

TARGETED KILLINGS AND THE SOLDIERS' RIGHT TO LIFE

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ABSTRACT

Targeted killings are a major, albeit controversial, policy in the modern war against terror. Yet, since modern warfare is conducted at large among civilian populations, the lives of troop soldiers, who are called to fight not behind battle lines but inside unknown hostile environments, are highly at stake. The present paper would like to present the position that subject to the principle of proportionality and irrespective of the legal regime governing targeted killings, extensive troop losses should also constitute, along with concern for enemy civilian casualties, a legitimate reason for the endorsement of the practice of targeted killings.

I. INTRODUCTION

In April 2002 the Israeli Defence Forces entered Jenin, in the West Bank, in the course of an operation to arrest Palestinian terrorists. A fierce battle erupted. The soldiers had to pass along booby trapped buildings, while the Palestinian fighters targeted them, hiding inside the civilian population.

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According to the Report of the United Nations' Secretary General,¹ this battle resulted in the death of about fifty-two Palestinians, half of them civilian although it was argued that the number of the civilian casualties in the particular incident was much lower.² Moreover, twenty-three Israeli soldiers also died, a heavy toll for the Israeli army.³

In December 2001, Yemeni Special Forces attempted to capture Al-Ahdal and Al-Harethi, major operative members of Al Qaeda in the country. Tribal forces in the village of Al-Hosun in Marib province, supporting Al-Ahdal, opened fire against the Yemeni forces, killing eighteen Yemeni soldiers before the terrorists managed to escape.⁴

In modern warfare, conducted at large among civilian populations, it is not only the civilians' lives which are in constant danger, but also those of the troop soldiers, who are called to fight not behind battle lines but inside unknown hostile environments. Yet, these troop casualties would have been avoided had the respective countries opted for operations by air against the specific targets.

Targeted killings are the most widely used, yet also highly disputed expression of the aforementioned policy. The present article would like to demonstrate that subject to the principle of proportionality and irrespective of the legal regime governing targeted killings, the troops' right to life constitutes a valid consideration for its endorsement. Targeted killings should be taken into account in any military commander's planning of an operation.

As such, Part II will focus on the legality of targeted killings. Once confirmed that the particular practice is not *ab initio* illegal, Part III will try to demonstrate that both according to international humanitarian law and human rights law, the lives of the soldiers should constitute a valid reason for resort to the particular practice. Part IV will delve into international jurisprudence, in an attempt to examine the limits of protection for the right to life. Part V will examine the sensitive balance between the lives of soldiers and those of enemy civilians, by focusing on the conditions under which the consideration of troop losses could lead to the approval of a targeted killing and by proposing the

1. The Secretary General, *Report of the Secretary General prepared pursuant to General Assembly Resolution ES-10/10*, ¶ 43, delivered to the General Assembly, U.N. Doc. A/ES-10/186 (July 30, 2002), available at <http://www.un.org/peace/jenin/> (last visited Sept. 4, 2007).

2. See *id.* ¶ 57. According to the Israeli government the number of civilian casualties amounted to fourteen deaths.

3. H CJ 3114/02 Barake v. Minister of Defense [2002] IsrSC 56(3) 11. The statement of the Israeli Supreme Court, adjudicating on allegations of a massacre, that "in Jenin there was a battle—a battle in which many of our soldiers fell. The Army fought house to house and, in order to prevent civilian casualties [to the greatest extent possible], did not bomb from the air. Twenty-three IDF soldiers lost their lives. Scores of soldiers were wounded." *Id.*

4. Gregory Johnsen, *Terrorists in Rehab: Yemen Uses the Pages of the Qur'an To Re-educate its Jihadis*, 17 WORLD MAGAZINE ONLINE 3, Summer 2004, <http://www.worldviewmagazine.com/issues/article.cfm?id=139&issue=34> (last visited Sept. 4, 2007).

principle of proportionality as a guiding standard. Finally, Part VI will try to offer some conclusions.

II. THE PRACTICE OF TARGETED KILLINGS

While the modern way of warfare has changed, with an emphasis on the war on terrorism, it is true that targeted killings are now one of the basic features of this war.⁵ As such, it should cause no surprise that major countries, like the United States and Israel, engaging in the fight against terrorism, have resorted to the particular policy.

In November 2002, the United States killed Al-Harethi, an Al-Qaeda member, in a targeted killing.⁶ Even before the September 11th attacks, the United States had considered the possibility of resorting to the particular practice. Presidents Clinton and Bush had reportedly authorized not only the arrest of Osama Bin Laden, but also his extermination, in case that was needed.⁷ In December 2002, the New York Times reported that the Central Intelligence Agency (CIA) is authorized to kill individuals, described as terrorist leaders, on a list approved by the White House.⁸ As for Israel, it has repeatedly resorted to the particular practice against the Palestinian terrorist groups.⁹

Notwithstanding its basic feature in the war against terrorism, it is true that nowadays the concept of targeted killings is also one of the most misunderstood concepts, often labeled by Non-Governmental Organizations¹⁰ as well as some United Nations' bodies¹¹ as extra judicial killings and assassinations. Yet, the

5. It is not by accident that the two states which have resorted to this option, the United States and Israel, both face serious terrorist threats.

6. CNN, *Sources: U.S. Kills Cole Suspect*, Nov. 5, 2005, <http://archives.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html> (last visited Sept. 4, 2007).

7. Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicability of Maintaining the Status Quo*, 26 B.C. INT'L & COMP. L. REV. 1, 29–30 (2003).

8. James Risen and David Johnston, *CIA Expands Authority to Kill Qaeda Leaders*, N.Y. TIMES, Dec. 15, 2002, at A2.

9. The policy of targeted killing, as far as Israel is concerned, started with the killing of Hussein Abayat. See Yael Stein, *Position Paper: Israel's Assassination Policy: Extra—Judicial Executions*, (Maya Johnston trans., 2001), available at http://www.btselem.org/Download/200101_Extrajudicial_Killings_Eng.doc (last visited Sept. 4, 2007).

10. See *id.*; Amnesty International, *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, [http://web.amnesty.org/library/pdf/MDE150562003ENGLISH/\\$File/MDE1505603.pdf](http://web.amnesty.org/library/pdf/MDE150562003ENGLISH/$File/MDE1505603.pdf) (last visited Sept. 4, 2007).

11. See U.N. Comm'n on H.R., *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, Report of the Human Rights Inquiry Commission*, ¶¶ 53–64, U.N. Doc. E/CN.4/2001/121 (Mar. 16, 2001), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G01/118/72/pdf/G0111872.pdf?OpenElement> (last visited Sept. 4, 2007); U.N. Comm'n on H.R., *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967*, ¶ 10, U.N. Doc. E/CN.4/2003/30 (Dec. 17, 2002), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/160/00/PDF/G0216000.pdf?OpenElement> (last visited Sept. 4, 2007).

truth is that the differences between targeted killings and the other two concepts are so great, that someone can easily distinguish between the three practices.

Extra judicial killings are basically punitive measures aimed against regime dissenters or human rights defenders, who are killed for ideological reasons without a fair trial during peacetime.¹² Extra judicial killings violate cardinal rights, such as the right to life and the right to a fair trial.¹³ Even if the hypothesis is made that their purpose is also defensive, still they are condemnable.

Although according to human rights conventions, such as Article 2 of the European Convention on Human Rights, state agents have a right to forfeit a person's life in the course of resort to the right of self defense, this possibility is to be narrowly interpreted as an *ultimum refugium* once the arrest of a particular suspect is not feasible, under the particular conditions enumerated in the specific provisions of Article 2. Moreover, in cases where a deprivation of life takes place by state agents, the state has a duty to investigate the matter. In peacetime, there is no need or justification for individuals to be killed on suspicion of membership in a group.¹⁴ A person should be detained and entitled to contest his/her detention in a meaningful way that involves due process of law.¹⁵ Under this specter, the fact that the Human Rights Committee has repeatedly condemned the particular practice¹⁶ should cause no surprise.

Targeted killings have often been labeled as "assassinations." Yet, assassinations are understood to be the selected killing of an individual enemy by treacherous means.¹⁷ On the contrary, when a state is in an armed conflict,¹⁸ targeted killings (given the turbulent background) are defensive measures—not

12. Antony Carillo-Suarez, *Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, 15 AM. U. INT'L L. REV. 1, 133 (1999).

13. Amy Howlett, *Getting "Smart:" Crafting Economic Sanctions that Respect All Human Rights*, 73 FORDHAM L. REV. 1199, 1225 (2004).

14. Mary O'Connell, *War Crimes Research Symposium: The Role of Justice in Building Peace: To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT'L L. 325, 330 (2003).

15. Gabor Rona, *War, International Law and Sovereignty: Re-evaluating the Rules of the Game in a New Century: Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT'L L. 499, 502 (2005).

16. See H.R. Committee, *Concluding Observations of the Human Rights Committee: Georgia*, Part IV ¶ 15, U.N. Doc. CCPR/C/79/Add.75 (May 5, 1997); H.R. Committee, *Concluding Observations of the Human Rights Committee: Brazil*, ¶ 31 U.N. Doc. CCPR/C/79/Add.66 (July 24, 1996).

17. Benjamin Gorelick, *The Israeli Response To Palestinian Breach of the Oslo Agreements*, 9 NEW ENG. J. INT'L & COMP. L. 651, 669 (2003).

18. See Ralph Ruebner, *Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel—A Comparative Perspective*, 31 GA. J. INT'L & COMP. L. 493, 541 (2003); Emmanuel Gross, *Thwarting Terrorist Acts By Attacking The Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty To Protect its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 224 (2001).

treacherous means.¹⁹ The laws of war recognize the non-culpable homicide of members of an opposing force during armed conflict.²⁰

As such, targeted killings are seen as an integral part of warfare, to be distinguished from assassination in peacetime, which is a form of terrorism. This is a well entrenched principle of international law. Although the opinions of Grotius, Vattel and Bynerhoeck condone an attack on an enemy leader with the intent of killing him, provided it is not treacherous,²¹ their opinions are not directly responsive to questions of targeting modern terrorists.²² Regardless, they hold a special importance due to their demonstration that classical international law always endorsed the possibility of killing leading enemies.

This being the case, it is appropriate to analyze targeted killings under the broad category of international law relating to the conduct of war.²³

Moreover, it is doubtful whether large scale operations to apprehend terrorists, like those adopted by the United States and the United Kingdom in Afghanistan or the Operation “Defensive Shield” of the Israeli army in 2002, are morally preferable to targeted killings. The invasion of a civilian area and the fighting that erupts lead to the death and injury of far more people, mostly innocent, and bring misery and destruction to people who are minimally involved in terror or military attacks.²⁴

Under this spectrum, targeted killings can be justified under certain conditions.²⁵ First, the state should be facing a security threat that it can not incapacitate with other reasonable alternatives, like arresting the attacker. Second, the principle of proportionality, dictating the minimum number, or even the complete absence²⁶ of civilian casualties,²⁷ should always be revered.

19. Nicholas Kendall, *Israeli Counter Terrorism: Targeted Killings Under International Law*, 80 N.C. L. REV. 1069, 1076–77 (2002).

20. See Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 12 DUKE J. COMP. & INT'L L. 281, 309–10 (2005); O'Connell, *supra* note 14, at 328.

21. Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 130 (1991).

22. Daniel Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency and International Law*, 30 GA. J. INT'L & COMP. L. 1, 17 (2001).

23. Kendall, *supra* note 18, at 1073–74.

24. Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQ. L. 179, 187 (2004).

25. See David Ennis, *Pre-emption, Assassination and the War on Terrorism*, 27 CAMPBELL L. REV. 253, 255 (2005); David Kretzmer, *Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. OF INT'L L. 171, 211 (2005).

26. Kretzmer, *supra* note 25, at 204.

27. See Amos Guiora, *Symposium: “Terrorism on Trial”: Targeted Killings as Active Self Defence*, 36 CASE W. RES. J. INT'L L. 319, 322 (2004); William Wagner, *As Justice and Prudence Dictate: The Morality of America's War Against Terrorism—A Response to James V. Schall, S.J.*, 51 CATH. U. L. REV. 35, 50 (2001); Amos Guiora, *Legislative and Policy Responses to Terrorism: A Global Perspective*, 7 SAN DIEGO INT'L L. J. 125, 145 (2005) [hereinafter *Guiora II*]; Emmanuel Gross, *Democracy in the War Against Terrorism—The Israeli Experience*, 35 LOY. L.A. L. REV. 1161, 1194 (2002).

Opposite enemy civilian casualties as a parameter for the approval of an aerial strike, the right to life of one's troops, as an expression of the principle of military necessity, is juxtaposed. Thus, when a military commander is almost certain that the sending of troops in a populated area in order to arrest a terrorist would result in losses among his troops, aerial strikes pose as a legitimate alternative, even at the expense of some enemy civilian casualties.

Although international humanitarian law and human rights law interact differently in international and non-international conflicts, changing the standards governing the legality of targeted killings,²⁸ consideration of the lives of the soldiers remains a legitimate factor in any decision concerning an aerial operation.

Irrespective of the international or non-international character of a conflict and the application of international humanitarian or human rights law, troop losses are always relevant, because in both fields of law, humanity and respect for human dignity as well as the principle of proportionality are basic elements.²⁹ The conclusion is particularly important in the new war against terrorism, where states are engaged in *sui generis* conflicts having elements of both international and non-international conflicts.³⁰

III. THE CONSIDERATION OF THE SOLDIERS' LIVES AS A LEGAL DUTY UNDER INTERNATIONAL HUMANITARIAN LAW

A. *The principle of military necessity*

Under international humanitarian law, while members of the armed forces and civilians enjoy the same fundamental right to life, that right is limited by military necessity. A primary goal of military necessity is the submission of the enemy at the earliest possible moment with the least possible expenditure of personnel and resources.³¹ Moreover, it is international humanitarian law that acknowledges the possibility of civilians being killed or wounded as a result of a military operation against a lawful target. Collateral damages are a well

28. For a complete analysis of the circumstances under which targeted killings would be permissible in international and non-international armed conflicts, see Kretzmer, *supra* note 25, at 171–212.

29. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 245 (2000); Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, ¶ 183 (Dec. 10, 1998).

30. Kretzmer, *supra* note 25, at 175, 196. See also David Kretzmer, *Agora: ICJ Advisory Opinion on Construction of A Wall in the Occupied Palestinian Territory: The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88, 96 (2005) (discussing the difficulty of establishing whether the conflict between Israel and the various Palestinian terrorist groups is an international or a non-international one and the different opinions expressed).

31. William Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 93 (1982).

known accepted phenomenon in the international humanitarian law framework.³²

According to military necessity, a belligerent can, subject to the laws of war, apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of life.³³ Thus, a military commander does not have to sacrifice members of his force in order to exterminate the enemy, once he can achieve the same goal without any troop losses. The fact that civilians could be also be killed or injured as a result of the particular operation does not constitute an absolute factor forbidding the conduct of the operation.

Once it is accepted that civilians can eventually die in the course of hostilities, the important features that determine the legality of the operation towards them are whether they were themselves directly targeted³⁴ and whether the number of civilian losses contravened the principle of proportionality.

Yet, although military necessity does broaden the protection awarded to troops, it does not necessarily legally bind the army commander to preserve by all means his soldiers' lives. Military necessity gives the discretion to the military commander to beat the enemy while minimizing casualties in his troops. Yet, military necessity does not legally guarantee the life of a soldier, as his commander may decide for whatever reason to endanger the soldier's life instead of opting for alternate measures.

As such, military necessity should be seen through the lens of another basic principle of international humanitarian law—the principle of humanity.

B. The principle of humanity

The notion of humanity always constituted a pillar of the laws of war.³⁵ International humanitarian law has been traditionally seen as a triumvirate equation³⁶ under which military necessity is framed by the prohibition of unnecessary suffering during the proportionate application of military force,³⁷

32. *Id.* at 94.

33. Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 93 (1994).

34. Edda Kristjansdottir, *The Legality of the Threat or Use of Nuclear Weapons Under Current International Law: The Arguments Behind the World Court's Advisory Opinion*, 30 N.Y.U. J. INT'L L. & POL. 291, 352 (1997–1998).

35. See *Corfu Channel* (U.K. of Gr. Brit. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 79 (July 8).

36. Gabor Rona, *Interesting Times For International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER FORUM OF WORLD AFFAIRS 55, 57 (2003).

37. Dale Stephens, *Human Rights and Armed Conflict—The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 YALE HUM. RTS. & DEV. L.J. 1, 17 (2001).

in an effort to “humanize” a reality—like that of war—which is dominated by cruelty and barbarity.

The Geneva Conventions, especially the fourth one, with the explicit provisions for the protection of non combatants and the insistence on the distinction between combatants and non combatants in the first place are a clear indication of the borders that international humanitarian law came to put on the conduct of hostilities and of the humanitarian face of international humanitarian law.

The same humanistic borders were also settled regarding combatants. Since the essence of war is the forfeit of combatants’ lives, the humanitarian aspect did not find expression in the non allowance of their killings, but to the concern the particular branch of law showed regarding the way their deaths should occur. Thus, the use of certain types of weaponry, causing unnecessary suffering and superfluous injury, was forbidden.

Yet, it is important to note that the extent of this concern varied significantly. In the case of civilians, it encompassed their right to life, while in the case of combatants, the forfeit of their lives was deemed up to a point acceptable—the laws of war coming to reassure only its dignified and more painless character. Moreover, the laws of war traditionally protected persons on the side of the enemy, but not persons from their own governments or authorities.

According to the *jus in bello*, both the aggressor and the aggressed are bound by the same standards³⁸ and in the law of armed conflict all lives have equal value.³⁹ These particular conclusions juxtaposed to the *jus ad bellum* which governs the legality or not of a military operation, stress the fact that even combatants belonging to the side resorting to the illegal use of force should be equally protected as combatants of the defending state.

Yet, the equal protection of combatants in *jus in bello* was not meant to equate their status to the protection and the preference awarded to civilians by international law. On the contrary, one basic premise of international humanitarian law has always been the distinction between combatants and civilians. It is exactly this distinction that was weakened by the applicability of human rights norms in the law of conflict.⁴⁰

It is true that traditionally, human rights laws were not seen as mainly applying in situations of armed conflicts—namely in cases where two or more armed groups are engaged in hostilities.⁴¹ The derogation clauses existing in

38. Rona, *supra* note 36, at 67.

39. Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 412 (1993).

40. Francisco Forrest Martin, *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*, 64 SASK. L. REV. 347, 371 (2001).

41. O’Connell, *supra* note 14, at 328.

international human rights instruments do suggest that application of their provisions was indeed contemplated in times of war. Yet, their exceptional and emergency character point to the fact that their drafters saw the application of the instruments, under such circumstances, as the exception and not as the standard rule. While human rights were deemed to apply during peacetime, international humanitarian law had an exclusive role during times of war. Nowadays, the aforementioned statement seems to be revised and human rights are indeed seen as applicable in cases of armed conflict,⁴² without meaning that there is a pretension that armed conflicts do not constitute a case where the enforcement of human rights must take into account the existence of a belligerent situation.

According to the prevailing view⁴³ endorsed by the International Court of Justice in its Advisory Opinion on the Legality of Nuclear Weapons⁴⁴ human rights laws do apply in armed conflicts, yet the specific circumstances should also be taken into account. International humanitarian law is to be applied as *lex specialis* each time human rights application is called for, as a branch of law more suitable to the particular circumstances. Yet, this should not lead to the conclusion that human rights are subordinate to international humanitarian law. Rather, the two fields of law are in a continuous dialogue.

Thus, although international humanitarian law determines what an “arbitrary” deprivation of life is in order for a violation of the right to life to be declared, it is human rights law, which influences the proper application of international humanitarian law in tilting the balance between military considerations and humanitarian concerns in favour of the latter.⁴⁵

The introduction of human rights law in the law of armed conflict should not be deemed as a legal coup d’etat. It is none other than the first article of the First Additional Protocol to the Geneva Conventions that constitutes the most recent restatement of the Martens Clause—a clause deeply entrenched in international humanitarian law⁴⁶—which stipulates that in cases not covered by the Protocol or other international agreements both civilians and combatants remain under the protection of the principles of international law derived, *inter alia*, from those of humanity and from dictates of public conscience.⁴⁷ Thus, it

42. Roy Schondorf, *Extra-State Conflicts: Is There A Need For A New Legal Regime?*, 37 N.Y.U. J. Int'l L. & Pol. 1, 60 (2004).

43. See Meron, *supra* note 29, at 239; Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS 94 (1993).

44. *Nuclear Weapons*, *supra* note 35, at 25.

45. Orna Ben Naftaly & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 IS. L. REV. 17, 57 (2003–2004).

46. Theodor Meron, *The Martens Clause, Principles of Humanity and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78 (2000).

47. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the

is the Martens Clause and consequently international humanitarian law itself, which allowed its penetration by human rights law.⁴⁸

The application of human rights in the field of war had an effect in the moral as well as in the legal field. Acts embedded in the essence of war, such as the killing of an enemy combatant, ceased to be viewed from an international humanitarian viewpoint and thus was condoned as lawful. Once stripped off the mantle of legality, the act in question started to stand out as a starkly unjustifiable and inexcusable killing of a human being.⁴⁹

Gradually, it became understood that the only justified reason for killing soldiers is that in a war, soldiers are not seen as individuals but as agents of their states.⁵⁰ Were they to be judged as individuals, most soldiers would be morally exempt from being killed by the enemy. However, judged as agents of a collective, soldiers lose their personal merits and are seen only as “the enemy,”⁵¹ targeted just because they constitute impersonal units who conceptualize an impersonal general threat posed to the whole group by the enemy.

Thus, human rights law came to shed light also on the status of combatants; like civilians, soldiers began to be considered as human beings with the same needs and feelings. From a moral point of view, the notion⁵² was entrenched that soldiers should be seen as a separate distinguishable unit from their state of citizenship, many times not even agreeing with their governmental policies. As such, also they—and not only civilians—should be regarded as human beings with a dignity and separate personality, not as simple units in the disposal of an army commander.

The implications of the former conclusion affected an attitude towards the combatants’ lives, both in relation to enemy combatants as well as the political and military administrations of the soldier’s own country. Regarding the former, it was realized that although in life threatening cases the killing of an enemy soldier would not only be morally defensible but also utterly necessary, there are also circumstances where this would not be the case.

The shooting of an enemy combatant who poses no immediate security threat for the other side’s bodily integrity or life at the moment of his repose

Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(2), Dec. 7, 1978, 16 I.L.M 1442.

48. Francisco Forrest Martin, *The Unified Use of Force Rule Revisited: The Penetration of the Law of Armed Conflict by International Human Rights Law*, 65 SASK. L. REV. 405, 405 (2002).

49. YORAM DINSTEIN, *AGRESSION AND SELF DEFENSE* 140 (Cambridge University Press 3rd ed. 2001) (1988).

50. Statman, *supra* note 24, at 189.

51. RICHARD NORMAN, *ETHICS, KILLING AND WAR* 188 (1995).

52. William Bradford, *Barbarians at the Gates: A Post September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 721 (2004). The notion dates back to the Enlightenment. The famous maxim of Rouseau that soldiers who surrender or lay down their weapons “cease to be enemies or instruments of the enemy and become ordinary human beings again” is characteristic.

such as would be the case with a combat soldier being attacked off duty while sleeping or just having leisure time in a military post, can be brought as an example. In such incidents, the enemy is targeted not because at the moment of his death he is contributing to the military machine, but just because of the potential part he could play in hostilities in the future. Such is the case with the targeting of a soldier in a non combat post, such as a driver or a cook. If potentiality is seen as a legitimate ground for killing, then civilian killings should also be sanctioned, because they can theoretically also take arms and join hostilities. Yet, the targeting of civilians is prohibited.

As far as his own state is concerned, the soldier should never be viewed as a proper sacrifice the moment his life could be saved and the same military objective could—in accordance with the principle of proportionality—be achieved by other means. The state may not resort to any means to attain its ends, as it is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any state action.⁵³

Soldiers, should not be seen as means, but as an end by themselves, as human beings with human rights, first and foremost the right to life. It is true that a soldier has a duty towards his country to protect it. Yet, this does not mean that the soldier has a duty to forfeit his life. A soldier is bound to fight, not to die. The moment death as the culmination of a military operation becomes a certainty and not just a speculation, and the whole discussion around the operation is not about whether there would be any casualty troops, but how heavy these casualties would be, the operation ceases to be an alternative and should not even be considered from the beginning.

In a war, the notion of risk and the potential of death are embedded in every military operation. Yet, the moment that this potential ceases to be a potential and is transformed to a certainty, the whole notion of “risk” is also annulled. The debate whether a specific risk is permissible or impermissible in order to sanction the conduct of the operation, has a value as long as the notion of “risk” itself stands in the foreground. As soon as it is replaced by a mortal certainty, the whole argument regarding levels of operational dangers is disqualified. As such, the fact that modern military ethics dictates that the death of soldiers and not only of civilians should weigh as a factor in a military commander’s decision-making⁵⁴ should come as no surprise.

53. Velasquez Rodriguez Case, 1988 Inter-Am. Ct. H.R. (ser. C.) No. 4, at 27 (July 29, 1988).

54. See Guiora, *supra* note 27, at 332; Guiora II, *supra* note 27, at 145; Assa Kasher & Amos Yadlin, *Fighting Against Terror Morally*, 6 BITACHON LEUMI 5 (2003) [hereinafter Kasher].

IV. THE CONSIDERATION OF THE SOLDIERS' LIVES AS A LEGAL DUTY UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND JURISPRUDENCE

From a legal point of view, the application of human rights and the fact that they are attributed to every person because of his human nature irrespective of assumption or performance of any obligations⁵⁵ places force protection not only as an important national policy concern, but also as an express legal obligation⁵⁶ towards the military commanders and political leaders of a particular state.⁵⁷ The human rights system directly addresses the responsibility of a government vis-à-vis populations over which it exercises power.⁵⁸ The protection of human rights necessarily comprises the concept of the restriction of the exercise of state power.⁵⁹

The right to life is one of the most basic rights, embodied in all the major human rights instruments and deemed by some also as a *jus cogens* right⁶⁰ and the most important of all human rights.⁶¹ With deep roots in natural law and stipulated in the most important legal documents like the Magna Carta and the Bill of Rights, the right to life is embodied nowadays in all the human rights documents.⁶² Moreover, the right to life is not derogated in situations of public emergency, such as a war.⁶³

The fact that Article 15, Section 2 of the European Convention on Human Rights clearly allows for the derogation of the right to life in cases where deaths result from lawful acts of war should be taken to sanction only the possibility of death as deeply embedded in the notion of war itself and not to justify, in any

55. A. DELAFIELD SMITH, *THE RIGHT TO LIFE* 52 (1955).

56. Martin, *supra* note 48, at 393.

57. *Smith v. United Kingdom*, 384 Eur. Ct. H.R. 620, 624 (2000), where it is stated that investigations into military personnel's homosexuality and their pursuant discharge from the Royal Navy on those grounds, constituted degrading treatment and violated the right to private life. *See also* Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria, 20 Eur. Ct. H.R. 56, 87 (1994), where it was held that the decision of the defence minister to prohibit the distribution of a journal to military personnel, violated the freedom of expression and article ten of the European Convention on Human Rights.

58. Meron, *supra* note 29, at 256–57.

59. *The Word "Laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, 1986 Inter-Am Ct. H.R. (ser. A) No. 6, at 5 (May 9); *Godínez Cruz v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5, at 31 (Jan. 20, 1989).

60. Mark Janis, *The Nature of Jus cogens*, 3 *CONN. J. INT'L L.* 359, 359 (1988).

61. *See* Yoram Dinstein, *The Right to Life, Physical Integrity and Liberty*, in *THE INTERNATIONAL BILL OF RIGHTS* 114, 114 (Louis Henkin ed., 1981); *State v. Makwanyane* 1995 (3) SA 391 (CC) at 214, 217 (S. Afr.).

62. M. Cheriff Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 *DUKE J. COMP. & INT'L L.* 235, 254 (1993).

63. *See e.g.*, International Covenant on Civil and Political Rights, art. 4, Dec. 16, 1966, 999 U.N.T.S. 171; The European Convention on Human Rights, art. 15, Dec. 10, 1948, 213 U.N.T.S. 222.

case, unnecessary troop losses. The fact that the article comes to excuse deaths stemming only out of lawful acts of war is indicative. As such and in light of the other human rights instruments awarding a responsibility to the state to preserve its nationals' lives, it is doubtful whether a command to soldiers to go into a mission of "no return" would constitute a "lawful act of war."

Even if the view is put forward that in battle the deprivation of the right to life does not occur by the state itself, but by a third party—because it is an enemy combatant that forfeits the soldier's life—still the state can be held accountable. Not only are states obliged to not actively deprive their citizens of the specific right arbitrarily, but are also held responsible for infringement of human rights law once they do not prevent the entrance of their citizens in life risking situations.

The duty to protect the right to life⁶⁴ entails, in the first place, a negative obligation of respect. The duty of respect encompasses the obligation to prevent situations that might imperil human life and eventually the obligation to prosecute persons responsible for a loss of life.⁶⁵

Thus, in the *Velasquez Rodriguez* case, the Inter-American Court of Human Rights clarified that a state can be found imputable of a human rights violation not because the violation itself could be attributed to the state or one of its agents, but because the state did not take the necessary steps in order to prevent the particular violation from taking place.⁶⁶ In *Godinez Cruz v. Honduras*, it was held that an illegal act which violates human rights and which is initially not directly imputable to a state can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or respond to it as required.⁶⁷

In Europe, the aforementioned statement was also incorporated in the jurisprudence of the European Court of Human Rights. For example, in *Osman v. United Kingdom*, the Court not only certified the aforementioned statement, but also proceeded to establish a negligence standard according to which even the reasonable ability to foresee a potential forfeit of life can constitute a valid ground for claims of violations of the right to life. As the Court pronounced in its judgment, sufficient grounds for such allegations required a demonstration that the state knew or ought to have known of the existence of a real and immediate risk to an individual from the criminal acts of a third party, and that it had failed to take measures expected to avoid that risk.⁶⁸ In another occasion,

64. JOHAN DE WAAL, IAIN CURRIE, & GERHARD ERASMUS, *THE BILL OF RIGHTS HANDBOOK* 217 (3d ed. 2000).

65. Richard Desgagne, *Integrating Environmental Values Into the European Convention on Human Rights*, 89 AM. J. INT'L L. 263, 268 (1995).

66. Rodriguez, 1988 Inter-Am. Ct. H.R. at 30–31.

67. Cruz, 1989 Inter-Am. Ct. H.R., at 32.

68. *Osman v. United Kingdom*, 101 Eur. Ct. H.R. 245, 305 (1998).

the same Court recognized that a potential violation may amount to an actual violation when the injury is foreseeable and of serious and irreparable nature.⁶⁹

Of course, it is true that a problem arises in determining when there is enough “certainty” of the soldiers’ deaths in order for the state to be obliged to abstain from sending its soldiers in the battlefield. The answer lies in the evidence available each time according to facts on the ground. In other words, what are the objective chances that a soldier will survive from such a mission without the requirement of a high level of proof.⁷⁰

According to the aforementioned, sending soldiers into battles from where they are bound with almost certainty not to return alive, is a clear violation of these soldiers’ right to life. Any argument that the forfeit of life is legal in war, and thus a state could not be held accountable for a death that it has incurred legally, is not feasible. First, killing a soldier is legal only from an enemy’s point of view. Second, even in situations where death is legally imposed by a third party, a state is prohibited from allowing, much less creating, the circumstances leading to the forfeit of the lives of its citizens.

While indeed the state is brought into existence solely to protect its nationals against harm, an idea dating back at least to ancient Greece,⁷¹ this does not mean that the state only has a duty to protect its nationals from external dangers, which makes the existence of an army necessary. The state is equally obliged to protect its citizens from criminal behaviour internally,⁷² even when the criminal behaviour stems from actions of the state itself. Thus, as much as the state owes civilians a duty to do everything possible to protect them from enemy attacks, it may not order its combatants to expose themselves to excessive risks while protecting civilians.⁷³

As such, although it is legitimate for the state to demand the drafting and the active participation of its citizens in an army and their participation in hostilities, even by endangering their lives to safeguard the state’s territorial entity, these state expectations cannot extend to the point that soldiers are sent on expeditions which equal their certain extermination by the enemy.

The recognition that life can indeed be taken in a war, does not mean that this can occur under all circumstances. In this regard, international

69. *Soering v. United Kingdom*, 161 Eur. Ct. H.R., (ser. A) 439, 468 (1989).

70. John Pak, *Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life*, 26 CORNELL INT’L L. J. 239, 274 (1993).

71. Michael Lacey, *Self Defence or Self Denial: The Proliferation of Weapons of Mass Destruction*, 10 IND. INT’L & COMP. L. REV. 293, 310 (2000).

72. See Jeffrey Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 761–62 (2003); Christopher Clarke Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA J. INT’L L. 151, 201 (2002).

73. Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 89 (2006).

jurisprudence regarding the imposition of the death penalty is indicative. The latter came not only to define the circumstances under which the death penalty should apply, but to erase the possibility of the imposition of the particular sentence in the first place. Although death penalty still constitutes the legal deprivation of life⁷⁴ in cases where persons are convicted in countries which have abolished the death penalty, their extradition or deportation to countries where it is not only certain but even likely for them to face the particular sentence, is forbidden.

The landmark case is that of *Soering v. United Kingdom*.⁷⁵ Soering, a West-German national, murdered his girlfriend's parents in the United States and fled to the United Kingdom, from where his extradition was requested. After the United States' request was answered positively by the British government, Soering appealed to the European Court of Human Rights. The latter refused to allow the extradition of Soering to the United States because of the high probability that while there, the accused would be subjected to inhuman or degrading treatment by being kept on death row for a prolonged period.⁷⁶ Thus, the Court pronounced that the United Kingdom could not violate any human rights of the accused, and was also prohibited from placing the accused in a framework where violations of his rights were likely to occur.

The decision of the European Court in the case of *Soering* should not be seen as an isolated example. Similar trends in international jurisprudence can be traced in the decisions of the Human Rights Committee. In *Kindler v. Canada*,⁷⁷ as in *Ng v. Canada*,⁷⁸ the Committee allowed Canada to extradite Kindler to the United States without requiring the former to ask for guarantees that Kindler was not going to be executed in the United States. Yet, in both cases, the problematic nature of the Canadian practice was hinted. In *Ng v. Canada*, the Committee held that Canada had violated Article 7 of the International Covenant on Civil and Political Rights, because Canada could have easily foreseen that if Ng was to be extradited to the United States he could be sentenced to death in California.⁷⁹ While in the case of *Kindler*, although the request for any guarantees for Kindler's life was not posed as a requirement for the legality of the extradition, the Committee added that States must be mindful of the possibilities for protection of life when exercising their discretion in the

74. Neira Alegria et al. Case v. Peru, 1995 Inter-Am. Ct. H.R. (ser. C.) No. 21, at 17 (Jan. 19, 1995).

75. *Soering*, 161 Eur. Ct. H.R. at 468.

76. *Id.* ¶ 91.

77. H.R. Comm., *Communication No. 470/1991, Joseph Kindler v. Canada*, U.N. Doc. CCPR/C/48/D/470/1991 (Nov. 1, 1993) [hereinafter *Kindler*].

78. H.R. Comm., *Communication No. 469/1991, Charles Ng v. Canada*, No. 469/199, U.N. Doc. CCPR/C/49/D/469/1991 (Jan. 7, 1994).

79. *Id.* ¶ 16.4.

application of extradition treaties.⁸⁰ This was an important remark for the extraditing country to note.

The preponderance of the assurances requirement gradually evolved in the internal jurisprudence of the Canadian Supreme Court, in order to form a veto requirement in the subsequent decisions of the Human Rights Committee. In the case of *United States v. Burns*, the Canadian Supreme Court held that prior to extradition, the Canadian government must seek assurances in all but exceptional cases that the death penalty will not be applied.⁸¹ In *Judge v. Canada*,⁸² the Human Rights Committee applied its requirement of assurances also to a case of deportation where no legal framework existed in order to be moulded according to requirements of respect for the right to life. Such was the case with the extradition treaty between Canada and the United States, which was required to be seen under this particular spectre. In *Judge v. Canada*, the forbiddance of subjecting a person to a situation or a jurisdiction where his life was likely to be endangered emerged as an independent rule and not as the outcome of the interpretation of a legal framework.

In June 2001, the Constitutional Court of South Africa granted a petition from Khalfan Khamis Mohamed, a participant in the Al Qaeda bombing of the United States Embassy in Tanzania. After being arrested in South Africa, Mohamed was summarily turned over to the Federal Bureau of Investigations (FBI) in what the state called a "deportation," although the Court saw no reason to view it as anything but a disguised extradition.⁸³ The Court noted that in handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed's right to life, his right to have his human dignity respected and protected, and his right not to be subjected to cruel, inhuman or degrading punishment.⁸⁴

In the case where soldiers are sent on a mission with almost certainty that some or all of them will not return, the aforementioned jurisprudence is more than relevant. First, even the likelihood of the forfeit of life can render a state accountable for violation of its obligation to respect and insure the particular right. Second, the state is not held accountable for the deprivation of soldiers' lives by enemy combatants, but for their failure to take the necessary steps to insure that these soldiers would not enter a situation that would certainly forfeit

80. Kindler, *supra* note 77, ¶ 14.6.

81. *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, 42.

82. H.R. Comm., *Communication No. 829/1998, Judge v. Canada*, U.N. Doc. CCPR/C/78/D/829/1998 (Aug. 5, 2003).

83. William Schabas, *Symposium: Death Penalty and International Law: International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM. AND MARY BILL OF RTS J. 417, 441 (2004).

84. *Mohamed v. President of S. Afr.* 2001 (3) SA 893 (CC) at 17 (S. Afr.).

their lives. Thus, the state is held accountable for establishing the crucial link that led to these soldiers' deaths. As such, it is irrelevant whether the soldiers themselves wanted to join the mission or whether they were well paid or even well trained for such missions.

Their consent to membership in the mission should be seen as consent to the risk of death, but not to its certainty. Should that not be the case, in no way could such consent be deemed lawful, as this would lead to a violation of the state's international obligations regarding the preservation of the lives of the people under its jurisdiction. As far as the professional training of soldiers is concerned, it must be noted that the objective of training is to lessen the chances of death and should not be seen as granting *carte blanche* to the state to place soldiers in situations from which they are not about to exit. Combatants are expected to assume reasonable risks, as far as their lives are concerned,⁸⁵ and constitute legitimate targets. Yet, as all human beings, they are also entitled not to be arbitrarily deprived of their lives.⁸⁶

The notion of arbitrariness as a legal potential for the legality of life deprivation, appears explicitly in the International Covenant on Civil and Political Rights as well as the Inter-American Convention on Human Rights.

Yet, as much as the specific term constitutes a basic parameter in the consideration of the legality of life deprivation, it is also filled with vagueness. This is not by accident. The drafters of Article 6 of the International Covenant on Civil and Political Rights left intentionally vague the definition of "arbitrary", so as to insure wide latitude for the protection against deprivation.⁸⁷ Indeed, the Human Rights Committee has interpreted the right to life broadly, particularly in circumstances concerning the deprivation of life by a state's security forces.⁸⁸

Yet, no matter how one reads and interprets the notion of arbitrariness in relation to the right to life, the prohibition against the arbitrary deprivation of life finds a ready application within the general principle of proportionality.⁸⁹ According to the European Court of Human Rights, there must be regard for the fair balance that has to be struck between the competing interests of the individual and the community as a whole.⁹⁰

Thus, the competing interests of the army or of a state for the achievement of a certain military result at all costs—even by troop losses—should be balanced to the right of the individual to care for the perseverance of his life.

85. Benvenisti, *supra* note 73, at 90.

86. *Id.* at 83.

87. B. G. RAMCHARAN, *The Concept and Dimension of the Right to Life*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* 1, 19 (B. G. Ramacharan ed., 1985).

88. Stephens, *supra* note 37, at 6–7.

89. *Id.* at 7.

90. *Powell v. United Kingdom*, 172 Eur. Ct. H.R. (ser. A) 355, 368 (1990).

Because the issue at stake is the waging of a balance and not the elimination of one of the two interests, it is self-evident that a solution forfeiting soldiers' lives cannot be condoned. On the other hand, a military solution that would achieve the same military result in another way should be deemed utterly preferable.

As such, the principle of proportionality, a major principle in international humanitarian law, should be invoked twice. The principle should be invoked not only for the protection of civilians and the diminishment of their casualties, but also for the protection of combat soldiers' lives, whose protection—albeit grounded in the principle of military necessity—should be tempered by the principle of proportionality.⁹¹ In fact, it is this particular principle which keeps the balance between these seemingly opposite interests. Saving the lives of a few soldiers cannot justify the endorsement of the death of a disproportionate number of civilians. Concurrently, pity for one or two civilians cannot justify the death of many more soldiers.

V. THE RIGHT TO LIFE OF SOLDIERS V. THE RIGHT TO LIFE OF CIVILIANS

It is accepted that soldiers are supposed to take some risks in order to save the lives of enemy civilians.⁹² Yet, the question of the extent of these risks must be framed by the principle of proportionality.⁹³

The effects of any military operation and the hardship it inflicts on the civilian population must be proportionate to the advantage that is achieved by resorting to the particular practice,⁹⁴ namely, the sparing of the lives of the soldiers. The need for a balance between the right to life of civilians and the right to life of soldiers is particularly urgent in our era. In the new war against terrorism the battlefield is carried into civilian population centers. Terrorists are hiding among civilians with the purpose of using these civilians as a means

91. The Judge Advocate General's School, *TJAGSA Practice Note: International and Operational Law Note*, ARMY LAW., Feb. 1999 at 1, 6.

92. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 151 (2d 1992).

93. The principle of proportionality finds expression in article 51 of the First Additional Protocol, regarding international conflicts. Although in non-international conflicts, international humanitarian law does not seem to wholly apply, yet article 13 of the Second Additional Protocol refers to the distinction between combatants and civilians. As such, the standards of international conflicts would be applicable; the targeting of combatants would be legitimate, while the death of civilians would be subject to the principle of proportionality. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Appeals Chamber) at 33–34 (Jul. 15, 1999) (the Tadic Case where the Appeals Chamber of the ICTYU stated that, “with the exception of common article 3 . . . the four Geneva Conventions of 1949 only apply to armed conflicts between state parties”); International Committee of the Red Cross [ICRC], *Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (June 8, 1977) Art. 51 ¶ 4.

94. Major John Parkerson Jr., *United States Compliance With Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 47 (1991).

of achieving immunity from attacks by the defending state⁹⁵ and making their elimination, without heavy civilian casualties, more difficult.

In modern warfare, where combatants purposely hide among the civilian population—oftentimes with the encouragement of the civilians themselves—the argument can even be posed that the latter constitutes a legitimate target. What is included in the category of “targets,” according to the Hague Regulations and the laws of war, is broader than just troops in the field. Non-combatants and civilians can be designated as a valid target if they are sufficiently involved in the war effort. The decision of whether a civilian should be deemed a valid target depends on context.⁹⁶

In situations where aerial bombardments occur in areas that basically constitute a battlefield where it is known that military targets are mainly situated and civilian presence, if traced, should be deemed as unexpected or incidental⁹⁷ according to Article 57 of the First Additional Protocol, any civilian losses should not be deemed as contravening international humanitarian law. Such would be the case for any civilians remaining in an area after having been warned by the attacking army that the specific region would be subject to an aerial bombardment.⁹⁸

The critical issue that determines the legality of air strikes against military targets is not the existence of civilian casualties, but their number. The preference for sparing soldiers’ lives and the price it inflicts on the enemy civilian population is legitimate, once no other operational alternatives exist, sound and reliable information are at the army’s disposal regarding the particular target⁹⁹ and the incidental loss of life in the enemy civilian population is not excessive in relation to the concrete and direct military advantage.

The problem with the principle of proportionality is that as every principle, it is quite abstract and thus difficult to apply.¹⁰⁰ In weighing the pros and cons and possible disagreements regarding the legality of an operation in cases where joint military action has to be taken, a military commander may find it difficult

95. See Guiora, *supra* note 27, at 329; Emmanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 EMORY INT’L L. REV. 445, 456 (2002); Statman, *supra* note 24, at 186.

96. Castenaro, *supra* note 7, at 8.

97. Asa Kasher, the man who wrote the military ethics code of the Israeli Defense Forces says that, “assuming that we warned the civilians and gave them enough time to leave and that the civilians that remained chose, themselves, not to leave, then there is no reason to jeopardize the lives of the troops.” Nathaniel Rosen, *IDF May Be Morally Justified In Flattening Terror Strongholds*, JERUSALEM POST, Jul. 27, 2006 at 1–2.

98. *Id.*

99. Guiora, *supra* note 27, at 322.

100. See Gardam, *supra* note 39, at 391; *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* ¶ 48 (June 8, 2000), available at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited Oct. 3, 2006).

to concretize the principle, which can lead even to the annulment of an operation.¹⁰¹ One additional difficulty is the fact that the number of potential civilian casualties is never known in advance. In targeted killings this is exceedingly true.

One additional issue that is raised in the practice of targeted killings in respect to civilian casualties and is closely linked to the principle of proportionality is whether the final large number of collateral civilian damages should be seen as an *ex ante* or *ex post facto* for the pronouncement of the illegality of the operation. In other words, the question is whether the legality of an attack should be judged by the knowledge of its planners and their intentions to act according to the laws of war or according to the results of the operation, such as the high number of civilian casualties or the revelation that the person targeted was in fact innocent.

Jurists have always been loath to “second guess” the military which operates often in the heated context of the battlefield.¹⁰² Yet, expectations are higher in cases where the planners of a particular operation have the time and possibility to calmly take into consideration various parameters before making a decision—in our case, the order for a targeted killing. The deep split among the judges of the Grand Chamber of the European Court of Human Rights in the McCann case is indicative.¹⁰³

In the particular case, the Court had to adjudicate on the legality of the killing of three members of the Irish Republican Army by the British Special Air Forces in Gibraltar. The British had reason to believe that the particular persons were planning a terrorist attack. Thus, when British soldiers perceived a move by one of the terrorists as an attempted detonation of a bomb, fire was opened by the British forces. This eventually led to the killing of all the terrorists. The majority of the Court, albeit slim and based on the double vote of the Court’s president, stressed the erroneous assumptions that eventually led to the opening of fire and the death of the terrorists.¹⁰⁴ As such, the Court emphasized the facts and the objective reality rather than the subjective reality of the planners of the operation and the soldiers who, when they opened fire, did not know and could not have known in advance that the particular persons were not carrying a bomb. With all the information they had, the opposite hypothesis was more plausible. As such, the majority opted to take a objective view of the operation, rather than a post event point of view.

101. Françoise Hampson, *States’ Military Operations Authorized by the United Nations and International Humanitarian Law*, in *THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW* 371, 400 (Luigi Condorelli, Anne-Marie La Rosa & Sylvie Scherrer eds. 1996).

102. Martin, *supra* note 40, at 381.

103. *McCann v. United Kingdom*, 324 Eur. Ct. H.R., (ser. A.) 97, 97 (1995).

104. *Id.* at 175–76.

On the contrary, the minority underlined the importance of judging the legality of the operation according to the data that the planners of the attack had in their disposal.¹⁰⁵ This tendency is reinforced by positions of states like the United Kingdom, which ratified the Additional Protocol and rushed to specify its interpretation of the text, stating that the commander in charge had the authority to make a decision with the knowledge he had at the time of the attack. According to this position, we should not benefit from the hindsight of the judge in applying the inherent standard of excessiveness. Rather, the ultimate determination is made on a moral basis.¹⁰⁶

Since nowadays most battles are being conducted among civilian populations, graver civilian and troop casualties should be expected to occur in cases of ground operations. Thus, the option of operations by air is the best moral and legal alternative. This option protects not only the attacking state's troops, but also their enemy civilian population.

The case of Israel and the targeted killings it performed in Gaza Strip—the most densely populated area in the world—is characteristic. In June 2006, targeted killings by the Israeli Air Force resulted in thirteen civilian casualties, which spanned over the course of a week.¹⁰⁷ Once the Israeli Army decided to enter the Gaza Strip, the number of casualties in one day rose to twenty-three, and Israeli soldiers were also killed. Although a big part of the aforementioned Palestinian casualties were combatants, irrespective of their precise number¹⁰⁸ it is more than logical that the casualties and suffering among civilian populations were augmented due to the ground operation.¹⁰⁹

105. *Id.* at 179–87, (Bernhardt, Vilhjamsson, Golcuklu, Pekkanen, Freeland, Baka & Jambrek, dissenting).

106. Vincent Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L. J. 801, 885 (2005).

107. Irwin Arief, *U.N. Again Urges Israel To Cease Targeted Killings*, REUTERS, June 21, 2006, available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/KKEE-6QYPW7?OpenDocument&rc=3&emid=ACOS-635PFR> (last visited on Sept. 14, 2007).

108. Avi Yischaharof, *How Many Were Killed in the Operations of the Israeli Army? It Depends on Whom we are Asking in the Gaza Strip* (in Hebrew), HAARETZ, June 07, 2006, available at <http://www.haaretz.co.il/hasite/pages/ShArtPE.jhtml?itemNo=736176&contrassID=2&subContrassID=21&sbSubContrassID=0> (last visited Oct. 19, 2007).

109. See IDF: *Basel Was Killed By Friendly Fire*, JERUSALEM POST, Jul. 9, 2006, available at <http://www.jpost.com/servlet/Satellite?cid=1150885950567&pagename=JPost%2FJPArticle%2FShowFull> (last visited on Sept. 14, 2007); CNN, *Report: Hamas Orders Palestinian Forces To Fight Israel: Up to 23 Palestinians, 1 Israeli killed as Gaza Offensive Intensifies*, Jul. 6, 2006, <http://www.cnn.com/2006/WORLD/meast/07/06/israel.soldier/index.html> (last visited on Sept. 14, 2007). See also Amos Harel & Avi Yischaharof, *What is the Purpose?* (in Hebrew), HAARETZ, June 30, 2006, available at <http://www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=733143&contrassID=0&subContrassID=0&sbSubContrassID=0> (last visited Sept. 14, 2007) (the article in Haaretz speaking of twelve civilian casualties already only two days after the Israeli operation in Gaza).

Force must be expected to produce a preponderance of good over evil. Subject to the principle of proportionality, air strikes in general and targeted killings in particular, should be endorsed in situations where the elimination of an individual or a small group would preclude the forfeit of more lives or a greater damage caused to the enemy population.¹¹⁰ In such cases, the resort to targeted killings poses not only as a legal possibility, but also as an ethical demand.¹¹¹

VI. CONCLUSION

International humanitarian law always considered the death of combatants as a *fait accompli*. Yet, a closer look to the particular branch of international law as well as to human rights law leads to the conclusion that this should not be the case. Soldiers also have a right to life, and the state has an obligation to respect it and not send them on missions from where their return is unlikely. Subject to the principle of proportionality, the extent to which consideration of the lives of the troops should be taken into account is balanced with the enemy civilian population's right to life. Cases where an operation would result in heavy civilian casualties should be cancelled, even if the operation would have likely minimized or eliminated the possibility of troop losses.

The aforementioned conclusions are well applied in modern warfare, largely held in civilian populations, especially in regard to the dilemma of modern armies in general whether to resort to air strikes instead of ground operations—and to the policy of targeted killings in particular. Although it is true that civilians' lives should continue to be held in reverence, the soldiers' lives should also constitute a parameter which would render these strikes lawful. The principle of proportionality should govern the extent to which the strike is considered lawful.

Albeit difficult to be concretized and subject to the subjective decisions of military commanders, the aforementioned principle is, bottom line, the ultimate test for humanity's conscience—the chance for modern man to prove that despite his engagement in battle, he has not lost his humanity. Like the Abrahamic discussion with his Creator before the destruction of Sodom and Gomorra, officials in top political and military echelons are called to ponder and ultimately decide by themselves how many innocent lives are worth sacrificing to save their troops.

110. Joshua Raines, *Osama, Augustine and Assassination: The Just War Doctrine and Targeted Killings*, 12 *TRANSNAT'L L. & CONTEMP. PROBS.* 217, 235 (2002).

111. See Guiora, *supra* note 27, at 328; Kasher, *supra* note 54, at 6.