

SILENCING HUMAN RIGHTS IN THE CLASH OF ARMS? ISRAEL'S OFFICIAL POLICY OF "TARGETED KILLINGS"-A DARK SIDE IN FIGHTING TERRORISM

There is no act to which the law does not apply in as far as it is a matter falling within the purview of the law and the law takes a position as to whether it is permitted or forbidden. Where there are legal norms there are also legal standards to implement the norms. When a democracy fights terrorism the law cannot be presumed to be silent. International human rights law applies equally in war and in peace, and covers all classes of people at all times, and under all circumstances. The wide and sweeping notion of national security should not be allowed to allow a direct subversion of human rights as Israel continues its formal and public policy of "targeted killings". The end justifies the means, is a dangerous notion where the twin pillars of civilized society apply-right to life and due process. Human rights law provides normative grounds for delimiting the lines between permissible and impermissible behaviour. The legality of the policy of "targeted killings" in light of international human rights law is the focus of this Article.

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I. Introduction

"In its modern manifestations, terror is the totalitarian form of war and politics. It shatters the war convention and the political code. It breaks across moral limits beyond which no further limitation seems possible" (Gross:233). Whether civilian or non-civilian there is no immunity from terrorism. Terrorists kill anyone. Terrorists do not respect the law nor do they "play by the rules" (Porras:139). "The complaint is that the terrorist respects no law--not the criminal law, not moral law, not the law of peace, and not the law of war. The terrorist is understood to be flouting all of these sets of law simultaneously" (Porras:142). "...[W]hat is terrifying about terrorists is not that they are law violators, but that they have situated themselves in that impossible place, located somewhere outside of law..." (Porras:142).

States have historically initiated a legal response as their first reaction to international terrorist activities. Legal mechanisms such as extradition and prosecution are primary examples of legal responses used by States against international terrorists (Nadelmann:64-71) States, however, have never relied solely on legal means to combat terrorism because legal strategies often prove to be insufficient mechanisms for deterring future terrorist attacks (Raimo:1478). In any case in the face of the seriousness of new and potentially devastating terrorist threats, there seems an urgent need to take action before a terrorist attack occurs rather than respond to an attack with legal action (US Congressional Records 1997).

The perceived threat that terrorism poses to States impacts the laws and policies used to thwart it (Agencies' Efforts to Fight Terrorism 1998). "It has been argued that international

law actually plays into the hand of terrorists. They protect themselves by exploiting various lacunae in the law and use these to their advantage. Further, it is argued that if it is desired to wage war against terrorism, then terrorists must be seen, not as criminals, but as persons jeopardizing national security” (Gross:202; Sofaer:89-90). This view has become especially dominant in the post-September international climate.

Until recently, the law enforcement approach predominated counter-terrorism responses (Bassiouni:89-96). This approach considers terrorist events as purely criminal acts to be addressed by the domestic criminal justice system and its components. This entails domestic criminal law which is clearly within the authority of individual nations, and grants no status--other than that of common criminal and common crime--to either those who commit terrorist acts or to the acts themselves. “Equally important, a law enforcement response to terrorist acts *ensures due process*. When the evidence is insufficient, allegations are dropped or fail in court, resulting in a dismissal of the charges or findings of not guilty. The use of military force, on the other hand, provides no due process to those killed or injured, and creates a greater risk of harm to innocents caught up in the battle. The law enforcement approach is a more precise instrument and one much more capable of meting out *individualized justice*” (Travalio & Altenburg:99)[Emphasis added].

Despite the clear-cut positives that the domestic legal enforcement framework offers, it has proved to be inadequate. The possibility of dismissed charges or acquitted defendants is all too real and frequent. Only in the mid-1980s did States (notably Israel and the US) begin to suggest that terrorist acts might be approached from a conflict management (and thus, law of armed conflict) perspective, rather than exclusively from a law enforcement viewpoint (Travalio & Altenburg:99). The belief is that only the use of armed force will result in the degree of decisive action that will minimize the likelihood that offenders will go unpunished.

The lack of clear-cut definition of terrorism at the international level (owing to political and ideological differences) means that domestic agencies best suited to implement an antiterrorist strategy cannot be ascertained and thus leads to a patchwork that entails the courts, the intelligence services and not infrequently the military. The law enforcement approach to terrorism applies domestic law, while the conflict management (use of force) seeks to utilize the law of armed conflict. While the right of a State to defend itself and safeguard its citizenry

is clear, the nature and degree of force to be used is pegged on the law of armed conflict and engages international human rights law as well.

Israel views the Palestine uprising of September 2000 (al-Aqsa Intifada) as an armed conflict which in turn means that the framework applicable to this is the law of armed conflict. The issues regarding the status of terrorists as well as counter-measures that are raised in the Arab-Israeli conflict are complex. On one hand, the terrorists fall within the ambit of combatants and thus engage the law of armed conflict; on the other hand they are criminals and thus fall within the rubric of domestic legal enforcement. “Israel’s reactions include the destruction of Palestinian security facilities; frequent use of targeted state killings of suspected perpetrators of violence; ever-tighter closures around Palestinians locations; aerial bombardments and ground invasions to refugee camps...” (Ben-Naftali & Michaeli:247). It is the “targeted killings” as one of the means Israel uses to combat what terrorist attacks directed against its citizens, and what the Palestinians refer to as their uprising against the Israeli occupation that is the focus of this Article.

Depending on the construction of the realities of the Intifada, the legality or illegality of “targeted state killings” still remains to be determined on a broad spectrum that engages both the laws of armed conflict and human rights. This Article seeks to adopt a limited dimension-reviewing the actions against the background of international human rights. Human rights law although interrelated with the law of war and humanitarian law, is a distinct branch of international law and it is the human rights perspective with which this Article is concerned with.

James Bond Style Operations: Surgical Strikes

On November 9, 2000, Hussein Abayat, drove his car on one of the crowded streets in the West Bank. An Israeli helicopter circling above fired three missiles killing him as well as two civilians (Amnesty International 2001). Shortly after Hussein Abayat, was killed, an Israeli Defence Forces (IDF) Spokesman issued the following announcement: “...The action this morning is a long-term activity undertaken by the Israeli Security Forces, targeted at the groups responsible for the escalation of violence” (Amnesty International 2001). This announcement marked the start of an official, publicly stated Israeli policy of “targeted killings”. Fourteen months later, the policy was unequivocally reaffirmed when the Judge Advocate General of the IDF issued conditions for the use of selective assassinations of

terrorism suspects. The policy prohibits targeting as “retribution for past terror strikes.”(Amos & Alon) The four conditions allowing selective assassinations are:

There must be well-supported information showing the terrorist will plan or carry out a terror attack in the near future. The policy can be enacted only after appeals to the Palestinian Authority calling for the terrorist’s arrest have been ignored. Attempts to arrest the suspect by use of IDF troops have failed. The assassination is not to be carried out in retribution for events of the past. Instead it can only be done to prevent attacks in the future which are liable to toll multiple casualties .”(Amos & Alon).

The Israeli government initially defended the policy as anticipatory self defence against future acts of murder against Israeli civilians as limited to the “ticking bomb” situations. However, this hollow justification has been rapidly jettisoned by the reality that Israel clearly doesn’t take into account what seemed like an almost plausible rationale in an otherwise very controversial legal and moral policy.

Three and half years after the policy of “targeted killings” was officially pronounced, there have been about 250 deaths (130 “targets” and about 100 “collateral”) (The Australian). The policy shows no sign of abating. Only recently, Israel, in the face of widespread condemnation killed two Hamas leaders within a space of less than four weeks. In the early morning of 22 March 2004, three rockets fired from Israeli helicopter gunships struck the entourage of Hamas spiritual leader Sheikh Ahmed Yassin reducing the car conveying the blind, paraplegic cleric into a pile of twisted metal. Dumbfounded Palestinians gathered the remains of the nine victims, including the dashed out brains of Sheikh Yassin. Twenty- six days later, Sheikh Yassin’s successor Dr Abdel-Aziz Rantissi was killed in a copy-cat operation (The Economist).

“By publicly admitting the policy of targeted state killings, Israel indicates that far from engaging in the illegal activity of extra-judicial executions or wilful killings, it is duly exercising its right of self-defence in a situation that amounts to an armed conflict appropriately governed by the Laws of War” (Ben Naftali & Michaeli:240-41). In the context of the Arab-Israeli conflict, another important issue is whether the Palestine groups are in a war of national liberation or simply criminals engaging in heinous deeds? However, the scope of the Article does not allow for a consideration of the issues that these actions raise in the context of the laws of armed conflict as well as within the recognized right to self-determination. It suffices to note that even in the context of war, the meaning of the term “assassination” is, simply, any unlawful killing of particular individuals for political purposes

and is prohibited under the laws of armed conflict (Hague Regulations:art 23; Additional Protocol I:art 37). This rule is largely consistent with the definition under human rights law to which the Article now turns.

Extra-judicial Executions Defined

Israel's controversial policy of "targeted killings" receives a variety of references, ranging from extra-judicial executions and political assassinations (Human Rights Commission Report 2000:121) to liquidations and acts of self-defence (Human Rights Commission Report 2000:121). "The term used surely reflects one's political point of view, but also connotes the different legal framework within which the speaker places the action. Extra-judicial killings and political assassination are not terms usually identified with combat terminology, but rather with human rights regimes; liquidation and self-defence on the other hand, are commonly used in combat situations, but are foreign to human rights terminology (Ben-Naftali & Michaeli:275)."

In the human rights context, extra-judicial executions *are unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence* (Amnesty International 1992). The description is used to distinguish extra-judicial executions from other killings. This has several elements. For example, an extra-judicial execution is *deliberate*, not accidental. An extra-judicial execution is *unlawful* and it violates national laws such as those that prohibit murder, and/or international standards forbidding the arbitrary deprivation of life.

An extra-judicial execution, strictly speaking, is *carried out by order of a government or with its acquiescence* (Amnesty International 1994:86). This concept distinguishes it from "extra-judicial executions" for private reasons, or killings that are in violation of an enforced official policy (Amnesty International 1994:86). The concept of extra-judicial executions brings together several types of killings; death in police custody, assassination or killings by officers performing law enforcement functions but involving a disproportionate use of force to any threat posed (Amnesty International 1994:87). The combination of unlawfulness and governmental involvement puts extra-judicial executions in a class of their own. Therefore, an extra-judicial execution is, in effect, a murder committed or condoned by the state (Amnesty International 1994:87). The unlawfulness of extra-judicial executions distinguishes it from justifiable killings in *self-defence*, deaths resulting from the use of reasonable force in *law enforcement*, killings in war that are not forbidden under international laws regulating the

conduct of *armed conflict*, and the use of the *death penalty* following a lawful process (Amnesty International 1983:89-90).

Argument has been made that attacking terrorists, as part of a pre-emptive policy of Israel is not an issue in which the law needs to or can intervene. In other words, it is said that the issue is not justiciable, at least from an institutional point of view. This position was supported by an Israeli court in *Motti Ashkenazi v Minister of Defence* (Israeli High Court). The bold statement by the Court in the case however seems at odds with the dictates of international law. Any military action by a state generally engages the law of armed conflict which is in general part of customary international law. This in turn means that the operational policies of a state ought to be constrained by international law and judged by the standards established by both the law of armed conflict and international human rights law. There is no doubt that decisions of whether or not to undertake military action are executive decisions which domestic courts may not be in a position to adjudicate, however these decisions ought to accord with international law rather than a sweeping invocation of “national security” as though this trumps laid down international standards.

Professor Ralph Ruebner writing on the Rule of Law in an age of terrorism avers strongly that: “When a democracy uses security as a trade off against individual and human rights, real security will elude it. Security comes to a nation when it adheres to the Rule of Law” (Ruebner:454). Support for this position is espoused by Justice William Brennan, Jr. who cautions on the danger of balancing away human rights in time of war. Justice Brennan notes that: “A jurisprudence that is capable of sustaining the supremacy of civil liberties over exaggerated claims of national security only in times of peace is, of course, useless at the moment that civil liberties are most in danger” (Brennan:14). Professor Ruebner contends that: “The conception that equates human rights as security and security as human rights disrespects individual rights and the Rule of Law” (Ruebner:545). The author concurs with this views considering the reality that governments have a bad record in seeking to use national security as a rationalization why security should come out on top in a balancing scheme that engages these two important themes. Human rights law concerns rights enjoyed by all people at all times and more so when it relates to its core non-derogable values which are particularly imperilled when the notion of state of emergency is engaged.

“Targeted Killing” as a Violations of International Human Rights

Extra-judicial executions are clear violations of fundamental rights proclaimed in the earliest human rights instruments adopted by the UN. The adoption of the Universal Declaration of Human Rights (UDHR) in 1948 in the aftermath of the sovereign excesses of World War II was an immensely important event. By adopting it, the governments of the world, represented at the UN, agreed that everyone is entitled to fundamental human rights (UDHR: art 2). These rights apply everywhere, not just in those countries whose governments may choose to grant them. It follows from this that all governments must protect the rights of people under their jurisdiction, and that a person whose human rights are violated has a claim against the government that violates them (UDHR:art 8). Although the UDHR does not have the formal force of a treaty, and is therefore not legally binding in and of itself, it has become so widely recognised and accepted since its adoption that it should be regarded as obligatory for all States as part of customary international law (Tehran Proclamation 1968; Henkin 1981:16-20).

Article 2 of the UDHR provides:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty (UDHR).

Article 3 of the UDHR further enshrines one of the core non-derogable rights central to human rights: “Everyone has the right to life, liberty and security of person.” It follows from the fundamental concept of human dignity that human rights law excludes no human being from protection, whether a *combatant* or a *civilian*. About two decades after the adoption of the UDHR, the rights to life, liberty and security of person were encoded as treaty obligations in the International Covenant on Civil and Political Rights (ICCPR).

The ICCPR (to which Israel is a State Party) specifically guarantees the right to life in Article 6(1): “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” The statement that individuals have an “inherent right to life” of which they shall not be “arbitrarily” deprived suggests that the right to life only may be forfeited pursuant to fair and regular procedures for serious criminal

offences. Clearly, the right to life is the prerequisite for the exercise of all other rights. Arbitrary and summary executions arguably are a flagrant disregard of an individual's humanity and reduces them to the status of superfluous objects. (ICCPR:arts 10, 16).

There is no question that when an act of terrorism occurs, nations should be willing to act swiftly and in a decisive manner. The case for Israel is off course the more compelling in view of the tactics of employed by various radical Palestinian groups. But to argue that the unique threat means that the security measures applied should not endow the same treatment to all people and that differentiation should be allowed pushes the whole matter into the murky waters of self preservation. National security measures pursued by governments are subject to legal constrains. Legal constrains are far too important to be abdicated to the caprice of government as it paves the way for abrogation of fundamental human rights.

International human rights recognises that rights are not absolute. Their content is examined and determined against the rights and interests of others. This corpus of law thus incorporates the concepts of national security, public order, and public emergency. Indeed, the ICCPR recognizes the need to resort to extreme measures in extraordinary circumstances in Article 4(1), stating that, in times of public emergency, States may take measures derogating from their obligations under the Covenant. Some rights, however, are of such a fundamental character that States cannot derogate from them. The prohibition on summary and arbitrary executions applies during public emergencies. Article 4 of the ICCPR permits derogation from States Parties obligations in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed (ICCPR:art 4 para 1). Such derogations may occur to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with States' other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin (ICCPR:art 4 para 1). This is a strict standard permitting good faith derogations strictly limited by the absolute necessity of combating a publicly proclaimed emergency which threatens an entire State, rather than only a distinct segment of the population (Hartman:16-17). The derogation must be proportional to the threat in terms of both degree and duration. It follows that the state of emergency declared by Israel does not allow it to derogate from the right to life. The provisions of human rights law apply in full to residents of the Palestinian territories.

Hernan Montealegre, Executive Director of the Inter-American Institute of Human Rights argues that non-derogable rights constitute “a certain core of fundamental rights ... [which] acquire an absoluteness and pre-eminence in the hierarchy of legal norms” (Montealegre: 42).

[I]f the suspension of one right affects the due fulfilment of the pre-eminent obligation, such suspension, although permitted in principle, is illegitimate in the way it is exercised. Without question, the exceptional derogation of obligations is permitted only to the extent it does not affect the fulfilment of the “reinforced” non-derogable obligations; in the event this is not the case, a pre-eminent international obligation is violated (Montealegre: 42).

Relating specifically to extra-judicial killings, the Human Rights Committee (HCR) places a special interest on the excessive use of force exercised by States’ security forces. In General Comment No. 6, it concluded that:

The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6(1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities (General Comment No. 6:6 para 3).

The HCR has been harshly critical in situations where States have used what is deemed excessive force in dealing with national security situations. For example in 1992, the Committee lambasted Peru for the excessive force used by its military and paramilitary forces against persons suspected of terrorist activity. While condemning the “atrocities perpetrated by insurgent groups” and “the scale of terrorist violence, which shows no consideration for the most basic human rights,” the Committee nonetheless held that combating terrorism with arbitrary and excessive state violence, including numerous extra-judicial executions, cannot be justified under any circumstances (Human Rights Committee 1992:8).

Summary and Arbitrary Executions and the United Nations

The United Nations General Assembly in 1980 expressed its alarm at the incidence in different parts of the world of summary and arbitrary executions and articulated concern over the occurrence of executions “which are widely regarded as being politically motivated” (GA Resolution 35/72: 195). In 1981 The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders unanimously adopted a resolution deploring and condemning the killing of political opponents or suspected offenders by governmental personnel or by paramilitary or political groups acting with tacit or direct governmental support (Sixth UN Congress 1981:8). The Congress affirmed that such acts constitute a

“particularly abhorrent crime,” the eradication of which is a “high international priority” (Sixth UN Congress 1981:8). It urged governments and the United Nations to act to prevent such acts (Sixth UN Congress 1981:8).

Reports of political killings led the Economic and Social Council in 1982 to appoint a Special Rapporteur on summary or arbitrary executions (Rodley:715-16). Arbitrary executions were considered by the Special Rapporteur to be killings carried out, without resort to the judicial process with the government’s complicity, tolerance or connivance (First Report 1983:18). The Special Rapporteur observed that the phenomenon of summary or arbitrary executions is most prevalent in countries experiencing internal disturbances and there existed a close relationship between summary or arbitrary executions and violations of other human rights (First Report 1983:140). In addition the use of summary or arbitrary executions often has been associated with the declaration of a state of emergency which results in a suspension of due process protections and constitutional protections for human rights.

In a recent report to the UN Commission on Human Rights, the UN Special Rapporteur on extra-judicial, summary, or arbitrary executions referred to the Israeli policy of “targeted killings” as a “grave human rights violation” (UN Human Rights Commission 2002). This assessment of the Israeli policy is better understood in light of its pre-planned element. Unlike an immediate response to an outbreak of violence, often leaving no time for hesitation nor room for the employment of alternative means, Israel’s policy seems to obstruct the possibility of resorting to an available judicial process, a right provided for the by article 14 of the ICCPR.

From a human rights point of view, the Israeli policy as a whole is an unjustified and illegal infringement of the right to life. Human rights law cannot sustain actions that result in so high a death toll. The jurisprudence of human rights bodies suggests that specific and pinpointed killing, even of a person whose employment of terrorist means has been undisputed, cannot be considered legal. Only in rare and exceptional circumstances could such an operation be justified (Ben-Naftali & Michaeli:287).

Conclusion

The multilateral human rights instruments that have entered into force since the founding of the United Nations in 1945 define the substantive rights of individuals vis-à-vis their own States. They represent commitments to the entire international community by each State Party. These commitments make human rights a proper subject for international concern and justify sanctions by other States, individually and collectively, for violations thereof. Because

they focus on individual rights and not on State responsibilities, general human rights instruments do not refer directly to a State's obligation to investigate or prosecute under international law. However, they do recognise an individual's right to a remedy when his/her rights have been violated.

The law plays an important role in marking the limits and conditions on measures used to protect national security against terrorism. Though States may propose counter-terrorism measures they must consider both their operational practicality and legality. The rules of international law must and do evolve to meet new and changing circumstances. But this evolution is circumscribed by necessity and accomplished only by the explicit and implicit agreement of the world community. The rules relating to state responsibility and self-defence are sufficiently robust and flexible to permit a broad range of counter-terrorism measures. However, States should not allow the real and terrible threat of terrorism to lead them down paths that are best left unexplored.

Undeniably, one has to protect both fundamental human rights and the social structure. It does not however mean that there is necessarily a contradiction between individual rights and maintenance of national security. Cooperation among between domestic and international law enforcement agencies through mutual assistance programs stands as the best way to decrease the use of "targeted killings" as a necessary alternative, and increase the effectiveness of law enforcement techniques such as evidence gathering and apprehending suspected terrorists. Adhering to universally-accepted principles, processes, and instruments is an important safeguard that will prevent lapses into state-centric agendas focused on dangerous notions of self-preservation.

While it has long been recognised that international law requires States to respect and ensure human rights, that same law has generally allowed governments to determine how their obligations will be fulfilled. But the measures used to secure human rights are no longer subject to the broad discretion of governments when it comes to a core set of fundamental rights that merit special protection. What is needed is the realisation by States of a definite corpus of international law that may be applied apolitically to internal atrocities everywhere, and that recognises the role of all States in the vindication of such law.

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