

DEBATE FORUM

TARGETED KILLING AS A MEANS OF ASYMMETRIC WARFARE: A PROVOCATIVE VIEW AND INVITATION TO DEBATE

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The killing of Mahmoud al-Mabhouh reportedly by agents of Israel's Mossad service in Dubai a year ago¹ serves as a quick reminder that extrajudicial executions, assassinations and other targeted killing operations are taking place and are part of a modern democracy's arsenal of antiterrorism and counter-terrorism means. Targeted Killing Operations reportedly form part of NATO's operational practice: depending on the circumstances they represent just another option of the lawful use of force in an armed conflict or assimilated situations. Consequently, it is argued that International Law does not impose an explicit ban on the lethal neutralization of certain persons in an armed conflict scenario. This opinion provides a provocative view on possible justifications using targeted killing as an actual means of present day security operations – which must not be confused with traditional methods of domestic 'policing' in a democratic state.

"In recent years, a few States have adopted policies that permit the use of targeted killings, including in the territories of other States. Such policies are often justified as a necessary and legitimate response to 'terrorism' and "asymmetric warfare", but have had the very problematic effect of blurring and expanding the boundaries of the applicable legal frameworks...."²

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¹ BBC News, ' Hamas military commander "assassinated in Dubai"', 29 January 2010, http://news.bbc.co.uk/2/hi/middle_east/8486531.stm.

² Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24/Add.6, Summary. The term of asymmetric warfare refers to unconventional warfare where the military capabilities of the combatants differ significantly.

Lawful, legitimate, morally justifiable – or just criminal and reprehensible? Can military and/or intelligence services lawfully use lethal force against specifically selected target persons – aka ‘high value targets’ (‘HVTs’)?³ Can such ‘targeted killing’ ever be permissible under international law, either as proportionate military action or as a means of law enforcement without taking evidence and judgment? This question, pointedly asked by Professor Alston in his most recent study on targeted killings, submitted as part of his report to the Human Rights Council,⁴ implies an answer in the negative – but rightly so?

What is the position under International Law? Generally, States and International Organisations have a right to do whatever is not explicitly prohibited – in this case by the principles and rules of the Law of Armed Conflict (LOAC) or relevant International Human Rights Law.⁵

Targeted killings occur in armed conflicts and international military operations mandated under Chapter VII of the UN Charter,⁶ and in military hostage release operations. Targeted killings may also be part of counter terrorism operations, namely if the individuals labelled as ‘terrorists’ are fighters of a non– governmental party to an armed conflict – by some also referred to as ‘unlawful combatants’ – and as such have lost their protection as civilians under the Fourth Geneva Convention and the Additional Protocols (where applicable).⁷ As illustrated by relevant domestic jurisprudence, the Israeli Defence Forces (IDF) conducts targeted killing operations more or less openly;⁸ in addition, Israel's secret service, Mossad, reportedly does the same.⁹ The British reader is reminded of the *McCann* case of 1988 where three suspected Irish Republican Army terrorists were killed by UK Special Air Service operatives¹⁰ during an operation which was considered to have a ‘policing’ nature. Subsequently, questions about the legality of such ‘targeted killings’ resurfaced again in

³ A HVT is a target which is deemed important for the military/ political command for the successful accomplishment of a particular mission, such as a high ranking Taliban commander in a particular area of responsibility (AOR).

⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions.

⁵ This opinion piece takes an international law perspective and hence does not address whether, and if so, what limits States may have to respect in applying methods of warfare which are not prohibited by international law.

⁶ Articles 39 to 51 of chapter VII of the Charter of the United Nations lay down possible ‘action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression’.

⁷ Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949).

⁸ Judgment HCJ 769/02, 11 December 2005.

⁹ BBC News, ‘Israel's ‘targeted killings,’ 17 April 2004.

http://news.bbc.co.uk/1/hi/world/middle_east/3556809.stm H. Tomlinson and S. Frenkel, ‘Mossad assassination squad used British passports,’ *The Times* 16 February 2010.

¹⁰ *McCann and Others v United Kingdom* (1996) 21 EHRR 97. For a discussion see e.g. John Andrews, ‘Right to life in Gibraltar,’ 1996 21(4) *European Law Review* 333-336.

2009 in the context of the shooting of de Menezes.¹¹ Further reports also mentioned the use of Unmanned Aerial Vehicles (UAV) by the US to target Taliban and al-Qaeda operatives in the tribal area of Pakistan, and to target al-Qaeda operatives in Yemen. One author has expressed criticism and labeled this practice as an 'extra-judicial execution'.¹² Whilst this label is inappropriate for targeted killings occurring in armed conflict and legally equivalent situations, it aptly captures cases in which totalitarian regimes have used this method to eliminate members of the opposition, e.g. by death squads. 'Extrajudicial executions' in the latter sense violate the right to life and to due process of law,¹³ provided it amounts to:

...an unlawful and deliberate killing carried out by order of a government or with its acquiescence...which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice.¹⁴

This being said, the UN Special Rapporteur charged with investigating such cases nevertheless misperceives his or her mandate when he or she analyses the practice of legitimate international military operations under the same paradigm. There is a huge difference between targeted killings as a surrogate for law enforcement and targeted killings as a method of warfare. Whilst the former are a matter of 'policing' (law enforcement), the latter are acts of war. Without prejudice to any other relevant considerations, this difference activates the delineation between international human rights law and the law of armed conflict – which, according to the International Court of Justice, are in a relationship of *lex generalis* (human rights) and *lex specialis* (Law of Armed Conflict).¹⁵ Accordingly, targeted killings occurring in armed conflict come within the ambit of the law of armed conflict and must hence be assessed solely in light of this legal domain's principles and rules.

The Law of Armed Conflict (LOAC) prohibits general and non-discriminate attacks on civilian non-combatants and the acceptance of excessive collateral damage. Such attacks

¹¹ See for example, http://news.bbc.co.uk/1/shared/spl/hi/uk/05/london_blasts/tube_shooting/html/

¹² See for example, David Kretzmer, 'Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?' 2005 16(2) *European Journal of International Law* 171-212.

¹³ Most notably constituting violations of Article 6 of the International Covenant of Civil and Political Rights (1966) and its Second Optional Protocol to the ICCPR, aiming at the Abolition of the Death Penalty (1990), Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), whereas 'Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally,' which is reiterated in Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁴ Amnesty International, *Israel Must End its Policy of Assassination* (Amnesty International: London, July 2003) and Kretzmer, 'Targeted killing of suspected terrorists'

¹⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, 136

or effects may violate, as the case may be, one or more of the fundamental LOAC principles, that is, the principles of military necessity, distinction and proportionality.¹⁶ To prevent such violations, armed forces have developed a complex targeting process. This process, in particular steps 'target development' and 'assessment' therein¹⁷ applied by many armed forces aims – among other ends – to ensure that these humanitarian limitations to the use of force are observed.¹⁸ However, the designation of a person as a target is not based on procedures similar to police or prosecutorial investigation; the presumption of innocence which directs the administration of criminal justice is hence inept in this context. Rather, the aim of targeting individual persons is to reach a decision – based on comprehensive legal advice – taken by the responsible military commander as to how the opposing party to the conflict shall be weakened temporarily or (preferably) constantly. U.S. intelligence sources have observed, by the way, that the effectiveness of targeted killings is causing the Taliban and Al Qaida problems in recruiting new personnel for certain leadership positions.¹⁹

Intelligence collection, analysis and target reconnaissance provide the required information – both for the planning and execution of a given operation. New information, specifically if additional significant collateral damage must be anticipated, may cause an operation to be cancelled or suspended on grounds violations of distinction and/or proportionality.²⁰ Upon completion of an operation, in a post operational assessment both the military advantage achieved and compliance with standards of International Law are assessed; in case of non-compliance this will also involve the question of whether a formal investigation leading to appropriate legal consequences is required. To mention but one example, the International

¹⁶ See also Common Article 3 Geneva Conventions, the German Military manuals on Law of Armed Conflict ZDV 15/1–15/3 (Zentrale Dienstvorschriften (ZDVs), *Humanitäres Völkerrecht in bewaffneten Konflikten*, the Lieber Code as well as the US' Commanders Handbook on the Law of Naval Operations, at <http://usmilitary.about.com/cs/wars/a/loac.htm>.

¹⁷ Target development referring to the process of providing timely and accurate locations of the enemy, 'assessment' refers to the assessment of target *viz.* damage: both steps ensure that the accurate provision of direct targeting data is ensured and in line of the principles of IHL.

¹⁸ For an overview, see Michael N Schmitt, 'Targeted Killings in International Law: Law Enforcement, Self-Defense and Armed Conflict,' in R. Arnold, and N. Quenivet, (eds.) *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff: Leiden, Boston, 2008) 525-54

¹⁹ While the overall strength of the Taleban seems to be on the rise or at least stable, see e.g. 'Taliban strength on rise in south', report, at <http://www.irishtimes.com/newspaper/world/2010/0719/1224275018281.html>

²⁰ As the international principles on the proportionality of *the jus ad bellum* as a means of interstate relations as stipulated under Articles 2(4) and 51 of the UN Charter and of the choice of weapons and military tactics under the limitations and constraints of the Hague and Geneva Conventions, see note 13 *supra*.

Assistance Force in Afghanistan (ISAF) employs specific procedures to review the existence of any (potential and actual) civilian casualties.²¹

From the perspective of those who share the view that targeted killings are permissible whenever the Law of Armed Conflict applies to an operation, the questions raised above may at best relate to details of operational planning and execution. The present discussion among the stakeholders of International Law, however, shows disagreement that goes beyond such pure military details. Concerns exist particularly about the targeted killing of civilians taking a direct part in hostilities. The International Committee of the Red Cross (ICRC)'s Interpretive Guidance on the notion of direct participation in hostilities under IHL of May 2009²² should have removed any remaining doubt as to whether any civilian exercising 'a continuous combat function' and having lost temporary protection of the law of Geneva²³ may be targeted lethally at any time. However, according to some stakeholders the detention of such persons should be the choice preferred over a targeted killing – provided this is possible without major risks for the forces involved.²⁴ The ICRC member responsible for the Interpretive Guidance has stated the same position in his doctoral thesis and, among others, corroborated his view by asserting that related legal statements made by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions transformed this interpretation into peremptory International Law (*jus cogens*).²⁵

²¹ See, e.g. 'ISAF looks into civilian casualties in Kunar province,' ISAF News Release 2010-11-S-241-2885 at www.nato.int/isaf.

²² Retrieval at <http://www.icrc.org/eng/resources/documents/publication/p0990.htm>

²³ Ibid, 70, essentially reiterating Common Article 3 to the Geneva Conventions, whereas 'persons taking no active part in the hostilities' shall be treated humanely and may not be lawfully killed.

²⁴ Ibid, 78, as 'restraints on the use of force in direct attack'.

²⁵ Nils Melzer, *Targeted Killing in International Law*, OUP, (2008), *passim*. It would exceed the scope of this opinion piece to summarize the complex line of argument by which Melzer has first discovered that the Geneva Conventions and Protocols protect the right to life of civilians who take a direct part in hostilities in more or less the same way as by international human rights law, the relevant source essentially being the European Convention on Human Rights (which contains the highest standards of all human rights instruments Melzer has reviewed), that this protection has the nature of *jus cogens* although many States are not parties to any international human rights treaty, and that this *jus cogens* nature derives, *inter alia* and in particular, from the findings of the Special Rapporteur for extrajudicial, summary or arbitrary executions. Moreover, Melzer also reads a presumption of civilian protection into GP I where this protocol only knows a presumption of civilian status (Article 50(1) of GP I – compare the silence of Article 51 of GP I). Suffice it to say that Melzer offers a position which may or may not deserve support *de lege ferenda* but which has no support *de lege lata* except when based on very interesting and unorthodox methods of legal reasoning. In a time and age where interesting and unorthodox legal reasoning, when applied by governments, has triggered significant criticism, this may be considered regrettable.

This unorthodox position shows how human rights– based arguments might change the Law of Armed Conflict by means of a re– interpretation – provided though that the States and International Organisations involved in international military operations were to accept this without objection.

However, the ongoing public discussion about targeted killings, which has gathered momentum since the leakage of various US and ISAF documents by *WikiLeaks*, may challenge the view that there is sufficient policy consensus or even common legal opinion (*opinio juris*) on the legality and practicability of targeted killings. However, the long standing practice of States and International Organizations – which involves decision– making within NATO and the UN Security Council, but also by way of involving the host states of such international military cooperation in the execution of targeted killings – as well as the ISAF Commander’s new Counterinsurgency Guidance continue to highlight that targeted killings are still a method of warfare – even though they may not enjoy full universal acceptance.²⁶

Both NATO and the United Nations allow States contributing troops to international military operations the freedom of decision on whether to permit or not the possibility of targeted killing as part of their operational repertoire. This allows them to take into account national legal considerations when drafting their national rules of engagement (ROEs). There is a limitation to this freedom though: by acceding to International Organizations like NATO, states accept the organisation’s role in determining, furthering or developing International Law – including a (not necessarily express) mandate for outlining a legal framework for targeted killings in military operations. This legal consequence may not be to the liking of some continental states: the reluctance of the German government and its electorate to come to terms with the fact that a war is being fought in Afghanistan serves as such an example.²⁷ Consequently, NATO’s authorization – which may be considered to form part of the general rules of International Law – to kill opposing fighters, including civilians directly participating in hostilities, in accordance with the Law of Armed Conflict, and provided no excessive collateral damage is anticipated, takes precedence over opposing domestic law. The German constitution – the Basic Law – does not only allow Germany’s membership in NATO or the UN in their capacity as mutual collective defence systems, but it also ensures that their respective LOAC practice can and will be respected at the domestic level. Lawful and legitimate? Under contemporary International Law the answer is clearly in the

²⁶ See http://www.nato.int/isaf/docu/official_texts/counterinsurgency_guidance.pdf

²⁷ See ‘Germany Comes to Terms With Its New War,’ *The Times*, <http://www.time.com/time/world/article/0,8599,1978800,00.html>

affirmative. Nevertheless, there should no doubt that in answering the question of whether targeted killings are morally justified or reprehensible all actors involved, at the political level and within the armed forces, must also duly consult their conscience.