

# Assessing U.S. Targeted Killings Under An International Human Rights Law Framework

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## Keywords

US TARGETED KILLINGS – APPLICABLE INTERNATIONAL LEGAL FRAMEWORK - INTERNATIONAL HUMAN RIGHTS LAW

## Abstract

The US practice of targeted killings provokes difficult questions concerning the appropriate legal framework and the standards that govern such strikes. This article will argue that, in certain cases, it is necessary to examine the legality of targeted killings under international human rights law (IHRL). An explicit IHRL justification for targeted killings is important and, at present, often ignored by the US. IHRL requires any use of lethal force to be proportionate to the legitimate aim of safeguarding life and a necessary measure with no other reasonable means available to address the threat. It is possible, following a survey of human rights decision-makers, that targeted killings in exceptional circumstances are justifiable under IHRL. It is also incumbent on the US to pass domestic legislation that provides a legal basis for strikes disconnected to September 11, and also the provision of administrative and judicial review in order to provide a post-hoc check on targeted killing decisions.

## I. Introduction

The use of weaponised drones to target suspected members of al-Qaeda has become a centrepiece of US counter-terrorism strategy. Yet, the intensification of targeted killings provokes difficult questions concerning the appropriate legal framework and the standards that govern such strikes. Targeted killings cut across a variety of international legal frameworks: the international laws regulating resort to force, international humanitarian law (IHL), and IHRL. This article will examine possible justifications for the US practice of targeted killings under IHRL.

It will begin by assessing the three legal frameworks and the need for certain drone strikes, being those that take place outside of active conflict zones, to be justified in accordance with IHRL. The article will then go on to assess the applicable principles

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under IHRL, drawing upon the pronouncements of human rights decision-makers. This analysis will show that it is conceivable that, in exceptional circumstances, targeted killings are justifiable under IHRL. The article will call for a more conscientious assessment of IHRL in US targeted killing decision-making, the introduction of domestic legislation setting out clear standards that govern the practice, and more robust administrative and judicial review.

## II. Ascertaining the applicable legal framework

### II.1 International Humanitarian Law and International Human Rights Law

Targeted killings can be evaluated under the international law governing resort to force (*jus ad bellum*), IHL and IHRL. The US asserts that it is engaged in an armed conflict with al-Qaeda and associated forces, triggering the rules of IHL.<sup>2</sup> According to Brennan, this armed conflict is unconstrained geographically: members of al-Qaeda can be targeted wherever they reside, whether in “hot” zones of armed conflict or in territories that are not the site of hostilities.<sup>3</sup> The rationale for this position is clear. To narrowly confine the ambit of a conflict geographically means that suspected terrorists can locate themselves in safe havens outside of a combat zone where they are free to plan and execute acts of terrorism.

From a US policy perspective IHL is a favourable choice of law: it provides more permissible rules for killing than IHRL and ensures immunity for its agents in such operations.<sup>4</sup> Whilst targeting under IHRL is generally a measure of last resort, under IHL it can be an option of first resort, provided that those targeted are combatants/civilians taking direct part in hostilities who are not *hors de combat*.<sup>5</sup> Further, IHL is *lex specialis* during armed conflict, displacing IHRL. The strict prohibition on the taking of life under article 6 of the International Covenant on Civil and Political Rights instead has to be read in line with the more permissible rules for the deprivation of life that prevail during armed conflict.<sup>6</sup> A further reason why the US prefers the armed conflict characterisation is that it provides stronger normative justification for conferring wide discretion on the executive without the need for

<sup>2</sup> See Speech by Koh, H. H. Legal Advisor, US Department of State, *The Obama Administration and International Law*, Speech to the Annual Meeting of the American Society of International Law, Washington DC, 25 March 2010, , available online at <<http://www.state.gov/s/1/releases/remarks/139119.htm>> (accessed 9 February 2013).

<sup>3</sup> Remarks of Brennan, J., Assistant to the President for Homeland Security and Counterterrorism Program on Law and Security, Harvard Law School, Cambridge, Massachusetts, *HLS-Brookings Conference*, 16 September 2011, available online at <<http://www.lawfareblog.com/2011/09/john-brennans-remarks-at-hls-brookings-conference/>> (accessed 9 February 2013).

<sup>4</sup> United Nations Human Rights Council, Alston P., REPORT: *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 28 May 2010, [UN Doc A/HRC 14/24/Add6], para. 46.

<sup>5</sup> For recent iteration, see Ambos, K. and Alkatout, J., “Has Justice Been Done? The Legality of Bin Laden’s Killing Under International Law”, *Israeli Law Review*, (2012); cf. Melzer, N., “Targeted Killing or Less Harmful Means? – Israel’s High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity”, *Yearbook of International Humanitarian Law* 9 2006, 87.

<sup>6</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 66, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, para. 106; *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v Uganda), 2005 I.C.J. 116, paras. 217-219.

independent scrutiny.<sup>7</sup> As the US executive argued in *Al-Aulaqi v Obama* when resisting a judicial review of its targeted killings programme, it is acting in the interests of national security during wartime—to them a quintessentially non-justiciable question.<sup>8</sup> By contrast, if IHRL were deemed to be the applicable legal framework, the focus would inevitably shift to the rights of the individual, and the human rights legal method would require the executive to provide an individualised justification for the infringement of these rights.<sup>9</sup> As a human rights question, in turn there may be more scope for the courts to examine the use of lethal force.

However, there is a concern with the legal characterisation of *all* targeted killings as falling under the laws of armed conflict. Common Article 2 of the Geneva Convention defines an armed conflict as one that involves two or more states, commonly known as an international armed conflict.<sup>10</sup> Given that al Qaeda does not represent a state, it is evident that such conflict is not of an international character.<sup>11</sup> It has been argued that the US was at least initially engaged in an international armed conflict with al-Qaeda who supported the Taliban as militia, when the Taliban was the functional government of Afghanistan during the 2001 US intervention in Afghanistan. However, the Taliban has now been overthrown and replaced by a new government in January 2004.<sup>12</sup> Therefore, the US-al-Qaeda conflict is no longer an “international” one.<sup>13</sup>

By contrast, Common Article 3 envisages an ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.’<sup>14</sup> IHL thus also regulates non-international armed conflicts (NIAC) between governmental authority and groups of persons subordinate to this authority.<sup>15</sup> Characterisation as a NIAC is a better fit, given that parties to the conflict are state and non-state entities respectively. Whether IHL applies to the US-al-Qaeda conflict will depend on whether a narrow or broad approach is adopted.<sup>16</sup> On a narrow approach, according to *Prosecutor v Tadic*, IHL requires ‘protracted armed violence between governments’ authorities and organized armed groups or between such groups within a State’.<sup>17</sup> An armed conflict thus occurs within defined zones of

<sup>7</sup> Indeed comparatively speaking IHL mechanisms for ensuring compliance are weaker than that found under IHRL. See further Alston, P., “The CIA and Targeted Killings Beyond Borders” *Harvard National Security Journal* 2 2011, 283, 305.

<sup>8</sup> *Al-Aulaqi v Obama*, No 10-cv-1469 (US District Court for the District of Columbia, 25 September 2010), Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendants’ Motion to Dismiss, 19-35; *Schneider v Kissinger*, 412 F.3d 190, 194-95 (D.C. Cir. 2005). In defense of this view, see Yoo, J., *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, University of Chicago Press, 2005.

<sup>9</sup> See generally Fitzpatrick, J., “Speaking Law to Power: The War Against Terrorism and Human Rights” (2003) 14 *European Journal of International Law*, 241.

<sup>10</sup> Common Article 2, The Geneva Convention Relative to the Protection of Civil Persons in Time of War (Fourth Geneva Convention), 1949, 75 UNTS 287.

<sup>11</sup> Lubell, N., *Extraterritorial Use of Force Against Non-State Actors*, Oxford University Press, Oxford, 2010, 96.

<sup>12</sup> US Department of State, Bureau of International Information Programs, ‘Timeline – Key Events in Afghanistan’s Political and Economic Reconstruction’, 26 January 2006, available online at <<http://www.america.gov/st/pubs-english/2006/January/20060126120012dpnosmoht0.9750482.html>> accessed 3 January 2013.

<sup>13</sup> Solis, H., *The Law Of Armed Conflict International Humanitarian Law in War*, Cambridge University Press, New York, 2010, 211.

<sup>14</sup> Common Article 3, The Geneva Convention Relative to the Protection of Civil Persons in Time of War (Fourth Geneva Convention), 1949, 75 UNTS 287.

<sup>15</sup> Cullen, A., *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, Chapter 2.

<sup>16</sup> For a discursive look at these approaches, see: Anderson, K., “Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a ‘Legal Geography of War’”, in: Berkowitz, P., eds., *Future Challenges in National Security and Law*, Hoover Institution Press, Stanford, California, 2011.

<sup>17</sup> *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-

hostilities where it is established that intense fighting has occurred.<sup>18</sup> Undoubtedly there has been an armed conflict occurring in Afghanistan. It has been argued that a state can be engaged in a NIAC with non-state actors if the military intervention is invited by the territorial state that is itself a party to the Geneva Conventions.<sup>19</sup> At the invitation of Afghanistan, the US is a party to the conflict and can conduct counter-terrorism operations in cooperation with Afghan forces.<sup>20</sup> For these reasons, targeted killings within Afghanistan and Iraq have not evoked much controversy, as they arise during the course of a conflict within a definable zone of hostilities. However, the narrow approach is unable to provide a legal basis for all the targeted killing operations that have taken place far from any conventional battlefield, such as those in Somalia and Yemen.<sup>21</sup>

In these circumstances the US has to rely on a more expansive interpretation of armed conflict.<sup>22</sup> Provided that an individual is directly participating in acts of hostilities on behalf of al-Qaeda against the US they can legitimately be made the object of an attack wherever they are located.<sup>23</sup> This position suggests that Common Article 3 should be interpreted to apply to any armed conflict that falls outside the scope of inter-state armed conflict under Common Article 2.<sup>24</sup> In this case, the US-al-Qaeda conflict can be classified as a NIAC. This view does not withstand scrutiny. For a start, it contradicts the *Tadic* criteria, which is reflective of customary international law.<sup>25</sup> Such an approach undermines a central purpose of IHL, which is to define areas of combat to minimise civilian casualties.<sup>26</sup>

## II.2 The Role of Self-Defence and IHRL

The justification for targeted killings would be on stronger ground if the distinct interests affected by a decision to use force were addressed. When a state uses lethal force in the territory of another state, directed at non-state actors, there are two legally recognizable interests engaged: the territorial integrity of the state and the rights of the individual being subjected to force. Accordingly, these interests in turn shape the appropriate legal framework applicable. It would not suffice simply for the US to assert that it is engaged in a global armed conflict with al-Qaeda. In particular, the existence of a global armed conflict with al-Qaeda, which in turn justifies the use of force, omits consideration of the interests of the territorial state whose sovereignty is interfered with by the attacking State. The existence and scope of an armed conflict, forming considerations in the *jus in bello*, cannot provide a justification for inter-state uses of force, governed by the *jus ad bellum*. Pronouncements from US officials appear

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1-T, International Criminal Tribunal for the Former Yugoslavia (2 October 1995) para.70; O’Connell, M. E., “Combatants and the Combat Zone”, *University of Richmond Law Review* 43, 2009, 845, 860-64.

<sup>18</sup> Alston, P., *supra* note 4, para. 54.

<sup>19</sup> Lubell, N., *supra* note 11 at 101.

<sup>20</sup> *Ibid.*

<sup>21</sup> See further, Ramsden, M., “Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki”, *Journal of Conflict and Security Law*, 16(2), (2011), 385-406.

<sup>22</sup> Dehn, C. J. and Heller, K. L., Debate: “Targeted Killing: The Case of Anwar Al-Aulaqi”, *University of Pennsylvania Law Review*, PENNumbra 159 2011, 175, 190.

<sup>23</sup> *Hamdan v Rumsfeld* 126 S. Ct. 2749 (2006).

<sup>24</sup> *Ibid.*

<sup>25</sup> Dehn and Heller *supra* note 22, 183; *Prosecutor v Tadić* Trial Chamber Judgment, 7 May 1997, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-AR72; *Prosecutor v Tadić*, (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction), Case No. IT-94-1-T, (2 October 1995), para.70; see also *Threat or Use of Nuclear Weapons Advisory Opinion* [1996] I.C.J Rep. para. 78.

<sup>26</sup> It is also necessary to establish that al-Qaeda is an organized armed group which is not addressed in this article in light of space. For an analysis, see: Ambos, K. and Alkatout, J., *supra* note 5.

to recognise this distinction, where it is said that targeted killings occur with the consent of the territorial state concerned, or if in the absence of consent, by invoking the inherent right of self-defence.<sup>27</sup> Pursuant to Article 51 of the UN Charter a state can use force in self-defence if an 'armed attack occurs'. Such defensive force must be necessary, proportionate and non-retributive.<sup>28</sup>

Yet, whilst on a *jus ad bellum* analysis the doctrine of consent or the right to self-defence provides the appropriate framework with which to judge the legality of any use of force in the territory of another state, this can only provide a partial justification. Particularly, the right to self-defence is part of the *jus ad bellum* and thus is a relevant legal principle governing state relations. It serves to preclude the wrongfulness of using force against another state. In itself, it does not provide a justification for the interference with the legal interests of the individual made the object of attack. The International Law Commission in its authoritative work on state responsibility confirms this view that a *jus ad bellum* justification does not preclude the wrongfulness of any violation under IHRL.<sup>29</sup> This is not to say that any justification under self-defence is going to be irrelevant to the assessment under IHRL; in many respects, the standards constraining the use of lethal force are likely to be the same under both frameworks.<sup>30</sup> Where they do differ, however, is that whilst the law of self-defence operates on an inter-state level, IHRL serves to confer rights on individuals and thus calls for an individualised assessment concerning the need and proportionality of a targeted killing. Indeed, such individualised assessment should be open to scrutiny in the form of administrative and judicial review. This point will be developed more shortly, but the working assumption that this article takes is that at least some of the drone strikes conducted by the US, those taking place outside of armed conflicts, engage IHRL and must be justified as such.

### II.3 Application of IHRL

Despite the apparent relevance of IHRL to targeted killings, there has been little said about its applicability by the US executive. There is some indication of the US position in 2006, when it informed the Human Rights Committee that 'it did not consider questions concerning the war on terrorism, and detention and interrogation outside United States territory to fall within the scope of the Covenant.'<sup>31</sup> This view is underpinned by the belief that human rights obligations under the ICCPR do not

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<sup>27</sup> Brennan, J., *supra* note 3; Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associate', available at <[openchannel.nbcnews.com/\\_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite&preview=true%22](http://openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite&preview=true%22)> (accessed 13 April 2013). See also John Denh, C., "Targeted Killing, Human Rights and Ungoverned Spaces: Considering Territorial State Human Rights Obligations", *Harvard International Law Journal Online* 542012, available online at <[harvardilj.org/2013/01/online\\_54\\_deh/](http://harvardilj.org/2013/01/online_54_deh/)> (accessed 17/04/2013).

<sup>28</sup> See generally, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States) (Merits) [1986] ICJ Rep 14.

<sup>29</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 53 UN GAOR Supp. (No 10), para. 43 stated: 'This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations...As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.'

<sup>30</sup> Chesney, R., "Who May Be Killed? Anwar Al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force", *Yearbook of International Humanitarian Law*, 132010, 3-60.

<sup>31</sup> Second and Third Periodic Reports of the United States of America, 18 July 2006, [UN Doc. CCPR/C/SR.2380], (2 July 27, 2006), (statement by Mr. Waxman).

apply extraterritorially.<sup>32</sup> Space precludes detailed assessment of this claim, although the broad contours of the debate will be mentioned.<sup>33</sup> Article 2(1) of the ICCPR requires states parties ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant’. The essential issues boil down to whether Article 2(1) of the ICCPR is to be read conjunctively (territory and jurisdiction) or disjunctively (to acts that occur either on a State’s territory *or* where an individual is under the jurisdiction of the State). If disjunctively, then the key issue is whether an individual is placed under the jurisdiction of the US when being the subject of a targeted drone strike.

Despite US assertions to the contrary, both the ICJ and Human Rights Committee have noted that the ICCPR has extraterritorial effects.<sup>34</sup> In any event, it is arguable that the source of obligations to protect human rights extraterritorially need not flow from the ICCPR, but can be derived from customary international law.<sup>35</sup> The key issue thus turns on what is meant by coming within the “jurisdiction” of a state. There is a clear rationale for a jurisdictional clause, as it imposes responsibility on states for territory and inhabitants under their control. The difficulty arises in definition, in particular whether jurisdiction is constituted legally or factually.<sup>36</sup> The view taken here is that jurisdiction is not an indivisible concept but rather has different meanings for various purposes.<sup>37</sup> As King noted, territorial-based jurisdiction must be distinguished from jurisdiction based on non-territorial factors.<sup>38</sup> Where state agents are acting abroad without territorial control it is necessary to look at the effects of their power.<sup>39</sup> The Human Rights Committee has confirmed this view pronouncing that jurisdiction extends to extraterritorial efforts by a state to abduct a person in another state.<sup>40</sup> Similarly, the Inter-American Commission on Human Rights observed that action by Cuban military planes striking two civilian light aircraft ‘placed the civilian pilots...under their authority’.<sup>41</sup> Based on these authoritative interpretations it is arguable that drone strikes come within the jurisdiction of the US and potentially engage its state responsibility.

### III. Assessing Targeted Killings Under a Human Rights Framework

If, then, IHRL applies to US targeted killings outside of the battlefield context, do such drone strikes violate human rights, particularly the right to life of the victims? Some commentators take a strict approach, noting that it would be difficult to establish

<sup>32</sup> Dennis, M. J., “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation”, *American Journal of International Law*, 99 2005, 119.

<sup>33</sup> See generally King, H., “The extraterritorial human rights obligations of states”, *Human Rights Law Review* 9(4) 2009, 521.

<sup>34</sup> *Lopez Burgos v Uruguay*, Cmn No. 52/1979, (29 July 1981); see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 J.C.J. 136, 108-11 July 9); Scheinin, M., “Extraterritorial Effect of the International Covenant on Civil and Political Rights”, in Coomans, F., and Kamminga, M. T., eds., *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2004, 73.

<sup>35</sup> Kretzmer, D., “Targeted Killing of Suspected Terrorists: Extrajudicial Executions or Legitimate Means of Defence?”, *European Journal of International Law* 16 2005 171-212, 183-85.

<sup>36</sup> See generally Milanovic, M., *Extraterritorial Application of Human Rights Treaties*, Oxford University Press, Oxford, 2011.

<sup>37</sup> King, H., *supra* note 33, 556.

<sup>38</sup> *Ibid.*

<sup>39</sup> Ambos, K. and Alkatout, K., *supra* note 5.

<sup>40</sup> *Lopez v. Uruguay*, *Communication* No. 52/1979, CCPR/C/OP/1 (1984), 88, 12.1- 12.3

<sup>41</sup> Inter-American Commission on Human Rights, *Alejandro, A., Costa, C. et al*, REPORT No.86/99 CASE 11.589, September 29 1999, para. 25.

when, if ever, a targeted killing would be justified under IHRL.<sup>42</sup> During armed conflict, the right to life of civilians is robustly protected, but this is not the same for parties to the conflict (either as combatants or civilians taking direct part in hostilities) who can legitimately be made the object of attack without any prior attempt to effectuate an arrest, unless the party is *hors de combat*. During peacetime, however, the right to life can only be deprived in the most exceptional circumstances; to quell a grave threat to life, which is often imminent, concrete, specific, and where no less harmful means are available.<sup>43</sup> Without this exceptional factual predicate, the state is limited to standard law enforcement measures and is required to afford suspects a fair trial before any finding on criminal responsibility.

The following section will show, however, that the right to life admits of a variable standard depending on the circumstances. This section will consider whether targeted killings can be justified under IHRL, assessing the approaches taken by international and regional decision-makers on the right to life and the use of lethal force. It notes that whether the use of lethal force was necessary and proportionate has accommodated the particular context in which force was used, including the degree of control that the law enforcement authorities were able to exert over the suspect.

### III.1 Proportionality

As a starting point, Article 6 of the ICCPR prohibits the ‘arbitrary’ deprivation of life. The arbitrariness standard was inserted into Article 6 so as not to pre-empt every case when the use of lethal force would be justified, instead evaluating the proportionality and necessity of such force on a case-by-case basis.<sup>44</sup> To satisfy the proportionality requirement under IHRL, any use of lethal force must be commensurate to the taking of life. Proportionality under IHRL differs markedly from that under IHL. Under IHL the sole objective of an operation can be to kill enemy combatants where it serves a military advantage, yet under IHRL there is a need to establish objectively that each operation served the purpose of averting a threat to life.<sup>45</sup> The targeting of a suspected terrorist may thus amount to a proportionate measure if it pursues the legitimate aim of saving life. The human rights communities have noted in particular the threat posed by terrorism to human rights. As UN Special Rapporteur, Chris Heyns, observed after the death of Bin Laden, ‘[a]cts of terrorism are the antithesis of human rights, in particular the right to life.’<sup>46</sup> Indeed states are under a positive obligation to exercise due diligence to protect the lives of individuals from threats of terrorism.<sup>47</sup> As the Inter-American Commission on Human Rights noted in its *Report on Terrorism and Human Rights*, ‘in situations where a state’s population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing

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<sup>42</sup> See Alston, P., *supra* note 4.

<sup>43</sup> Eighth UN Congress on Prevention of Crime and Treatment of Offenders, ‘Basic Principles on the Use of Force and Firearms’, Havana, Cuba 1990, UN Doc A/CONF 144/28/Rev 1, 112, para. 9.

<sup>44</sup> United Nations, General Assembly, REPORT: *Report of the Secretary-General, Annotations on the Text of the Draft International Covenants on Human Rights*, 1955 [UN Doc A/2929], Chapter VI, para. 3

<sup>45</sup> Alston, P., “The CIA and Targeted Killings Beyond Borders”, *Harvard National Security Journal* 2 2011 283, 304.

<sup>46</sup> Heyns, C., and Scheinin, M., “Osama bin Laden: statement by the UN Special Rapporteurs on summary executions and on human rights and counter-terrorism”, 6 May 2011 Office of the High Commissioner for Human Rights, available online at <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E>> (accessed 3 January 2013).

<sup>47</sup> Council of Europe, Committee of Ministers, “Guidelines on Human Rights and the Fight Against Terrorism”, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies, point 1; *Isayeva v Russia* (2005) 41 EHRR 791, para. 70; Inter-American Commission on Human Rights, “Reports on Terrorism and Human Rights”, 22 October 2002, [OEA/SerL/V/II.116, Doc 5 rev 1 corr], para. 87.

may use lethal force in certain situations.’ There are a number of proportionality related issues with targeted killings that require consideration.

The first concerns the extent to which the US actually engages in an individualised risk assessment of its targets. Brennan, Legal Advisor to the US Administration, noted that it was unnecessary for the US to assess the threat posed by each target. To be sure, if a targeted killing must arise as a response to a threat to life, then it is of course necessary for the state to establish a causal link between the target and the potential threat posed. Transnational terrorist groups such as al-Qaeda are loosely structured and based around shared ideas rather than a necessarily strict command structure. Merely being a member of al-Qaeda or indeed subscribing to the beliefs of the group does not in itself necessarily pose a threat to life. This would tend to suggest that the US practice of signature targeting of those who are seen in the ‘wrong place’ is unlikely to be lawful under IHRL. The analysis would potentially be different for personality strikes of operational leaders where presumably there would be stronger evidence of their involvement in future threats.<sup>48</sup>

A further contentious issue concerns the incidental loss of life arising from targeted killing operations. Collateral loss is often an unavoidable feature of armed conflicts and this is recognized in IHL. But assuming that IHL does not apply the degree to which collateral damage is permitted remains an open question. On a strict view, any death other than the intended target would amount to a violation of the right to life. Philip Alston, the former Special Rapporteur for Extrajudicial Killings, observed that ‘...drone killing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability’.<sup>49</sup> A broader view, one that finds support from the European Court of Human Rights in *Isaveya v Russia*, would permit collateral loss, provided that the operation was planned and controlled by the authorities so as to minimise the risk to life; authorities had to take all feasible precautions in the choice of means and methods with a view to avoiding and, in any event, minimising incidental loss of civilian life.<sup>50</sup>

The legality of collateral deaths under IHRL will turn on whether the narrow or broad approach is taken. The rationale for the narrow approach is clear: the authorities must follow a stricter standard of proportionality for law enforcement operations than those which occur during armed conflict, where there is greater scope to factor in the military advantage into any proportionality exercise. However what may be an unacceptable consequence of lethal force in a domestic law enforcement setting is inevitably different in an environment where the state exercises little operational control over a suspected terrorist. In the final analysis it is submitted that whether collateral damage is permitted will turn upon a host of considerations, foremost being the threat to life posed had the intended target been able to carry out a future terrorist attack. The degree of control over an operation that pursues a legitimate aim of protecting life should also be factored into the legality assessment.

### III.2 Necessity

The legality of a targeted killing operation will also turn on whether it was necessary.<sup>51</sup>

<sup>48</sup> See further, Lotrionte, C., “When to Target Leaders”, *The Washington Quarterly* 26(3) 2003, 80-81. For an excellent analysis, see: Heller, K., “‘One Hell of a Killing Machine’: Signature Strikes and International Law”, *Journal of International Criminal Justice* 2012, forthcoming.

<sup>49</sup> Alston, P., *supra* note 4, para. 86.

<sup>50</sup> *Supra* note 47. The ECtHR has also found the incidental killing of innocents could be proportionate: *Andronicou v Cyprus*, 1997-VI Eur. Ct. H.R. 2059, 2107.

<sup>51</sup> See UN Human Rights Committee, CCPR *General Comment No. 6*, (30 April 1982) para. 3; UN

This requirement embodies two main enquiries. First, an examination of whether there was any alternative non-lethal means to contain the threat. Second, whether the threat was an imminent one. Each will be dealt with in turn.

In assessing the alternatives to non-lethal force, human rights law requires that lethal force may only be used as a 'last resort' if there are 'no other means' of preventing a threat to life.<sup>52</sup> Most directly on point, the Human Rights Committee in responding to Israel's practice of targeted killings noted that 'before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terrorist must be exhausted.'<sup>53</sup> In *McCann v UK*, for example, the European Court of Human Rights, in finding that the UK had breached Article 2 of the ECHR, observed that the state had others means at its disposal (i.e. arresting the terrorist suspect before arriving at the place targeted for the terrorist attack), that its failure to assert authority at an earlier stage of the operation therefore negated the legality of its later killing of the terrorist suspect. There is undoubtedly good reason for this standard. It places an onus on the state to establish that alternative means were not available. It can minimize unnecessary deaths by emphasizing the need for non-lethal alternatives. It also addresses a growing concern in the US targeted killings context that such a lethal method now represents a general policy without proper individualised assessment of the feasibility of non-lethal alternatives in each case.

The Human Rights Committee recognizes that the degree of control that the state exercises over suspects will have a bearing on the feasibility of non-lethal alternatives.<sup>54</sup> In the 2011 decision in *Finogenov v Russia*, the European Court of Human Rights acknowledged that the rigorous standard of absolute necessity might not always be appropriate, given that the state may have had 'to act under tremendous time pressure and where their control of the situation was minimal'.<sup>55</sup> The strictness of the standard will inevitably vary taking into account all relevant considerations relating to control and the imperative to avert a grave threat to life.<sup>56</sup> The extent to which the US is able to exercise law enforcement control over suspected terrorists thus forms a relevant factor. Clearly the US can exercise such authority within its own jurisdiction. Likewise the US can work with many states with strong governing capacities to address terrorist threats within its territory according to strict law enforcement standards. However, so-called terrorist 'safe havens' pose a myriad of difficulties, often because the territorial state has weak governing capacity or is unwilling to assist.<sup>57</sup> It is in these circumstances that the strict law enforcement standard would require modification to take into account the absence of the means to address a threat to life through conventional policing.

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Human Rights Committee, *Guerrero v Colombia* Communication No. 45/1979, UN Doc. **Supp. No. 40 (A/37/40), 137**; UN General Assembly, 'Code of Conduct for Law Enforcement Officials', UN General Assembly Res 34/169, 17 December 1979; *Isayeva*, *supra* note 47, para. 175; *McCann v UK* (1996) 21 EHRR 97, para. 212.

<sup>52</sup> *Montero Aranguren v Venezuela*, Preliminary Objection, Judgment, IACtHR (ser. C) No. 150, July 5, 2006, at 67; Alston, P., *supra* note 4, para. 32.

<sup>53</sup> UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, para.15, UN Doc. CCPR/CO/78/ISR, 21 August 2003, available online at <[www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.CO.78.ISR.En](http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.CO.78.ISR.En)> (accessed 3 January 2013).

<sup>54</sup> *Guerrero* *supra* note 51. Alston in his report on targeted killings acknowledged that the degree of force permitted will vary depending on the degree to which a state controls a particular area: *supra* note 4, para. 77.

<sup>55</sup> *Finogenov v Russia* ECtHR, App. No. 18299, 2011, para. 210.

<sup>56</sup> See, e.g., *Erdog an v Turkey*, App. No. 57049/00, para.99 (ECtHR, May 15, 2007); *Andronicou v Cyprus*, 1997-VI ECtHR 2059, 2102.

<sup>57</sup> See Paust, J. J., "Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan" *Journal of Transnational Law and Policy* 19 2010 237, 251.

A survey of human rights jurisprudence also shows that the nature of the adversary and safety of security forces is also relevant. In *Bubbins v United Kingdom*, the European Court of Human Rights noted that officers do not need to put their life in danger in effectuating an arrest. To hold otherwise would ‘impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others’.<sup>58</sup> A similar point was made in *Isayeva v Russia* concerning an armed insurgency in Chechnya. The court accepted that the presence of a ‘very large group of armed fighters’ and the ‘active resistance’ may have ‘justified use of lethal force’.<sup>59</sup> Special considerations therefore factor into the assessment of the feasibility of alternatives to targeted killing.<sup>60</sup> Whilst deploying ground personnel to arrest a suspected terrorist may in theory be a preferable course of action, from a right to life perspective this may actually lead to greater loss of life than would arise with a surgical air strike directed at its intended target. Previous attempts have been made to arrest al-Qaeda members in the terrorist strongholds in Yemen. For example, in December 2001, 18 Yemeni soldiers died in a failed attempt to capture Al-Harithi, the al-Qaeda leader alleged to have planned the USS Cole bombings.<sup>61</sup> Thus, where there are substantial grounds to believe that the threat to the life of the law enforcement officials is a grave one, out of proportion (from a right to life perspective) to the advantage of using non-lethal means, then it is arguable that there would be no need to first attempt to effectuate an arrest.<sup>62</sup>

The second major factor in evaluating whether a targeted killing was necessary turns upon the use of imminence.<sup>63</sup> The need for an imminent threat is often used to mean that the threat is visible, literally in the process of being carried out. According to this view, the requirement of imminence safeguards against abuse; an imminent threat is concrete and observable, whereas a future threat still in the planning stages may never materialise.<sup>64</sup> On a strict imminence standard, it is hard to see how any targeted killing would be justified. The most direct source of any imminent threat is inevitably the ‘triggerman’ literally in the process of carrying out the attack. By contrast, it seems that the purpose of targeted killings, according to US executive pronouncements, is to disrupt terrorist planning and remove operational leaders.<sup>65</sup> Whilst such suspected terrorists may be in the process of planning a future act that constitutes a threat to life, this threat is by no means imminent in the conventional sense.

The strict approach of imminence is (and ought to be) the standard applicable to almost all operations to quell a threat to life. Yet, the unique threat posed by terrorist safe havens abroad, which may present only a limited window of opportunity to disrupt the on-going planning of known terrorist leaders who intend to launch an attack at an undefined time, may justify a departure from this strict standard. In these cases there should not be a need to delay action until some “theoretical end stage”, which would create an “unacceptably high risk that the action would fail”.<sup>66</sup> Indeed, it

<sup>58</sup> (2005) 41 EHRR 24, 483.

<sup>59</sup> *Isayeva v Russia*, *supra* note 47.

<sup>60</sup> Kretzmer, D., *supra* note 35, 179.

<sup>61</sup> Whitaker, B., “Al-Qaida suspect killed in Yemen car blast”, *The Guardian*, London, 5 November 2002, available online at <[www.guardian.co.uk/world/2002/nov/05/alqaida.terrorism](http://www.guardian.co.uk/world/2002/nov/05/alqaida.terrorism)> (accessed 3 January 2013).

<sup>62</sup> *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel 2005, H CJ 769/ 02, para. 40.

<sup>63</sup> UN Human Rights Committee, ‘Concluding Observations of the Human Rights Committee: Israel’ (21/08/2003), UN Doc. CCPR/CO/78/ISR.

<sup>64</sup> Alston, P., *supra* note 4, para. 86. Kretzmer, D., *supra* note 35, 182.

<sup>65</sup> Brennan, J., *supra* note 3.

<sup>66</sup> DOJ memo *supra* note 28.

would appear that some flexibility is permitted in human rights law to adapt imminence to the particular circumstances, where a future substantiated threat poses a grave threat to life. For example, principle 9 of the UN Basic Principles for the Use of Force and Firearms by Law Enforcement Officials provides that lethal force can be used, aside where there is an imminent threat, in order to ‘prevent the perpetration of a particularly serious crime involving grave threat to life’.<sup>67</sup> This point is echoed by the Inter-American Commission on Human Rights, who noted that in ‘peacetime situations, state agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury, or a threat of committing a particularly serious crime involving a grave threat to life, and persons who do not present such a threat, and use force only against the former’. The European Court of Human Rights may think likewise. In *Isayeva v Russia*, the court seemed to accept that lethal force could be used to quell a rebellion, even where there is no indication that there was an immediate threat posed to life.<sup>68</sup> If there is such an exception to the imminence requirement, then it should be narrowly circumscribed.<sup>69</sup> The exceptional factual predicate of a terrorist safe haven that limits a state’s ability to address the source of the threat through non-lethal means inevitably factors into this assessment.

### III.3 Domestic legal basis

IHRL requires there to be a domestic legal basis for any operation using lethal force.<sup>70</sup> According to the OLC memo, targeted killings are covered by the Authorization for Use of Military Force (AUMF) statute, passed by the US Congress after 9/11.<sup>71</sup> AUMF states that the ‘President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons’.

The extent to which targeted killing operations are mandated under the AUMF will turn upon a number of factors. First, the scope of AUMF is unclear, in that it does not specify whether its applicability is solely limited to the circumstances of an armed conflict.<sup>72</sup> The scope of AUMF potentially matters, as there are domestic law prohibitions against assassinations and killing of Americans abroad, which apply during times of peace.<sup>73</sup> The Fifth Amendment also guarantees that a person shall not be deprived of life without due process of law. Thus, if AUMF is limited solely to armed conflict, then any targeted killing operation outside of defined zones of hostilities would be without a legal basis. But the AUMF need not necessarily be drawn so narrowly to circumstances of armed conflict and would seem to permit force of both high and low intensity.<sup>74</sup> Second, more problematically, based on a literal interpretation of AUMF, a connection must be established between the perpetrators of

<sup>67</sup> Eighth UN Congress on Prevention of Crime and Treatment of Offenders, *supra* note 43, para 112.

<sup>68</sup> *Isayeva v Russia*, *supra* note 47. See also *Kelly v United Kingdom*, (1993) 16 EHRR 20, but see criticism of *Kelly*: Joseph, S., “Denouncement of the Deaths on the Rock: The Right to Life of Terrorists”, *Netherlands Quarterly of Human Rights* 1996 14(1) 5-22, 9.

<sup>69</sup> See further, Kretzmer, D., *supra* note 35, 203.

<sup>70</sup> Melzer, N., *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, 225.

<sup>71</sup> See also *al-Aulaqi v Obama* (D.D.C. 25 September 2010) (Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendants’ Motion to Dismiss), 4.

<sup>72</sup> See *Hamdi v Rumsfeld*, 542 U.S. 507, 535 (2004); *Boumediene v Bush*, 553 US 723, (2008); *Parhat v Gates*, 532 F.3d 834 (D.D.C. 2008).

<sup>73</sup> 18 USC s.1119, Foreign Murder of United States Nationals Act.

<sup>74</sup> Chesney, R., *supra* note 30, 51.

the terrorist attacks on 9/11 and those subject to a targeted killing operation. In US case law it was noted that the AUMF does not include terrorist organizations that merely share an abstract philosophy or even a common purpose with al Qaeda – there must be an actual association in the current conflict with al Qaeda or the Taliban.<sup>75</sup> This is problematic, because some al Qaeda groups, such as the AQAP did not exist during 9/11. The AUMF is thus circumscribed quite narrowly in this regard and would seem to envisage the organisational hierarchy that comprised Al-Qaeda in 2001. In short, it would appear that the AUMF does not provide a sufficient domestic legal basis for the variety of targeted killing operations undertaken by the US.

### III.4 The Role for Judicial and Administrative Oversight

A further requirement is that any use of lethal force must be subject to review. Article 6 of the ICCPR does not provide explicitly that there must be an investigation. The Human Rights Committee in General Comment No. 6 noted that the law must ‘strictly control and limit the circumstances in which a person may be deprived of their life by the authorities’, and to take ‘measures...to prevent and punish deprivation of life’.<sup>76</sup> In subsequent cases, the Committee has noted that the state is subject to a duty to ‘take effective steps to investigate’ the deprivation of life.<sup>77</sup> This requires a ‘proper’ and ‘independent’ investigation to be carried out.<sup>78</sup> The Committee has not been prescriptive of any particular form of oversight, presumably according discretion to states as to how it investigates deprivations of life.

Similar pronouncements can be found in Strasbourg, where the European Court of Human Rights has frequently observed that protection of the right to life required some form of official investigation when state agents have killed individuals as a result of the use of force. The purpose of this investigatory obligation was to ensure accountability for deaths occurring under their responsibility. In order to meet this investigatory obligation, the state had to initiate a prompt and independent investigation capable of determining whether lethal force was justified. There must also be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.<sup>79</sup> Some exercises of executive power that interfere with human rights also require judicial oversight. For example in *Klass v Germany* the court noted in the context of covert surveillance laws that ‘an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.’<sup>80</sup> The court also noted that ‘in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.’<sup>81</sup> Likewise, the Israeli Supreme Court underscored the importance of judicial review of targeted killings when reviewing the executive’s practice.<sup>82</sup>

<sup>75</sup> *Hamlily v Obama* (US District Court for the District of Columbia), 19 May 2010, 16–17.

<sup>76</sup> United Nations Human Rights Committee, *General Comment 6*, UN Doc HRI/GEN/1/Rev.6 (1983), para 3.

<sup>77</sup> *Baboeram et al v Suriname*, Human Rights Committee, Communication Nos. 146/1983 and 148-54/1983.

<sup>78</sup> *Laureano v Peru*, Human Rights Committee, Communication No. 540/1993, U.N. Doc. CCPR/C/56/D/540/1993.

<sup>79</sup> *McKerr v. United Kingdom* (2002) 34 EHRR 20 paras. 111-115; *Kaya v. Turkey*: (1999) 28 EHRR 1, para 86; *Jordan v United Kingdom* (2003) 37 EHRR 2 at paras. 105-109; App. No.56413/00.

<sup>80</sup> *Klass v Federal Republic of Germany*(1978) 2 EHRR 214, para. 55.

<sup>81</sup> *Ibid.*, para. 56.

<sup>82</sup> Committee Against Torture, *supra* note 62, paras. 61 *et seq.*

The US executive has resisted calls for the introduction of external checks on its decisions to target suspect terrorists. Recently Brennan has noted, ‘a state that is engaged in an armed conflict or in legitimate self-defence is not required to provide targets with legal process before the state may use lethal force.’<sup>83</sup> Furthermore, Brennan also noted that adequate process was also unnecessary, as the ‘procedures and practices for identifying lawful targets are extremely robust...They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with applicable law.’<sup>84</sup> Despite assurance that the US practice of targeted killings accords with applicable law in the planning and execution stages, there are a number of concerns from an IHRL perspective. First, the characterisation of ‘applicable law’ is essentially one that is defined unilaterally by the US executive alone without any judicial challenge. The US District Court in *Al-Aulai v Obama* did not allay these concerns in finding that the issues raised non-justiciable political questions. Accordingly the US executive may be applying standards that fall short of IHRL, especially given that it primarily characterises the applicable law as IHL. Second, the failure to provide any form of independent mechanism violates basic procedural requirements under IHRL. The reasons presented by US officials to resist independent oversight are unconvincing. In particular, as analysed above, the procedural minimum standard under IHRL does not require *audial te rampartem* to be respected in the sense that the target has an opportunity of notice and reply prior to the commencement of any drone strike. Rather, the need for an independent investigation requires at a minimum a post-hoc examination of all the circumstances. Such oversight should be capable, if submitted, of identifying, amongst other matters, whether the individual was a member of a terrorist organization; the evidence that establishes he was engaged in acts of terrorism; whether he was arbitrarily deprived of his life. Third, the suggestion that independent oversight is unjustified or unnecessary reflects a worrying trend by US administrations to insulate counter-terrorism decisions from public accountability. Indeed, the reported human rights abuses at Guantanamo Bay provide a poignant example of the dangers of unchecked power.<sup>85</sup>

#### IV. Conclusion

It has been argued in this article that the US justification for targeted killings, resting on self-defence and the existence of an armed conflict with al-Qaeda, is unduly narrow and does not provide an adequate justification for all targeted killings to date. Outside of a defined zone of conflict, the US must justify any targeted killings as consistent with the international law of self-defence and IHRL. The international law of self-defence serves to preclude the wrongfulness of any use of force on another state’s territory, whereas IHRL provides the appropriate framework to assess the legality of depriving an individual of their life.

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<sup>83</sup> Thomas, J. in his dissent in *Hamdi v Rumsfeld*, *supra* note72; Koh, H. H., ‘The Obama Administration and International Law’ (Annual Meeting of the American Society of International Law, Washington, DC, 25 March 2010) available online at <<http://www.state.gov/s/1/releases/remarks/139119.htm>> (accessed 15 February 2013).

<sup>84</sup> Johnson, J. C., “Deans Lecture: National Security, Lawyers and Lawyering in the Obama Administration”, February 2012. See Koh, H. H., ‘The Obama Administration and International Law’ (Annual Meeting of the American Society of International Law, Washington, DC, 25 March 2010) available online at <<http://www.state.gov/s/1/releases/remarks/139119.htm>> (accessed 15 February 2013).

<sup>85</sup> See further Murphy, R. and Radsan, A. J., “Due Process and Targeted Killing of Terrorists”, 31 *Cardozo Law Review* 31 2009 405, 438.

Whilst IHRL imposes stringent requirements for the use of lethal force, it is to be noted that some pronouncements from human rights decision-makers recognise that the standards of necessity and proportionality are adaptable, taking into account the gravity of the threat posed to life and the extent to which the authorities are able to assert control over the suspected terrorists. Indeed, if an expanded definition of jurisdiction is given so that the ICCPR enjoys wide extra-territorial effects, it necessarily follows that the standards that qualify the right to life will also take into account a range of factors unique to any extra-territorial use of force. To assert otherwise would be to impose a domestic law enforcement paradigm on the quite different context and challenges arising from the extra-territorial uses of force.

Yet, IHRL is also relevant in another important way; in requiring the US to take measures domestically to provide a legal basis for the killings and an effective means of investigating each killing. In order to enhance the legitimacy of targeted killings and to safeguard from abuse, the US should take steps to provide a legislative standard governing the use of lethal force against suspect terrorists. Effective mechanisms of administrative and judicial review should also be put in place to protect against abuse and ensure that targeted killings only occur in accordance with law.

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