

Targeted Killings during High and Low Intensity Warfare

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Introduction

Recent years have seen an increase in targeted killings around the world. This tool, which is reputed to have been developed by Israel, is today one of the major means in the global war on terror. While the common perception is that targeted killings involve an attack against a person from a plane or an unmanned aerial vehicle (UAV), a more expansive definition of this type of attack could include the attack on Osama bin Laden by the United States and the attack on Mahmoud al-Mabhouh, (allegedly) by Israel, in January 2010 in Dubai.

Israel, which brought this modus operandi to the public's attention early in the twenty-first century,¹ was initially widely condemned internationally. Notwithstanding this criticism, other countries and militaries began to make use of this tactic over the years. The extensive use of targeted killings by the United States in recent years as part of its international war on terror has placed the question of this method's legality at the center of the international legal debate, and within the United States, at the center of political-constitutional

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discourse (mainly in context of the targeted killings of US citizens in Pakistan and other countries).²

This article reviews the legal frameworks that apply to targeted killings during warfare and examines what relevance, if any, the intensity of an armed conflict may have for the application of the targeted killing definition. Focusing on Israel, the article examines the legal frameworks that govern Israel when it carries out targeted killings, examines a number of case studies, and analyzes the results and implications of these instances. To that end it begins by building a framework for the discussion, and defining what constitutes targeted killing and what legal frameworks apply.

General

Targeted killings can be defined in various ways, based on the *modus operandi*, the identity of the target, the identity of those who perform the action, and the purpose of the action; every possible definition has political, legal, and operational implications. In fact, there is no single definition in any international treaty or state law that defines positively what constitutes targeted killing. The tendency is to examine each case individually and to rely, *inter alia*, on official declarations concerning the use of this tool by the states that employ it. This article uses a definition based on that of Philip Alston, the former UN special rapporteur on extrajudicial, summary, or arbitrary executions, in his report on targeted killings: “A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”³ This definition is not intended to determine the legality of the targeted killing, but only to set the framework for discussion. For the purposes of this definition, there is no significance to the means of attack, which could be carried out long distance (for example, using a plane, helicopter, or UAV), from a medium distance (for example, sniper fire), or from a short distance (pistol fire, knife, and the like).

This definition distinguishes between an attack on an identified target and an anonymous attack. When we refer to an attack on an identified target, this does not necessarily mean that the personal identity of the target is known, but also when that person’s operational role is known. Thus, an operation to kill the senior commander in the military wing of a terrorist organization will conform to this definition even if the strike force does not know the

target's name. At the same time, an attack of this kind raises questions about the reliability of the information and the certainty about the target's role. These and other questions are addressed below.

The Legal Framework

Two legal frameworks apply simultaneously to targeted killings: international law and domestic law.

International Law

International law has two frameworks that regulate, *inter alia*, the use of lethal force, whether in combat or on a regular, non-combat basis: international humanitarian law (the law of armed conflict) and international human rights law.

As a rule, international humanitarian law (IHL) applies only during combat. It is intended in part to regulate the use of force by warring parties during armed conflicts and to ensure that protected populations (such as civilians, the wounded, religious figures, and medical personnel) are in fact protected. Without going into the legal discussion in depth, we can note that according to the rules of IHL, although there is a total ban on directly attacking protected civilians, it is permissible to attack a combatant who belongs to enemy forces or a civilian taking direct part in the hostilities, as long as the attack is not expected to cause collateral damage disproportionate to the direct military benefit anticipated.⁴

In the context of targeted killings, IHL poses a number of questions: (a) Is the target legitimate (namely, an enemy combatant or a civilian taking direct part in the hostilities)? (b) Is the attack expected to cause harm to a civilian population or to civilian buildings? (c) If such harm is anticipated, is it proportionate to the direct military advantage that can be expected? If the targeted killing passes these tests, it is in compliance with IHL and it is permissible to carry it out.

It is worth noting that with regard to these tests IHL does not distinguish between an international armed conflict (namely, a "classic" conflict between two or more states) and a non-international armed conflict (for example, a civil war) or a cross-border asymmetric conflict between a state and an organized armed group. Furthermore, IHL is not subject to the various conditions of reciprocity, and therefore the argument that the enemy is violating these rules does not constitute grounds for corresponding violations

or provide any exemptions or allowances whatsoever with respect to the principles of distinction and proportionality noted above. These rules are part of customary international law, and they therefore apply to all regular armies and to guerrilla organizations as well, and violating them may be tantamount to committing a war crime.

International human rights law is a more general framework, which applies with full force in peacetime and to a certain extent in wartime as well. As a rule, international human rights law does not regulate the use of lethal force in combat, but only in cases involving law enforcement and the imposition of law and order (although the rules do not necessarily address the use of force by law enforcement officials only). International human rights law prohibits the arbitrary deprivation of life, and thus severely limits the ability to lawfully use force against an individual. However, the right to life is not absolute, and there are two exceptions that permit infringement of this right. The first exception is the death penalty, under which a person may lose his life on the basis of a punishment prescribed by law, though only after due process. The second exception that permits the use of lethal force is self-defense or protection of the public – and even then, only as a last resort and when the use of alternative, non-lethal means is not feasible.⁵ In cases in which lethal force is used under international human rights law, there is a need to examine whether in fact the case was such as to justify active measures and whether, based on the circumstances, there was a possibility of choosing a less lethal approach. When the use of deadly weapons is not consistent with these requirements, in practice, this is an infringement of the target's right to life without due process, which in turn constitutes a flagrant violation of international human rights law.

The interface between IHL and international human rights law is complex, and the transition between them is especially delicate and significant. For example, the law on killing in one framework is not identical to the law on killing in another. As such, killing an enemy combatant in a combat situation (under IHL) does not in and of itself constitute a criminal offense or even grounds for opening an investigation, unless there is suspicion, for example, that the action was accompanied by disproportionate collateral damage or that the target was not a legitimate target at the time of the attack. By contrast, in the framework of human rights law, an action that leads to loss of life must be examined in order to ascertain whether there was, in fact, justification for the use of lethal force for purposes of self-defense.⁶ While

international human rights law applies at all times (*lex generalis*), IHL applies only during and in connection with armed conflicts. Furthermore, at the time of its application, IHL has precedence (*lex specialis*) over international human rights law.⁷ As noted, this does not mean that human rights law ceases to apply during combat, but that it is the secondary, complementary framework, which covers the angles that IHL does not address. In addition, human rights law serves as an auxiliary interpretative tool in cases where IHL is not sufficiently clear concerning the manner of its implementation.

Accordingly, when the legality of a targeted killing is examined according to international law, the framework in which the action took place (international humanitarian law or international human rights law) must be examined first, since this has numerous implications for the analysis of the action and the manner in which it was performed. Only then can one examine whether the use of lethal force against the target was in accordance with the restrictions set forth in the relevant framework of international law.

Domestic Law

In addition to international law, every state also has domestic laws regulating the use of lethal force in the state itself or by the agents of the state. In many cases – though not always – this is more restrictive than international law. Domestic law can comprise local legislation as well as legal rulings and local custom. In certain cases, international conventions that constitute a kind of domestic law also wield influence (for example, the European Convention on Human Rights).

In Israel, the issue of targeted killings has been examined directly and in-depth by the High Court of Justice (HCJ), in a petition that has been called the “targeted killings case” (HCJ 769/02).⁸ According to a judgment written by then-President of the Supreme Court Justice Aharon Barak, targeted killings are not inherently illegal, and they should be examined on a case-by-case basis. However, the Court’s determination of this method’s legality was based on the assumption that it is used in an international armed conflict, and therefore it is an act of combat to which IHL applies, and not an act of law enforcement or self-defense by the state. In its ruling, the court clarified that the following criteria apply in carrying out a targeted killing: (1) Targeted killings must be preventative and not punitive; they are not meant to address acts committed in the past, but to prevent an attack. (2) The targeted killing must be carried out against a person taking direct

part in the hostilities, that is, not against a protected civilian. (3) The use of targeted killing will be permitted only when there is no less lethal alternative that will not pose an excessive risk to Israeli forces. (4) Disproportionate collateral damage must be avoided. (5) After the attack (*ex post facto*), the collateral damage caused to uninvolved civilians ought to be reviewed by a special objective examination committee to be established for this purpose.

This indicates that according to the HCJ, there are two bases for gauging the legality of targeted killings. First, the targeted killing must be a preventative act of combat against a person who is directly taking part in acts of combat. In other words, the targeted killing must take place within the framework of IHL. In so stating, the HCJ created the main normative framework and the minimum standards for carrying out targeted killings. Furthermore, the court stated that less lethal alternatives should be considered and that any collateral damage should be reviewed. Here, in effect, the Court creates the addition that constitutes the narrower domestic framework and imposes limitations beyond those required by IHL. Such law does not create an obligation to use a less lethal method for attacking combatants or civilians directly taking part in the fighting and does not require that each case of collateral damage be examined. Rather, this obligation is triggered only where there is concern that there has been a violation of the rules of IHL (that is, when there is concern that the collateral damage is not proportionate).

The establishment of a commission to examine targeted killings, along with its mandate to review, does not connote that there is a problem with targeted killings per se (as noted, targeted killings were not rejected by the HCJ). Furthermore, in contrast to the investigations carried out according to the rules of IHL that are based on concerns that a crime has been committed, the commission's review is automatic in any case in which uninvolved civilians have been killed as a result of the attack. According to the Court, the commission has the authority to review targeted killings carried out after publication of the Court's ruling in December 2006, and it is not obligated to review targeted killings retroactively. As a result, one of the most famous targeted killings – that of Salah Shehadeh, head of the military wing of Hamas, in 2002, which was also part of the basis for the petition on targeted killings – is outside the commission's purview.

However, in the Court's deliberation of the petition by Yoav Hess (HCJ 8794/03),⁹ which dealt directly with the legality of Shehadeh's killing, the state agreed to the establishment of an external, objective investigatory

commission. In January 2008, the “Special Investigatory Commission to Examine Targeted Killing – Salah Shehadeh” was established. In March 2010, retired justice Tova Strasberg-Cohen was appointed to head the commission, replacing the original chairman, former military advocate general attorney Tzvi Inbar, who died during the commission’s term. An analysis of the commission’s decision is not the purpose of this article. Suffice it to say that the commission determined that although the collateral damage (thirteen uninvolved civilians, including women and children) was not proportionate to the (great) benefit of Shehadeh’s killing, since the damage anticipated at the time the attack was ordered was significantly lower, there was no violation of the rules of international humanitarian law. The commission also addressed the question of a less harmful alternative and determined that the method chosen (a one-ton bomb) was legitimate given the circumstances, and that in light of the conditions on the ground, there was no less-lethal alternative that would not have posed excessive risk to IDF forces.¹⁰

For clarification, two preliminary conditions must be met in order to initiate the commission’s review. The first requirement is that a targeted killing took place, that is, the premeditated and deliberate use of lethal force against an identified target. The second is that the targeted killing resulted in collateral damage to uninvolved civilians. Hence, in cases of “regular” attacks during combat or targeted killings that didn’t result in any collateral damage, such operations are not subject to the review of the commission.

The importance and the impact of establishing an independent, objective commission to examine Shehadeh’s killing can be seen in the decision of the Spanish court that ruled on a private complaint against senior Israeli officials for their involvement in Shehadeh’s killing. According to the Spanish court, since Israel undertook an independent, legitimate investigation, there is no room to implement Spain’s universal jurisdiction in the case and it should be dismissed.¹¹

Clearly, the legal framework applicable to targeted killings is far from simple. It consists of a number of elements, some of which are intertwined, and some of which contradict each other. Moreover, while there is great importance in understanding the appropriate legal framework for examining targeted killings, this is not enough since, even within each of the various frameworks, there are situations that distinguish themselves from one another.

The Question of Intensity, Proximity, and Control

What follows is a discussion of distinctions among situations that are subject to IHL, and particularly the conditions of the fighting in which the targeted killing takes place.

One of the recurring questions in the context of targeted killings in the framework of IHL is the circumstances in which the killing takes place. Of particular focus is the question of proximity to the armed conflict and the intensity of the conflict. This approach distinguishes between a surgical strike that takes place outside the cycle of combat or during low intensity fighting and targeted killings carried out during high intensity combat or even on the battlefield itself.

Two examples will be cited here. On November 14, 2012, at the outset of Operation Pillar of Defense, Israel killed Ahmed Jabari, head of the military wing of Hamas, by attacking his car from an aircraft.¹² The attack took place during a relatively quiet period in Israel's conflict with Hamas since the outbreak of the second intifada in 2000. On November 18, 2012, during Operation Pillar of Defense (which had reached an especially high level of intensity that day), the IDF targeted Yahia Rabia, head of the Hamas rocket unit. This occurred during one of the most serious escalations in the region in recent years (and certainly since Operation Cast Lead, which took place in December 2008-January 2009).

On the face of it, it might appear that while the targeting of Jabari, which took place during a quiet period, is a clean, classic example of targeted killing, the targeting of Rabia constitutes a regular combat action, and is therefore not subject to the complex legal framework of targeted killings as presented above. However, according to the selected definition of targeted killings – an attack on an identified target – the intensity of the fighting and the circumstances in which the killing takes place have no significance. While they could be very significant in determining the legal framework we use to examine the action and its legality, they do not affect the initial determination of whether this is a targeted killing.

The ruling by the HCJ on targeted killings did not discuss intensity as a relevant criterion for defining a targeted killing. The Court discussed the circumstances, such as the extent of Israeli control in the area (the Gaza Strip) as a criterion that, for example, allows an examination of possible alternative, less lethal measures. However, its decision does not rule out application of the legal frameworks to targeted killings that take place

during high intensity combat, to the extent that they enter the realm of the definition of targeted killing.

Many of the targeted killings in the Israeli context have been carried out in connection with Israel's belligerent occupation of the West Bank. This has led to the mistaken perception that the ruling by the HCJ on the issue of targeted killings applies only to those carried out in the context of belligerent occupation. Nevertheless, in applying Israeli law to Israeli actions, including the ruling on targeted killings, the extent of Israel's control of the territories is not directly relevant. Rather, the significance of the actual level of control is likely to be manifested in the examination of the less lethal alternatives available to the IDF when it decides whether to employ targeted killing. In order to explain this issue, the two cases will be examined more closely.

The targeting of Ahmed Jabari can be examined under the two applicable legal frameworks – IHL and Israeli law. According to IHL, by virtue of his position in the military wing of Hamas, Jabari was *prima facie* a civilian who took a direct part in the hostilities, and therefore constituted a legitimate military target. Since the armed conflict between Israel and Palestinian armed organizations, particularly those in the Gaza Strip, was still ongoing (albeit at low intensity), there was nothing preventing this attack, and the claims against Israel in this context are liable to be against the proportionality of the attack in relation to the collateral damage.

There are allegations that, at the time of the killing, Jabari was actually involved in attempts to promote discussions on a ceasefire with Israel and was not engaged in military activity. Theoretically, such allegations could weaken the legal legitimacy of Jabari's targeted killing by raising doubts about his being a civilian taking direct part in the hostilities at the time of the killing. However, due to his senior position in the military wing of Hamas, which is an organized armed group in all respects, in order for him to benefit from the status of a protected civilian, he would have had to actively and clearly show that he was no longer taking direct part in the hostilities. In this instance, it would appear that this was not the case.

When we take into account the Israeli legal framework established by the HCJ ruling, we must also ascertain that a less lethal alternative was not available. In addition, if the action harmed uninvolved civilians, the action must be examined by the special commission established as a result of the ruling.

In the case of Yahia Rabia as well, it appears that the target was legal and legitimate, according to both IHL and Israeli law. However, here the targeting of Rabia led to collateral damage, harming eleven uninvolved people, including four children and five women.¹³ We therefore must also examine the information that was available to the relevant officials at the time the targeted killing was approved, about Rabia's being at the targeted location and the anticipated collateral damage. Under IHL, a situation could arise in which collateral damage is greater than expected, and even disproportionate damage would not be considered a violation. This is because the decision to carry out an attack must be examined *ex post facto* on the basis of the information available prior to the attack (*ex ante*), in accordance with the standard of the "reasonable commander."

However, Israeli law, according to the targeted killing ruling above, indicates that because of the collateral damage – the death of uninvolved civilians – the case must be transferred to the special commission, and no importance is attached to the fact that the action took place during a high intensity conflict, since it was an attack on an identified target.

Conclusion

Two frameworks of international law can be applied to targeted killings: the law of armed conflict (international humanitarian law) and international human rights law. Each has its own guidelines that regulate and restrict the legality of the use of deadly weapons. In addition, every state has its own domestic laws that usually regulate the legality of the use of force, whether during combat or in general.

By definition, targeted killings during combat are different from "regular" killings during combat because they are an attack on a specific, identified target (whether identified personally or on the basis of the operational role). The intensity of the fighting has no significance in defining an action as a targeted killing, and it therefore has no significance in determining the appropriate legal framework.

In addition, according to the ruling on targeted killing by the Israeli HCJ, in every instance of targeted killing in which uninvolved civilians are harmed, whether in the course of a high intensity conflict such as Operation Pillar of Defense or during a long term low intensity armed conflict, Israel has an obligation to transfer the case to the special commission, established to examine the legality of targeted killings, even when the collateral damage

is proportionate and legal. The fact that the targeted killing is reviewed by the commission does not mean it is inherently problematic. On the contrary, there can certainly be situations in which the commission carries out a review and decides that there were no less lethal alternatives that would not have posed an excessive risk to IDF forces. However, the review should start automatically and immediately when there is collateral damage to the civilian population. In the test cases cited above, the commission would of course take into account Israel's lack of control (or limited control) over the Gaza Strip in terms of collecting information, finding possible alternatives, and reducing the collateral damage, and would reach a decision on the action's legality.

In conclusion, even if Israel is to fight “with one hand tied behind its back,”¹⁴ it must have two “clean hands” displayed openly that shed light on any examination of the legality of the actions carried out during the fighting.

Notes

- 1 Mordechai Kremnitzer, *Is everything kosher when confronting terrorism — on Israeli preventative killing (targeted killing) in Judea, Samaria and Gaza*, Position Paper 60, ISRAEL DEMOCRACY INSTITUTE, http://www.idi.org.il/media/304725/pp_60.pdf.
- 2 JOINT LETTER TO PRESIDENT OBAMA ON US DRONE STRIKES AND TARGETED KILLINGS (2013), available at www.hrw.org/news/2013/04/11/joint-letter-president-obama-us-drone-strikes-and-targeted-killings; Scott Shane, *Targeted Killing Comes to Define War on Terror*, THE NEW YORK TIMES, April 7th, 2013, http://www.nytimes.com/2013/04/08/world/targeted-killing-comes-to-define-war-on-terror.html?_r=0; Michael Isikoff, *Justice Department memo reveals legal case for drone strikes on Americans*, NBC NEWS, February 4th, 2013, http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite; see also Hilly Moodrick, *United States Preventative Killing*, *supra* note 1, 47.
- 3 Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, United Nations Human Rights Council, A/HRC/14/24/Add.6, (May 28, 2010), www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf.
- 4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 (hereinafter “the First Additional Protocol”), Article 51(5) (b). Israel is not party to the First Additional Protocol, but recognizes that it reflects part of customary international law and thus its application to its conduct. See for example the Israel Ministry of Foreign Affairs report following Operation Cast Lead: THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS 44 (2009), <http://www>.

mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf.

- 5 See for example United Nations High Commissioner for Human Rights, *General Comment No. 06: the right to life*, <http://www.unhcr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3?Opendocument>.
- 6 Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?*, 88 *International Review of the Red Cross* 864 (December 2006).
- 7 Amichai Cohen and Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, 14 *YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW* 37 (2011).
- 8 Israel High Court of Justice Case 769/02, *Public Committee Against Torture in Israel et al v. the Government of Israel* (2006), available at www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf.
- 9 Israel High Court of Justice Case 8794/03, *Yoav Hess et al v. Judge Advocate General* (2008).
- 10 For an article regarding the commission's decision, see N., *The Disproportion in the Shehadeh Commission's Proportionality Test*, ASSOCIATION FOR THE PROMOTION OF INTERNATIONAL HUMANITARIAN LAW, <http://www.alma-ihl.org/opeds/the-disproportion-in-the-shehadeh-commission-s-proportionality-test>. The commission's report can be found at <http://www.pm.gov.il/NR/rdonlyres/DA339745-7D9F-40C7-B20F-4481AAF1F4C7/0/reportshchade.pdf>.
- 11 Ido Rosenzweig and Yuval Shany, *Update on Universal Jurisdiction: Spanish Supreme Court Affirms Decision to Close Inquiry into Targeted Killing of Salah Shehadeh*, 17 *TERRORISM AND DEMOCRACY NEWSLETTER* (May 2010), <http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-17/update-on-universal-jurisdiction-spanish-supreme-court-affirms-decision-to-close-inquiry-into-targeted-killing-of-salah-shehadeh>.
- 12 A video clip of the operation itself was released to public media, and can be viewed on YouTube at <https://www.youtube.com/watch?v=BGQAvmjALdc>.
- 13 Gillie Cohen, *IDF won't open a criminal investigation into the killing of nine family members in Operation Pillar of Defense*, Haaretz, April 13th, 2013, <http://www.haaretz.co.il/news/politics/1.1993041>.
- 14 Israel High Court of Justice Case 5100/94, *Public Committee Against Torture in Israel v. The State of Israel et al* (1999).