non-treacherous or non-perfidious practices.

As mentioned earlier, compared to peacetime assassination, it is important to note that as regards assassination in wartime, the political component has been eliminated from the analysis. From the moment war is being waged, every death can be viewed as politically motivated, since it is hard to distinguish political intent from other acts.

Nevertheless, this type of assassination still requires cumulative fulfilment of two elements: (1) the targeting of an individual and (2) the use of treacherous means [24, p. 632]. In the course of time many renowned philosophers have elaborated on assassination, questioning whether it is a legitimate means of warfare [17, p. 617–626]. The majority of these writers agreed that targeting specific individuals during wartime was permissible. However, they generally condemned killing by treachery or through the use of the treachery of another. For instance, seventeenth-century philosophers, Alberico Gentili and Hugo Grotius both argued that treachery on the battlefield was simply not honourable. A contention which was accepted with acclamations by the eighteenth-century thinker Emer de Vattel, who still reproached that view for its lack of clarification in the distinction between impermissible treachery and acceptable forms of stealth and surprise. That shared trepidation for treacherous killing appears to have been predicated on the general aspiration to protect sovereigns from perfidious attacks. A reasoning in turn based on the belief that waging war is a right belonging to sovereigns, for which they should not be required to pay for with their life. Although such kind of considerations have become abhorrent to contemporary reflections of war, those early interpretations on the proscription of targeting and treacherous killing have nevertheless by now found way into customary international law [19, p. 9].

At the beginning of the twentieth century, the proscription of treacherous killing was embodied in Article 23(b) of Hague Regulation [35]. It has been derived from this article, read in connection with Article 23 (c) of Hague Regulation, that law of war also prohibits combatants from targeting and killing enemy combatants who are no longer on the battlefield, but are resting at home or taking their family to the cinema [36, p. 8]. Hereby the contention, that lawful targeting in wartime has never required that the individual being targeted is actually engaged in combat and thus could be killed at any time and at any place whatsoever, is rejected [17, p. 627]. We support this rejection in deriving from Article 52 (3) Add. Prot. I [37] that any military objective can be attacked only if it fulfils a number of conditions: one of them being that the target must make a contribution to enemy military action at the time, and whereby the destruction or killing of the target must generate a definite military advantage, also under the circumstances at the time. In our view an enemy combatant who is not contributing to enemy military action, when he or she is spending time with his or her family and in those circumstances his or her killing does not generate a direct military advantage. Such a killing might not amount to perfidy as such, but dishonour in conduct is also in defiance with the general principles of humanity and humanitarian law.

As regards perfidy, a clear prohibition is set forth in Article 37 (1) Add. Prot. I, which stipulates that ‘it is prohibited to kill, injure or capture an adversary by resort to perfidy.’ Thus the term perfidy was adopted instead of treachery, which was considered to have a too narrow

meaning [38, para. 1488]. Although in modern law theory these two terms are thought to be synonymous, preference seems to go to perfidy [32, p. 21]. It concerns acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international humanitarian law, with the clear intention to betray that confidence. Article 37 (1) Add. Prot. I gives four examples of perfidious acts: the feigning of (1) an intent to negotiate under a flag of truce or of a surrender; (2) an incapacitation by wounds or sickness; (3) civilian, non-combatant status and (4) protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict. This list of actions is not exhaustive. For instance by virtue of Article 39 (2) Add. Prot. I, although not explicitly designated perfidy, it is also prohibited to make use of the flags or military emblems, insignia or uniforms of the adverse Party while engaging in combat. Another forbidden action, not labelled as perfidious, is the offering of a bounty for the death of an enemy [39, p. 226], the practice that is very common in the realms of 'war on terror' [40]. Furthermore it has been argued that poisonous weapons, invariably involve treachery [24, p. 640]. The same might be purported about using booby traps, as often used in the case of Israel's targeted killing policy [41]. Nevertheless, the choice of weapon is irrelevant and will not qualify a killing as an assassination, but it might still be unlawful under rules of international humanitarian law. Finally, also the ruse – perfidy distinction should be mentioned [23, p. 683]. Whereas perfidious acts are per se illegal, surprise attacks or ruses of war, using trickery and deception are considered legitimate tactics on the battlefield. This is not perfidy because they do not invite the confidence of an adversary with respect to protection (Art. 37 (2) Add. Prot. I). Examples are camouflage, decoys, mock operations and misinformation.

Two notable examples of possible treacherous killings occurred in World War II. The first example on May, 27, 1942, when the SS General Reinhard Heydrich, the Reich protector of Bohemia and Moravia, was assassinated by two Czech nationals while travelling in his open car. Both men were parachuted from a British plane and the whole operation was the plan of British Intelligence Service. Despite of the fact, that assassins were not wearing military uniforms, it has been suggested that this action does not constitute assassination but is a lawful killing in wartime [17, p. 628]. This reasoning is based upon the idea that the two men were merely using lawful camouflage. However it has also been argued that wearing civilian clothes or an enemy uniform to travel to the location of assassination would be lawful, but would be treacherous if the assassination takes place while still donning those clothes [42, p. 366]. Furthermore, in the case of Heydrich, the two Czech men, with full knowledge of both country and language, were able, under the cloak of a mufti, to accomplish what a British battalion could never have done [43, p. 101–111]. Nevertheless, this would seem to be an assassination because of the perfidious feigning of civilian status that was

later strictly prohibited by Add. Prot I, Article 37.

Another example whereby an officer was targeted and killed was falling short of treachery and as such does not constitute assassination. This was the successful attempt on the life of Admiral Isoroku Yamamoto, commander of the Japanese Navy and one of the main architects of the Pearl Harbour Attack [17, p. 627]. The interception of his airplane took place in April 1943 by a squadron of American planes, which was dispatched for that purpose. Yamamoto found his demise when his airplane crashed in the jungle. Open and above board in their targeting and killing of a combatant, in time of war, the US did not violate international law. The military advantage gained by the death of Yamamoto was described by the US as 'a severe blow to the morale of the Japanese armed forces' [43, p. 103].

From the discussion and examples presented it is clear that when a State claims it has targeted and killed a suspected terrorist in compliance with international humanitarian law, it should amongst other things be assessed whether or not treachery was involved. It is not because terrorists might be acting in a treacherous way, gaining the trust of the people they will eventually kill. This would ipso facto give soldiers the right to do the same. Thus if treacherous or perfidious means were employed it will constitute a targeted killing in defiance of international humanitarian law.

3.2. Terrorist: Combatant or Civilian?

3.2.1. Principle of distinction

Assessing the legality of targeted killing under international humanitarian law will to a great extent depend on the classic dichotomy between combatants and civilians. Without resorting to perfidy, a combatant can be killed lawfully in time of war, whereas a civilian can never be the object of an attack. Indeed under international humanitarian law, a bright line of separation exists between combatants and civilians [44]. Therefore if such a targeted killing is legal or illegal under international humanitarian law will depend largely on the status of that individual, rather than on his or her actions.

Without detailed insights into the definition of combatants and civilians, we shall note that the combatant's privilege is in essence a licence to kill or wound enemy combatants and destroy other enemy military objectives [45, para. 68]. If combatants fall into the power of the enemy, they become protected prisoners of war. As such they may not be prosecuted or punished for their lawful participation in hostilities. Nevertheless during hostilities they are still obligated to respect international humanitarian law. This includes, amongst other things, distinguishing themselves from the civilian population. Most importantly for the article at hand, is that combatants are legitimate objects of military attack. Even though in conflicts of non-international character there is no such combatant privilege, distinction between civilians and those who bear arms remains one of the essential rules. Since combatants are characterized by

some kind of uniformity and civilians by their variety, it is quite logical to define civilians by exclusion from the complementary category of combatants [46, p. 163]. A civilian is any person who is not a combatant. Furthermore, in the Blaškić Case the ICTY defined civilians as ‘persons who are not, longer, members of the armed forces’ [47, para. 180]. The civilian population comprises all persons who are civilians (Art. 50 (2) Add. Prot. I)

It is important to note that there are special circumstances during which civilians might lose their protection. This is derived from the fact that civilians can never be made the object of an attack ‘unless and for such time as they take a direct part in hostilities’ (Art. 51 (3) Add. Prot. I). In this the separation line is not that clear anymore. Since a civilian can be made the object of a military attack, not because of his or her status, but because of his or her actions.

3.2.2. Civilians Taking a Direct Part in Hostilities

From the moment a civilian is taking direct part in hostilities, he forfeits immunity from attack. He becomes a lawful target for the duration of his engagement in the hostilities [39, p. 18–23]. The first problem is whether this particular action, alters the status of the civilian. In that respect it should be emphasized that he does not acquire combatant status, he is still considered a civilian. Consequently, in a case of capture in international armed conflict he is not entitled to prisoner of war status and he does not enjoy immunity from prosecution for hostile acts (on the particular legal situation once ‘civilians taking direct part in hostilities’ find themselves in enemy hands, see K. Dormann [48, p. 45–74]). In an attempt to clarify the uncertainty surrounding their status, civilians taking direct part in hostilities, have been referred to as ‘unlawful combatants’ or ‘unprivileged combatants’, both seemingly suggesting that there is a third category besides combatants and civilians.

We contend that aforementioned terms are merely descriptive. It should be underlined that there is no intermediate status, on the predication that nobody in enemy hands can be outside the law [36]. On the contrary, a civilian taking a direct part in hostilities should still enjoy a minimum of protection as guaranteed under Common Article 3. This includes that he shall not be made the object of attack if he clearly expresses an intention to surrender or has become incapable to defend himself because of certain wounds or sickness and as such is hors de combat.

The second problem is to determine the exact moment on which a civilian starts to participate in hostilities. Moreover, this difficulty is further exacerbated because different phrases relating to participation in hostilities have been used: ‘a person who has taken part in hostilities’, ‘acts harmful to the enemy’ and ‘persons who have ceased to take part’ [44]. Common Article 3 of Geneva Conventions refers to ‘taking active part in hostilities’ [49]. This is different language as compared to the test for determining the moment on which participation starts, as set out in Add. Prot. I.

According to that test, civilians in international armed conflict are protected ‘unless and until such time as they take a direct part in hostilities’ (Art. 43 (2), 51 (3) and 67 (1) (e)). This method is also applicable to non-international armed conflicts pursuant to Article 13 (3) Additional Protocol II [50] and has been set out as well in the Rome Statute establishing the International Criminal Court [51].

Leaving these ambiguities and differences in terminology aside, it does not change the fact that this test is the only one at hand, and thus the interpretative discussion over the phrase ‘unless and until such time as they take a direct part in hostilities’ is what follows.

3.2.2.1. Taking ‘Direct’ Part in Hostilities

So far, a commonly accepted definition of the notion ‘taking direct part in hostilities’ has not emerged. Therefore it might be interesting to look at the various constitutive elements. First, hostilities or hostile acts. These have been interpreted to include acts, which by their nature and purpose are intended to cause actual harm to the personnel and equipment of armed forces [38, para. 1942]. Second, following from the latter, ‘direct’ participation’ should suggest ‘a direct causal relationship between the activity engaged in and harm done to the enemy at the time and place where the activity takes place’ [45, para. 53]. For this reason the ‘direct’ requirement has been criticised for not being able to categorize more accurately the different levels of participation.

The levels just referred to, include participation in (1) war effort, such as employment in a weapons factory or in war production in general, (2) military effort, for instance expressing sympathy and support for the cause of one of the belligerents and (3) military operations, as deployment and engagement in actual fighting [53, p. 121–122].

It should be noted that the first two categories are examples of indirect participation, which ‘does not involve acts of violence which pose an immediate threat of actual harm to the adverse party [45, para. 56]. Although indirect participation could make a civilian liable to lawful apprehension, he may never be made the object of attack. Only the third category, on military operations, concerns ‘direct’ participation. Clear examples are those situations whereby a civilian fires a weapon, sabotages military installations, kills enemy combatants, delivers ammunition to combatants or collects intelligence for military purposes [53, p. 121–122]. Another example is that of civilians who are engaged in military deployment preceding the launching of an attack in which they are to participate; in so far however, they are carrying their arms openly [36].

However, in many cases the dividing line between ‘direct’ or ‘indirect’ participation is very porous. This entails disagreement on which category is applicable. In a 2003 ICRC report, a number of ambiguous situations were discussed. For instance ‘voluntary’ human shields, driving an ammunition truck in a combat zone, the role played by journalists in the conduct of hostilities and mere posses-

sion of arms [54, p. 17–20].

Moreover certain theories bring forth even more disagreement. For instance the view that persons working in a weapons factory, or in other military objectives, must be considered quasi-combatants, liable to attack, find no support in modern State practice [39, p. 23]. In fact it should be underlined that in case of an attack on such a legitimate military objective, all possible incidental death or injuries caused to such civilians should be minimised by all necessary and feasible precautionary measures. Another theory concerns the membership approach. Here there is disagreement on the issue whether members of organized armed groups, especially during non- international armed conflicts, and to relevant extent also in international armed conflicts, are to be considered combatants or civilians, only occasionally taking direct part in hostilities [55, p. 41–58]. Nevertheless, in case of these ambiguous situations, the basic principle should be reiterated that in case of doubt a person is presumed to be a civilian.

3.2.2.2. Duration of the Direct Participation

In the previous part it has been established that civilians, taking direct participation in hostilities, forfeit immunity from attack. This also implicates that as soon as civilians lay down their arms and cease their unlawful activities, they reacquire protection from the attack. However according to some critique this might open a revolving door of immunity for civilian participants. Accordingly, on one side of the door they could participate in hostilities, subsequently drop their weapons in between, and on the other side of the door claim that they were protected civilians all along [53, p. 118–120]. In other words, a civilian could easily switch from the one side to the other. In that respect reference could be made to the well-known phrase that one's terrorist can be someone else's freedom fighter. However, here the question is whether an individual can be a guerrilla fighter by night and a farmer by day.

The revolving door theory has provoked a vivid discussion amongst legal scholars and practitioners alike, as to whether civilians taking direct part in hostilities always reacquire their immunity from attack whenever they successfully return from an operation, only to re-enter the battlefield at a later time. It has been suggested that once an individual has opted into hostilities, he remains a legitimate military objective, until unequivocally it can be established that the individual has opted out, via an extended non-participation or an action clearly confirming withdrawal [56, p. 510].

In line with a theory mentioned above, namely the membership approach, it has been contended that membership of an organized armed group, which is directly participating in hostilities, is said to inflict on the civilian member a loss of immunity from attack, as long as that membership lasts [44]. However, this approach seems to neglect passive or mere supporting membership of an organised armed group and active membership, in the sense of actually engaging in fighting. In other words this approach does not

solve the question, but merely offers another way of looking at it. The question here remains the same, only put differently: Who is an active member and who is not, and thus, who is taking direct part in hostilities and who is not?

The difficulty in the battlefield to determine that moment where participation ends is and will remain an issue of much discussion. However it should be added that either way, if a civilian, after taking direct part in hostilities has laid down arms, and consequently loses the possibility to defend, and thus is hors de combat, he is no longer a legitimate object of attack. This would be exactly the same situation if not a civilian, but a combatant was involved [36, p. 8]. It is of course also reasonable that the civilian taking part in hostilities might be attacked after laying down arms, without the adverse party knowing of such withdrawal [56, p. 510]. Nevertheless, the main rule should be that if at a later time a civilian takes up arms again, subsequently he loses immunity from attack again. In between those two moments a civilian can merely be apprehended, but not targeted and killed.

3.2.2.3. Terrorists and direct participation in hostilities

The question remains whether terrorists are combatants or civilians taking direct part in hostilities. Concerning the question of their status, it should be underlined that the goals a terrorist group is trying to achieve should not be taken into account. The determination of their status should in fact be based on all established criteria of international humanitarian law, a reasoning, which was also taken into consideration in the recent judgement of December 13, 2006 as regards the targeted killings openly pursued by Israel.

The Court concluded that the Palestinian terrorists did not qualify as combatants, which from our view, based on the conditions outlined above can be viewed as correct. The Court stated that it would be sufficient to find that terrorists do not have a fixed emblem recognizable at a distance. As such terrorists do not distinguish themselves from the civilian population. Moreover, they do not carry their arms openly and they do not conduct their operations in accordance with the laws and customs of war. The Court thus comes to the finding that they are not combatants, even though the armed conflict between Israel and Palestinians is recognised as international. Unfortunately the Court only briefly touched upon the question of 'unlawful' combatants. It merely states that 'unlawful' combatants are not outlaws, and their human dignity is to be honoured. It can be deplored that the Court did not state that there does not exist a third category beside combatants and civilians. Instead the Court confined itself to the equivocal statement that 'it does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law. However, new reality at times requires new interpretation' [57, para. 28].

The Court then turned to the question whether Israel,

although the terrorists were not combatants, was still entitled to kill them even if they are planning, launching or committing terrorist attacks. To the Court's view, the direct character of the partaking in hostilities has to be examined case by case. For instance the question put forward above, as regards the civilian driving a truck carrying ammunition in the combat zone towards the place where it will be used for the purposes of hostilities, the Court is of the opinion that this particular civilian should be seen as taking a direct part in hostilities [57, para. 35]. Thus the rules as regards collateral damage to civilians do not apply according to that view. However, the Court quoted from legal literature that these rules do apply in case of lawfully attacked military objectives where civilians work, such as a weapons factory.

Following, the Court focused on the question concerning the 'for such time' requirement, where again it contends that 'there is no choice but to proceed from case to case [57, para. 35]. The Court rejects the membership approach, which in our opinion, as contended above, leaves too much room for ambiguous interpretations. On the other hand, the Court also argued that the revolving door theory is to be avoided. In the wide area between those two extremes the Court referred to the 'grey' areas about which no customary law has crystallized, leaving no other option than to examine each case individually. The Court enumerated four strict conditions to make that assessment.

First, well-based information is required, before categorizing a civilian as a legitimate military target. Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful possibility, such as apprehension, can be employed. Third, after an attack on a civilian suspected of taking a direct part in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack is to be performed. Fourth, any collateral damage to civilians not taking direct part, should withstand the proportionality test.

CONCLUSIONS

1. Targeted killing is defined as the premeditated killing of a specific target (person/persons) suspected of terrorism, with explicit or implicit governmental approval. The advantage of using the term 'targeted killing' is that it is free from preconceived issues of legality, in contrast to such notions as 'extrajudicial execution' or 'assassination'. We content that the legality of eliminating or killing a terrorist, should not merely be derived from semantics, and subsequent preconception on legality, but from an objective and profound analysis under international law. To that purpose, various legal regimes can be applied, separately from or in combination with one another. We have focused only on international humanitarian law.

2. The starting point is that when committed in the course of an armed conflict a legal analysis of targeted killing shall be based on all applicable rules of international humanitarian law. In that respect the principle of distinction between civilians and combatants remains of utmost

importance. Furthermore there is no necessity to introduce or to elaborate any new specific rules regarding targeted killing. On the one hand, targeted killing during armed conflict is covered by already existing rules of international humanitarian law. On the other, easing down the regime by inventing new rules for targeted killing might not serve the role of law. This would merely exacerbate the discussion on what is targeted killing and what is not.

3. This reasoning is based on the predication that targeted killing is not a new legal phenomenon, but merely a dubious method of waging hostilities. Therefore it deserves much more recommendation to come up with new comprehensive interpretations on existing rules, including the notion of a civilian 'taking direct part in hostilities'. Disagreement among legal scholars and practitioners shows that no general answers can be given and every case of targeted killing should be assessed according to all particular circumstances in each different situation.

4. In that respect, the judgement the Israeli Supreme Court of December 13, 2006 as regards the targeted killings openly pursued by Israel, although not to be hailed with acclamations, seems to indicate such legal evolution and is therefore an interesting first step.

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TIKSLINIS NUŽUDYMAS IR JO TEISĖTUMAS PAGAL TARPTAUTINĘ HUMANITARINĘ TEISĘ

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S a n t r a u k a

Tikslinį nužudymą kaip nevienareikšmiškai vertintą kovos su terorizmu metodą naudoja beveik visos valsty-

bės, aktyvios vadinamojo „karo su terorizmu“ dalyvės. Ypač plačiai jį taiko Izraelis, Jungtinės Amerikos Valstijos, Rusija. Šis metodas naudojamas ir ginkluoto konflikto, ir taikos metu, pasitelkiant ginkluotąsias pajėgas, specialiosios paskirties pajėgas, specialiąsias priemones (pvz., nepilotuojamus orlaivius) Svarbu pabrėžti, kad tiksliniai nužudymai valstybių naudojami kaip specialus politinis – karinis įrankis, kuomet prievarta tikslingai nukreipiama prieš konkretų asmenį (-is), įtariamą terorizmu. Straipsnio autoriai pateikia šią tikslinio nužudymo sąvoką: „*tai iš anksto apgalvotas konkretaus asmens (taikinio), įtariamo terorizmu, nužudymas esant tiesioginiam ar netiesioginiam valstybės valdžios pritarimui.*“ Ši sąvoka svarbi tuo, jog ji neapima išankstinio tikslinio nužudymo vertinimo teisėtumo (kaip nutinka tuos pačius veiksmus apibūdinant kitokiomis sąvokomis, pvz., „neteisminė egzekucija“), bet nurodo elementus, būtinus reiškinio teisei analizei.

Tarptautinės humanitarinės teisės požiūriu, tikslinio nužudymo teisėtumo vertinimui keliami tokie patys kriterijai, kaip ir bet kokio kito nužudymo teisėtumui ginkluoto konflikto metu. Pvz., tarptautinio ginkluoto konflikto metu yra teisėta žudyti priešo kombatantus (vadinasi, tikslinio nužudymo taikinyms gali būti tik asmuo, atitinkantis kombatanto kriterijus), tačiau šiuo tikslu draudžiama vartoti apgaulę, t.y. nužudyti, pasinaudojant melagingai suteikta apsauga. Tačiau, ypač svarbu, kad, nepriklausomai nuo ginkluoto konflikto pobūdžio, būtų ypač griežtai paisoma atskyrimo principo, kuris leidžia naudoti jėgą tik prieš asmenis, tiesiogiai dalyvaujančius ginkluotos kovos veiksmuose. Todėl, pvz., 2006 m. Izraelio Aukščiausiojo teismo sprendime dėl šios taktikos panaudojimo, buvo nurodyti svarbūs kriterijai, privalomi taikyti kiekvieno tikslinio nužudymo atveju: pirma, rimtai pagrįsta informacija, leidžianti teigti, kad civilis laikytinas kariniu taikiniu, antra, tikslinis nužudymas gali būti taikomas tik tuomet, jeigu neįmanoma pritaikyti jokių kitų švelnesnių priemonių (pvz., sulaikymo), trečia, po tokios operacijos atlikimo visada turi būti atliekamas jos pagrįstumo patikrinimas, ketvirta, bet kokia šalutinė žala turi atitikti proporcingumo kriterijaus reikalavimus.

Straipsnio autorių nuomone, nėra jokio reikalo kurti naujas tarptautinės humanitarinės teisės normas, skirtas tikslinio nužudymo reglamentavimui, kadangi tikslinis nužudymas yra ne koks nors naujas teisinis reiškinys, o vienas iš ginkluotos kovos metodų, tačiau labai svarbu, jog būtų tinkamai ir pagrįstai išaiškinta „tiesioginio dalyvavimo ginkluotos kovos veiksmuose“ nuostata.

Pagrindinės sąvokos: tikslinis nužudymas, tarptautinė humanitarinė teisė, ginkluoto konflikto teisė, terorizmas, kombatantas, civilis.

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