AVIS

L’auteur a autorisé l’Université de Montréal à reproduire et diffuser, en totalité ou en partie, par quelque moyen que ce soit et sur quelque support que ce soit, et exclusivement à des fins non lucratives d’enseignement et de recherche, des copies de ce mémoire ou de cette thèse.

L’auteur et les coauteurs le cas échéant, conservent néanmoins la liberté reconnue au titulaire du droit d’auteur de diffuser, éditer et utiliser commercialement ou non ce travail. Les extraits substantiels de celui-ci ne peuvent être imprimés ou autrement reproduits sans autorisation de l’auteur.

L’Université ne sera aucunement responsable d’une utilisation commerciale, industrielle ou autre du mémoire ou de la thèse par un tiers, y compris les professeurs.

NOTICE

The author has given the Université de Montréal permission to partially or completely reproduce and diffuse copies of this report or thesis in any form or by any means whatsoever for strictly non profit educational and purposes.

The author and the co-authors, if applicable, nevertheless keep the acknowledged rights of a copyright holder to commercially diffuse, edit and use this work if they choose. Long excerpts from this work may not be printed or reproduced in another form without permission from the author.

The University is not responsible for commercial, industrial or other use of this report or thesis by a third party, including by professors.
DEATH FOR LIFE
A Study of Targeted Killing by States
In International Law

Par

Sébastian Jose Silva

Faculté de Droit de l'Université de Montréal

Mémoire présenté a la faculté des études supérieures
En vue de l'obtention du grade de Maîtrise en droit (LL.M.)

Août 2003

© Sébastian Jose Silva, 2003
Ce mémoire intitulé

DEATH FOR LIFE
A Study of Targeted Killing by States
In International Law

présenté par :
Sébastian Jose Silva

a été évalué par un jury composé des personnes suivantes :

Hélène Dumont
Présidente-rapporteuse

Daniel Turp
Directeur de recherche

François Crépeau
Membre du jury
Résumé

À la suite d'attaques terroristes massives est apparue une motivation féroce qui risque d’être manipulée pour justifier des excès de force. Voulant prévenir des attaques armées contre leurs intérêts, certains États ont adopté des politiques de « tuerie ciblée » pour éliminer de façon permanente des terroristes en sol étranger qui menacent leur sécurité. Il est pourtant illégal de tuer des individus en l’absence de conflits armés sans égard au droit à la vie. La présente recherche tient à déterminer si, en vertu du droit international, des États peuvent neutraliser par force des individus dangereux ou bien venir au secours d’otages en sol étranger. En étudiant l’article 51 de la Charte des Nations Unies, un certain nombre de conclusions sont apparues, notamment que des opérations pour « arrêter ou neutraliser » ne peuvent avoir lieu que dans des États qui supportent des terroristes ou qui restent indifférents face à leur présence, et que l’expression « guerre contre le terrorisme » ne peut permettre des « tueries ciblées » sans avoir à considérer les droits à la vie et à la légitime défense. Puisque toute division entre les membres de la communauté internationale peut venir limiter la prévention d’attaques, le fait que la coopération entre les États ayant abolis la peine de mort et ceux ayant recours aux « tueries ciblées » puissent en souffrir fait l’objet de cet ouvrage. Ladite recherche conclue que l’utilisation de « tueries ciblées » en dehors du contexte de conflits armés ne peut être permis qu’en dernière mesure lorsque réellement nécessaire pour prévenir des attaques armées et protéger la vie.

Summary

From the ashes of devastating acts of terrorism has arisen a resolve so powerful that measures of counterterrorism risk being manipulated by states to justify excess. In an attempt to prevent armed attacks against their interests, a number of states have adopted policies of targeted killing to permanently incapacitate terrorists on foreign soil. The intentional killing of suspected offenders, however, cannot be lawfully carried-out by states in the absence of armed conflict without regard for the right to life. The following research attempts to determine whether it is permissible for nations to use force on foreign soil to incapacitate dangerous individuals or rescue hostages under international law. By studying article 51 self-defense of the United Nations charter, a number of conclusions are asserted, namely that operations to “arrest or neutralise” can only be carried-out in states that support terrorists or are complacent to their presence, and that declaring “war on terrorism” cannot allow governments to kill suspected terrorists in countries where there is no war, except in a manner that is reconcilable with the rights to life and self-defense. Since division among members of the international community may ultimately diminish their ability to collectively suppress international terrorism, the potential for hindered cooperation between abolitionist states and those that carry-out targeted killings is also addressed. The current research concludes that targeted killings can only be justified outside the context of armed conflict when they are truly necessary as a last resort to prevent armed attacks and save lives.

Key words: Targeted killing/ self-defense/ right to life/ counterterrorism/ United Nations/ article 51.
General Outline

INTRODUCTION

CHAPTER I: THE USE OF TARGETED KILLING BY STATES
Part I. Targeted Killing and International Law
Part II. Targeted Killings: A Look at State Practice
Part III. Declaring “War” on Terrorism

CHAPTER II: JUSTIFYING TARGETED KILLING: THE ART OF SELF-DEFENSE
Part I. The Evolution and Scope of Self-defense
Part II. Self-defense and the Requirement of Necessity
Part III. Proportionality and Security Council Notification

CHAPTER III: SECURITY AND INTERVENTION IN A WORLD OF SOVEREIGN STATES
Part I. State Duties and International Law
Part II. Forceful Operations and the Protection of Nationals ‘Abroad’

CHAPTER IV: TARGETED KILLING AND THE RULE OF LAW
Part I. Reconciling Targeted Killing and International Human Rights Law
Part II. In search of a Unifying Framework

CONCLUSION
Detailed Outline

Introduction .................................................................................................................................. p.1

Chapter One: The Use of Targeted Killing by States ..................................................................... p.7

Part I. Targeted Killing and International Law ................................................................. p.7

A) From Assassination to Counterterrorism ............................................................................. p.7

B) A Defining Moment .............................................................................................................. p.12

Part II. Targeted Killings: A Look at State Practice .......................................................... p.20

A) The Israeli Experience ......................................................................................................... p.20

B) Targeted Killing and the United States of America ......................................................... p.28

Part III. Declaring "War" on Terrorism ............................................................................... p.37

Chapter Two: Justifying Targeted Killing: the Art of Self-Defense ..................................... p.48

Part I. The Evolution and Scope of Self-defense .................................................................... p.48

A) Just Wars and International Law ......................................................................................... p.48

B) Illegal Reprisals and the 'Armed Attack' Threshold ......................................................... p.54

Part II. Self-defense and the Requirement of Necessity ......................................................... p.63

A) Necessity as a Principle of Law .......................................................................................... p.63

B) Targeted Killing and the Necessity of Using Force .......................................................... p.70

Part III. Proportionality and Security Council Notification ................................................ p.77

A) Striving for Equilibrium ..................................................................................................... p.77

B) Security Council Notification ............................................................................................ p.86

Chapter Three: Security and Intervention in a World of Sovereign States ......................... p.90

Part I. State Duties and International Law .............................................................................. p.90

A) From Humanitarian Intervention to Counterterrorism .................................................... p.90

B) Providing Assistance to Terrorists and Refusing to "Prosecute or Extradite" ............... p.97

Part II. Forceful Operations and the Protection of Nationals 'Abroad' ................................ p.108

A) The Use of State Force outside the Context of Armed Conflict .................................... p.108

B) Life: the Great Divide ....................................................................................................... p.122
Chapter Four: Targeted Killing and the Rule of Law .......................................................... p.133

Part I. Reconciling Targeted Killing and International Human Rights Law ...................... p.133
A) Status of the Right to Life ......................................................................................... p.133
B) Acceptable Limitations to the Right to Life ............................................................... p.147

Part II. In search of a Unifying Framework ................................................................. p.156
A) The Principle of Legality ......................................................................................... p.156
B) Proposed Guidelines for Targeted Killings ............................................................... p.161

Conclusion ...................................................................................................................... p.165
List of Abbreviations

(A.J.I.L.): American Journal of International Law
(A.S.I.L.): American Society of International Law
(B.J.I.L.): Berkeley Journal of International Law
(C.J.L.J.): Canadian Journal of Law and Jurisprudence
(C.J.T.L.): Columbia Journal of Transnational Law
(C.L.Rev.): Cardozo Law Review
(C.W.R.J.I.L.): Case Western Reserve Journal of International Law
(CIA): Central Intelligence Agency
(C.J.I.L.): Cornell Journal of International law
(ICCPR): International Covenant on Civil and Political Rights
(EO): Executive Order
(ECHR): European Court of Human Rights
(E.J.I.L.): European Journal of International Law
(H.J.I.L.): Houston Journal of International Law
(H.R.Q.): Human Rights Quarterly
(ICIS): International Commission on Intervention and Sovereignty
(ICJ): International Court of Justice
(ICC): International Criminal Court
(ILC): International Law Commission
(IRA): Irish Republican Army
(IDF): Israeli Defense Force
(J.I.L.E.): Journal of International Law and Economics
(JTF II): Joint Task Force II
(K.J.L.P.P.): Kansas Journal of Law and Public Policy
(Mer. L. Rev.): Mercer Law Review
(Milt. L. Rev.): Military Law Review
(N.C.L.R.): North Carolina Law Review
(P.A.): Palestinian Authority
(PFLP): Palestinian Front for the Liberation of Palestine
(PLO): Palestinian Liberation Organisation
(SAS): Special Air Service
(S.L.R.): Saskatchewan Law Review
(Stan. L. Rev.): Stanford Law Review
(Syr. L. Rev.): Syracuse Law Review
(Templ. Int’l. Comp. L. Jour.): Templeton International and Comparative Law Journal
(UN): United Nations
(UNC): United Nations Charter
(V.J.T.L.): Vanderbuilt Journal of Transnational Law
(V.J.I.L.): Virginia Journal of International Law
(W.I.L. J.): Wisconsin International Law Journal
(W.L.R.): Whittier Law Review
(Yale J. Int’l L.): Yale Journal of International Law
Dédicace

The following thesis is dedicated to the great women in my life. To the memory of my late grandmother, Irene, who taught me about sacrifice and dying with dignity. To my mother, Francine, whose constant guidance and support made this project possible. And to Shelly, the love of my life, for her undying patience and believing in me throughout.
Remerciements

To begin with, I would like to thank my director, Daniel Turp, for helping me complete this thesis. Much of what I was able to write and convey would never have existed were it not for his open-mindedness and passion for international law. I would also like to thank Francine Brulé for keeping me on track, Louise Rolland for her invaluable advice, and my editors: Neil, Paris and Shelly, for taking-on such a daunting task.

I would also like to take this opportunity to thank everyone in my life that has provided inspiration for this project. From friends to family, fallen or not, it was thanks to you that I was able to summon the courage to complete this task.

Thank you.
INTRODUCTION

The illustration in New York and Washington of the destructive potential of terrorism has brought about a redefining of international security that encompasses not just interstate relations, but the relations between states and individuals. Because the use of international force against states has traditionally been regulated by humanitarian law, governments that use military or foreign security forces in the pursuit of individuals abroad are attempting to apply its standards to their enforcement actions against them. By describing their efforts to prevent acts of international terrorism as a “war” and designating international terrorists “combatants,” some governments are providing perhaps the most revolutionary and controversial contribution to international law: the deliberate attempt to justify intentional killing outside the context of armed conflict without due process of law.

Considering that unilateral action in the eyes of the international community seldom meets a very high threshold of legitimacy, the use of intentional killing without minimal constraints is sure to cause great tensions between states. Under the cloak of security or humanitarianism, many fear that powerful nations will adopt a recourse to aggression that is clearly aimed at providing strategic advantage, and that they will further resort to inappropriate means to secure such ends. When countries are free to designate individuals as “terrorists” and “combatants” without judicial or legislative input, the potential for abuse is alarming, especially since such designations may be equivalent to death sentences. Most states will not take lightly the proposition that foreign powers can kill individuals within their jurisdiction in the absence of hostilities.

Because targeted killings as discussed in the current study pertain to lethal actions taken outside the context of armed conflict, it is especially important to determine how states can respect the minimum considerations of humanity recognized to all individuals in peacetime, starting with the right to life. The “war on terrorism,” after all, is not exclusively a struggle against states that support terrorism, but an effort to detain and prosecute individuals that kill innocent civilians. International terrorists—much like druglords, slave-traders, assassins, and arms smugglers—are criminals. The prosecution of such individuals is therefore as much a matter of national and international security as fighting wars. As a complement to forceful interventions, bringing terrorists to justice remains the most sustainable way of fighting international terrorism.
Although governments are now facing asymmetric threats from non-state actors that defy territorial boundaries, they may not artificially turn the planet into a giant battlefield. Any forceful operation, whether it is performed domestically or internationally, requires that in the absence of armed conflict innocent people be spared; international criminals and terrorists cannot be targeted arbitrarily, and the innocent civilians that surround them, if killed, cannot be treated as “collateral damage.” When states use force on foreign soil to “arrest or neutralise” individuals abroad that have attacked them, they are fulfilling enforcement tasks that are otherwise the responsibility of sanctuary-states, or perhaps the international community. Given that both domestic and international security forces are expected when fulfilling law-enforcement tasks to respect minimal criminal and human rights standards of law, then it follows that states intervening on foreign territory to incapacitate wanted terrorists must in theory also respect them.

While humanitarian law has regulated by Treaty the most extreme breakdown of international relations, war, more specific standards to govern limited enforcement operations on foreign soil have not yet emerged. Most states have officially recognised the rights of all individuals as expressed by the International Bill of Rights and the rights of all states as provided for by the United Nations Charter, but a number still behave as though respect for human rights and sovereignty were somehow optional in the sphere of international relations. To the detriment of civilian populations worldwide, the rules drafted to regulate confrontations between national entities are slowly becoming the governing standards for the use of force against individuals. Humanitarian law in the absence of armed conflict is being increasingly cited to meet less stringent criteria for the use of lethal force.

Before a state can forcefully intervene on the territory of another, it must necessarily have the right to do so. Where the state in question or the Security Council have not provided such a right, only self-defense can. Accordingly, operations to “arrest or neutralize” terrorists on foreign soil that would normally fail to respect the prohibition on the threat or use of force must somehow be permitted by international law. Because article 51 of the United Nations Charter (UNC) provides the only available excuse under international law for states to unilaterally resort to force, the inherent right of self-defense will remain the principle justification for the use of force by states on foreign soil, including targeted killing.¹ The following analysis will therefore consider whether targeted killings as measures of counterterrorism aimed at non-state actors abroad can be legitimately justified by article 51 self-defense.

For the purpose of this study, military responses to terrorism that are directed primarily against hostile states for supporting terrorists (such as air strikes or invasion) will only be addressed incidentally, so as to permit a more thorough treatment of forceful actions taken by states to “arrest or neutralise” in self-defense individuals on foreign soil who threaten their, and international, security. Therefore, they are not cases of excessive force by law-enforcement officials or politically motivated assassinations, but rather situations in which state agents are specifically ordered to kill to prevent acts of terrorism. Though the absence of a universally recognised definition renders difficult any treatment of the issue, targeted killing will be defined throughout this research as the **premeditated killing by states of specific individuals on foreign soil outside the context of armed conflict to prevent acts of international terrorism**. The scope and content of this definition will be addressed in the first chapter.

While the right to use force internationally has in the past been limited to situations where a state was directly involved in an ‘armed attack’, there is a growing sense that a right of self-defense may also exist when a state has provided assistance to those involved. The failure of a sanctuary-state to fulfill its duties inherent to sovereignty and mandated by international law, either by allowing terrorists to launch attacks from its territory or by subsequently shielding them from prosecution, can create against it a right of self-defense. Refusing to “prosecute or extradite” a terrorist responsible for an armed attack against a state may in some cases be a form of indirect aggression. Though a state’s refusal or inability to detain a suspected terrorist may not constitute in itself an armed attack, it can render the sanctuary-state indirectly responsible for the attack, as it is providing assistance to its authors *post facto* in the form of immunity from prosecution.

A right to use force in self-defense against a particular state may arise when the state in question has provided assistance to terrorists responsible for armed attacks, yet a general right of self-defense against all terrorists in every country cannot exist, even after the devastating attacks of 9/11. Though a victim-state may be justified in using targeted killing in the absence of armed conflict to kill terrorists that have, or are preparing to commit, an ‘armed attack’, it cannot use lethal force on foreign soil in the absence of a right of self-defense against the sanctuary-state. An expansive interpretation of self-defense may allow states to take action against terrorists in countries that fail to do so, but it may not permit the killing of individuals in countries that do.
In order to prevent acts of terror, it is crucial that there reigns over the entire territory of every state a sense of law and order, so that its more extreme elements are not free to cause harm to other states and their nationals. A state that is generally complacent towards their presence on its territory may place itself in a dangerously precarious position, inviting foreign powers to fill the void created by its inability to ensure their safety. State sovereignty, therefore, can only be secured as long as states forego behaviour that is harmful to others. The capacity to intervene when peace, security and human rights are threatened is paramount to the survival of states. Until the world is willing to accept that internationally criminal behaviour must be stopped during the act, and not simply prosecuted after the fact, states will have to assume certain international enforcement functions that are specifically related to their defense, especially in response to armed terrorist attacks.

Though a right of self-defense may justify using force against a state, it does not however justify violating the rights of those within it. A state may not move to violate the sovereignty of one’s person anymore than it can violate without cause the sovereignty of a state. It is however the right of every state to move against the integrity of an individual or state that engages in unlawful conduct against its essential interests, especially when the concerned behaviour presents a danger to human life. In doing so, both the victim-state (whose interests are targeted) and the international community may have a right to use force in its defence, but only to the extent that is needed to end the violence and restore peace. If in the process of fighting terrorism a state in turn takes the opportunity to inflict unlawful harm, it follows that it has over-stepped its right of self-defense and must be held accountable for it.²

To the extent that crime and terrorism threaten international peace and security, it is the people of this world that suffer when acts of violence go unpunished. The rationale behind state-lead prosecutions resides in the notion that crimes are an assault not only on the victims themselves, but on society as a whole. It is also true, however, that both national and international security are threatened when agents of a state are able to engage in behaviour that is clearly abusive or unlawful. Forceful actions by states such as torture and arbitrary executions that violate basic human rights are also an assault on society as a whole. As such, it is in the interest of every citizen to favour rules that shelter everyone from repressive policies. Because anyone in the world can become the target of an unfounded or politically motivated prosecution or attack, it is essential that recognised standards of domestic justice be applied internationally in the absence of armed conflict.

The following research is a study on the use of force and the prevention of international terrorism, with a focus on intentional killing, self-defense, and the right to life. The first chapter will narrow the legal environment in which targeted killings operate, provide the necessary definitions and background to effectively study their place as counterterror measures, and discuss the impact of declaring “war” on terrorism. The second chapter will study targeted killings in relation to national self-defense as prescribed by article 51 of the United Nations Charter and determine whether they can meet its requirements. The third will discuss the obligation of states to prevent acts of terrorism emanating from their territory and the corresponding duty to either “prosecute or extradite” the individuals that carry them out, as well as the use of force and the protection of nationals ‘abroad’. Finally, the fourth chapter will examine existing standards for the use of deadly force in relation to criminal and human rights law and provide a unifying framework by which to carry-out targeted killings to prevent abuses. The sum of these efforts should help bring useful answers to the following questions:

1) Can targeted killings be considered ‘necessary’ and ‘proportionate’ responses to international terrorism according to article 51 of the United Nations Charter?

2) How can targeted killings be lawful responses to individual or group terrorism in the absence of armed conflict?

3) Can targeted killings outside the context of armed conflict be acceptable limitations to the right to life?

Since proportionality as understood by humanitarian law renders military strikes lawful even in populated areas so long as the military advantage is great, the new face of war will render ordinary citizens more at risk from attack. Law-enforcement officials, however, do not have the right to incidentally kill innocent civilians any more than they can target suspected criminals for assassination. They are required to arrest and prosecute, and only use lethal force when necessary for the protection of life. Given that cities have become the new fronts in the “war” on terror, and that states are targeting individuals as combatants even in the absence of armed conflict, the likelihood that innocent civilians will be caught in the crossfire is high, making ordinary people fear both acts of terrorism and state violence. If democratic governments are serious about using force on foreign soil to meet their security needs, than they must be willing to accept the responsibilities that are inherent to such a task.

The use of targeted killings by states may not be compatible with the fighting strategies of peaceful democracies. The right to life and international norms prohibiting arbitrary killings may render unlawful in
democratic nations the use of targeted killing in peacetime, and states that oppose capital punishment will be especially weary of arbitrary executions outside the context of armed conflict. In the end, any policy concerning the use of force in times of peace which violates the right to life may potentially divide the international community, roughly in the same manner that capital punishment has divided America and abolitionist states in the administration of justice.

While the high courts of Europe and Canada, for example, have developed legal mechanisms to avoid breakdowns in cooperation with regard to criminal law-enforcement matters (i.e., guarantees of non-execution in exchange for extradition), the issue is re-emerging as states are declaring their intent to use targeted killings against terrorists outside the context of armed interstate conflict. The position articulated in the following work is that **though limited operations to arrest or neutralize terrorists may be justified as self-defense in response to 'armed attacks', policies of targeted killing in peacetime will inevitably divide the democratic world and seriously impair its ability to effectively suppress terrorism unless the right to life is respected.**

The need to compromise between individual liberty and collective benefit is a necessary process when confronted with opposing liberties. It is a domestic dilemma faced by all nations, democratic or autocratic alike. It is reflected in the problem of balancing liberty with responsibility, individual freedom with national security, pluralism and social conformity, private property with social good. Every society, including the international one, must undertake such a process in order to establish acceptable parameters of behaviour. Targeted killing is the latest measure to require scrutiny within the confines of this classic dilemma.

Although it may be hard to understand how targeted killing as part of a system of criminal law enforcement can be conducive to the maintenance of international peace and security, the reality remains that operations to "arrest or neutralize" may be necessary in extraordinary circumstances to protect against the **impossible to arrest and likely to strike again** terrorist. Considering the fact that governments have already adopted such killings as a matter of policy, it is all the more important that scholars and the public have an opportunity to study them, especially given their highly intrusive and definitive character. The following research is an attempt to make sense of the legal and strategic implications of such a choice.
CHAPTER I. THE USE OF TARGETED KILLING BY STATES

I. Targeted Killings and International Law

A) From Assassination to Counterterrorism

In some countries, the horrors of terrorism are prompting equally horrific responses. Human rights initiatives that have focused intensely on the elimination of oppressive state policies are being challenged by recent accounts of murder and torture throughout the world. Dissidents of all types, including opposition leaders, human rights activists, journalists, artists, students and religious figures, have traditionally been the targets of such persecution. In the aftermath of devastating acts of terrorism, that list has now been expanded by some nations to include suspected terrorists. Without recognising their obligation to respect the rights of individuals on foreign soil, or the rule of law for that matter, states are relying on foreign policy prerogatives to justify in peacetime actions only permissible in war. Carefully crafted claims of self-defense are permitting governments to act internationally in a manner that would not be tolerable domestically.

The following Chapter will define 'targeted killing' and discuss its use as practiced by states. By providing a more precise and circumvented meaning to the expression, the various nuances that emerge when such killings are undertaken by states will become apparent, and the interplay between humanitarian and human rights law more pronounced. The first portion of this Chapter will track the evolution of targeted killings by states in relation to the prohibition on assassination, while the second will focus intensely on their modern historical development as measures of counterterrorism. Finally, the third section will shed light on the implications of declaring "war" on terrorism.

As either an alternative or a compliment to criminal prosecution, targeted killings by states on foreign soil are emerging as counter-terror measures outside the traditional context of armed conflict. International terrorists that pose a danger to the national security of states are now being hunted down and killed, rather than arrested and convicted. Although such killings have always been condemned by the international community, they have been popularised in recent years by Israel's vigilante justice, and imported with less scrutiny by others. There is much confusion, however, about the definition of targeted killing, which renders difficult any meaningful treatment of the issue. The confusion arises in large part between the common literary definition of
assassination and its various legal interpretations under international law, and the tendency of governments to apply to their advantage the rules of armed conflict in the fight against individual or group terrorism.

By definition, assassination in peacetime represents the act of committing "murder by surprise attack, especially of a prominent person, as for political reasons." According to W. Hays Parks, "In general, assassination involves the murder of a targeted individual for political purposes." Judge Abraham Sofaer, former Legal Adviser at the U.S. Department of State, offered the following definition: "any unlawful killing of particular individuals for political purposes." An assassination consists therefore of three elements: (1) a murder or unlawful killing, (2) of a specifically targeted figure, (3) for a political purpose. Absent any one of these elements, a killing cannot be an assassination. For example, killing specific individuals in peacetime may amount to murder or extrajudicial execution, usually depending on whether an individual or a state is responsible, but if the killing lacks a political purpose, it is generally not an assassination.

As such, an assassination is always a targeted killing, but a targeted killing is not always an assassination. The common literary definition emphasises the killing of prominent or specific figures, but, unlike the legal definition under international law, it does not necessarily require a political purpose. Though virtually identical in practice, they differ in that the literary meaning can also encompass killings by states that are lawful, whereas the legal definition entails a method of attack that is usually illegitimate and inherently political. This distinction, however minute, goes a long way to explain why targeted killings, perceived by states as non-political self-defensive measures, are often labelled 'state assassinations'.

To further complicate things, the definition of assassination also varies during armed conflict. Under customary international law, the prohibition on assassination is a very narrow concept. According to Article 23(b) of the regulations annexed to the fourth Hague Convention of 18 October 1907 (known as the “Hague Regulations”), “it is especially forbidden […] to kill or wound treacherously individuals belonging to the hostile nation or army.” This legal definition is largely based on the first American effort to regulate the practice of war, known as the Lieber Code, promulgated by the United States army in 1863 as General Orders No.100: Instructions for

6 Hague Convention (IV) Respecting the Laws and Customs of War on Land, with annex of Regulations, 18 October 1907, T.S. No.539, 1 Bevans 631, 36 Stat. 2277 (entered into force 26 January 1910).
the Government of Armies of the United States in the Field. The U.S. Army field Manual 27-10 of 1956 on the Law of Land Warfare, which has incorporated the prohibition, authoritatively links Hague Article 23(b) to assassination: “This article is construed as prohibiting assassination, proscription or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy “dead or alive”.

The customary prohibition on assassination echoed the opinions of several early commentators. Alberico Gentili, for example, feared that general disorder would arise if opposing sides plotted the deaths of each other’s leaders. He argued that “if it is allowed, openly or secretly, to assail one man in this way, it will be allowable to do this by falsehood. If you permit murder, there are no methods and forms of attack which will be excluded from war. It should hence never be permitted.” He noted, “victory consists in the acknowledgement of defeat by the enemy, and the admission that one is conquered by the same honourable means which gave the other victory.” Though an enemy could always be sought and killed on the battlefield, Gentili rejected the suggestion that killing a single leader might save many lives. He considered that clandestine assassinations ignored elementary considerations of justice and honour. His emphasis on treachery as the distinguishing factor between lawful and unlawful wartime killing was the essence of his contribution.

Hugo Grotius also considered “whether, according to the law of nations, it is permissible to kill an enemy by sending an assassin against him.” Grotius, like Gentili, emphasised the notion of treachery and described it as a breach of confidence (such as violating an express or implied agreement of non-aggression), something he deemed inconsistent with the law of nations and nature. He distinguished between assassins that violated such express or tacit obligations of good faith, and those that didn’t, recognizing that not all forms of targeted killings were prohibited. Though he condemned the practice of placing a price on an enemy’s head and killing treacherously, Grotius deemed it permissible to kill an enemy in any place whatsoever. He believed strongly that an essential attribute of sovereignty was the right to wage war, and that the use of assassination in the context of a public war against a sovereign enemy was a general extension of this right. He noted:

---

10 Ibid.
Not merely by the law of nature but also by the law of nations (...)it is in fact permissible to kill an enemy in any place whatsoever; and it does not matter how many there are that do the deed, or who suffer. According to the law of nations not only those who do such deeds, but also others who instigate others who do them, are considered free from blame.  

The Swiss scholar Emmerich de Vattel, for his part, rejected the proposition that assassination was contrary to honour, but was careful to distinguish them from situations in which the very survival of the state was at stake. His emphasis on the principle of necessity was central to his understanding of assassination. Vattel ridiculed the suggestion that because killing was permissible in war, the manner in which an enemy was killed was irrelevant. With a view of war that corresponds more closely to that of modern times, he considered critical both the scale of an armed conflict and the state interests at stake in assessing the lawfulness of assassination. Although he recognized the right to kill an enemy leader without treachery, Vattel argued that this right existed "only when lesser measures do not suffice." He wrote:

Formerly, he who killed the king or general of the enemy was commended and greatly rewarded because in former times, the belligerent nations had, almost in every instance, their safety and very existence at stake; and the death of the leader often put an end to the war. Today, sovereigns tacitly agree to secure their own persons. In a war that is carried on with no great animosity, and where the safety and existence of the state are not involved, this respect for regal majesty is perfectly commendable (...) In such a war, to take away the life of the enemy's sovereign, when it might be spared, is perhaps doing that nation a greater degree of harm than is necessary. But it is not one of the laws of war that we should spare the person of the hostile king.

Bynkershoek was less inclined than many of his contemporaries to see war as a contest of valour and honour. Because it was immaterial whether an enemy was fought with courage or with strategy, any manner of deceit or fraud was permitted, except perfidy. By perfidy he meant the breaking of one's word or agreement, and excepted it not because some measures are illegitimate against an enemy, but because when an arrangement is reached the enemy ceases to be an enemy. In 1737, he commented:

In my opinion, every force is lawful in war. So true is this that we may destroy an enemy though he may be unarmed, and for this purpose we may employ poison, an assassin, or incendiary bomb...in short everything is legitimate against an enemy. I know that Grotius opposed the use of poison, and lays down various distinctions regarding the

---

14 Ibid.
15 C.Van Bynkershoek, "Quaestionum Juris Publici Libri Duo" (1737), reprinted in 14.2 The Classics of International Law 16 (T.Frank trans. 1930).
employment of assassins...But if we follow reason, who is the teacher of the law of nations, we must grant that everything is lawful against enemies as such.\textsuperscript{16}

The general consensus of these early commentators was that an attack directed against an enemy, including an enemy leader, was generally permissible, unless the attack was treacherous by nature, treachery being defined as betrayal by one owing an obligation of good faith to the intended victim. The main effect of forbidding the use of treacherous assassination in times of (agreed upon) peace was to ensure within each state a sense of order and to promote chivalrous principles of valour and honour. Implicit to these positions, however, was the premise that war was legal, and that sovereign leaders ought not to be required to sacrifice their personal safety in the performance of their duties.\textsuperscript{17}

Article 37 of \textit{Protocol I} of the \textit{Protocols Additional to the Geneva Conventions} of 12 August 1949, the latest attempt to codify the prohibition on assassination, outlaws killing, injuring, or capturing an adversary by resort to perfidy, and defines perfidy as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.”\textsuperscript{18} The concept of perfidy is broader than treachery, and the effect of \textit{Protocol I} was to absorb the concept of assassination to treat it under the broader prohibition of perfidious attacks. The purpose was to ensure that specifically targeting individual combatants in armed conflict was lawful (when perfidy was not employed) and to expand the prohibition beyond sovereign leaders.

The issue of assassination has also been discussed outside the context of armed conflict. The killing of abusive foreign leaders, a practice known as \textit{tyrannicide}, has been the subject of much debate, especially when the death of one individual may have prevented the killing of many.\textsuperscript{19} Recently, Libyan leader Muamar Al Ghadafi and ex-Iraqi leader Saddam Hussein have been the targets of similar discussions.\textsuperscript{20} Though normally prohibited by the 1973 \textit{Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons}, the assassination of authoritarian heads of state has been described as an act of liberation in

\textsuperscript{16} \textit{Ibid}.
\textsuperscript{17} Patricia Zengel, “Assassination and the Law of Armed Conflict” (1991) 131 \textit{Mil. L. R.} 123.
\textsuperscript{19} As in the case of Hitler had he been eliminated prior to the Second World War and the Holocaust.
a way analogous to forceful humanitarian intervention. Killing dictators that repress their citizens or support terrorism is a very contentious issue; one that is ultimately beyond the scope of this study.

The focus of this research is not tyrannicide, nor the use of assassination as prohibited by customary law, as both these notions operate at the highest level of interstate relations. During the first Gulf War, it was unclear whether the customary prohibition on assassination rendered illegal the targeted killing of state leaders. It has since become abundantly clear that the killing of such figures as enemy combatants is lawful during armed conflict. When operating within the chain of military command, state officials are transformed into combatants, rendering lawful their targeted killing. The military campaign in Afghanistan (2001) and the second Gulf War (2002) have truly solidified this principle, as both Taliban and Iraqi government officials have been killed as targets of “command and control.” Because there remains little doubt as to the lawfulness of targeting government officials as enemy combatants during hostilities, the true debate lies elsewhere.

Generally, assassination during peacetime is understood as “a politically motivated murder of a specific figure” and during wartime as “the targeting of an individual by treacherous or perfidious means.” Both definitions, however, are too narrow to encompass the pre-emptive killing of international terrorists in self-defense. When a state moves to “arrest or neutralize” a common criminal or terrorist on foreign soil, the impending use of force does not generally amount to an assassination, nor does it necessarily represent an act of war. Speaking of “state assassination” is only correct when the use of force is illegitimately exercised to further national interests that are inherently political. Targeted killings by states, which nonetheless involve an interstate dimension when committed abroad, are truly emerging as non-political self-defensive measures of counter-terrorism outside the traditional context of armed conflict. It is therefore essential to study them within this framework.

B) A Defining Moment

There are usually two situations in which governments are claiming a right to kill terrorists in order to prevent acts of terrorism. The first deals with terrorists that are on their way, meaning that they are preparing to kill or escape and must be immediately incapacitated. Normally this involves the killing of suicide bombers or

hostage-takers, but also of terrorists and criminals resisting arrest. The use of deadly force under such circumstances when unavoidable to save lives is not very controversial as provided for by criminal and human rights law. Police officers are often obliged to use lethal force in the performance of their duties to protect persons from unlawful violence. While using such force on foreign soil does raise particular issues of legality, the basic principle of individual self-defense remains the same throughout.

The second and more contentious instance of targeted killing in the absence of war involves the pre-emptive killing of the “impossible to arrest and likely to strike again” terrorist. Unlike the use of lethal force in the first case, such responses are not predicated solely upon immediate and uncontrollable circumstances. As demonstrated by the explicit authorization given by government officials for targeted killings, such measures are characterized by a heightened level of premeditation. An assessment has already been made prior to their execution of the unavailability of less forceful alternatives and the danger posed by the individuals targeted; incapacitation has been established as the perceived goal and death the most likely way of achieving it. While no one can predict with certainty whether terrorists will “strike again,” certain individuals given their past history and influence can pose a serious and legitimate threat to the essential interests of states. Providing they still pose a danger to human life, individuals that have planned or committed deadly acts of terrorism in the past may qualify as potential candidates for such measures. Targeted killings as understood in the current research pertain to such killings as described in this second category.

Alan Dershowitz in Why Terrorism Works offers a compelling example of the potential need for “targeted assassinations.” He uses the example of a terrorist leader like Osama bin Laden harboured in a country beyond the political or military reach of the United States. Faced with reliable information that he was plotting further attacks against American interests, the U.S. government would be left with few options. It could use

---

22 As previously stated, the use of the term ‘assassination’ can foster confusion. When used by a renown legal expert like Alan Dershowitz, one would tend to believe that its use is deliberate and calculated. His choice may be attributed to the fact that terrorists, according to him, are “combatants who are preparing to kill innocent civilians” (Alan Dershowitz, Why terrorism Works, infra, note 23, p. 184). As such, the term assassination is used to describe the targeted nature of killings which occur in the context of a military conflict. His choice may also be attributed to the fact that terrorism, as opposed to crime in general, is usually political. As such, any targeted killing will have political connotations and thus possibly be considered assassination. Though he may be right in using the term to describe Israel’s use of such measures given the existence of a political conflict between Israel and the Palestinians, assassination is not the most appropriate or useful term to describe the use of such killings by states in the larger context of counterterrorism. Though it may be biased to limit the scope of the term to the killings of terrorists, I believe that states must not and cannot engage in “assassination.” As will later be conveyed, UNC article 51 permits defensive action that is necessary for protective purposes; it does not allow the use of force that is “political.” If targeted killings are to be considered necessary and protective measures of self-defense, they must not amount to assassination.
diplomatic, economic, or military pressure to secure his detention, but if these failed or were unavailable, it
would be left with three basic options: (1) do nothing; (2) try to bomb his enclave; or (3) send a hit squad to
assassinate him. Bearing in mind that in the following example it is impossible to arrest him, the range of
options is significantly reduced.

The first option is unacceptable, especially if the threat he poses is high. The second option, though hinging like
the third on incapacitation, may result in the unintended killing of innocent civilians or an escalation of
tensions. The third option offers the greatest amount of risk to American agents, but is more acceptable morally
than the bombing option as it reduces the likelihood of innocent deaths. Gaining custody over a wanted fugitive
is always the most rewarding option since there is no better way for a state to show strength or obtain
information. But as a last resort, targeted killings “might be the right—or the least wrong—option to pursue,”
especially when casualties are avoided and acts of terrorism prevented.²³

A list found on the United Nations Drug Control Program and Crime Prevention website identifies the possible
counter-terrorist measures available to states.²⁴ They are divided into eight categories ranging from political and
economic measures, to judicial and military ones. While the “police and prison system” and “intelligence and
secret service” rubrics include “police powers” and “infiltration” methods, only the “military measures” section
discusses the use of “strikes or operations.” Under this banner, the UN lists four types of action: (a) pre-emptive
strikes against terrorist bases; (b) commando action against headquarters of terrorists (for arrest and/or
neutralisation); (c) punitive retaliatory action against location or community hosting terrorists (erect roadblocks
or engage in active search for weapons); (d) rescue operations for liberation of kidnap victims or hostages in
siegelbarricade situation. Because the following research is concerned mostly with the targeted killing of
terrorists, and to a lesser degree their arrest or abduction, the forceful responses taken by states on foreign soil
listed under (b) will be the focal points of this study.

It is useful when discussing the use of targeted killing by states that operations aimed at rescuing nationals
abroad also be discussed, as both are often intimately related and justified on similar grounds. When the
nationals of a state are held hostage by terrorists in a foreign state which refuses to intervene effectively to

²³ Alan Dershowitz, Why Terrorism Works; understanding the threat, responding to the challenge, (New Haven: Yale
²⁴ A Classification of Counter-Terrorism Measures, http://www.undcp.org/terrorism_measures.html, last visited 18
August 2003.
secure their release, it is only natural for their state of origin or nationality to attempt to liberate them by whatever means available. Ideally, forceful interventions would always result in the apprehension of those responsible. It is understood, however, that intentional killing may sometimes be necessary to limit resistance and secure the release of hostages. While they lack the level of premeditation characteristic of targeted killing, rescue operations are also taken in response to armed terrorist attacks. Though fundamentally distinct, both can be legitimate measures of counterterrorism taken by states in self-defense against terrorists in states that assist or harbour them.

As defined by Steven R. David, targeted killing is the “intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval.”²⁵ Though concise, the problem with this definition is that it fails to specify the intended targets and ignores the context in which they are carried out. By failing to define targeted killings as measures of counter-terrorism, killings of all types may indiscriminately fall under its mantle with devastating consequences. As such, the killing of political leaders in peacetime, which amounts to assassination, can fall within its scope. The same can be said about the killing of specific enemy combatants in armed conflict, which amounts to targeted military strikes, and the intentional slaying of common criminals, dissidents, or opposition leaders. Actions carried-out by governments within their jurisdictions can also be interpreted as targeted killings. Although the killing of terrorists abroad may constitute lawful and proportionate self-defense in response to armed attacks, the use of such measures by states for an unspecified number of reasons renders shady their very suggestion. David’s definition is essentially correct but over-inclusive.

As discussed in the following chapters, targeted killing will refer to lethal action taken by states against wanted individuals on foreign soil that have, or are preparing, to attack it. They must also not be equated with killings that occur during armed conflicts between states nor in the context of occupation or civil war. For the purpose of this study, targeted killing will be defined as the premeditated killing by states of specific individuals on foreign soil outside the context of armed conflict to prevent acts of international terrorism.

This definition covers almost any use of lethal force by states on foreign soil whose purpose is the prevention of international terrorism, provided that it is not carried-out in the context of an armed conflict as understood by

the Geneva Conventions. Generally, this implies any military confrontation between "two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,"26 as well as armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties. The limitation imposed by the proposed definition is that an armed conflict not already exist against the sanctuary-state or an armed group within it, as it would automatically render lawful the use of proportionate military force, including targeted killing. The purpose of the absence of armed conflict qualification is to remove from the analysis any possibility that targeted killings will be automatically justified as the killing combatants.

As for the use of the term "individuals" as opposed to terrorists, the qualification is important. Too often is the term "terrorist" narrowly associated with political violence. Individuals can resort to acts of terrorism for reasons other than intimidating a state into making political concessions. What usually distinguishes legitimate acts of resistance from terrorism is the intentional targeting of innocent civilians, not the cause in which the attacks are carried-out. In reality, the reasons that motivate an individual to use unlawful violence against non-combatants matter little. Be it for political, religious or financial gain, a terrorist is always a terrorist. Limiting by definition the scope of targeted killings by making them exclusively directed at "terrorists" may have the unfortunate effect of neglecting equally important aspects of the problem, namely fighting economic or religious terrorism. The object is not the frenzied pursuit of "terrorists" but the prevention of terror and those that engage in its operations.

Moreover, it is essential that targeted killings be used only to counter foreign threats and not domestic ones. The terms ‘transnational’ or ‘international’ terrorism normally refer to “the threat or use of violence with the intent of causing fear in a targeted group, in order to achieve political objectives,”27 the threat of which comes “from forces outside a state’s jurisdiction with at least a minimum level of foreign State support or toleration.”28 A more encompassing definition of “international terrorism” would not necessarily require state participation, as the term ‘international’ may refer also to the cross-border dimension of an attack. According to the State Department, the term “international terrorism” means terrorism involving the citizens or the territory

---

of more of more than one country. \(^{29}\) Although the state-centered dimension is paramount in international law to establish claims of liability and self-defense, foreign terrorists that infiltrate nations to commit murder and terror may also be considered ‘international terrorists’ and their actions ‘international terrorism’. \(^{30}\)

The highly subjective determination of which individuals constitute threats so dangerous that it is necessary to use lethal force against them to *prevent* terrorist attacks leaves considerable room for interpretation at the national level, but no more so than in the determination of what constitutes proportionate civilian casualties in military operations. While these matters are largely left to the consideration of states individually, predetermined principles of law already govern their conduct, both in armed conflict and law-enforcement operations. This unavoidable reality of a world unbound by an effective supranational order has perhaps allowed states to commit what are essentially war crimes and crimes against humanity during armed conflict and human rights violations in peacetime, yet the definition provided above contains an inherent qualification. It associates ‘targeted killing’ as a measure taken by states *to prevent acts of international terrorism*, thereby limiting their scope.

The reasons for doing so are varied, yet one prevails above all others. Never before in history have non-state entities been able to inflict such fear and devastation to the established order, and though I cringe at the necessity of using measures so anciently condemned as ‘assassination,’ I fear even more the possibility that the legitimization of such measures in the context of counterterrorism will numb our senses to the point that we accept them for reasons unrelated to the prevention of terror. It is therefore important to recognize the distinctly “preventative” nature of targeted killing and its role as a tool against international terrorism. Omitting this particular requirement might allow governments to kill for a multitude of reasons that cannot be reconciled with the protection of life and the concept of self-defense.

Terrorism, however, is truly a vague concept. Though there seems to be general agreement that terrorism involves the “threat or use of violence” and its purpose is to create a climate of fear, differences in definition range from the semantic to the conceptual, thus the relativist and often apologetic adage that “one person’s terrorist is another person’s freedom fighter.” While most scholars now agree that terrorism is a term that can be applied to both sub-state and state violence, powerful nations have usually attempted to limit its scope to

\(^{29}\) Jonathan R. White, *Terrorism*, fourth ed. (Belmont, Ca: Thomson Wadsworth, 2002), p.12.(Quoting Title 22 of the United States Code section 2656f(d)).

\(^{30}\) This formula may also apply to individuals who attack their own states and later find refuge in sympathetic nations. Though targeted killings are not generally carried-out in response to domestic acts terrorism, such attacks may be “internationalised” when those responsible are provided safe-harbor by foreign jurisdictions.
violence undertaken by individuals or groups opposing the established order, rather than allowing it to also cover the terror of states. Conversely, many developing countries have tried to remove the actions of national liberation movements from the definition of terrorism, eager instead to concentrate on the actions of states. What is revealed is that the term "terrorism" is defined less by the actors involved than the "terroristic" nature of their attacks, which involved the creation of fear to affect change through the deliberate killing of innocent civilians.

By approaching the concept of terrorism by reference to the actors involved, two basic types can be identified: individual or group terrorism, and state terrorism. Individual terrorism has many manifestations and is used by groups large and small, including organised criminals, nationalists, separatists, religious extremists and liberation fighters. The vast bulk of the literature on the subject of terrorism deals with individual terrorism, and the use of the term 'terrorism' in the current analysis refers to this aspect of the problem, as is usually the case in international law. State terrorism traditionally refers to acts of terror such as torture, deliberate killings, and mass arrests, conducted by oppressive governments against their own population. In recent years, however, a wider view of the concept has emerged to include such violence on the international level as well.

Although the killing of individuals domestically by state forces is equally if not more alarming than the targeted killing of terrorists abroad in self-defense, the following study is concerned with forceful actions taken by states on foreign soil, not against their domestic populations, which are normally sheltered against abusive laws by constitutional constraints. Its objective is not to view targeted killings through the lens of repressive state policies against civilians, but to study them as potentially legitimate measures of counterterrorism that may inevitably succumb to abuse as well. This is not to belittle the impact of state terror. However, as Jonathan R. White writes: "Governmental repression is a long-term political problem separate from modern terrorism. To include it in the discussion confuses the issue and does little to enhance our understanding of terrorism." Terrorism is essentially what governments are fighting. Violations by states of humanitarian and human rights law is what civilians are protesting.

32 While civilian agencies may be considered state-related targets (e.g. Oklahoma city bombing of a federal building), acts of terror aimed not specifically at "security related" targets or agencies can also be considered terrorism. Civilian employees of the government are 'innocent civilians' given that working for the government cannot in itself transform an otherwise peaceful person into a 'combatant'. Differences of opinion do however persist on the issue.
33 Hereinafter, the expression "individual terrorism" will be used to describe "group terrorism" as well, standing in opposition to state-terrorism.
34 Supra, note 29, p.9.
As to the definition of terrorism, there is, as one scholar put it, "a problem in the problem definition. We can agree that terrorism is a problem, but we cannot agree on what terrorism is."35 As another noted, "no single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multilateral treaty."36 Still, many definitions have been proposed by a variety of state and non-state actors. Terrorist expert Brian Jenkins calls terrorism "the use or threatened use of force designed to bring about political change," while Laqueur describes it as "the illegitimate use of force to achieve a political objective by targeting innocent people." Martha Crenshaw, for her part, believes terrorism is "socially and politically unacceptable violence aimed at an innocent target to achieve a psychological effect. 37

The U.S. Department of State has described terrorism as "the threat of violence for political purposes by individuals or groups, whether acting for, or in opposition to, established governmental authority, when such actions are intended to influence a target group wider than the immediate victim or victims."38 More recently, the State Department has defined it as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended to influence an audience."39 While this second and more objective definition provided by the State Department is very useful, it also limits terrorism to politically motivated violence.

For the same reasons cited above concerning the use of the term individual as opposed to terrorist in the proposed definition, it is not helpful to ascribe a particular motivation to define terrorism when its proponents are so varied. Instead, what emerges as the condemnable act of terrorism is the threat or use of force against noncombatants to bring about change through fear and intimidation. The purpose of counterterrorism and thus targeted killing is to prevent such harm from occurring, not to pass judgment on the changes thereby sought. Though more will be said later on the subtleties of state-supported terrorism, the killing of innocent civilians is probably the most common and useful element in defining acts of terror.

37 Supra, note 29, p. 8.
To better understand targeted killings, it is essential to look at state practice. Though assassination has existed much throughout history, the use of targeted killings in response to acts of terror, including suicide bombings, is a relatively new phenomenon. Because Israel and the United States of America have been subjected to some of the worst attacks against civilians in history, the following section will provide background information on the evolution and scope of targeted killing from their perspective. It must be noted, however, that the definition set out above does not always apply neatly to the Israeli context given the prevailing ‘warlike’ environment and _interstate_ dimension of the conflict.\(^{40}\) Since the practice has nonetheless emerged under its auspices, it is essential to dedicate a portion of this research to its understanding.

II. Targeted Killings: A Look at State Practice

A) The Israeli Experience

The state of Israel has been actively fighting terrorism for much of its existence. In recent years, it has openly engaged in a counter-terrorist strategy known as ‘targeted killing’ whereby Israel actively responds to acts of terror by killing individuals it believes are involved in the planning and carrying out of such violence. The practice, albeit intensified since the commencement of the second _intifada_, is not new. From its independence in 1948 to the present, Israel has always “used the policy of targeted killings to advance its interests.”\(^{41}\) Although the number of killings has fluctuated between periods of heightened conflict and relative peace, the practice has never totally disappeared. The persistence of this policy can be ascertained by the following brief historical overview.

In the period before Israeli independence, underground Jewish groups such as the Hagana, Irgun, and Lehi resorted to targeted killings, citing Biblical and ancient precedents to justify their use.\(^{42}\) They were usually carried-out to eliminate supporters of the British occupation of Palestine, such as the mediator Count

\(^{40}\) Although more will be said later about the potential for Statehood with regards to Palestine and hence the possibility of applying humanitarian law, it is no secret that several States are in a sense still at war with Israel, such as Iran, Syria, Lebanon, Saudi Arabia and others. Because terrorism in the Middle East is largely supported by States and motivated by aspirations of Statehood, the definition set out above does not specifically apply to the case of Israel, except when targeted killings are conducted outside of Israeli or Palestinian territory and other states that have not made peace with Israel.

\(^{41}\) Supra, note 25, p.3.

\(^{42}\) Supra, note 25, p.2.
Bernadette, as well as fellow Jews suspected of being informers.\textsuperscript{43} The leaders of some of these groups, such as Menachem Begin and Yitzhak Shamir, also went on to assume leadership positions in modern Israel. In the 1950s, Israel focused its campaign of targeted killing on efforts to halt fedayeen (Holly warrior) attacks from Egypt; two senior Egyptian military intelligence officials heading the operations were killed by mail bombs sent by Israeli intelligence.\textsuperscript{44} In the 1960s, similar attacks convinced German scientists to abandon their work on Egypt’s missiles and return home, successfully bringing about an end to its ballistic armament program.\textsuperscript{45}

Following the War of 1967 and subsequent occupations, the use of targeted killing increased dramatically in response to Palestinian terror operations. In 1971, General Ariel Sharon commanded an anti-terror detachment tasked with the elimination of militants from Gaza. Often posing as Arab civilians, Sharon’s unit reportedly killed 104 Palestinians and arrested another 742.\textsuperscript{46} It was nonetheless the killing of 11 Israeli athletes at the Munich Olympics that cemented and popularized the policy within Israel. In response to the gruesome 1972 attack, “Committee X” chaired by Prime Minister Golda Meir and Defense Minister Moshe Dayan was established. Its mandate was to oversee the killing of the Black September members responsible for the Munich massacre. Beginning in October 1972, the Committee oversaw the killing by the Mossad (Israeli foreign intelligence service) of thirteen individuals, including the unfortunate murder of an innocent Moroccan waiter in Lillehammer, Norway.\textsuperscript{47}

Israel’s war with the Palestinian Liberation Organisation (PLO) escalated in April 1973 when three of its leaders were killed in separate attacks led by Ehud Barak in Beirut. During the 1980s, Israel attempted to kill two prominent Palestinian leaders. The first was the failed effort to eliminate Palestinian leader Yasser Arafat during the 1982 invasion of Lebanon. Despite several attempts, Arafat escaped unscathed. An Israeli sniper reportedly had him in his sights during the PLO’s withdrawal from Beirut, but permission to shoot was never granted given the presence of American and other diplomats during the farewell ceremony.\textsuperscript{48} The second was

\begin{thebibliography}{99}
\item\textsuperscript{44} Dan Raviv and Yossi Melman, \textit{Every Spy a Prince: The Complete History of Israel’s Intelligence Community} (Boston: Houghton Mifflin, 1990), p.122; \textit{supra}, note 43, p. 304.
\item\textsuperscript{45} \textit{Supra}, note 25, p.3; \textit{Supra}, note 44, p.122.
\item\textsuperscript{46} \textit{Supra}, note 25, p.3; \textit{Supra}, note 44, p. 247.
\item\textsuperscript{47} Ian Black and Benny Morris, \textit{Israel’s Secret Wars: A History of Israel’s Intelligence Services} (New York: Grove Weidenfeld, 1991), pp. 272-277; \textit{Supra}, note 44, p. 189. Ali Hassan Salameh, the reported Black September operations officer who planned the Munich massacre and was the target of the Lillehammer attack, was eventually killed in 1979 by a car bomb in Beirut, though apparently serving as an asset for the U.S.
\item\textsuperscript{48} \textit{Supra}, note 44, p. 276.
\end{thebibliography}
the successful killing in 1988 of Khalil el-Wazir (Abu Jihad) in Tunisia, Arafat's second-in-command. Drawing on his 1973 Beirut experience, Ehud Barak led the joint Army/Mossad commando hit squad that eliminated Abu Jihad, perceived as an irreplaceable leader and key author of the first intifada.

During the 1990s, several targeted killings were undertaken with mixed results. In October of 1995, Israel killed Palestinian Islamic Jihad leader Fathi Shikaki in Malta. No competent successor emerged to replace him, rendering the organisation virtually helpless for years. The killing in January 1996 of Yahya Ayyash, known as "the engineer," proved an important wake-up call. In killing one of Hama's most skilled and prolific bomb makers, Israel was faced with four successive suicide bus bombings in the following two months. As a result, more than 50 Israelis were killed and resentment in the Arab world rose dramatically.

Finally, an embarrassing attempt to kill Khaled Meshal, chief of Hama's Amman political bureau, occurred in September 1997. Two Mossad agents succeeded in poisoning Meshal but were captured by Jordanian authorities while attempting to leave the country. In order to secure their release, Israeli Prime Minister Benjamin Netanyahu agreed to provide the antidote for the poison (bringing about Meshal's recovery) and to release Hamas Sheik Ahmed Yassin from an Israeli Prison. The 1997 episode resulted in damaged relations with Jordan, one of two officially friendly Arab countries, and Canada, whose passports were used by the Israeli agents. Most importantly, the aura of invincibility and shrewdness that surrounded the Mossad had been badly compromised.

Following the failure of the Camp David accords in the summer of 2000 and Ariel Sharon's visit to the Temple Mount in late September, the Palestinian's unleashed a violent revolt against Israel. As a result, a surge in targeted killings began in November 2000 with the start of the second Palestinian intifada. Though there is nothing really new about Israel's policy of targeted killing, its scale has increased dramatically; never have so many militants been killed in such a short period of time. Also new are some of the methods and tactics used, namely the widespread use of helicopter gunships and car bombs. Because of the increased visibility and extent

---


50 "For Many Israelis, Assassination is Only as Bad as Its Execution," The Washington Post, Barton Gellman, 12 October 1997, p. A1; Supra, note 25, p. 5.
of the killings, the government of Israel has further been obliged to acknowledge its role in targeted killings to a much greater extent, though it still fails to routinely claim responsibility for its operations.\textsuperscript{51}

Several high-ranking Palestinians have also been killed during the second \textit{intifada}. They include the head of the Palestinian Front for the Liberation of Palestine (PFLP), Abu Ali Mustafa, the Secretary-General of the PFLP, Mustafa Zibri, and a leader of the Tanzim movement, Raed al-Karmi. Most of those killed, however, were mid-level fighters, \textit{important enough to disrupt terror operations but not enough to provoke murderous retaliation}. Those targeted killed usually knew they were being sought, as Israel identified them through its intelligence apparatus and through collaborators.

In Israel, no attempt is made to conceal the fact that targeted killings are conducted by agents of the state or to deny that such killings are occurring as a matter of policy. They are ordered at the very highest levels of the army and government and are carried out openly by whatever means appropriate. Security forces that carry out targeted killings offer no proof of guilt, and no right of defence. The identities of those who authorise the killings are hidden and investigations are seldom granted when innocent individuals are targeted or incidentally killed.\textsuperscript{52} According to the Israeli government, “there is no miracle cure in this war, but in the end, swift action against terrorists responsible for repeated attacks represents the most effective way of dealing with them.”\textsuperscript{53}

In the context of counter-terrorism, Israel has essentially provided, as it once did in the case of torture, the first international justification for murder.\textsuperscript{54} While torture has since then been outlawed by the Israeli Supreme Court, the same is not true of targeted killings.\textsuperscript{55} On December 21\textsuperscript{st}, 2000, Voice of Israel radio laid down the parameters of its policy of targeted killings in a briefing by an unnamed Israeli Defense Force (IDF) officer. The officer recognised that there was indeed a new policy of what he called “pre-emptive operations.” He said that the main method of killing leaders of Hamas, Islamic Jihad, and Fatah, was by sniper fire, but that other means would also be used. He stated that the IDF would not kill political leaders, only ‘terrorists’ that were on


\textsuperscript{54} Ardi Irnseis, “Moderate torture on trial: critical reflections on the Israeli Supreme Court judgement concerning the legality of general security service interrogation methods,” (2001) 19 \textit{B.J.I.L.} 328.

their way to a terrorist attack or were actively planning one. He further added that “The IDF goes to great lengths not to harm innocent bystanders.”

On July 3rd, 2001, the Guardian reported Israeli deputy defence minister Dalia Rabin-Pelossof as confirming that targeted killings would continue as long as they were necessary. “It is a policy of self-defence,” she said. “When we know of a terrorist who is a ticking bomb, meaning he is on his way, carrying explosives, to carry out an attack in Israel, it is incumbent on us to prevent it and that is what we do.” According to this statement representative of Israeli policy, the main purpose of targeted killing is usually to prevent armed attacks by ‘neutralising’ individuals that are preparing to strike. The reality, however, is that targeted killings are also used to eliminate individuals that are not “on their way.” Quite often they are also used to kill individuals that have already committed attacks against Israel, or to eliminate those that have provided support for such actions. Though understandable in some cases, the problem with such killings is that those targeted are not always impossible to arrest and likely to strike again.

In an interview with Human Rights Watch on November 8th, 2000, Lt. Col. Pnina Sharvit Baruch, deputy head of the International Law division of the IDF, explained that the current conflict was different from the first intifada because there was now an armed Palestinian force in the occupied territories and the violence itself was of a different nature. He qualified the conflict not as a state of war or peace but “somewhere in the middle.” Because there exists no such “somewhere in the middle” regime under international law, the conflict is either a national emergency for which no derogation to the right to life is permitted, or an armed conflict in which the targeted killing of terrorists may be justified by humanitarian standards of law.

If a terrorist attack is staged within Israeli territory by its nationals (Israelis and Palestinians alike), the use of targeted killing in response would likely amount to law-enforcement action. Actions by domestic security forces to prevent persons from unlawful violence may be excessive or proportionate; given the complete absence of judicial proceedings in pre-emptive targeted killings, those that are excessive or unnecessary may

---

also amount to ‘extrajudicial executions’. Such measures, as Yael Stein of Israel’s Btselem human-rights organisation claims, would “violate the *Universal Declaration of Human Rights* and the United Nations’ *International Covenant on Civil and Political Rights* and undermine Israel’s moral and ethical standing.”

Most terrorists, however, launch their attacks against Israel from Palestinian-controlled territory. As Nicholas Kendall points out, “attacks emanating from a *foreign territory* more readily fit into an *armed conflict paradigm*, and both sides seem content with using the language of war.” Israeli prime minister Ariel Sharon has further declared a state of war, presumably to render lawful the targeted killing of Palestinians, and to justify incursions into Palestinian towns. This qualification may justify targeted killings, but it also carries the consequence of recognizing Palestine as a national entity (or at least an aspiring one) because war can only be waged against states or groups that represent national entities. Although declaring “war” on terrorism does not necessarily signal an actual state of war, there is little doubt that both sides—however moderate the intensity—are engaged in an armed conflict. As such, the law of warfare still provides the most appropriate framework to evaluate the lawfulness of Israel’s targeted killings, except when committed internationally in countries where there is no war.

In response to claims that Israel engages in ‘assassination’ or ‘extrajudicial executions’, the Israeli Embassy in London stated that “the use of such phrases to describe such defensive acts is demagogic and inappropriate.” It further went on to describe ‘assassination’ as the murder of a prominent person or public official for political ends, noting that the targeting of terrorists does not depend on the public role of these individuals, but on the role played by them in the murder of innocent civilians, and has as its goal not political motives but the saving of life. While it may at times use the advantage of surprise or stealth, Israel does not use treacherous means or

---


63 Israeli Prime Minister Ariel Sharon has admitted publicly that he regretted not having killed Yasser Arafat when he had the chance during the 1982 War against Lebanon. See: “Sharon regrets missed chance. ‘sorry we didn’t kill Arafat 20 years ago,’” *The Gazette*, 1 February 2002, B1 (Reflecting the idea that the killing of a political leaders can only be tolerated in the context of armed conflict casts doubt as to whether the current situation in Israel can be considered one of ‘war’ as in 1982.


65 *Supra*, note 56.
perfidy in carrying out its attacks; it does not invite the confidence of those targeted as prohibited by international law, nor does it violate any agreement or obligation incumbent upon it to forego such attacks. Israel's policy of targeted killings in hostile countries is not one of 'assassination' as defined by international law, but one of anticipatory self-defense.

Instead, the questioned lawfulness of Israel's targeted killings lies in the often disproportionate nature of its attacks. Though targeted killing may be justifiable as necessary self-defense when lesser means do not suffice, the suffering incurred upon civilian populations as a result can seriously impede Israel's claims of moral and legal clarity. In visits to Israel and the Occupied Territories, including areas under the jurisdiction of the Palestinian Authority (PA), Amnesty International delegates (including an independent military adviser) investigated several cases of targeted killings. They found that not only could some of those killed have been arrested, but in a reckless use of disproportionate force, uninvolved Palestinians were often killed alongside some of those targeted. Amnesty International concluded: "The acceptance by Israel of unlawful killings and the failure to investigate each killing at the hands of the security services is leading to a culture of impunity among Israeli soldiers and is fuelling a cycle of violence and revenge in the region. Both Israeli security forces and Palestinian armed groups are showing an appalling disregard of the supreme human right—the right to life."  

Though Amnesty International rejects Israel's suggestion that the present intifada constitutes an armed conflict, it nonetheless recognises that the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War is applicable throughout the territories occupied by Israel, including Jerusalem. The Israeli government, while in principle recognizing the applicability of the Fourth Geneva Convention in some areas, points out that terrorists situated in areas under Palestinian jurisdiction cannot claim its protection, "both because these areas, under the full governmental control of the Palestinian side, cannot be considered occupied, and, more importantly, because by actively engaging in terrorist activities they forfeit their rights under the Convention." As stressed in the Special Rapporteur's 1996 report on extrajudicial, summary or arbitrary

66 Ibid.
executions: “Governments must respect the right to life of all persons, including members of armed groups, even when they demonstrate a total disregard for the lives of others.”

The use of disproportionate force, whether in armed conflict or in peacetime, is always a crime. Whether at the hands of Palestinian terrorists or the Israeli army, the killing of innocent civilians must never go unpunished. Ironically, both Israelis and Palestinians claim to be fighting terrorism, either from occupation or suicide bombings, and both in their plight resort to measures that disregard the right to life. The unchecked use of targeted killing, however, will not bring an end to the violence nor ever produce a real sense of justice. If anything can be learned by the conflict in Palestine, it is that revenge only fosters hate, and that human life and dignity always suffer as a result.

Though it is perfectly understandable for a state to consider an attack on its nationals—at home or abroad—as an attack on itself, the use of pre-emptive or anticipatory force must be carefully exercised to avoid unintended consequences, namely the killing of innocent individuals. The unregulated use of targeted killing can result in the death of individuals that are not impossible to arrest and likely to strike again terrorists, or even worse, of persons wrongly accused or present at the time of an attack. Though humanitarian law provides ample evidence of the need to distinguish between civilian and enemy forces, the lack of review concerning the use of force renders them completely dependent upon the good faith and subjective interpretation of the claimant-state. The inherent deficiencies of fighting terrorism exclusively according to the rules of armed interstate conflict are clearly visible by the potential for escalation, wrongful deaths, and disproportionate attacks resulting in civilian casualties.

When a powerful nation like Israel is in a position where it can arrest terrorists or kill them in a manner that avoids civilian deaths, it is required to do so. Both legally, as the use of unnecessary or disproportionate force may render attacks unlawful, and morally, as killing terrorists that can be detained is contrary to fundamental notions of justice and human rights. When targeted killings are absolutely necessary as a last resort to kill a

---

69 Supra, note 56.

70 Canadian MP Svend Robinson of the NDP stated: “I would characterize suicide bombing, and I have characterized suicide bombing, as terrorism, just as I characterize some of the appalling violence and brutality of (Israel Prime Minister Ariel) Sharon in the occupied territories as state-sponsored terrorism,” in “Unrepentant Robinson takes Israel to task,” The Gazette, Tim Naumetz, 19 April 2002, A-15.

terrorist that is "on his way" or that is "impossible to arrest and likely to strike again," then it is incumbent upon the government to act accordingly. When alternatives such as arrest are unavailable, the attitude, one shot—one kill, ought to dominate, in a legally defensible and openly debatable fashion. Heightened risk is a reality that Israel has faced throughout much of its existence, and one that it has on most occasions willingly accepted to avoid innocent deaths. There is no reason why at this point it should abandon its commitment to the right to life in order to secure its borders, as both are intimately related.

Though it is obvious that any resolution of the conflict will be impossible unless settlement activity and terrorism are abandoned, and a compromise is reached on the future of Jerusalem and a Palestinian state, there is a wide discrepancy between legitimate resistance or self-defense and the use of indiscriminate violence against non-combatants. Because the merits of both parties are equally defendable and yet reprehensible, little can be said about the violence in the Middle East except that too many people have been killed, injured or enslaved, and that crimes against humanity have been committed by both parties at the detriment of Peace and the innocent. Targeted killings do not have to fall within this category, providing that Israel respects the national sovereignty of peaceful states and shows regard for the right to life and dignity. The use of international force, of which targeted killing is but one expression, is a matter of international peace and security that affects the world in its entirety. This brings us the controversial role of the United States of American in the evolution of targeted killing.

B) Targeted Killing and the United States of America

In the United States, debate concerning targeted killing as a matter of policy has been conducted mostly under the banner of assassination. The topic first received public attention following the 1963 assassination of President Kennedy, as allegations that Cuba’s Fidel Castro had ordered the killing in retaliation for the many attempts on his own life by the Central Intelligence Agency (CIA) surfaced. The subject also arose in discussions regarding the wisdom of such actions in Vietnam, and more specifically during the military coup that resulted in the death of South Vietnamese President Ngo Dinh Diem, an American ally. It was not,

73 "Israel to try Arafat aide. Announcement made as Amnesty calls suicide bombings 'crimes against humanity,'" The Gazette, Montreal, 12 July 2002.
however, until the mid 1970s that assassination became a prominent political issue. Allegations that the U.S. government had been involved in plotting to kill several foreign leaders became the subject of intensive scrutiny as part of congressional investigations of covert activities. In November 1975, the Senate Committee to Study Governmental Operations with respect to Intelligence Activities issued an interim report that alleged American involvement in at least five separate assassination attempts of foreign leaders since 1960.75

Those targeted included General Rene Schneider (1970), perceived as an obstacle to the CIA’s efforts to prevent Salvador Allende from taking office as Chile’s president. Though evidence of direct US participation in the death of Allende has never been substantiated, CIA support for the coup d’etat which resulted in his death and the subsequent rise to power of Augusto Pinochet has been substantiated. In the case of President Diem, the United States similarly encouraged and assisted a coup by South Vietnamese military officers in 1963; the report nonetheless suggested that Diem’s death had not been planned in advance and that it occurred without prior U.S. knowledge. In the Dominican Republic, the United States supported and provided weapons to local dissidents that intended to kill Rafael Trujillo. The CIA, according to the report, also directly targeted two other individuals cited in the document. In both cases, however, these attempts failed. They included Congo’s (then Zaire’s) Premier Patrice Lumumba, apparently killed by individuals not connected to the United States, and Fidel Castro, who remains the leader of Cuba to this day.

The Senate Committee concluded that short of war, assassination should be rejected as a tool of foreign policy, citing that such killings were “incompatible with American principles, international order, and morality.”76 It also noted the difficulty in predicting with any certainty the effects of assassination, pointing out that political instability following a leader’s death could prove a greater danger to American security than the current (and well known) leader. It further discussed the difficulty of ensuring, in a democracy, that covert activities remained hidden. Finally, the report emphasised that the use of assassination by the U.S. would inevitably invite reciprocal or retaliatory action against American leaders. The interim report nonetheless made a distinction between plots that had as an objective “the cold-blooded, targeted, intentional killing of an individual foreign leader,” and those in which the leader’s death was not intended, but was a reasonably foreseeable possibility. It stated:

75 Senate Committee to Study Governmental Operations with respect to Intelligence Activities, Interim Report (1975).
76 Ibid.
Coups involve varying degrees of risk of assassination. The possibility of assassination...is one of the issues to be considered in determining the propriety of United States involvement...This country was created by violent revolt against a regime believed to be tyrannous, and our founding fathers received aid from foreign countries...we should not today rule out support for dissident groups seeking to overthrow tyrants.77

The interim report also expressed profound concern over the manner in which assassinations were authorised. It found that efforts to maintain “plausible deniability” within the government itself, and the deliberate use of ambiguous language when discussing sensitive topics such as covert operations, had produced a breakdown of accountability by elected government and created a situation in which lethal action was often undertaken without presidential authorisation. The Committee concluded that “a flat ban on assassination should be written into law,” and strongly recommended the “prompt enactment of a statute making it a federal crime to commit or attempt an assassination, or conspire to do so.” It argued that a statute, as opposed to an executive order or an intelligence directive, was needed because “laws express our nation’s values; they deter those who might be tempted to ignore those values and stiffen the will of those to resist the temptation.” Moreover, a statute would be less vulnerable to rapid policy reviews caused by changes in the executive branch.

Despite the Committee’s recommendations, and three separate legislative proposals placed before Congress between 1976 and 1980, no statute materialised. It has been suggested that the failure by Congress to enact legislation forbidding assassination might be interpreted as an implicit recognition of the President’s right to use them as a policy option. The more likely explanation, however, is that Congress was reluctant to reopen the debate on a sensitive subject that would surely prove divisive and highly controversial. Commentators have also provided other explanations for its inability to enact legislation, including the lack of interest shown by American constituents, the Committee’s deliberate covert investigation strategy to avert public attention, as well as the inherent difficulties associated with securing information about the intelligence community’s inner workings.

Instead of congressional action, President Ford issued Executive Order 11095 in 1976, which prevented employees or agents of the United State government from engaging or conspiring to engage in assassination. The prohibition was reissued by President Carter in 1978 (EO 12036) and is now embodied in Executive Order 12333, issued in 1981 by President Ronald Reagan. Under American constitutional law, executive orders of the president consistent with his power as “Commander-in-Chief” according to article II § (2) have the same status

77 Ibid.
as Treaties, yet they cannot contradict legislation. This is precisely why many opponents of assassination have urged Congress to explicitly prohibit them by enacting legislation to that effect. Executive Orders can be reversed by more recent executive orders. In this sense, legislation by Congress to reverse the ban is not necessary. The section of Order 12 333 pertaining to United States intelligence activities and assassination reads:

2.11 Prohibition on Assassination. No person employed or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.

2.12 Indirect Participation. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this order.

It has been argued that the effect of Executive Order 12333 is not to restrict in any meaningful way the President’s ability to direct assassinations, but to ensure instead that he alone may do so. In addition to retaining the right to draft a new Executive Order repealing the prohibition of 12333, the President may also, in order to circumvent it: (a) ask congress to declare war or authorise the use of force, thereby transforming enemy targets of a particular state into combatants; (b) construe article 51 of the United Nations Charter to allow assassination based on the right of self-defense; (c) narrowly interpret 12333 by specifically attributing to himself and his senior leaders responsibility for assassinations.

Following the attacks of September 11th 2001, President George W. Bush opted to elicit all of the above. While not declaring war against a particular state, the American legislature (Congress and Senate) authorised the President to use force in order to bring its perpetrators to justice. The authorisation, granted only days after the infamous attack, provided the administration with the legitimacy needed to conduct its war against Afghanistan and the Taliban. Targeted killings in the context of the war were lawful as permitted by international humanitarian law, given that the use of force was a legitimate exercise of article 51 self-defense in response to an armed attack committed by individuals aided (directly or indirectly) by the state of Afghanistan. Members of Al-Qa’ida that were partaking in armed hostilities were therefore targeted as enemy combatants.

---

80 Supra, note 17.
81 Supra, note 17.
More importantly, the U.S. President signed what is known as an intelligence ‘finding’ or ‘directive’, effectively endorsing the targeted killing of suspected terrorists. By explicitly citing their names in what amounts to death warrants, President Bush’s directive apparently extends beyond Al-Qa’ida and the FBI’s 22 “most wanted” terrorists. With the CIA debating how many of the 40 or more countries identified as places where the network is active could figure on Bush’s ‘hit list’ by virtue of those targeted, it is increasingly clear that the United States of America is willing to expand its battlefield beyond Afghanistan. By attempting to declare itself “at war” with Al-Qai’da and terrorism in general, the United States is attempting to apply the rules of armed interstate conflict without really being at war with the countries in which those targeted may be found.

The authority to undertake such killings was granted by the President in October of 2001, allegedly authorising the CIA to covertly attack wanted terrorists anywhere in the world. The new presidential order draws on one signed by President Clinton in response to the 1998 Embassy bombings in Kenya and Tanzania, whereby CIA agents were given maximum capability to stop attacks planned by Bin Laden’s Al-Qa’ida network against American targets. Clinton’s order was apparently instrumental in stopping numerous terrorists only moments before their attacks, namely in Jordan, Egypt, Kenya and the Balkans. Although it is difficult to determine the exact content of Bush’s secret finding as it has not been made public, it has certainly broadened the list of “potential targets beyond Bin Laden and his immediate circle of operational planners— and beyond Afghanistan.”

Andrew Card, White House chief of staff, said on NBC’s Meet The Press: “It could take years, but we are going to do everything we can to rout out the terrorists in Afghanistan, and then get them all around the world.” The US defence secretary, Donald Rumsfeld, also confirmed this by saying on CNN that the U.S. would be acting in self-defense in carrying out such missions. He said: “It is not possible to defend yourself against terrorists at every single location in the world and at every single moment. The only way to deal with terrorists is to take the battle to them and find them and root them out and that’s self-defense. We’re going after these

85 Supra, note 84 (Woodward).
people and their organisations and their capabilities to stop them from killing Americans." By authorising lethal force in self-defense and by making clear that responsibility and accountability rests with the President and his senior advisors, the highly classified directive apparently adheres to the longstanding U.S. ban on assassination.

Although the Senate Committee’s work was dedicated mostly to assassination attempts against foreign leaders, its report nonetheless included a military figure in General Rene Schneider. One would also have to conclude that if high ranking government leaders have been targeted for assassination, many lower ranking officials and enemies have been as well, but were not significant enough to warrant congressional attention. The prohibition on assassination found in executive order 12333, however, is not limited to foreign leaders, nor were the legislative attempts to do so. Furthermore, the Committee’s conclusions that assassinations are contrary to American values, international order and morality, or that they may invite others do so the same, are equally applicable to targeted killings.

The killing of six alleged Al-Qa’ida members in Yemen on November 3rd, 2002, marked a turning point in the history of targeted killing. It was essentially the materialisation of the administration’s policy to kill suspected terrorists outside the context of armed conflict. The main target was Qaed Salim Sinan al-Harethi, a senior Al-Qai’da operative in Yemen, suspected of being the mastermind behind the October 2000 bombing of the destroyer USS Cole which killed 17 U.S. soldiers. Killed by a Hellfire missile fired from a CIA-operated drone plane, the Yemen attack provides the first known example of a targeted killing by American agents outside of Afghanistan. As stated in the Economist, “The Americans have used unmanned aircraft to target their enemies in Afghanistan, but not until now in the Arab world. The Arabs will certainly draw a parallel with Israel’s assassination techniques.”

To lawfully kill terrorists in foreign jurisdictions, victim-states must have a right to use force in self-defense against the nations harbouring them. In the absence of such a right, the use of lethal force abroad will either constitute an illegal use of force or an arbitrary deprivation of life. The American attack in Yemen serves to illustrate this point. As Sweden’s Foreign minister, Anna Lindh, pointed out: “If the USA is behind this with

86 Interview with Donald Rumsfeld on CNN, 28 October 2001.
88 “Yemen and the war on terrorism: no holds barred,” The Economist, 9 November 2002, p.49.
Yemen’s consent, it is nevertheless a summary execution that violates human rights. If the USA has conducted the attack without Yemen’s permission it is even worse. Then it is a question of unauthorized use of force.\(^89\)

Because the attack was allegedly undertaken with Yemeni consent, the United States was not obliged to claim a right of self-defense to justify its use of force on foreign soil (by proving that Yemen had somehow supported those responsible for the attack on the USS Cole). The United States was exercising its enforcement authority abroad with the acquiescence of the governing authority. Therefore, the killings in Yemen were not unlawful acts of aggression, but possibly summary (actually arbitrary) executions, given the (total) absence of judicial input.\(^90\) The case for killing these individuals riding in the desert has unfortunately never been laid out, making it difficult to determine whether it was truly necessary for the United States to use lethal force.

Yemeni forces had previously attempted to arrest al-Harethi, yet he was able to escape when local tribesmen had opened fire on state forces, wounding several in the process. The U.S. government had also passed on information the Yemenis “only to wait days before action was taken- by which time the suspect had moved.” On this occasion, they decided to “cut out the middle man.”\(^91\) As such, the attack in Yemen may have been consistent with peacetime rules of engagement, given the unavailability or inappropriateness of less forceful alternatives such as arrest.

Though it is troubling that targeted killings may be used in the context of domestic law-enforcement, and equally so that states are allowing foreign powers to commit extrajudicial executions on their territory, the most alarming factor is the justification provided for the attack. Instead of justifying its actions by arguing that they respected both the right to life (given that alternatives to save lives were unavailable) and the prohibition on the threat or use of force (by first allowing Yemen to intervene and then seeking permission), the Pentagon relied merely on the uncertain position that “terrorists” can be targeted anywhere in the world as they are “enemy combatants”.\(^92\)

---


\(^91\) Supra, note 84.

The conclusion drawn from the attack and subsequent American justification is that the administration feels it can circumvent human rights standards based largely on the premise that it is “at war” with Al-Qai’d. As one writer explained: “While military experts said the incident could herald a new era of robotic warfare, lawyers debated the implications of the surprising turn in US strategy- killing specific individuals in countries where there is no war.” Given the absence of armed conflict with Yemen, the inevitable message being conveyed is that the right to life can now be violated even in peacetime.

Following the devastating attacks in New York and Washington, spokesperson for the Department of State Phillip Reeker stated the US position concerning targeted killings. He stated: “It’s the same position that we’ve said over and over again, and that is that we oppose targeted killings.” On November 4th, 2002, an Israeli drone plane was reportedly involved in the killing of a senior Hamas militant in the West Bank and town of Nablus. Ironically, the U.S. renewed its opposition to Israel’s ‘assassination’ policy, even after the killings in Yemen. Richard Boucher, spokesman for the State Department, reiterated that: “Our policy on targeted killings in the Israeli-Palestinian context has not changed.” When asked to explain on what grounds the distinction could operate, the American administration cleverly responded by declaring that Israel’s killings were not illegal, but instead were an obstacle to peace. The administration managed to save face by declaring that its opposition to Israel’s policy was not based on legal grounds but on the detrimental effects that such killings could have on the prospects for a resolution to the conflict.

To add to the irony, it is not the United States, but rather Israel, that can potentially rely on the claim of “lawful acts of war” to justify targeted killings. Israel is fighting an aspiring national entity because of outstanding territorial claims. Although Israeli assassinations in friendly countries (like those following the 1972 Munich attacks) don’t fall quite as neatly within this category, there is no denying that Israel is fighting a people whose aspirations include statehood. Beyond the fact that Sharon’s declaration of ‘war’ signifies an elevated status for Palestine, George W. Bush has endorsed a “two states for two people solution,” and Ariel Sharon has not discounted it. In any event, it has never really been contested that Israel occupies land that does not belong to

---

93 Supra, note 88.
97 “Sharon dismisses ‘two states’ remark,” Middle East Information Center, found online at http://www.guardian.co.uk/print/0,3858,4558613-103681.00.html, last visited 18 August 2003.
it, and that it must be returned, security permitting. As expressed earlier, the situation in Palestine is best characterised as part of an international armed conflict, or something akin to it.98

The United States, on the other hand, is not involved in such a conflict. Though it has been targeted for providing what is perceived to be bias support for Israel at the expense of Palestinians and enormous amounts of weapons which are used regularly in attacks against them, it is not at war with any particular state or national entity.99 Instead, it is fighting a multitude of terrorist groups that have chosen to attack America for its conduct in world affairs. Though it may have been lawful to kill Al-Qai’da fighters that forcefully opposed U.S. military intervention in Afghanistan as combatants, terrorists in general cannot be killed according to the rules of interstate armed conflict unless they are somehow agents of a state or some nexus to one can be established.100

By designating terrorists as combatants, the U.S. government is seemingly eliminating the state-centered aspect of humanitarian law to allow the otherwise unlawful use of deadly force. Declaring that it can target terrorists “anywhere in the world,” the U.S. is failing to acknowledge that a right of self-defense will inevitably be directed at a state. If the United States made it clear that it would only target terrorists as combatants when a right of self-defense permits such action on the territory of states that support terrorists, the above qualification would not be so threatening for international law and societies at large. Abiding by standards for the use of lethal force that are more closely related to criminal and human rights law would go a long way to alleviate fears of unchecked military endeavours.

Although there exists, in most democracies, an aversion by civil governments to use military forces to ensure domestic peace, it is quite possible to foresee that law-enforcement or intelligence officials may one day adopt measures like targeted killings domestically. The British and Israeli experiences provide concrete examples of situations where deadly force has been used pre-emptively to counter local terrorist threats. While the use of military force domestically should be avoided at all cost, it makes little difference whether targeted killings are undertaken by elite military units or their police counterparts; what really matters is that domestic standards concerning the right to life and the use of deadly force are respected. Given the pending tendency towards the restriction of civil and political rights, it takes only minimal foresight to conclude that in time, terrorists will be

98 See section on “The Israeli experience”.
99 The Use of American attack helicopters is such an example. It is also likely that Israel acquired its nuclear capabilities via the United States.
killed in the United States as well; if terrorists can be killed as combatants without a nexus to a state, and terrorists can travel virtually anywhere in the world, than such a conclusion is nearly inevitable.

It is also important to note that an American citizen, Kamal Derwish, was killed during the U.S. attack in Yemen. Though it may be lawful to kill an American that is taking part in hostilities according to humanitarian law, the killing in Yemen was admittedly taken in the absence of armed conflict, as demonstrated by Yemeni cooperation. The killing of an American was perhaps an unintended consequence, but the justification by Dr. Rice that followed was not. Condoleezza Rice, Bush's national security advisor, argued on behalf of the administration that the killing of a U.S. citizen in this fashion was legal. She said: "I can assure you that no constitutional questions are raised here. There are authorities that the President can give to officials, and he's well within the balance of accepted practice and the letter of his constitutional authority." Because the strike occurred in a peacetime, the "war on terrorism" withstanding, the extrajudicial killing of an American citizen strikes at the core of the debate. With the knowledge that U.S. officials have already killed an American citizen, and that several others have been held indefinitely without charges or legal counsel, the population has every right to question the erosion of civil liberties, as well as the constitutional interpretations of those with a vested interest in tilting the balance in favour of security.

III. Declaring 'War' on Terrorism

There is much confusion created by governments desiring to legitimise targeted killing by resorting to international law. Attempting to justify the use of preemptive or anticipatory force against individuals, governments are claiming a right of self-defense. While the pursuit of justice through criminal law enforcement involves a self-defensive dimension, article 51 of the United Nations Charter operates as a justification for violating state sovereignty, without which the prohibition against the threat or use of force would apply. The defensive dimension which emerges when specifically targeting individuals is nonetheless being limited exclusively to the realm of humanitarian law, even though criminal and human rights law might otherwise apply.

102 "For whom the Liberty Bell tolls," The Economist, 31 August 2002, p.18.
103 Supra, note 1, art. 2(4).
Peacetime targeting of individuals that would qualify as combatants in armed conflict presents a serious dilemma. In wartime, it is unusual to label the killing of enemy combatants as targeted killings. The very essence of war permits the use of lethal force against enemy forces. The term targeted killing has emerged instead in the context of counter-terror operations. There exists nonetheless a strong debate internationally as to whether terrorists belonging to particular groups can be killed as combatants anywhere in the world without first establishing a nexus with a state. Beyond undermining the distinction between wartime and peacetime standards for the use of deadly force and the impact that it will have on civilians as a whole, the following section will look at the impact of declaring war on terrorism and its possible effects on international peace and security.

The international security system has evolved to regulate mostly the conduct of states. The United Nations Charter, as well as The Hague and Geneva Conventions, were drafted like most International agreements to govern the relations of sovereign nations. Their drafters believed strongly that if wars could be averted, peace would reign unhindered. While noble, their conception of conflict as a threat to humanity was more the product of centuries of devastating warfare between countries than a reflection of modern realities. The proliferation of international crime and terrorism has significantly altered the landscape of international security, whereas the potential for threatened harm has shifted considerably from state to non-state actors.

When discussing the use of force by states in international law, a first distinction must be made between the legality of the use of force, or *jus ad bellum*, and the lawfulness of the force itself, or *jus in bello*. The issue concerning the resort to armed force is now determined in large part by the Law of Peace and International Security as provided by the United Nations, whereas the rules that regulate the conduct of hostilities are determined largely by Humanitarian law, as expressed by The Hague and Geneva Conventions. These notions apply both to states individually in the exercise of their right of self-defense, and collectively, in their actions to enforce international peace and security. They operate nonetheless within the realm of *interstate relations* and concern the acceptable standards for the use of force against states and armed groups operating within them, as in the case of non-international armed conflicts.

Traditionally, military activities have been associated with war. It was only with the advent of the United Nations Organisation that peace-keeping, and later peace-enforcement, were popularised. Illegal violence, it

---

was thought, would not be tolerated, as international forces could respond to international crisis very much as police officers do domestically. Article 46 of the UN Charter calling for a ‘unified command’ structure laid the groundwork for rapidly deployable forces, yet stand-by arrangements (article 43) and permanent military cooperation never really materialised.\textsuperscript{105} Unable to compromise on a shared command structure, or even \textit{when} to dispatch UN forces, it was needless to determine \textit{how} they should behave on the field.

Because all that existed were the rules of war, they became the basic common denominator for just about any international action. From multilateral collective action and unilateral air strikes to secret covert operations, The Hague and Geneva Conventions became the yardstick by which states would be judged. The rules of war, which permit intentional killing, thus became the governing standards for \textit{all} uses of international force. Humanitarian law was nonetheless developed to regulate the conduct of hostilities between \textit{sovereign nations}, not operations to specifically “arrest or neutralize” common criminals and terrorists in the absence of armed conflict. Regardless, some states exploit the nebulous world of international law at the detriment of individuals; using foreign policy as their platform, they succeed in convincing world media and public opinion that different standards of criminal law enforcement apply internationally, so that terrorists can somehow be hunted and killed without due regard to their basic human rights.

What is happening in the Middle East, Asia, and elsewhere in the world, is that military forces are being used to fulfill the law enforcement needs of states abroad. Because they lack jurisdiction over foreign territories, states are using their military and foreign security forces to extend their authority beyond their borders. While there may be situations that warrant forceful responses to terrorism, there is a significant danger in engaging individuals with forces designed to fight wars. Targeted killings are tools normally employed in war, not in peacetime. Though they may be justified in extraordinary circumstances as law-enforcement measures to prevent acts of international terrorism, their potential for abuse is extremely high. Because killing individuals requires fewer resources than capturing and successfully prosecuting them, the likelihood that suspected offenders will be killed instead of arrested raises concern, as does the potential for innocent deaths.

There are only two situations that warrant using lethal force against individuals. Either because they are combatants in a state where an armed conflict exists, or because they are dangerous terrorists whose killing can be reasonably reconciled with peacetime requirements of the right to life. The European Convention of Human

\textsuperscript{105} \textit{Supra}, note 1, arts. 43, 46.
Rights is especially instructive on this matter, restricting any violation of the right to life as either a "lawful act of war" or as action by police that is "absolutely necessary" for the protection of life. As it were, humanitarian law assumes its full purpose when nations confront one and other militarily. Human rights law, on the other hand, seeks to govern the relationship between states and individuals.

When targeted killings as defensive measures are not aimed primarily at the state, but the individuals within them, it is not always appropriate to apply exclusively the rules of armed interstate conflict. Targeted killings are measures of counterterrorism directed at individuals and not the "territorial integrity or political independence" of the states harbouring them. Their primary purpose is not to punish a state for its support of terrorists, but to eliminate the threat posed by individuals that are not agents of the state. Instead, they are directed at common criminals and terrorists that are hiding in foreign states, often in heavily populated areas.

By using the term war to describe international efforts to counter terrorism, some governments are attempting to alter the existing legal framework of international law to justify the killing of suspected terrorists in peacetime. By speaking of a global "war on terrorism," suspected terrorists are transformed into valid military targets, dispensing at once with the need to respect the right to life and the presumption of innocence. If all uses of international force are judged solely according to humanitarian standards law, including those taken without a legitimate right of self-defense, a number of unintended consequences will follow, namely that states will apply the rules of armed conflict when there is none and ignore their obligations to respect human rights under international law.

By modifying the legal environment in a way reminiscent of the Israeli "somewhere in the middle" qualification, states are attempting to selectively benefit from both legal regimes. Specifically, we may be witnessing the emergence of what has already been referred to as "a 'third way' of combating terrorism: one that is neither quite justice nor quite war, but a thoroughly opaque mix of the two." It is this hybridization of war and justice which obscures the lines between the applicable standards concerning the use of deadly force. Though targeted killings as limited operations may sometimes be justified even in the absence of armed conflict by article 51 self-defense, it is not appropriate to artificially import the laws of war to justify civilian casualties.


When military force is not used primarily against the state, *elementary considerations of humanity* demand that civilians not be considered simple means to an end.\(^{108}\)

The use of the term war, even if it were otherwise justified, is allowing states to presume what would otherwise have to be proved, namely that a state is somehow responsible for supporting armed attacks. In times of peace, when there is no armed conflict between nations or a right of self-defense held by one against the other, it is unlawful for a state to arbitrarily kill individuals on foreign soil. A state cannot claim to be “at war” with a particular terrorist group to justify lethal military action against one of its members in a state that *does not support or harbour terrorists*. A state may have the right in self-defense to protect itself from terrorists anywhere in the world, but it cannot claim to be at war with terrorism generally in order to target individuals as combatants in any country it chooses.

That being said, it is extremely dangerous to render legitimate the application of humanitarian law—and not criminal and human rights law—in situations where the use of force is unlawful. Though it is useful to retain its basic rules as a common denominator for the conduct of hostilities, the result is generally to promote the use of lethal force. Essentially, a state that wishes to use force on foreign soil, say to arrest or neutralize a suspected terrorist, will always be applauded for respecting the rules of war. Yet what merit is there in following the rules of *jus in bello* when the use of force is not first justified by the rules of *jus ad bellum*? And furthermore, what merit exists in following the rules of war when in fact the actions pursued occur in peacetime? The use of the term war excludes or distorts alternative ways of understanding and dealing with the problem of terrorism, namely, as a criminal and political issue.\(^{109}\)

At the most basic rhetorical level, the term ‘war’ serves to denote magnitude: put simply, the problem of terrorism must be one so big one that it is worth going to war about. To declare war on terror as one would declare war on drugs or poverty signifies resolve.\(^{110}\) Yet war is waged against states, not against social

---


\(^{110}\) A good example of this is “Pedestrian and drivers at ‘war’: study,” *The Gazette*, Irwin Block, 15 May 2002, A4. It is understood however that drivers and pedestrians alike may not kill one and other according to the rules of war. Another take on the meaning of ‘war’ lies in a speech given by Haile Sellassie in Californian on February 28th, 1968, and sang by Robert Marley: “Until the philosophy which holds one race superior and another inferior is finally and permanently discredited and abandoned, it’s a war. That until there are no longer first class and second class citizens of any nation, until
phenomena. In cases where terrorism is not directed, sponsored or supported by states, it is inappropriate to speak of war, save rhetorically. As Zbigniew Brzezinski, former national Security Advisor to President Jimmy Carter, rightly pointed out: “Terrorism is a technique, a tactic. You can’t wage war on a technique.” 111 War cannot be declared or initiated against terrorism in general, or even against specific terrorist groups such as Al-Qai’da, without regard to issues of national sovereignty.

In war, the state’s will to survive is directed essentially against another sovereign. Schmitt, for instance, wrote that “an enemy exists only when, at least potentially, one collective of people confronts a similar collective. The enemy is solely the public enemy.” 112 Accordingly, the rules of humanitarian war which govern such confrontations clearly designate their material field of application. Under the Geneva Conventions, an armed conflict involves a confrontation between “two or more of the High Contracting parties,” or an armed confrontation of a non-international character “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” 113 On this issue, Antonio Cassesse clearly stated:

I shall not dwell on the use of the term ‘war’ by the American President and the whole US administration. It is obvious that in this case ‘war’ is a misnomer. War is an armed conflict between two or more States. 114

While it is tempting to consider efforts to eliminate Al-Qai’da and other such groups as an armed conflict, international law does not yet account for a definition of armed conflict that fits the current realities of counter-terrorism. Although existing standards suffice to ascertain the legality of forceful interventions, updating humanitarian law to meet the demands of the new security environment is perhaps in order. The use of force

the colour of a man’s skin is of no more significance than the colour of his eyes, me say war. That until basic human rights are equally guaranteed to all, without regard to race, it’s a war... There are many “wars” worth fighting in this world, namely against poverty, slavery, racism, exploitation and tyranny, but claiming a right to kill individuals in their name without regard to the rule of law is false.

against non-state entities abroad will always occur via the territory of a state, meaning that forceful interventions must be authorised by international law (Security Council authorisation/ Self-defense) or the state in question. When the use of force cannot be justified in light of these, targeted killings are unlawful. Declaring “war on terrorism” will not alter this fundamental reasoning.

Counter-terrorism is different from conventional war. Terrorists are politically, ideologically or religiously motivated organised criminals, not state deployed armed forces. They have no territory of their own and very often little or no command structures. An argument that may one day gain acceptance is that terrorist organisations such as Al-Qai’da are similar to guerrilla fighters in non-international conflicts, except that they operate globally. Though I agree with this basic statement, it does little to explain why states victimised by terrorism ought to have the right to kill individuals in states that do not support them. There may truly be a “war on terrorism” from the perspective that victim-states will be engaged in a drawn-out campaign to eliminate individuals and government that partake in the killing of innocent civilians. Each venture must nonetheless be carried-out according to existing standards of international law. The phrase “war on terrorism” cannot serve as a carte-blanche to engage terrorists anywhere in the world irrespective of sovereignty and the right to life.

By declaring war on terrorism, it is unlikely that such rhetoric will, beyond raising the stakes and escalating the violence, increase in any meaningful way the international community’s resolve to prevent acts of terror. As the language of war gathers its own momentum, it will in all likelihood produce new targets and “enemies” under the same indiscriminate mantle of “terrorists”. Clearly, “hysterical exaggeration of the enemy’s unfathomable evil is a classic feature of propaganda, particularly when it is recognised, at some level of awareness, that the case for resort to force is weak.” By constructing an enemy akin to fascism, Nazism and totalitarianism that must be physically defeated or eradicated, and by focusing obsessively on Al-Qai’da rather than its immense breeding ground, the rhetoric prevents one from paying serious attention to the underlying causes of terrorism. The effects of such language are also being felt domestically. As Pellet noted:

115 In Canada, amendments were made to the anti-terrorism bill so that the definition of terrorism could not inadvertently apply to protesters and strikers, see “Terror bill to get rewrite,” The Gazette, Janice Tibbetts, 13 November 2001, A14.
117 As Stanley Fish put it: “If we reduce that enemy to "evil", we conjure up a shape-shifting demon, a wild-card moral anarchist beyond our comprehension and therefore beyond the reach of any counterstrategies.” Stanley FISH, “Condemnation Without Absolutes,” New York Times, 15 October 2001; “To hate is to acknowledge our inferiority and our fear; we do not hate a foe whom we are confident we can overcome.”
The effects of this state of emergency are already being felt in—and are indistinguishable from—the evolution of the legal order. At the domestic level, there is the familiar danger, under the all-encompassing banner of ‘security’, of a militarisation of the polity and a reduction in civil liberties, including proposals for increased wire-tapping, indefinite detention for those suspected of terrorism, racial profiling, various forms of censorship, and the lifting of the taboo—albeit only in the media—on torture. Somewhere on the precarious fault lines of the domestic and the foreign, a long-held ban on the assassination of foreign leaders is overturned and immigration is being ever more strictly controlled, in a desperate attempt to sanctuarise the ‘homeland’ cocoon.\footnote{Rights, liberties at risk: official. Could be casualties of the war on terrorism, watchdog warns,” The Gazette, Jim Bronskill, 22 January 2002, A10.}

There exists also in declaring war against terrorism an attractive obsession with time, which manifests itself in warnings about “a \textit{lengthy} campaign unlike any other we have ever seen,” the use of the expression “\textit{infinite} justice” as a code name for the operation in Afghanistan, as well as its subsequent replacement with “\textit{enduring freedom},” both of which seek to metaphorically stretch political actors’ temporal horizons.\footnote{\textit{Supra,} note 109.} Joint Resolution 64 passed on September 14th, 2001, which authorised the President to use all necessary and appropriate force in order to prevent any further acts of international terrorism against the United States, is open-ended in scope in a way that is perhaps reminiscent only of the 1964 Tonkin resolution of the Vietnam War.\footnote{\textit{Supra,} note 84.} In this way, the expression “war on terrorism” comes in particularly handy; the idea of war projects durability and the kind of “consistent pattern of violent terrorist action” which Antonio Cassese described as a basic precondition to the contemplation of recourse to self-defence against terrorism.\footnote{\textit{Supra,} note 114.}

The purpose of terrorism, generally, is to change the policies or structures (political, social or economic) of a perceived enemy state or territory by means of coercion. In a broad sense, terrorists seek to destabilize world order by polarizing people and society through fear and intimidation. It is senseless for governments to act likewise. Uttering arbitrarily the threat of death and the condition of war in response to individual acts of terrorism can achieve similar results. The use of excessive or indiscriminate force is the method of the extremist, yet the state is not above it. Applying exclusively the rules of war in the absence of armed conflict is perhaps an example of this. In the end, declaring war on terrorism will not help despaired populations eradicate the conditions conducive to martyrdom, nor compel Muslims to provide valuable support in the global campaign against terror.

By enlisting the lexicon of the warrior, state officials are defining their response to terrorism in absolutes, as one essentially of “\textit{good over evil}” in which you’re “either with us or against us.” Though using simple
language and concepts for the sake of public consumption is useful, resorting to divisive and otherwise abstract terms can only provide a glimpse of a much larger picture.\textsuperscript{122} Egyptian foreign minister, Ahmad Maher, declared that America lost a unique chance to rally the world to its side after the 9/11 attacks by applying the “with us or against us” judgment in pursuit of narrow interests rather than broader principles. Describing states and individuals as ‘allies’ and ‘enemies’ leaves very little room to manoeuvre for those who condemn the killing of civilians but nonetheless believe strongly in the causes compelling individuals to do so. Isolating them evokes a type of “clash of civilisations” with the West and its allies on one side and the rest of the world on the other.\textsuperscript{123}

Ritually projecting the kind of larger-than-life enemy it needs to sustain its deadly endeavours, the language of total war is counterproductive to the West's proclaimed intention of waging a circumscribed fight against a few select groups.\textsuperscript{124} Instead of dictating the course of a limited war, there is thus a very pressing danger that the political will be subordinated to the warlike. Yet it is precisely by declaring an all-out war that one falls into the terrorists’ trap, following them in their “scorched-earth policy of burning bridges between civilisations and driving civilian populations with them over the precipice.”\textsuperscript{125} As terrorists do their best to lure the West into a crusade it does not want and certainly does not need, it would be wiser to marginalise those who condone violence and to support wholly those that don’t.\textsuperscript{126}

According to distinguished military historian Micheal Howard, the United States moved counterterrorist conflict to a new level by declaring war on terrorism. He considers that “to declare war on terrorists is to elevate them to a position they do not deserve. It brings legitimacy to their actions as if they had a right to murder.”\textsuperscript{127} Howard believes we should not talk of being at war with terrorism, but rather handle the situation as an international emergency. He further argues that “the attacks in New York City and Washington, D.C.

\textsuperscript{122} As Will Durant wrote, citing the famous philosopher Baruch Spinoza wrote: Bad and good are prejudices which the eternal reality cannot recognize; “it is right that the world should illustrate the full nature of the infinite, and not merely the particular ideals of man.” And as with good and bad, so with the ugly and the beautiful; these too are subjective and personal terms, which, flung at the universe, will be returned to the sender unhonored. From Will Durant, The Story of Philosophy, (New York: Garden City Publishing Co., Inc., 1926, p.191).


\textsuperscript{124} The American administration has made repeated efforts to signal that the “war on terrorism” is not a war against Islam, but extremists who attack innocent civilians.


\textsuperscript{126} Ibid.

\textsuperscript{127} Supra, note 29, p.289.
were crimes against the international community rather than isolated military or criminal acts against the United States. Although he praises President Bush for strides against terrorism, he argues that overt military action can ultimately backfire. Citing British admiral Sir Michael Boyce, Howard argues that the counterterrorist struggle, like the Cold War, must be kept cold. I would say colder.

The separation between the laws of war and the laws of peace is essential to the effective maintenance of international peace and security. Unless the distinction is maintained, the law-enforcement and human rights standards that regulate in peacetime the use of deadly force will succumb to the desire by states to justify a permanent recourse to armed aggression. While extremist groups represent serious threats to international peace and security, those willing to target innocent civilians still represent a minority. Unsupported by states, terrorists cannot truly hope to erode the strength and unity of democratic states except by causing division among them. Using targeted killings in countries where there is no war may provoke such a split, given that such measures, unless permitted by humanitarian law in the context of an armed conflict, are violations of the right to life. Countries that believe in human rights and the rules of law, particularly those that have abolished the death penalty, may oppose vigorously the use of unchecked targeted killings.

The overwhelming response from the civilized world is that in the absence of war, terrorists must be arrested and punished accordingly, not killed arbitrarily where civilians dwell. Individuals that are not directed or supported by states cannot be killed as enemy targets under humanitarian law, especially in the absence of armed conflict. Speaking of 'war' may convince domestic constituents that using lethal force is warranted, but it will not alter the legal framework by which these killings are evaluated. When unauthorized by the governing authority, the Security Council, or the UN Charter under Article 51self-defense, targeted killings in the absence of armed conflict will, in all probability, violate the national right to sovereignty and the individual the right to life.

Except in cases where a right of self-defense is exercised forcefully against a state that support terrorists, to describe efforts to counter terrorism as a war and hope to benefit from its legal implications is not generally correct. A war is not a war unless it can end. The struggle to suppress terrorism has always existed in some parts of the world and probably always will, much in the same way that crime has plagued humanity throughout

128 Supra, note 29, p. 289.
history. Since countries will always face the threat of terrorism, targeted killings and other potentially arbitrary measures cannot be permitted simply on the basis that one is “at war” with terrorism, given that the world, according to such reasoning, will always be at war and thus never at peace.

*He who would make his own liberty secure must protect even his enemy from oppression, for if he does not, he sets a precedent that will reach unto himself.*

— Thomas Paine
CHAPTER II. JUSTIFYING TARGETED KILLING: THE ART OF SELF-DEFENSE

I. The Evolution and Scope of Self-defense

A) Just Wars and International Law

Behind the concept of self-defence lies the implied right to peace. Whether inherent to humans or simply a consequence of their shared social heritage, it is the only true common thread between all societies and nations. While some profit from the suffering of others, all humans strive to live in peace, free of violence and oppression. When people are tortured, raped or murdered, rational people cannot be expected to remain indifferent. Faced with similar abuse from hostile states or their agents, governments cannot in turn be prevented from doing what is necessary to end such aggression, especially when their own nationals are threatened.

The history of self-defense is as old as the human experience. Though class struggles continue in most countries to limit the ability of individuals to resist tyranny, the right to ward off illegal or unjust violence has always existed. Traditionally considered a natural right, self-defense in the last century has risen also to the status of an exercisable right provided for by law. The codification in law of human rights and the prohibition against the threat or use of force by states signal a growing consensus towards the protection of life and security. Self-defense has emerged as the guarantor of these commitments. The following Chapter will study its evolution and determine whether targeted killings can meet its requirements under international law.

On the individual level, self-defense has evolved as a defense against criminal prosecution. It is a moral principle commonly, if not universally, accepted that force may be justified in self-defense. This precept is reflected in the provisions of most legal systems concerning homicide. The laws of most (if not all) nations acknowledge that the use of deadly force, as self-protection, is permissible when such force is reasonably believed to be immediately necessary to prevent extreme harm such as death, serious injury, kidnapping, or sexual assault. For example, Article 35 of the Canadian Criminal Code states:

35. (1) [Self-defense against unprovoked assault] Everyone who is lawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than necessary to enable him to defend himself.
(2) [Extent of justification] Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursued his purposes; and (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.\(^{129}\)

Associated with this right is the correlative limitation that force be used only to secure an end to unlawful violence, whereas a victim cannot go beyond what is immediately necessary to achieve this purpose and inflict undue harm. Judges empowered by their national jurisdictions to evaluate claims of self-defense can thus determine whether, in any given situation, individuals exceeded their protective right. In civilised societies where the rule of law prevails, impartial judges ensure that self-defense will not serve as a justification for unnecessary and equally abhorrent behaviour. When disproportionate force is used to repel aggression, both police and ordinary citizens alike can themselves be confronted with charges of unlawful violence.

Self-defence can also be evoked by states as provided for by article 51 of the United Nations Charter. The requirements justifying its use are roughly the same. Forceful action can only be taken in response to unlawful aggression, referred to in the language of states as an armed attack. The resort to force must be necessary for the protection of essential state interests, and the response must not be disproportionate to the threatened harm. Finally, actions taken on its behalf must be signalled to the Security Council. The difference is that in international relations, there exist no independent and impartial judges to ascertain the validity of self-defense or to determine whether its requirements are transgressed. An overreaching interpretation of article 51 that permitted action that was clearly aggressive and served no defensive purpose would defeat the purpose of self-defense.

Though it can condemn violations of sovereignty, the International Court of Justice cannot sanction individual violations of human rights as it only adjudicates interstate conflicts. Except through the application of international humanitarian law in armed conflict, violations of human rights law and particularly the right to life would receive little attention, if any. The International Court might otherwise determine that states have used force on foreign soil illegally (i.e., targeted killing), yet the highly politicized Security Council would likely not take action or settle the dispute in favour of inaction by way of the veto. Although the Court can stipulate on matters involving the use of force when parties have agreed to submit to its jurisdiction, little in the way of enforcement can ever be achieved, as was demonstrated by the 1986 Case Concerning Military and

\(^{129}\) _Criminal Code_, R.S.C., 1985, c. C-46, ch. C-34, art34; 1992, ch.1 art.60 (1997). A parallel can be drawn by the expression “no more than necessary” with the absolute necessity threshold of article 2 of the European Convention.
To expect individual compensation for human rights violations when national violations of sovereignty are not sanctioned is wishful thinking at best.

Self-defense is a direct descendant of just war theory. The baseline assumption of just war theory is that some circumstances can morally justify the resort to war or the use of force by states. As Walzer proclaimed: "Aggression justifies two kinds of violent response: a war of self-defense by the victim, and a war of law enforcement by the victim and any other members of the international society." Source of much of the positive international law of armed conflict, the just war theory has been criticised by both pacifists and realists, either for condoning violence or introducing moral concepts such as permissibility and justice to the conduct of international relations. Regardless, international humanitarian law is already firmly grounded in such principles and the right of self-defense already permits the use of force that is genuinely necessary.

The distinction between *jus ad bellum* and *jus in bello* is very much a part of Just War theory. Crimes against peace with regards to violations of either *jus ad bellum* or *jus in bello* can lead to criminal prosecution under international law. Violations of *jus ad bellum*, as the rules that states must consider before initiating the use of force, are usually committed by political leaders, since the decision to involve the state and its people in the extreme condition of war normally rests upon their shoulders. Heads of states, elected or not, are ultimately responsible for ensuring that such decisions can be rationally justified in terms of state interests and withstand the requirements of international law. The following criteria must be jointly satisfied before a state can lawfully resort to armed force:

**Just cause:** A state may resort to armed force against another if it is reasonably deemed necessary to vindicate universally accepted principles of international justice, notably human rights and those state rights which are compatible with them. States have rights because their citizens do. To secure them, states must be entitled to territorial integrity and political independence. As the determining 'just cause' factor under the United Nations Charter, self-defense can justify the resort to armed force in response to unlawful violations of either basic human or state rights.

**Right intention:** A state resorting to war can only do so for the sake of vindicating the rights whose violations have justified a resort to force. A state may not employ the cloak of a 'just cause' to prosecute a war for 'unjust' motives such as racial supremacy or political advantage. The vindication of state rights, and human rights in general, remains

---

130 Supra, note 100.
131 Hugo Grotius is often credited with translating the moral principles of just war theory, first introduced by the likes of Augustine and Aquinas, into more definite codes of international law.
133 As demonstrated by the Nuremberg and Tokyo Tribunals, and more recently those of ex-Yugoslavia and Rwanda.
the sole *just cause* grounding resort to warfare. The *good faith* of states and the Security Council currently ensure the right intention requirement.

*Proper authority and public declaration:* War must be declared, in the appropriate public fashion, by the legitimate public authority within the state in question. These just war norms have been enshrined in Articles 1-2 of the Hague Convention (III). Today, war is seldom declared. Instead, nations “authorize” the use of force. Internationally, however, the use of force must be “authorized” by the Security Council, or permissible under Article 51 self-defense, in which case it must also be *signalled* to the Council.

*No precipitate use of force:* Where a reasonable solution to a conflict can be brought about through alternative means such as diplomacy, they ought to be pursued and exhausted prior to resorting to armed force. No precipitate force, also known as last resort, is codified in articles 2 (3) and 33-40 of the UN Charter.

*Probability of success:* A state may not resort to war if it can reasonably foresee that doing so will have no measurable benefit. Because a state may only use force for the purpose of ending unlawful violence, it cannot do so if going to battle will be futile and cause greater suffering and destruction. This requirement emanates less from international law than from the concept of good government and the responsibilities inherent to sovereignty, as no governing authority (and especially not a representative one) can justify death and destruction that is futile without endangering peace and violating the rights of its nationals.

*Proportionality* (Macro): A state must, prior to initiating a war, weigh the expected universal goods to result from prosecuting a just war (rights-vindication, defeat of aggression) against the expected universal evils that will occur as a result (destruction of life and property). Only if the benefits seem reasonably proportional to the costs may the war action proceed.\(^{134}\)

These *jus ad bellum* principles are, for the most part, firmly anchored in United Nations law. Because there exists no Treaty law outlining when the use of force by states is permitted, UN Organisation was developed chiefly to determine when states could lawfully resort to armed force in a regime of collective peace enforcement.\(^{135}\) Article 2(4) which reads: “Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations,” is the Charter’s golden rule.\(^{136}\) By expressing the general prohibition against the threat or use of force, it stands alone as the primary international obligation of all states.

The first exception to article 2(4) is enshrined at article 42 of the UN Charter. It pertains to collective enforcement action authorised by the Security Council. The Korean conflict (1950-1953) and the efforts to oust Iraqi forces from Kuwait during the first Gulf war (1990) are examples of enforcement actions approved by the Security Council. Though exercised only sporadically, the Council retains the ultimate say over *when* the resort to force is ever justified. Its ability to deploy military force reaffirms the international community’s role in


\(^{136}\) *Supra,* note 1, art. 2(4).
resolving international conflict and highlights the Council’s primary jurisdiction over such matters. The General Assembly has also contributed to this debate by determining when force cannot be used as it constitutes aggression. Article 42 reads:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Just War theory is very similar to current UN law in that at its core only defensive force is permitted. The legitimate right of self-defense, as such, is the second general exception to the prohibition against the use of force. The inherent right of self-defense, which prior to the Charter existed as a customary rule of law, was codified at article 51. Unlike article 42 which involves collective action to restore peace and security, self-defense may also be exercised unilaterally, making it the most contentious justification for the use of force. Because it is defined broadly and interpreted by states individually, nations have claimed a right to self-defense to validate almost every possible use of force against the sovereignty of others. Article 51 reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Providing the only exceptions to article 2(4), articles 42 and 51 represent the *jus ad bellum* of modern international law. Allowing forceful action pursuant to Security Council authorisation or an armed attack, they outline when under international law the use of force may legally be resorted to. Yet in the current system of peace enforcement, powerful states still determine the appropriateness and reasonableness of using force. The only significant change brought upon by the United Nations, though an important one at that, is that states are now obligated to disguise their aggressive behaviour with an appearance of legitimacy.

---

137 Supra, note 1, art. 24.
139 Supra, note 1, art. 42.
141 Supra, note 1, art.51.
142 Supra, note 1, art. 27.
The problem with self-defense is that ever more unilateralism is tolerated under its banner though collective action is the cornerstone of international legitimacy. As professor Charney stated: "States will rarely, if ever, admit that they have violated customary international law, even in order to change it. Rather, they will argue that their behaviour is consistent with traditional law, or that the rule has already changed." The very malleable concept of self-defense provides the ideal justification for almost any unilateral action, including targeted killing. Like scientists in a lab, the legal counsels of various governments have worked to transform what are often ‘state assassinations’ into lawful measures of self-defense. While the idea of using targeted killings to prevent acts of international terrorism is not entirely devoid of sense, disassociating them from their aggressive and politically charged dimensions will not be easy.

The codification by The Hague and Geneva Conventions of the rules which form the corpus of humanitarian law has also provided effective limitations to the conduct of warfare by states. Because they concern the rules that guide the conduct of armed conflict, responsibility for state adherence to principles of *jus in bello* is normally borne by the military commanders, officers, and soldiers who formulate and execute the war policy of states. The Nuremberg Tribunal’s assertion of their customary nature and their subsequent reiteration by the International Court of Justice in the *Case Concerning military and paramilitary activities in and against Nicaragua* and its Advisory opinion concerning the *Legality of the threat or use of nuclear weapons* have made them obligatory and all but absolute. Individuals and states that transgress them can be prosecuted for violations of the following principles:

**Discrimination and Non-combat Immunity**: Combatant states shall at all times discriminate between military targets and the civilian population of an enemy state. Lethal force can only be intentionally directed against the combating elements of the enemy state. Discrimination and non-combatant immunity is codified in Articles 22-8 of the Hague Convention (IV), and in Article 48 of Protocol I.

**Proportionality** (Micro): States in the midst of war must weigh the expected universal goods/benefits of each significant military tactic employed within the conflict against its reasonably expected universal evils/costs. Only if the benefits of the proposed tactic seem at least proportional to the costs may a state and its armed forces employ it. In war, the proportionality requirement usually concerns the potential for civilian casualties in relation to the strategic military advantage thereby gained.

---


**No intrinsically heinous means or weapons are to be employed in war:** The means available in war are not unlimited. The use of weapons and tactics that cause unnecessary suffering unto combatants are not permissible; the use of nuclear, biological, or chemical weapons (NBC), as well as torture, medical experimentation, and forcing soldiers to fight against their own camp may also qualify as such. Policies of ethnic cleansing and other practices that shock the conscience of humanity are also prohibited.

Because the above stated humanitarian/just war requirements are codified by Treaties that have largely become part of international customary law, targeted killings from this perspective can be invalidated either as unlawful resorts to force against a nation or as disproportionate attacks during periods of hostilities. This dual analysis that is the precondition of any lawful use of international force provides minimal constraints to states wishing to kill terrorists on foreign soil. The evaluation of self-defense and its requirements in the second portion of this chapter will determine whether the notions of *jus ad bellum* and *jus in bello* can be mutually satisfied to the benefit of states using targeted killings abroad.

**B) Illegal Reprisals and the ‘Armed Attack’ Threshold**

The establishment of a strict doctrine of self-defense seemed attainable prior to, and immediately following, the *United States v. Nicaragua* case.\(^{145}\) In its landmark ruling, the International Court of Justice held that states had an obligation not to engage in the threat or use of force against the territorial integrity or political independence of nations. It also confirmed that supporting local resistance groups to engage in such acts was equally unlawful. It considered self-defense as a non-political right whose purpose was to repel armed attacks, not as a pretext for states to involve themselves forcefully in the internal affairs of others. Though certainly correct in its assessment of the situation at the time, it adopted a restrictive interpretation of self-defense which mirrored the predominant reality of a world led exclusively by states. Since the *Nicaragua* judgment, however, devastating acts of mass terrorism by non-state entities have forced societies to redefine their notion of conflict, and therefore self-defense.\(^{146}\)

The differing interpretations of article 51 fall into two basic categories: the restrictive view and the liberal view. Those adhering to the restrictive view argue that the UN Charter, while preserving the inherent right of self-defense, is limited by the phrase “if an armed attack occurs.” The justification of self-defense *strictly*
understood would seemingly rule out the possibility of pre-emptive or anticipatory action absent a prior strike, and last only as long as the wrong was threatened or was in course of being committed. Though equally opposed to aggressive action under the cloak of self-defense, the liberal view supports the concept of pre-emptive action and the doctrine of anticipatory self-defense. Its proponents recognize that a state cannot idly wait until it is attacked before taking defensive action, especially in the context of counterterror operations. As Louis Beres stated:

International law cannot compel a State to wait until it absorbs a devastating or even lethal first strike before acting to protect itself. Because acts of terror can in fact only be averted by preventative actions taken before an attack occurs, it is therefore impossible to ignore the importance of anticipatory self-defense. The traditional weakness of the Security Council in offering collective security against an aggressor reinforces the more expansive view of self-defense. 148

The essence of self-defense proper lies in the fact that because alternative means of protection are useless or unavailable, a state may use force to prevent the occurrence of an armed attack. As such, self-defense can only exist in response to unlawful violence. Even when it involves pre-emptive action, there must be some identifiable state of affairs or course of events which provokes an act of force and rationally accounts for it. In seeking to justify the contours of a continuous right to self-defence beyond specific attacks, there exists a real danger that, in a world of increasingly complex security dilemmas, one can end up justifying a permanent recourse to armed violence that is the precise antithesis of what self-defence was supposed to be. Allowing states to legitimise wars of aggression or arbitrary killings under the cover of anticipatory or preventative self-defense is flatly unacceptable.

Unlike armed reprisals, the use of force that is initiated in self-defense is not a form of redress or punishment, but a means to a particular end: that of protection, or self-preservation. Self-preservation itself has a very wide scope, having aptly been characterised as a generic term for self-defense, self-help and necessity. Because self-preservation has no legal standing in international affairs and the use of force cannot be justified under the UN Charter in terms of necessity or self-help, there is consequently a tendency to use ‘self-defense’ as a term to justify forcible actions where other explanations would be less respectable. Despite their similarity to revenge

147 Supra, note 146 (Brownlie), p.367.
149 Peter Gordon Ingram, "Self-defense as a Justification for War" (1994) 7 C.J.L.J. 283, p 283.
or retaliation, armed reprisals involving the use of force are being declared defensive in an attempt to include them under article 51 of the United Nations Charter.

In short, the best way to reconcile international law and state practice for matters of political expediency is to justify what was once illegal reprisal as self-defense and subject them to its requirements. In his 1972 article on reprisals and the use of force, Derek Bowett began his analysis of reprisals by stating that "few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal." He then went on to state that the proposition has acquired a credibility gap, related to the divergence between international law and the actual practice of states.

States have, on numerous occasions, responded forcefully to terrorism by claiming a right of self-defense. Generally, armed responses have involved military strikes against terrorist assets or the states that support them. Israel has claimed a right of self-defense on numerous occasions to justify forceful actions abroad, notably during its counter-terror operations in Lebanon (1978-1982), its destruction of the Iraqi Osirak nuclear reactor (1981), and Tunis raid (1988). The United States for its part has also justified its raids on Libya (1986), Baghdad (1993), Afghanistan and the Sudan (1998), not to mention Afghanistan (2001), according to the same article 51 right of self-defense.

Acknowledging the failure of states to develop a legitimate capacity for collective action under international law, Bowett questioned the continuing normative validity of the law prohibiting reprisals, given the separation between norm and state practice. He studied many cases in which states victimised by guerrilla raids originating from outside their borders responded forcefully with attacks against their bases. He noted that such responses could be justified as anticipatory self-defense, the rejection of which Bowett found both unrealistic and inconsistent with state practice. In attempting to clarify the law of reprisals and its foundation, he addressed the distinction between reprisals and self-defense, pointing out that both are forms of self-help which have in common three preconditions:

(a) The target state must be guilty of a prior international delinquency against the claimant state;
(b) An attempt by the claimant state to obtain redress or protection by other means must be known to have been made,

150 Derek Bowett, "Reprisal Involving Recourse to Armed Force" (1972) 66 A.J.I.L. 1.
151 Supra, note 1, article 51.
and failed, or to be inappropriate or impossible in the circumstances;

c) The claimant’s use of force must be limited to the necessities of the case and proportionate to the wrong done by the target state.

Having examined several cases of so-called reprisals considered by the Security Council, Bowett found that it had consistently failed to address forceful responses by states within the context of an overall conflict, rejecting the concept that reprisals could be appropriate responses to an accumulation of terrorist attacks. The Council did nonetheless waver between the desire to condemn reprisals as inherently illegal and the desire to condemn only those that were excessive or disproportionate in character. This reflected a tendency to mix *jus ad bellum* with *jus in bello*, as the reasonableness of the force is a separate and distinct issue from the right to resort to such force in the first place.

He concluded that while the Council’s treatment of reprisals was on the whole unrealistic, it was mitigated by its unwillingness to condemn reasonable reprisals. This position could eventually lead to the permissibility of forceful responses to terrorism before or after an armed attack, so long as their intended objective was to prevent future ones from occurring. In a world where states are virtually free to interpret when the use of force is appropriate, all the Security Council can do in many cases is comment on the reasonableness of such responses. The difference between reprisals and self-defense lies essentially in the aim and purpose of each:

Self-defense is permissible for the purpose of protecting the security of the state and its essential rights- in particular the rights of territorial integrity and political independence- upon which that security depends. In contrast, reprisals are punitive in character: they seek to impose reparation for the harm done, or to compel the delinquent state to abide by the law in the future. But coming after the event and when the harm has already been inflicted, reprisals cannot be characterised as a means of protection.¹⁵³

Reprisals cannot be considered a means of protection because of their intended goal, not because they occur after an attack. Certain measures that come after the infliction of harm, such as the arrest or neutralisation of those responsible, can also be considered protective and thus self-defense. Within the broader context of a continuing state of antagonism between states, with recurring acts of violence, forceful actions could be regarded as being at the same time “both a form of punishment and the best form of protection for the future,

¹⁵³ *Supra*, note 150.
acting effectively as deterrents against future attacks.”154 Yet deterrence is not truly self-defense unless it serves a protective purpose as well, such as degrading the capabilities of terrorists.

Targeted killings operate under the same assumptions. Killings that are undertaken primarily to punish or compel terrorists in foreign states are illegal reprisals; those undertaken to prevent armed attacks and save lives are legitimate measures of self-defense. Though they may act as a deterrent to terrorists, measures whose purpose is to secure the detention or incapacitation of individuals that are impossible to arrest likely to strike again serve a protective purpose as well. Killing out of revenge “to get even” is not protective and therefore not self-defense. Like the death penalty, inflicting death as a punishment is only possible when provided for by law under previously established rules of procedure.

When it can be shown that states have provided terrorists with support, either directly (by providing financial assistance, training or expertise) or indirectly (by providing safe-harbour to them), victim-states may have a right to use force in self-defense. Qualifying forceful actions whose purpose is truly to defend the state (actions that are not simply limited to showing strength but aimed at limiting an enemy’s ability to strike) as reprisals has perhaps become inappropriate in the current security environment. In cases where action is taken by states in response to armed attacks—whether past, actual or threatened—it is possible to speak of legitimate self-defense. In such cases, it is more constructive to avoid using the term reprisal and to limit its use to situations where states use force that is not protective but punitive. Forceful reprisals can thus remain illegal under international law without interfering with the right of states to use force pre-emptively to prevent acts of terrorism.

Somewhere along the line a number of interested states attempted to deny others the right to use force to counter threats of international terrorism. Because it has been expressed throughout this study that forceful measures on foreign soil may at times be necessary to protect individuals from unlawful violence, it is preferable to abandon the concept of defensive reprisals and concentrate instead on the right of self-defense (anticipatory or pre-emptive) and focus on its requirements. The concept of armed attack, a precondition for the right of self-defense, has sufficiently evolved to allow forceful actions not just in response to actual armed attacks, but in response to past and future one’s as well, so long as some reasonable level of proximity is present. Professor Dinstein’s observation that to “be defensive, and therefore lawful, armed reprisals must be

154 Supra, note 150, p. 46.
future-oriented, and not limited to a desire to punish past transgressions” is really the defining factor. Actions that are truly defensive in nature cannot be ruled out as illegal reprisals merely because they occur after an attack.

As regard to what constitutes an ‘armed attack’, the International Court of Justice held that such an attack must “occur on a significant scale.” Prior to September 11th, an attack of such a scale could only be fathomed as emanating from a state. Modern acts of terrorism have nonetheless challenged existing perceptions, requiring a fresh look at the impact of non-state entities on the framework of international security. On September 12th, the Security Council unanimously passed resolution 1368, recalling the inherent right to self-defence. It did not explicitly mandate the use of force, nor did it recognise the right of self-defense “in response” to the attacks. Instead, it recalled in its preamble the inherent character of the right of self-defense. With it came the realisation that the ‘inherent’ right of self-defense could perhaps also be directed against non-state actors, as the right was stated in the context of a terrorist attack.

While the United States was not precluded from using force in self-defence, nor was it explicitly authorised to do so. The Security Council seemed to waver instead between the desire to take matters into its own hands and resignation to unilateral action by the U.S. Self-defence can of course be used without Council authorisation, but the point is that such an authorisation would significantly have supported the case for the use of force. In 1991, the Security Council clearly stated Kuwait’s right to individual or collective self-defence in response to the Iraqi invasion. Following the New York attacks, the Al-Qa’ida terrorist network headed by Osama Bin Laden seemed the likely culprit, but since no evidence was immediately forthcoming, both Resolutions 1368 and 1373 failed to pinpoint an aggressor. It is for this reason, and not because self-defense can be exercised without a nexus to a state, that the Council recalled the inherent right of self-defense.

The idea that self-defence can be exercised at will against non-state actors is false. Article 51 of the United Nations Charter, as part of an agreement reached by states to regulate their conduct, was clearly drafted to be used against states. Article 50, for example, specifically refers to “preventive or enforcement measures against

---

155 Supra, note 125.
156 Supra, note 100.
any State.\textsuperscript{160} The General Assembly’s definition of \textit{aggression}, the trigger for self-defence, further describes it as “the use of armed force by a \textit{State} against the sovereignty, territorial integrity, or political independence of another State.”\textsuperscript{161} This state-centred aspect of self-defence is not simply the result of a historical incapacity to understand a world where states no longer rule absolutely. The drafters of the UN Charter clearly intended to make sovereignty and statehood the basis of the international system of collective security. That much has been demonstrated by the evolution, over the last fifty years or so, of international law and politics.

There is also a compelling reason why self-defence has to be directed against a state: that is, quite simply, whether one wants it to or not, it will be. Any exercise of \textit{puissance publique} on the soil of another without that sovereign’s consent, even if designed to capture or kill only one person, is a violation of that state’s sovereignty. Unless victim-states use force against non-state actors on their own territory, the high seas, the South Pole, or in outer space, that force will invariably be directed against the territorial integrity of another state.\textsuperscript{162} Because terrorist groups have no state of their own, they must operate within the territories of states that may or may not be complicit to their activities. When these individuals are responsible for attacks against foreign states, an interstate dimension emerges, yet the applicability of article 51 to justify the use of force will depend largely on whether or not the sanctuary-state has provided assistance to them, as well as its willingness to subsequently bring them to justice.

While the concept of armed attack as codified by article 51 of the UN Charter remains concerned chiefly with state relations, it is not accurate to consider that only states can carry-out what are known as armed attacks. When the essential interests of a nation are attacked by individuals or groups that have been supported by foreign governments, victim-states can use force against the concerned nations even though the individuals or groups in question acted independently at the moment of the attack. Though more will be said on this topic in the following chapter, I believe strongly that a terrorist attack can be considered an armed attack according to article 51 self-defense, but action on the territory of a sovereign state can only be initiated to the extent that the state in question has somehow supported those responsible, either before or after the attack. Acts of

\textsuperscript{160} Supra, note 1, art. 50.
\textsuperscript{161} Supra, note 138 (GA/RES/3314).
\textsuperscript{162} When a state uses force in self-defense but does not violate the sovereignty of another state, it can be said to be acting according to its ‘inherent’ right of self-defense. Responding to an armed attack, a member-state might technically still have the obligation to notify the Security Council if it used force against an external threat, though probably not within its borders. There may also be a violation of sovereignty on the high seas if the ship(s) attacked are lawfully flying the flags of a particular state.
international terrorism that are not marked by some level of state support or complicity are crimes and not forms of indirect aggression rendering lawful the use of force in self-defense.

Any act of violence that results in loss of life or serious injury for the nationals of a state, at home or abroad, is an armed attack when its authors, supported by states, are (from) beyond its borders and those targeted were selected to intimidate or coerce the state in question. Whether only one person is injured, captured or killed—or a thousand—a terrorist attack against individuals because of their state of origin or residence is always an attack against that state. Article 51 self-defense and the concept of armed attack become relevant when terrorism takes on an international dimension. This position has been stated by the United States Department of State as follows:

Where an American is attacked because he is an American, in order to punish the U.S. or to coerce the U.S. into accepting a political position, the attack is one in which the U.S. has a sufficient interest to justify extending its protection through necessary and proportionate actions. No nation should be limited to using force to protect its citizens, from attacks on their citizenship, to situation in which they are within boundaries. The right of a state to protect its nationals in a foreign country is an integral part of the right of self-defense. 163

The 9/11 attacks, for example, were directed at the state and the symbols of its authority, not to mention its territory and population, with the intent to intimidate and coerce it. The heart of its economic sector was targeted, as was the seat of its military establishment. Its political decision-making centers may also have been struck were it not for the intervention of a few brave souls over the skies of Washington D.C. Those responsible further originated from without its borders, having entered the United States for the purpose of attacking it. Al-Qai' da, the organisation responsible for the attack, provided them with training and resources, while the Taliban government of Afghanistan provided them with safe-harbour prior to the attack, and after it as well, by using its sovereignty to shield its leaders from prosecution.

By most standards, transforming airliners into precision-guided missiles and crashing them into buildings qualifies as attacks of a significant scale. An affirmative conclusion as to the occurrence of an 'armed attack' can also be drawn from NATO’s decision to activate article 5 of the NATO treaty, declaring in a strong show of support that an ‘attack on one is an attack on all’. 164 The September 11\textsuperscript{th} attacks qualify, to use an expression

---

163 Statement by the Legal Advisor to the Department of State, quoted from Supra, note 28 (Knauf).
coined by Professor Henkin, as an actual armed attack which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication.¹⁶⁵ When the complementary and always significant element of state involvement is added to the equation, there is little doubt that ‘armed attacks’ resulting in loss of life can justify the use of force in self-defense, including targeted killing.¹⁶⁶

As long as the use of force is taken by states in response to armed attacks, whether past, actual or reasonably imminent, the ‘inherent right of self-defense’ which pre-dates the Charter system will apply. It is doubtful that the phrase “if an armed attack occurs” was ever intended to limit self-defense to cases of actual armed attacks, since the words were used illustratively rather than exhaustively.¹⁶⁷ The term ‘actual’ is important as it stands in opposition to ‘possible’ or ‘imagined.’ Recognizing this, Wolfgang Friedman wrote:

The judgement as to when to resort to such [preemptive] measures now places an almost unimaginable burden of responsibility upon the leaders of the major Powers. But while this immensely increases the necessity for a reliable international detection organisation and mechanism, in the absence of effective international machinery the right of self-defense must probably now be extended to the defense against clearly imminent aggression, despite the apparently contrary language of article 51 of the Charter.¹⁶⁸

An ‘armed attack’ is a form of crime that is intimately linked with loss of life, deprivation of liberty, or serious injury, and more often than not with aggression. Whether such attacks come at the hands of terrorists or actual state agents is an important, yet secondary, consideration. Though matters of liability may be greatly affected by such determinations, between life and death there is but one distinction: the ability to defend. Government must hence retain the right to act defensively prior to an attack, and the right to react defensively after one as well. Because acts of international terrorism are so difficult to prevent, armed terrorist groups cannot be allowed to associate freely with the devastating ingredient of state support. When achieved, such an alliance can only be defeated by decisive state action. The capacity to elicit any effective and reasonable option that is protective in nature to eliminate this type of aggression will ultimately determine the fate of nations and people alike.

¹⁶⁵ Supra, note 125.
II. Self-defense and the Requirement of Necessity

A) Necessity as a Principal of Law

There are a number of requirements that are implicit to every use of international force. States that use force according to article 51 of the United Nations Charter must do so in a principled manner. In general, they are required to use proportionate force only when necessary for defensive purposes. These limitations inherent to self-defense that have been interpreted as representative of international customary law represent the most important safeguards against unwarranted or excessive state action. Together, with the added requirement that forceful measures “be immediately reported to the Security Council,” they form an impressive system of checks and balances that is unparalleled in international law. In a mere two sentences, article 51 manages to summon all instances of unilateral force under the sole heading of self-defense while ensuring that such action will be necessary and proportionate, as well as reported to the Security Council.

As the primary and often decisive factor in determining the lawfulness of force, even the mildest of armed responses will be outlawed unless force is judged necessary under the circumstances. When forceful action is necessary, measures that would otherwise be unlawful are tolerated, as long as they are proportionate responses to armed attacks. The requirement of necessity provides the essential impetus for action, allowing states to respond forcefully as a last resort to prevent or deter armed attacks. The proportionality requirement only comes into play once the necessity test has been met. The remainder of this Chapter will discuss the concepts of necessity and proportionality, both as general principles of law and as prescribed by article 51 of the United Nations Charter, in order to evaluate whether targeted killings by states can be justified as legitimate self-defense.

Necessity was from long ago coupled with the notion of self-preservation. Anytime a threat to the nation arose, a state could take forceful action to preserve its existence, even when such force would otherwise be unlawful (in the absence of the threat) and peaceful means were still available.169 Writing in the seventeenth century, Grotius observed that many nations recognised the right of self-preservation in their international law: “The Jewish law, no less than the Roman, acting upon the same principles of tenderness, forbids us to kill anyone

who has taken our goods, unless for the preservation of our own lives." 170 This principle was for Grotius equally applicable to inter-state relations.

Grotius' assertion that force directed at states could only ever be taken in response to attacks that pose a danger to human life is as pertinent today as it ever was. His position, beyond recognising the necessity of action geared towards the self-preservation of the state, is strangely consistent with the 'danger to human life' standard of human rights law which forbids the use of deadly force except when absolutely necessary to secure the lives and safety of others. 171 Requiring that deadly force be used only for the protection of life at the interstate level would go a long way to clarify the concept of armed attack and ensure that states not kill for political or financial gain. The effect of adopting a 'danger to human life' standard for self-defensive action by states would also help bridge the gaps between the rules of law-enforcement and those of armed conflict, as is urgently needed to fight terrorism effectively. 172 Incorporating such a requirement at the interstate level is the next step in the evolution of international law.

Though he spoke of the right, Grotius did not leave the exercise of necessity unencumbered. He emphasised the narrowness of the circumstances in which states could justly undertake otherwise unlawful acts. 173 Nineteenth century scholars for whom the Grotian understanding of necessity as a right resonated strongly went on to develop the concept that states possessed certain fundamental rights, including the right to existence and the attendant right to self-preservation. One of these, Travers Twiss, wrote, "Of the primary and absolute rights of nations the most essential, and as it were the cardinal right, upon which all others hinge, is that of self-preservation. This right necessarily involves, as subordinate rights, all other rights which are essential as means to secure this principle end." 174 Following up on this idea, Hershey concluded that "in order to protect and preserve this right, a State may in extreme cases of necessity violate the territorial sovereignty or international right of another State." 175

173 Burleigh C. Rodick, The Doctrine of Necessity in International Law 5-6 (1928), quoted from Boed(supra, note170).
175 Amos S. Hershey, The Essentials of International Public Law and Organization 231 (1927), quoted from Boed (supra,
The perception of self-preservation as the ultimate right of states inevitably led to the conclusion that a state could, as a matter of right, use whatever means available to ensure its survival, even when such actions were disproportionate in nature and incongruent with its international obligations. This easily abused conception of necessity as a right was further exacerbated by the vagueness of self-preservation as a principle of law. It was possible for states to justify the use of force in response to almost any threat, however significant, when they considered their very existence at stake. Contemporary international law responded to this difficulty by dispensing with the notion of necessity as a ‘right,’ in favour of the assertion that action necessary for the preservation of a state’s essential interests could serve, in limited circumstances, as an ‘excuse’ for internationally wrongful conduct.

It was at the request of the International Law Commission (ILC) that Roberto Ago, subsequently appointed Judge to the International Court of Justice, prepared a comprehensive study in 1970 on the concept of necessity in international law.\(^\text{176}\) Ago rejected the notion of self-preservation and necessity as rights of states. He argued instead that necessity was an excuse that rendered possible the breach of an international obligation for the protection of a state’s essential interests. His conclusion was based largely on the fact that while some states in the past had attempted to link self-preservation with a plea of necessity to excuse non-compliance, the predominant trend in more recent practice was to expand the notion of necessity to cover essential interests other than threats to the very existence of states.\(^\text{177}\) By invoking necessity, a state would no longer claim a right to violate its obligations, but rather assert that under the circumstances international law should excuse its unlawful conduct.\(^\text{178}\)

Illustrative of this tendency was the International Law Commission’s (ILC) characterisation of the Torrey Canyon Incident. In 1967, a Liberian tanker carrying 117 000 tons of crude oil ran aground off the coast of Cornwall, but outside British territorial waters.\(^\text{179}\) Through a hole in its hull, the Torrey Canyon began leaking oil into the sea, posing a threat to the English coastline and its population. Instead of allowing the entire cargo to spill into the sea, the British government bombed the vessel to burn off the remaining oil. Though the spill


\(^{177}\) Supra, note 176, at 23.

\(^{178}\) Supra, note 176, at 23.

\(^{179}\) Supra, note 176, at 35 (describing the incident).
did not pose a threat to the very existence of Great Britain, it did threaten one of its essential interests, namely the protection of its marine and coastal environment. In its commentary on draft article 33 of the Law of State Responsibility, the ILC referred to the British Government's destruction of the Torrey Canyon, stating:

Whatever other possible justification there may have been for the British Government's action, it seems to the Commission that, even if the shipowner had not abandoned the wreck and even if he had tried to oppose its destruction, the action taken by the British Government would have had to be recognised as internationally lawful because of a state of necessity.

The Commission's response to the Torrey Canyon incident, acknowledging both the validity of Britain's actions and its claim of environmental necessity, reflected the emerging interpretation of necessity. Its conclusion that necessity was not inextricably linked to preserving the very existence of the state, but that it could also be legitimately invoked in a broader set of circumstances, served as evidence for Ago's interpretation. In 1997, the International Court of Justice went on to confirm Ago's view of necessity and his emphasis on essential interests. In the Gabeikovo-Nagymaros Project Case, the Court proceeded, in a matter involving a breach of obligation by Hungary towards Czechoslovakia (later Slovakia), on the assumption that the threat of an ecological catastrophe could establish a state of necessity, and that such a state could provide a valid excuse for a state's non-compliance with relevant international obligations. Basing itself on the ILC's codification of necessity at draft article 33, which in its words "reflected customary law," it stated several conditions for the legitimate exercise of necessity.

While the following conditions were intended to determine the applicability of necessity as an excuse for precluding wrongfulness and not to evaluate the necessity of using force in self-defense, they can nonetheless provide interesting insight for such a purpose. The conditions were: (a) the otherwise unlawful action must be aimed at "safeguarding an essential interest;" (b) the threat to a state's essential interest must rise to the level of "grave and imminent peril;" (c) the otherwise unlawful action must be "the only means" of safeguarding an essential interest; and (d) the act must not "seriously impair an essential interest of the state towards which the

---

181 Supra, note 180, para. 15.
182 Case Concerning the Gabeikovo-Nagymaros Project (Hungary vs. Slovakia), 1997 I.C.J. 92 (Sept. 25).
183 Supra, note 182, at 52.
obligation exists.” Article 25 (1) of the Law of State Responsibility reflects the aforementioned conditions. It states:

A State of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that state not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.\(^\text{184}\)

As to the meaning of “essential interests,” the ICJ declined to enumerate them, noting that the extent to which a given interest was essential to a state depended on the particularities of the case at hand. It is safe to say, however, that any serious threat to a state’s population, territory or political stability, might warrant the applicability of necessity. While the Court refused to elaborate beyond its immediate recognition of ecological necessity, Ago nonetheless gave examples of the sort of interests that might be considered essential, including a state’s “political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, and the preservation of the environment of its territory or a part thereof.”\(^\text{185}\)

With regard to the meaning of “grave and imminent peril,” both Ago and the ILC resorted to the general notion that the danger must be “extremely grave” to justify otherwise unlawful conduct, and pose “a threat to the interest at the actual time.”\(^\text{186}\) The International Court of Justice sought to further clarify imminent peril, observing that ‘imminence’ was synonymous with ‘immediacy’ or ‘proximity’ and went far beyond the concept of ‘possibility’.\(^\text{187}\) The Court also interpreted ‘peril’ as referring to danger in as much as it “evokes the idea of risk” rather than “material damage.”\(^\text{188}\)

On the requirement that “no alternative means” be available to secure the essential interest of the state, the ILC stressed in its Commentary that “the only means” test implied that “the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations.”\(^\text{189}\) The ICJ also adopted this reasoning, though it failed to define the scope of its proposition concerning cost. As to the requirement that the otherwise unlawful action not seriously impair an essential

\(^{184}\) General Assembly (Sixth Committee) resolution A/RES/56/83. Responsibility of States for internationally wrongful acts, UN Doc. XXX., 56\(^{th}\) session, December 12, 2001.
\(^{185}\) Supra, note 180, at 12.
\(^{186}\) Supra, note 180, at 49; supra, note 182, at 13.
\(^{187}\) Supra, note 180, at 54-57.
\(^{188}\) Supra, note 180.
\(^{189}\) Supra note 180, at 33 (emphasis added).
interest of the state towards which the obligation is due, a balancing act between the competing interests of the states involved must be undertaken: on the one hand, the interest in the name of which the defending state invokes necessity and, on the other, the harm done to the interest of the state claiming a breach of obligation. A plea of necessity is only valid if the scale tips in favour of the essential interest of the state that has acted unlawfully: “The interest sacrificed on the altar of ‘necessity’ must obviously be less important than the interest it is thereby sought to save.”

Although the balance of harms requirement, which requires that wrongful acts not seriously impair the essential interests of others, is reminiscent of the proportionality requirement of humanitarian law, there are fundamental differences between necessity as an excuse for precluding wrongfulness and the necessity of using force in self-defense. The first is that necessity as an excuse does not demand that otherwise wrongful acts be proportionate to the harm avoided, but that such violations be foregone altogether when they cause similar or greater negative impact. A state acting in self-defense may in fact use force that causes an equal or greater amount of harm onto the attacking party, so long as the force deployed is proportionate to the objective of ceasing the unlawful aggression.

Second, necessity as an excuse for precluding wrongfulness considers states as equal sovereigns in their relations throughout a dispute (as between Hungary and Slovakia in the Gabeikovo-Nagymaros Case). Because they remain as such even when one fails to meet an obligation owed to the other, it is possible to view necessity as the withdrawal of one from a contractual engagement. When a state uses force against another, or assists terrorists in doing so, the impending situation is somewhat different. The victim-state is not faced merely with a violation of a bilateral agreement, but a violation of the Laws of Peace and Security owed to all, for which there is no derogation. When a state violates its obligation not to use force against another, it becomes almost akin to a criminal in a domestic setting, having violated an express duty to forego aggressive action.

Finally, in response to armed attacks, victim-states can actually claim a right of self-defense, as opposed to necessity which operates as an excuse for precluding wrongfulness. The Law of State Responsibility actually provides for ‘self-defense’ as an excuse for precluding wrongfulness at article 21, which reads: “The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in

---

190 Supra, note 180, at 35.
conformity with the Charter of the United Nations.” 191 Though a tendency to confuse the two is understandable, it is best to maintain the existing distinction and not to use necessity for matters involving the threat or use of international force.

Before the adoption of the UN Charter and the more liberal interpretation of armed attacks, necessity was perhaps the only legal basis to justify the use of force prior to, or some time after, an attack. Because the concept of ‘armed attack’ has evolved sufficiently to recognise an anticipatory or pre-emptive right of self-defense, it is no longer necessary to use necessity—a by-product of self-preservation—to justify forceful responses. Necessity as an excuse for precluding wrongfulness cannot allow a state to use of force in violation of the general prohibition against such action. Allowing it to do so may signal a return to elder days and ways.

In some situations, a state of necessity may oblige a state to use force on the territory of another when not doing so might cause unacceptable harm unto its essential interests, namely its nationals, and the intervening state is genuinely incapable of seeking the sanctuary-state’s consent or assistance. In cases where the state lacks alternative means of action and the immediacy of the peril rises to the level of grave and imminent danger, a balance of harms evaluation may justify the use of force absent a right of self-defense against that particular state. 192 Though the sanctuary-state may not in any way have aided the individuals within its territory suspected of armed attacks, a victim-state may nonetheless be obliged to take action against them according to its inherent right of self-defense. In such cases, necessity as an excuse for precluding wrongfulness would not render lawful the resort to force as a matter of right, but excuse instead why permission from the sanctuary-state was not obtained or sought in advance.

The greater a threat to the survival of a nation or its essential interests is, the greater the need to make difficult choices between competing interests. Sending F-18s to destroy a highjacked airliner full of passengers destined to crash into city buildings is such an example, as is the use of torture to extract information that may be vital to the very survival of the nation or a good part thereof, such as the location of a portable nuclear device timed to detonate. 193 While self-defense remains the appropriate justification for the use of force by states on foreign

191 Article 59 states: “These articles are without prejudice to the Charter of the United Nations.” See also art. 21. (Supra, note 184).
192 It is almost inconceivable to think that a foreign power could not first obtain permission to enter the territory of another state, but exceptional circumstances—perhaps involving high speed chases—can occur.
193 A.L. Dewitt, “The Ultimate Exigent Circumstance” (1996) 5 K.J.L.P.P. 169; Fighter jets were apparently airborne during the 9/11 tragedy and the vice-president was prepared, if absolutely necessary, to authorise their destruction.
soil, the concept of necessity presents interesting insight into the need, in situations of extreme emergency, to undertake actions that would otherwise be intolerable. As Steve Chapman of the Washington Times once wrote, “No one could possibly justify sacrificing millions of lives to spare a murderous psychopath a brief spell of intense pain, which he can end by his own choice. When the threat is so gigantic and the solution so simple, we are all in the camp of the Shakespeare character who said, ‘There is no virtue like necessity.’”

B) Targeted Killing and the Necessity of Using Force

The United Nations Charter outlawed perhaps the “first use” of force, but it did not prevent states from taking, individually or collectively, forceful defensive action in response to terrorist attacks. Consistently throughout this study it has been held that targeted killings, like any other use of force, can be justified in limited circumstances where necessity (now an essential element of self-defense) can justify the use of force in response to a threat to the self-preservation of the state (now known as an armed attack), so long as the defensive action is proportionate to the objective of ending the threat at hand. The use of lethal force abroad may be dangerous in a nuclear era, but a state that is attacked by terrorists must be allowed to use force to defend itself against them, especially when they are directed or supported by states.

When respectful of international law, the use of limited operations to detain or neutralise terrorists on foreign soil represent an equally important dimension of self-defense. To strictly prohibit such action may ensure the waging of war. Forbidding states to pursue terrorists by means other than armed conflict may oblige victim-states to engage in costly militarily campaigns. Because such an outcome would lead to more casualties and further endanger the cause of peace, it is important to acknowledge that targeted killings may be proportionate responses to terrorism in the absence of armed conflict. When terrorists are provided safe-harbour by states, the use of targeted killings, as an alternative to armed conflict and impunity, can amount to proportionate responses of self-defense. And when arresting suspected terrorists is truly and verifiably unfeasible, the use of targeted killings may, in extraordinary circumstances, prove necessary as a tool against international terrorism. Though potentially problematic in terms of human rights law, such measures can be compatible with international law when they are genuinely defensive and necessary for protective purposes.

\[194 Supra, note 23, p. 106.\]
The use of force which takes place a few weeks or months after an attack, however, can look dangerously like *illegal reprisals*, and forceful action which occurs some time before an attack—anticipatory self-defence—can look a lot like *aggression*. Because targeted killings can occur some time before an armed attack (when their objective is to prevent a terrorist from striking) and some time after one (when their aim is to arrest or neutralize its authors), such measures can generate concerns regarding both these aspects. To avoid such accusations and ensure legality, it is crucial for states to justify the use of targeted killings according to recognised precepts of international law. To satisfy the necessity requirement of self-defense, victim-states need only demonstrate that defensive force was needed as last resort to repel an armed attack and that the impending use of force was *limited to that immediate goal*.

The incident that provided the basis for the most commonly accepted formulation of the necessity requirement of self-defense was the *Caroline* incident, in which an American steamship assisting Canadians in a rebellion against Britain was set on fire in 1837 and towed into the current of Niagara Falls. In response to American protests, the British retorted that American authorities had not acted to prevent the illegal infiltration of the Caroline, rendering the attack necessary as an act of self-defense and self-preservation. The United States Secretary of State Daniel Webster responded with the classic formulation that self-defense applied only in "extraordinary circumstances where the necessity of that self-defense is instant, over-whelming, leaving no choice of means, and no moment of deliberation." Suggesting that their raid met this standard, the British expressed regret for what was perceived as a necessary violation of U.S. territory and the matter was resolved. Both parties nonetheless accepted Webster’s definition of necessity.¹⁹⁵

The above formulation of necessity seems to indicate that military or forceful action of any kind must only be taken in the face of actual danger, or perhaps at the last possible moment, to prevent armed attacks. Responding to terrorist threats operates upon a continuum, the decisive line being the use of deadly force. According to the *Caroline* incident criteria, targeted killings by states may only be permitted when “there is no choice of means and no moment of deliberation.” Such an interpretation restricts the possibility of planning such killings in advance as a matter of governmental policy without consideration for peaceful alternatives. The only logical conclusion is that targeted killings will only be lawful when terrorists cannot be detained otherwise and killing them is the only way to prevent them from escaping or endangering the lives of innocent civilians.

Targeted killings involve a level of premeditation that is more closely related to murder than self-defense. In the absence of armed conflict, targeted killings by states that serve no protective purpose will be considered unlawful uses of force, and in times of hostilities, possibly amount to the infliction of excessive or unnecessary suffering. Humanitarian law does not permit the arbitrary killing of combatants that have laid down their arms or have been place 'hors de combat', nor does it tolerate the infliction of superfluous or unnecessary harm. Targeted killings can amount, even during periods of belligerency, to war crimes or crimes against humanity. Such would be the case of killings committed not out of military necessity, but out of spite, revenge, or simply to avoid prosecuting terrorists or holding them as prisoners of war. 196

In armed conflict, the use of force that provides no military advantage is unnecessary and thus unlawful. When directed against the leaders of states or terrorist groups that have a strong influence over the commission of armed attacks, the argument that targeted killings can provide military advantage takes shape. In such cases, targeted killings, which are generally permissible in armed conflict, can be deemed proportionate when civilian deaths are avoided. But when those targeted are mere puppets of larger figures and entities, and killing them will have little or no impact on the group's ability to wage attacks in the future, such killings will not be considered necessary and may amount to violations of humanitarian law. Similarly, the use of force that is not necessary to repel or prevent an armed attack will not be lawful according to article 51. The determining factor in international law is whether targeted killings will serve to legitimately protect a state or simply amount to unlawful retaliatory action.

The necessity defense, as an excuse under the international law for precluding wrongfulness, offers an interesting framework by which to evaluate the necessity requirement of article 51. Its first condition is that otherwise unlawful acts be aimed at safeguarding the essential interests of states. Because population is a most essential of state interests, an armed attack against a state’s nationals, at home or abroad, can trigger the necessity of using force in self-defense. To successfully argue that targeted killings can amount to necessary defensive action, a state must minimally demonstrate that they can prevent terrorist attacks.

196 The killing, for example, of Chechen hostage-takers by Russia in a Moscow theatre is a poignant case in point. Although such action was considered domestic law enforcement and as such was subject to a higher standard of protection of the right to life, it may very well be that many of the killings failed to meet even the lesser standard applicable in war. While the use of gas to knock out the hostage-takers may have been necessary, the same cannot be said about the fifty or so that were shot in the head while unconscious. As it caused unnecessary or excessive suffering, the killing of unconscious terrorists may have amounted to war crimes under international Humanitarian law. See “Burials begin after theatre siege,” The Gazette, Craig Nelson, 30 October 2002, A-22.
Military responses to terrorism are usually conducted to persuade targeted states and other similarly inclined actors that support of terrorism is bound to trigger a response that is prohibitively costly. Beyond providing protective advantage such as the destruction of terrorist camps or weapons, they can be successful in altering state behaviour because states are limited in numbers and they behave, for the most part, in a rational way so as to ensure their survival. Terrorists on the other hand are less rational. Their numbers potentially range in the millions, and they unlike states are not easily identifiable. Terrorists are much like the internet: one broken link does little to disrupt the system. When one is eliminated, others emerge unscathed and undeterred. Most of all, extremists like suicide bombers are not usually deterred by the possibility of death.

Because targeted killings can have only limited effects as punishments or general deterrents, their protective impact may be outweighed by their ability to cause further dislike and resentment. From this perspective, it is thus problematic to consider them necessary (even in the larger context of self-help or self-preservation) as they have been shown in some cases to actually increase—not decrease—the likelihood of further attacks. This factor has been experienced by most states that have dealt with serious terrorist threats from within, including Russia, Great Britain, and Israel. When important and beloved leaders were intentionally killed by state forces, especially without first being given a chance to surrender, their respective groups promised revenge and usually delivered. Because severe repression by state forces can contribute, if not fuel, an unending cycle of violence, it is always hard to accept that targeted killings can be necessary to protect people from further attacks.

197 Supra, note 195.

198 Because they share a very different cost and benefit standard, the “threat of killing terrorists - either in the course of terrorist action or as subsequent punishment- is ineffective.” (Dershowitz, Supra, note 23, p. 171).

199 As punishment or general deterrents, extrajudicial killings produce “all out wars” between police and organised crime, as is often the case in South America, especially against Colombian drug lords. It is one thing to take action to shut down a production facility by arresting those responsible and seizing their assets, and another completely to use deadly force to arbitrarily kill everyone involved in the operation, which may include honest individuals working to feed their families. Although the war on drugs is an important public health and security issue, a state is never justified in using aggressive lethal force on foreign soil to ruthlessly kill individuals that produce drugs when alternatives such as arrest are available. Because demand will always entice individuals to partake in illegal activities, the best way to deal with the problem is usually to contain it, and to make every effort to disrupt production without causing an all-out war between criminals and law-enforcement officials. Special legislation prohibiting membership to organised criminal groups (gansterism) is often useful for such a purpose. It is simply not worth while for government and security officials to risk their lives and those of their families to prevent people from acquiring narcotics they will ultimately obtain anyway.
A number of concrete examples concerning Israel’s policy of targeted killings also support the argument that, by provoking retaliation, such measures actually increase the number of Israeli’s killed.\textsuperscript{200} First, the killing of Yehiya Ayash (the “Engineer”), the chief bomb maker for Hamas whom Israeli agents killed in January 1996 by placing explosives in his mobile phone, provoked four retaliatory suicide bombings resulting in 50 casualties. Second, the first-ever killing of an Israeli cabinet minister occurred in October 2001, as members of the Palestinian Front for the Liberation of Palestine (PFLP) killed Rehavam Ze’evi to avenge the killing of their leader, Mustafa Zibri. Third, the January 2002 targeted killing of Tanzim leader Raed al-Karmi ended a ceasefire declared by Arafat the previous month, in which the violence of the \textit{intifada} had been reduced to its lowest point since its inception. The Palestinians responded with an unprecedented wave of suicide bombers, which Fatah leader Marwan Barghouti and senior Israeli military officers attributed to the slaying of Karmi. More importantly, his death reportedly caused the Al-Aksa Brigades, a secular group owing allegiance to Fatah, to engage in suicide bombings. Previously, only Islamic Jihad and Hamas employed this tactic. The result was a record number of casualties among Israelis and the added complication of having to confront female suicide bombers.\textsuperscript{201} Finally, the killing of Hamas leader Sheik Salah Shehadal lead to the suicide bombing of Hebrew University, not to mention an end to negotiations for a ceasefire and a pledge by the Palestinians which stated, “From this moment forward, we will end attacks on innocent, non-combatant men, women and children.”\textsuperscript{202}

While targeted killings are usually inappropriate measures for democracies to adopt, there are nevertheless situations where their potential dangers can justify their use.\textsuperscript{203} When states are threatened with attacks by individuals that cannot be detained and they can be killed without loss of life to innocent non-combatants, then a “\textit{balance of harms} makes assassination manifestly reasonable as a means of law enforcement.”\textsuperscript{204} This may be the case when dangerous terrorists are constantly protected by well trained security forces or local authorities, and their incapacitation will seriously hinder their group’s ability to wage attacks.

\begin{flushleft}
\textsuperscript{200} The following examples are documented in: \textit{Supra}, note 25, p.9.
\textsuperscript{203} Rajendra Ramlogan, “Towards a New Vision of World Security: The United Nations Security Council and the Lessons of Somalia” (1993) 16 \textit{H.J.I.L.} 213. The fear that often leads government officials to favour assassination over abduction is that too many lives will be lost if attempts are made to arrest criminals in foreign countries. The badly planned operation in Somalia on October 3/4\textsuperscript{th} 1993 which led to the deaths of eighteen American soldiers and countless Somali casualties would in itself be enough to cast doubt on the practice.
\textsuperscript{204} \textit{Supra}, note 148.
\end{flushleft}
In some cases, Israel has achieved notable results from its policy of targeted killing. In the 1950s, terrorist infiltrations from Egypt lessened when Egyptian intelligence officers were killed. In the 1960s, Nasser's plan to build ballistic missiles capable of reaching Israel collapsed when German scientists fled in the wake of Israeli mail bombs. Following the Israeli campaign to avenge the Munich massacre, Black September was all but destroyed as a functioning terrorist organisation in the 1970s. Finally, the 1995 Israeli assassination of Shikaki in Malta undermined the effectiveness of Islamic Jihad for several years, as successors struggled over policy and power.205

As stated by Steven R. David, “several other benefits of Israel's policy of targeted killing became apparent from its heightened practice during the second intifada.”206 Targeted killings have impeded the effectiveness of Palestinian terrorist organisations where leadership, planning, and tactical skills have been confined to a few key individuals. Only a limited number of people have the technical ability to make bombs and plan attacks. When these individuals are eliminated, the ability to mount attacks is degraded. The reduced performance of Palestinian operations, as demonstrated by the number of poorly planned attacks and intercepted suicide bombers, indicates weakness with their organisations or those available to carry them out.207 Furthermore, individual leaders whose charisma and organisational skills are necessary for success and group cohesion are not easily replaced. Eliminating them, as in the case of Shikaki of the Islamic Jihad, impairs their group's ability to launch attacks. Another clear benefit of targeted killing is keeping would-be bombers and bomb makers on the run. Time and effort taken to avoid Israeli agents is time and effort not spent on planning or carrying out operations against innocent civilians.

While young martyrs can easily be recruited and difficulty dissuaded by targeted killings, the number of dedicated leaders willing to die is significantly lessened by such measures. There is strong evidence emerging on this level, as demonstrated by the meeting between Ariel Sharon and Palestinian leaders on January 30th, 2002. When Sharon asked the Palestinians what they wanted from him, first on their list was an end to targeted killings. Islamic Jihad and Hamas apparently agreed to refrain from launching attacks in pre-1967 Israel in December 2001, so long as Israel refrained from killing its leaders. As expressed by Steven R. David, "although the cease-fire eventually broke down, their willingness to abide by the cease-fire, even temporarily, indicates

205 Supra, note 25.
206 Supra, note 25, p.6.
207 Supra, note 49, p.2.
the deterrent power of targeted killings.” 208 Similar requests by Palestinians have also been made under Roadmap to peace.

As to the condition that the threat to a state’s essential interest rise to the level of ‘grave and imminent peril,’ it seems reasonable that to prevent a deadly terrorist attack, an otherwise unlawful resort to force such as targeted killings may be rendered legitimate. While the threat posed by weapons of mass destruction still looms on the horizon, the potential for devastating attacks has already been demonstrated worldwide by Al-Qai’da and other such groups.209 It is less difficult in this sense to prove that terrorists are capable of ‘grave’ attacks as it is to demonstrate their ‘imminence’. An interesting way to study the temporal factor, given that imminence is a relative criterion, is to determine whether an operation to “arrest or neutralise” occurred during the last possible window of opportunity. Because a state may generally target those believed to represent serious security threats, evaluating the necessity of a pre-emptive attack can be done by determining whether force was truly used when the threat could last be thwarted effectively.

While the need to remove terrorists and criminals alike from society is absolutely essential to the safety of the civilised world, situations that fail to rise to the level of grave and imminent peril cannot permit the use of deadly force that is avoidable. The International Court of Justice’s observation that imminence was synonymous with immediacy or proximity, and that it went far beyond the concept of possibility, is an indication that general policies of targeted killings can only be permitted when inaction will seriously lead to unacceptable consequences.210 Because the use of force is only permitted in “extraordinary circumstances where the necessity of that self-defense is instant, over-whelming, leaving no choice of means, and no moment of deliberation,” targeted killings that are clearly committed on the basis of mere possibility are unnecessary.

Probably the most useful factor to determine whether targeted killings can meet the ‘necessity’ test of article 51 is whether deadly force was “the only means” for preventing an armed attack. The use of force, in the range of options available to a state, must obviously be considered as a last resort.211 At this stage, it is not necessary to

---

208 Supra, note 25, p.7.
209 Whether they involve the hijacking of commercial aircrafts, the destruction of sky-scrapers, the bombing of Embassies, hotels, or nightclubs, terrorist attacks of any kind that lead to civilian deaths are always grave. The Tokyo saran gas attack and the use of anthrax in Washington in 2001 are also alarming trends of bio-terrorism. Beyond the usual suspects, goupis such as Jemaah Islamiyah in Asia are becoming increasingly deadly in their methods, much like Hizbollah.
210 Supra, note 182, at 54-57.
211 Supra, note 1, art. 2(3).
ascertain whether targeted killings were the least harmful option, and whether military strikes or forced arrests may have achieved similar results without casualties. The type or degree of forceful intervention is a matter of proportionality. The necessity requirement of self-defense simply requires states capable of ensuring their protection through peaceful means to forego the use of international force. When peaceful alternatives are unavailable and “likely to strike again terrorists” pose a grave and imminent risk to states, targeted killings undertaken as a last resort to protect life can be considered necessary to prevent armed attacks.

Considering that the International Court of Justice was unable to conclusively declare the absolute illegality of nuclear arms based largely on the basis of state-survival and self-defense, it would be all the more unreasonable to conclude that targeted killings outside the context of armed interstate conflict are always illegal. When the nationals of a state are threatened with serious injury or loss of life, it may be necessary for its government to consider all available measures, including targeted killings.212 The quintessential requirement of necessity can thus in very limited circumstances be satisfied when targeted killings are the only means available to ensure the protection of persons from unlawful violence.

When targeted killings fail to meet the ‘necessity’ test of self-defense, either because peaceful alternatives exist or they serve no protective or military advantage, determining whether they amount to ‘proportionate’ measures of self-defense is unnecessary. Yet in the limited and extraordinary cases where targeted killings are necessary as a last resort to protect the state and its essential interests, they may, like any other forceful measures, satisfy the ‘necessity’ test of article 51 self-defense. As such, it is crucial for the sake of thoroughness—and because they are in fact occurring—to determine under what conditions targeted killings by states can amount to proportionate responses to international terrorism under international law.

III. Proportionality and Security Council Notification

A) Striving for Equilibrium

Proportionality in essence is a very simple concept. It signals at its core the notion of balance, of things being equal. In mathematical terms, it refers to having a constant ratio.213 Unfortunately, the world of international law

---

212 Supra, note 195.
213 Supra, note 3, p. 1354.
politics is not interpretable in strictly mathematical terms, whereby one state action may be equal to another. Given that in any situation a number of competing factors normally co-exist simultaneously, it becomes nearly impossible to determine what constitutes a 'proportionate' response. With regard to the use of force in international relations, attempts have nonetheless been made to circumscribe within a predetermined set of parameters what actions can be regarded as proportionate.\textsuperscript{214} From this perspective, international law has provided the concepts and framework for such an analysis. The principle of proportionality, an essential requirement of self-defense, is such a concept. At its core, it requires states to strike a balance between the harm done and the harm to come.

International law, especially in its regulation of armed conflict, has been granted much attention by states. Humanitarian law is after all the only body of law which can lead to the international prosecution of government officials. Proportionality under its provisions is therefore a most authoritative statement of this principle. Referred to in criminal law to ensure the punishment of criminals according to their crime and degree of responsibility, it has been absorbed by humanitarian law for the process of civilising armed conflict. Reinforcing the belief that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy, proportionality requires military planners to consider the potential impacts of operations on the lives of civilian populations. As expressed in article 51(5)(b) of Protocol I to the 1949 Geneva Convention, the use of force must not cause excessive suffering for civilians in relation to the concrete military advantage anticipated.\textsuperscript{215}

Since its entry into force (Protocol I), proportionality has been both a conventional and a customary principle of the law. The United States government, which has signed but not ratified Protocol I, has declared support for both the customary nature of the prohibition on direct attacks against civilians (distinction requirement) and the principle prohibiting attacks that "would clearly result in collateral civilian casualties disproportionate to the expected military advantage" (proportionality requirement).\textsuperscript{216} The proportionality rule in the context of war is nevertheless a balancing test that is difficult to enforce and easy to abuse. When weighed against military advantage, how much civilian loss of life or injury is proportional?

\textsuperscript{214} Humanitarian law, for example, is an attempt to set the acceptable parameters of armed conflict: Herman S. Burgos, "Humanitarian Law and Human Rights in Internal Conflict," Implementation of International Humanitarian Law, in Eds. Frits KALSHOVEN and Yves SандOZ, (Dordrecht: Martinus Nijhoff Publishers, 1986).
\textsuperscript{215} Supra, note 113.
\textsuperscript{216} Supra, note 8.
Although innocent civilians may accidentally be killed when terrorists find refuge among them, responsible governments must whenever possible avoid methods of attack that fail to discriminate. While Israel reported that sniper fire would be the preferred method of attack, it has since resorted to more drastic measures and caused numerous innocent deaths in the process. Targeted killings may become necessary for states to undertake in extraordinary situations to prevent armed attacks, but their use will be severely questioned and undermined unless civilian casualties are avoided at all costs. Though it may be true that intentionally killing civilians for political purposes is worse than accidentally killing civilians to prevent undue harm, the distinction is quickly overshadowed when excessive state responses parallel the brutality of terrorist attacks.

The killing of Hamas military leader Salah Shehadeh, offers striking insight into the flaws of self-assessed proportionality. The reality that certain political figures are willing to compromise the lives of innocent people, including those of children, to kill one man, is a reflection as much of their deep pathologies as it is of the international community’s failure to bring peace to the region. Though it is difficult for outside observers to make fair assessments of the situation, there are certain actions that transgress both political and territorial boundaries. The dropping of a 450-kilogram bomb by an F-16 on a residential building in Al Daraj, a densely populated neighbourhood, is such an example. The attack killed 14 Palestinians, nine of who were children, and injured more than one hundred innocent civilians. Shehadeh’s wife and at least one of his three daughters were among the dead.

In response to the killing, the Israeli government was roundly condemned by the international community. United States President George W. Bush criticised Israel’s strike, describing it as “heavy-handed,” while Swedish Foreign Minister Anna Lindh called the strike “a crime against international law and morally unworthy of a democracy like Israel.” United Nations Security Council Resolution 1411 called on Israel to “stop the targeting of civilians in response to terrorist acts.” Canada considered itself “deeply concerned by civilian casualties resulting from the use of force in built-up areas, and by the targeting of individuals without trials,” and Foreign Affairs spokesperson Marie-Christine Lilkoff further called on Israel to “respect its obligations under international law.” Ariel Sharon, while describing the civilian casualties as “regrettable,” told his cabinet in a meeting in Jerusalem that the killing was “one of our major successes.”

218 Ibid.
219 Ibid.
Realising the full measure of its actions and the international community’s response, the Israeli government declared the following day that faulty intelligence was to blame. As politicians stated intelligence failures, President Moshe Katsav told Israeli Army Radio that “intelligence was apparently not complete,” but said that political leaders bore the responsibility. With the Israeli leadership admitted to problems surrounding the attack, the media began questioning the use of what was reportedly a one-ton bomb in such a densely populated area. “It’s possible that the designation of the bomb was not right,” said Capt. Sharon Feingol. The head of military planning, Maj.-Gen. Giora Eiland, further acknowledged that “wrong calculations” had been made.220

However, senior correspondent Walter Rogers reporting from Israel on August 10th, 2002, claimed on CNN’s The Capital Gang that a source within the Sharon government had recognised the necessity of undertaking the attack, and justified it by declaring that hundreds of Israeli lives had been saved as Shehadeh was preparing at least a half dozen high profile bombings. Though no one will ever know for certain whether Israeli civilians were spared by his death, or whether he may have been arrested instead, it is a fact that a Hamas a suicide bomber blew himself up in revenge at the Hebrew University in Jerusalem just two days later, killing seven people and injuring many others.221 In the face of abusive state action, retaliatory action by terrorists is a near certainty.

Although it may be lawful to target terrorists in the context of the Palestinian conflict, it is difficult to understand how a democratic nation like Israel can justify the killing innocent civilians, especially children. There can be no moral equivalency between the actual killing of civilians and the potential benefits provided, unless of course it can be evidenced that the fate of a nation is at stake. The fact that Israeli officials justified the attack even after learning of the devastation defies comprehension, as every innocent life lost is a tragedy beyond measure. As Dershowitz writes in reference to Palestinian suicide bombings, “a willingness to kill an innocent child suggests a willingness to do anything to achieve a necessary result.” The same applies for Israel.

Those that blame Shehadeh for being with his family in a residential area may be justified in their criticism, but they cannot blame those killed for being at home at the wrong time. There is even a strong chance that out of all those killed or injured, perhaps only a handful were aware of his presence. The Israeli army, on the other hand, cannot declare itself unaware of the presence of innocent civilians in a residential area, or that it failed to realise

that dropping such a large ordinance would have devastating consequence. The same technology that located Shehadeh in the first place was more than capable of locating the presence of others, and equally capable of tracking him as he left the area. Faulty intelligence was less to blame than faulty judgment.

Clearly, proportionality is a very subjective principle of law, as different actors can perceive various degrees of force as warranted in any given situation. It is nearly impossible, all things considered, to determine how many civilian casualties can be deemed proportionate to the death of one individual terrorist. What is clear is that the highest ranking military or political figure (of a state or terrorist group) would justify the highest number of civilian casualties. It is nevertheless difficult to determine at large what that number could be. One would have to examine the targeted individual’s degree of involvement in the ‘armed attack’ that gave rise to a right of self-defense, the harm caused as a result, and the possibility or likelihood of further strikes. Another factor to consider would be the types of casualties incurred, whereas killing innocent non-combatants would be more difficult to justify than the killing of other known terrorists. The availability of more targeted means of attack can also play a significant role in determining whether civilian casualties were justified in terms of proportionality.222

Although a strong show of force may at times be necessary to discourage resistance on the part of offenders and ultimately protect life, proportionality requires consideration for enemy forces. Though the use of overwhelming force is militarily preferable for winning wars, the means and methods of warfare employed must not cause unnecessary suffering, as is usually the case of nuclear, biological or chemical warfare (NBC). While forceful state responses to terrorism may be stronger than the attacks initially motivating them, they must nonetheless be proportionate to the legitimate objective of preventing armed attacks. Striking indiscriminately at the assets of a state, or even its so called terrorist infrastructure, cannot be justified according to article 51 unless some protective objective is truly secured, especially when innocent civilians are killed.

Because proportionality under Humanitarian law is concerned mostly with the potential threshold for collateral injury to civilians, the intentional targeting of combatants often escapes the realm of proportionality beyond the concept of necessity. The proportionality requirement of article 51 self-defense, on the other hand, is more generally marked by the desire to strike a balance between the harm done and the harm to come. When a state

222 Dropping a one-ton bomb on a residential area or using helicopter rockets in such quarters instead of snipers or commandos would play against the targeting-state’s claim of proportionality of means.
is acting according to its legitimate right of self-defense, it must *carefully evaluate the amount of force necessary to achieve its defensive objectives*. Though it may not be obligated to grant individuals abroad all the protections expected in a domestic context, it must carefully weigh the effects of its actions and policies. In the absence of armed conflict, the use of overwhelming force is not always compatible with the concept of proportionality.

Proportionality then has become the cardinal rule in the battle against international terrorism. It requires government leaders to decide whether forceful measures are appropriate not based on their own political agendas, but on the lawfulness of using force in particular situations, notably when the impact on innocent civilians would not be disproportionate to the military advantage secured. While humanitarian law may ultimately contain the minimal standards for evaluating the lawfulness of international force, it is always preferable for states to accord whenever possible a higher degree of protection to civilian populations.

There are a number of additional factors that must also be considered at this point. Although civilian casualties may render policies of targeted killings unlawful, they may also be the most proportionate responses available. Targeted killings do not employ large number of troops. As opposed to costly and devastating military operations which affect entire populations, targeted killings are aimed only at those responsible for terrorist attacks. Major incursions into Palestinian territory in the spring of 2002 produced many civilian deaths, not to mention severe international condemnation. Although it is important that states retain their ability to mount military operations abroad for the purpose of arresting wanted terrorists, it may very well be that such endeavours jeopardise more lives than they can potentially save. Such may have been the case in 1989 when American troops inflicted heavy casualties to arrest Manuel Noriega, and surely when American troops attempted to arrest Somalia's General Aidid in 1993. In these cases, the use of clandestine abductions or targeted killings may in retrospect have been more proportionate responses.

There is also a growing jurisprudence to suggest that abductions on foreign soil (also known as forced arrests) may become valid measures of law-enforcement and self-defense, especially when those taken are treated fairly. With regards to international law and the UN Charter specifically, the factors that permit a state to use lethal force abroad against terrorists are almost identical to those permitting abductions. Unless the use of force is authorized by the Security Council, in both cases the impending violation of sovereignty will be justified only by a claim of article 51 self-defense. Although the subject-matter at hand is not abductions *per se*, the
issue necessarily emerges as it is often the only forceful alternative to targeted killings. In fact, it is almost impossible to deal with one measure without discussing the other, given that states must always detain individuals that are not resisting arrest, much like enemy soldiers that in war have laid down their arms or have been placed “hors de combat.” 223

Because terrorism is primarily a criminal matter involving individuals, abductions of foreign nationals may provide an effective alternative to conflict and impunity. Although the practice of kidnapping individuals is one of the worst forms of human rights violations, abductions may be extremely useful when confronted with hostile states that support or shelter terrorists from prosecution. Operations to detain or neutralize terrorists on foreign soil must nonetheless be based on sound legal reasoning, as has been proposed by courts in cases involving abduction. The arrest of war criminals by NATO forces in ex-Yugoslavia also provides evidence of the potential success for such international operations in the future, especially since interstate tensions have arisen from similar extraterritorial applications of national sovereignty in the past. 224

The difficulty of course is that abductions are illegal under international law and quite often a violation of extradition treaties. Nevertheless, if a state can declare war against another when confronted with prior hostilities, than undertaking in self-defense limited operations to detain or neutralize wanted terrorists on foreign soil is surely permissible. Just as targeted killings are less forceful responses than the waging of war, so abductions are less severe reactions to armed attacks than targeted killings. Yet before such operations can be accepted by the community of states and justified as self-defense, conditions similar to the following must be met to provide the legitimacy required of such forceful operations.

First, there must be sufficient evidence against an individual targeted for abduction to demonstrate participation in an ‘armed attack.’ Second, such evidence must be evaluated and considered sufficient for the emission of an arrest warrant. Third, the sanctuary-state prior to the operation must be given an opportunity to execute the arrest warrant itself, and failed to do so. A refusal, however, to prosecute or extradite based on a legitimate basis provided by law and ascertained by an impartial tribunal cannot be interpreted as a form of aggression or post facto complicity. Fourth, alternative peaceful means such as diplomatic initiatives or economic pressure

---

223 I like to refer to this principle as death interrupted, whereby a planned targeted killing is not carried-out because circumstances have changed and alternatives such as arrest or extradition have become available.

must first be exhausted, with no chance of success, unless a state of necessity requires immediate action. Fifth, the operation to abduct must respect humanitarian law, and further be conducted according to recognised standards of law-enforcement respectful of the right to life and dignity. Finally, a captured individual, once brought back to the victim-state, must be granted a fair trial with all the protections recognised as essential by civilised nations for a full and complete defense, including the right to appeal and seek redress.

When 'abductions' are treated as international arrests and executed as such, with due regard for life and the rule of law, they may truly be considered as valid measures of self-defense, especially when designed to avoid civilian casualties. In situations where peaceful alternatives such as diplomacy have failed to produce the desired results (i.e., extradition or prosecution of individuals suspected of armed attacks), it may be necessary for states to respond with force short of armed conflict. This is especially true when dealing with powerful states against which armed conflict or diplomatic pressures may lead to consequences that are disproportionate to the intended benefits. Violating another state's sovereignty to capture and obtain custody of an alleged criminal may be as politically imprudent as it is unlawful in the absence of a right in self-defense. Though undemocratic, perhaps the accommodation of law to state power makes sense in the area of foreign abductions.

The practice of abducting criminals on foreign soil is not without precedent. As Justice Holmes stated: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing a cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." In *Alvarez-Machain*, the United States Supreme Court held that a district court had jurisdiction to try a criminal defendant that had been abducted, even from a nation with which the United States had an extradition treaty. The Israeli Supreme Court also provided evidence in support of abductions in *Attorney General v. Eichmann*. It stated:

Even if [an extradition] agreement existed between the two countries but the offender was not extradited to the country in accordance therewith—the Court will not investigate the circumstances in which he was detained and brought into the area of jurisdiction.

---

225 Supra, note 224 (Bush).
Although *Alvarez-Machain* critics might argue that no judicially imposed limits remain to restrict the conduct of government agents acting abroad, this is clearly not the case. Courts that are confronted with cases of governmental abuse can look to the *Toscanino* exception fashioned by the U.S. Second and Ninth Circuits which created an exception to *Ker-Frisbie* and *Alvarez-Machain* for government actions that “shock the conscience,” such as torture. 229 The ‘Toscanino exception’ can reflect the above requirement that operations to arrest individuals be planned and executed according to recognised standards of law, all the while ensuring that violations by the state will be sanctioned.230

Abductions, like targeted killings in the absence of armed conflict, can be unlawful when the right to life is violated, but only to the extent that governments and courts are willing to bind themselves to such requirements. In the end, the manner in which a defendant is brought to stand trial does not determine whether a crime has actually been committed or whether punishment is warranted. As such, a fair trial and respect for human rights in the course of abductions may provide the best form of protection against impunity and armed attacks, as well as a reasonable alternative to targeted killings.231 Although they violate international law and are morally distasteful, international abductions are surely a lesser evil to extrajudicial executions.

With any forceful operation to arrest or neutralise terrorists comes the risk that international peace and security will be further endangered, causing more bloodshed and suffering than was originally sought to avoid. While the security environment may have evolved significantly since 1914, it was after all the assassination of one man—Archduke Franz Ferdinand—which triggered the First World War. Though democratic states may not be inclined to use the full measure of war to vindicate the rights of one person, it is not unreasonable to believe that some states may still be ready to do so if their leaders are assassinated.232 If neutralising one dangerous

---

230 In addition, a court may choose to invoke the supervisory power doctrine which is “designed and invoked primarily to preserve the integrity of the judicial system” and “to prevent the federal courts from becoming accomplices to government misconduct,” see: Arthur E. Shin, “On the Borders of Law Enforcement- The Use of Extraterritorial Abductions as a Means of Attaining Jurisdiction over International Criminals” (1995) 17 W.L.R .327.
231 Article 14 of the *International Convention International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on 15 December 1997, reads: Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.
232 The United States, for example, used military force (cruise missiles) against Iraqi intelligence for the assassination attempt on former president Bush Sr. in 1993.
terrorist or head of state can save a limited number of lives, but at the same time lead to a full-scale armed conflict in which thousands—or millions, will perish, there are obviously good reasons to forego such killings.

Although it is the distinction requirement, or noncombatant immunity, that prohibits the intentional targeting of civilians, it is the proportionality requirement that provides in the context of counter-terrorism the best form of protection against civilian casualties. Ironically, it also provides the required authority to kill a few in seeking military advantages. If targeted killings are not undertaken for protective advantage, then describing them as ‘proportionate’ will not be appropriate as they are unnecessary. And if the use of targeted killing results in a disproportionate number of civilian casualties with regard to the protective advantage secured, then such measures will certainly fail to meet the proportionality test of article 51.

B) Security Council Notification

The final requirement of article 51 is of a procedural nature. It demands that the use of armed force by states in self-defense be reported to the Security Council. This being said, one might imagine that every state using force internationally would immediately attempt to legitimise its infringement of article 2(4) by informing the Security Council of its actions, since it would have little to lose. The fact is, however, that states rarely inform the Security Council of their actions despite claims of resorting to self-defense, thereby preventing any timely debate and response.233 Though increasing pressures to prohibit the use of unilateral force may compel nations to notify more frequently the Council in the future, especially when stretching the allowable boundaries of self-defense, covert operations to “arrest or neutralise” terrorists on foreign soil are seldom revealed.

Given that any use of force on the territory of another normally implies a violation of sovereignty, targeted killings by states must also be signalled to the Security Council. While they may be justified as necessary and proportionate measures of self-defense, targeted killings must nonetheless meet the notification requirement. Not doing so may not automatically render targeted killings unlawful, but it may strongly indicate such a possibility. A failure to notify constitutes a clear violation of a state’s international obligation under article 51.

of the UN Charter, which can further be noted in resolution by the Security Council, and whenever appropriate
or politically feasible, sanctioned as well.

In theory, if the Council has already taken measures to restore international peace and security, a state cannot
do so. The Charter as a collective security system has turned self-defence into a sort of interim measure,
whereas a state may forcefully assume its own defense only until the Security Council is able to do so. The
problem, of course, is that an effective system of collective security capable of responding to threats to the
peace has yet to emerge. When the Council is unwilling or unable to intervene, states are often left alone to
defend themselves against armed attacks. And when the Council has simply taken note of a situation or
condemned a particular attack, it may have taken measures of sorts, but not necessarily taken measures to
restore international peace and security.

With the site of the bombings only a few blocks away from the East River building, the Security Council
discussed the terrorist attacks and on September 12th, 2001, unanimously adopted Resolution 1368 in less than
half an hour. Two weeks later, the Security Council adopted another, longer resolution, Resolution 1373, on the
“threats to international peace and security caused by terrorist acts.” Did the Security Council thereby take
“measures necessary to maintain international peace and security?” On the one hand, the Council undeniably
adopted measures of sorts. Although Resolution 1368 was particularly weak on effective operative clauses, the
same cannot be said of Resolution 1373, which contemplated a whole series of immediately applicable
measures, including the freezing of terrorist assets and the creation of a committee to monitor anti-terrorist
cooperation and the implementation of the resolution.

While nothing in the Charter suggests that only military measures are adequate to deal with armed attacks and
threats to international peace and security, the need to respond in Afghanistan with the use of force was perhaps
necessary, at least in the short term, to disrupt Al-Qai’da and overthrow the Taliban. Though it passed a number
of resolutions and declared itself ready to authorise further action if needed, the Council did not take immediate
action, or any action at all, directed against the perpetrators of the bombings. The United States was thus forced
to assume its own defense in order to compensate for the Council’s shortcomings or lack of interest.

In the case of operations to rescue nationals or to arrest and neutralise terrorists responsible for armed attacks,
there is little doubt that the Security Council is the only body with the necessary authority to undertake such
missions internationally. When forceful actions involve a cross-border dimension, international forces would obviously be best suited to undertake operations of this type. Terrorism, after all, is a threat to international peace and security, as well as democracy. But considering the low probability of such cooperation, victim-states will in all likelihood be forced to undertake such missions unilaterally for quite some time. The obligation to report these, even after the fact, will nevertheless be in order.

It is likely, still, that operations on foreign soil to arrest or neutralise individuals will not be signalled to the Security Council, so as to prevent international censure of such actions. The Council in this sense must be sensitive and understanding of the legitimate security needs of states, which may include the need to use force abroad to accomplish legitimate enforcement tasks that form an integral part of self-defense. When the Security Council fails to recognise, as it often has in the case of Israel, that some situations require victim-states to use force abroad to protect their nationals, they discourage any constructive analysis of the lawfulness of each use of force, as it has been determined in advance that every forceful response will be condemned on mostly political grounds.

The inherently political nature of the Security Council may not render it the most ideal forum to establish the lawfulness force, as an independent tribunal would assuredly provide an infinitely more objective assessment, yet for the moment it remains the only truly international body capable of making such judgements and acting upon them. While its structure is reflective of outdated realities as demonstrated by the highly concentrated and absolute power of the veto, it is empowered by the international community to respond with force when necessary to ensure peace and security. However diluted and politicised the Council may be, it is essential that it be informed of the use by states of unilateral force in their defense. It is a precondition imposed by the Charter, as it serves to recognise the Council’s primary jurisdiction over such matters. Ultimately, the best way for states to legitimise their enforcement operations abroad is to inform the Security Council of their actions, and to comply in the course of their responses with international standards of law, particularly regarding the use of military force on foreign soil and the applicable standards concerning the use of deadly force in peacetime.

Evidently, states using force clandestinely to rescue, arrest, or neutralise individuals on foreign soil would likely prefer to keep such operations unknown. This is understandable, as notification to the Security Council would inevitably lead nations that have been trespassed to learn of such activities, making it more difficult in the future for victim-states to perform such missions. Having such information made public also obliges these
countries to show strength and save face, making an escalation of tensions more likely. Somewhere between the need for disclosure and concealment lies a point of equilibrium; some operations will likely be kept hidden for a number of years, while other less sensitive endeavours in hostile countries will not require the same level of operational secrecy. The monitoring and documentation of such operations domestically, or perhaps within regional organisations, is thus equally if not more important than revealing their occurrence to the Security Council. Keeping a detailed record of operations and the reasons justifying them can ensure accountability and lead to the subsequent notification of their occurrence.

As a last resort, it is important that states be able to undertake operations to rescue, arrest, or target individuals when necessary to protect life and prevent armed attacks. It is not practical or legally defensible in a modern world to prohibit absolutely states from acting abroad to defend their essential interests. To the extent that enforcement measures on foreign soil can sometimes amount to acts of self-defense, it is crucial to acknowledge their potential lawfulness, so that international consensus can emerge as to what constitutes proportionate armed responses to international terrorism against individuals outside the context of armed conflict. A complete disregard towards this aspect of self-defense, which on a scale of state prerogatives is still lesser than the right to wage war, will only invite states to act secretively and increase the odds that in the process both individual and state rights will be violated.

To the living we owe respect
But to the dead we owe the truth

- Voltaire
CHAPTER III. SECURITY AND INTERVENTION IN A WORLD OF SOVEREIGN STATES

It is time that nations, like men, should emerge from the wild state of nature, and contract to keep the peace. The whole movement of history is the ever greater restriction of pugnacity and violence, the continuous enlargement of the area of peace.

– Immanuel Kant

I. State Duties and International Security

A) From Humanitarian Intervention to Counterterrorism

When governments fail to uphold their basic duties and attacks are perpetrated or left unpunished as a result, the concepts of sovereignty and non-interference will not prevent victim-states from taking action abroad against those responsible. Given the degree to which sovereignty in the last decade has been redefined to accommodate equally important interests such as security and human rights, there can be little doubt that states plagued by international terrorism will not hesitate in the future to use force when necessary to protect the lives of their nationals. Because this study pertains to the enforcement standards that states must adhered to when using force against individuals on foreign soil, it is important to recognise from the outset that forceful interventions may in some cases be justifiable. In fact, studying the rights and standards of law applicable to foreign enforcement action presupposes that governments have the right, at least in some cases, to move against individuals on foreign soil.

The previous Chapter came to a similar conclusion with regard to the requirements of self-defense, while the present Chapter will also look at state responsibilities and the impact of supporting terrorists. The first section will examine the issue of intervention, as it somehow underlies every operation conducted by states on foreign soil, and the corresponding right of each state to use force in self-defense to protect its nationals from harm. It will discuss the concept of sovereignty in light of state duties, and put forth the idea that states can only be sheltered from foreign interference to the extent that they respect human rights and forego aggressive conduct. The second portion will study the governing enforcement standards for the protection of nationals through actions taken abroad, as well as discuss the inherently divisive impact of using intentional killings without safeguards in the absence of armed conflict.
During the cold war, most international attempts to enforce peace and human rights, save perhaps in Korea, were abandoned for fear of the great powers, especially in their spheres of influence. National authorities, however illegitimate, were thus free to violate human rights and acquiesce to the presence of terrorist elements on their territories with little fear of reprisal. In a world of competing ideologies, communism and capitalism could not coexist, nor could authoritarianism and democracy, unless international law granted every state an equal and nearly absolute right to sovereignty. In the absence of an effective supranational ruling body or even a common enforceable ideal of justice, it was essential that states be forbidden, in light of their sovereign equality, to use force against one and other save in their defense. Non-interference emerged therefore as a reactionary response to a quest for peace, a middle-of-the-road approach as it were.

The bipolar power structure that once prevented foreign interference has since dwindled, thereby exposing abusive regimes to the reality of intervention. Yet the notion that states, like individuals, are expected to forego conduct that is harmful to others has always existed. State rights and duties, much like individual rights and duties, essentially map-out a set of firm commands and prohibitions, or deontological side constraints, on how state’s can behave in relation to one and other. The state exists as a moral person, which is a negatively free rational agent, capable of making choices between alternative courses of action, and of being held responsible for the character of those choices. Essentially, states have minimal constraints set upon them so as to allow others to live free of violence and oppression.

Democratic societies built on freedom have always attempted to strike a delicate balance between individual liberty and collective well being. This process has been the impetus behind all the civil rights movements since the Magna Carta, the driving force behind the international community’s efforts to eradicate aggression and human rights violations, as well as its efforts to establish the Law of State Responsibility. As governments adopt policies (such as targeted killing) that may subject their own populations to the forceful actions of foreign powers, this same process is now being lived not in isolation between nationals, but between all citizens and governments of the world alike.

234 Which was, in any event, only made possible by the U.S.S.R.’s absence from the Security Council (to boycott its unwillingness to recognize China’s new revolutionary government under chairman Mao TseTung).
The Kantian thesis challenged the widely held view that states, not individuals, are the basic subjects of international law. This view, statism, is responsible for the development of the theory of effective power, that is, the insistence that a government is internationally recognised when it rules effectively over a territory. This is not understood by international lawyers simply as a necessary condition of legitimacy, but a necessary and sufficient condition. The government presents its foreign policy to the outside world, and outsiders treat it as the official policy of the state, regardless of whether the government really represents the people on whose behalf the policy is pursued. Yet the theory of effective power cannot be defended under any plausible legal, moral, or political theory. Any theory of law has to distinguish between naked political power and legitimate authority, between purely physical coercion and justified coercion.

According to this statist view, state sovereignty is an all-or-nothing concept that only collapses when a state is the target of a just war. Every other form of intervention that entails some degree of coercion is prohibited, even when the governing authority violates the rights of individuals or endangers the security of other states. Sovereignty, however, encompasses the right of states to “freely determine, without external interference, their political status and to pursue their economic, social and cultural development.” Sovereignty is not an all-or-nothing concept, nor is it an autonomous and self-sustaining moral principle, in which states are equally protected by virtue of their statehood. It does not provide an absolute right to exist without due regard for other members of the community. Sovereignty is rather an instrumental concept linked to human rights, both individual and collective, through which people unite to administer their relations and security.

In situations where the central authority of a state negates its duty towards individuals or the international community, the moral reasons supporting an act of intervention compete against the moral reasons that support sovereignty, and the result cannot be determined in advance. In short, sovereignty shields a state from intervention only to the extent that it is willing to respects human rights and the laws of peace. A government that systematically violates human rights, or engages in unlawful behavior that is harmful to others, cannot rely on the dictates of sovereignty to shield it from foreign interference.

236 Supra, note 235, p.39.
239 Supra, note 235, p. 40.
In all cases, sovereignty implies responsibility. At a minimum, the governments of every nation share two common duties: to serve the populations they govern, and to protect from attack the states with whom they coexist. This implies that “national political authorities are responsible to the citizens internally and to the international community through the UN, and it means that the agents of the State are responsible for their actions; that is to say, they are accountable for their acts of commission and omission.” Though some governments ignore whenever possible the requirements of human rights law domestically, the majority of states have accepted, at least in theory, the obligation to respect the fundamental rights of their nationals. It is rather on the issue of accountability towards foreigners, and the international community in general, that most nations are stalling.

Measures such as targeted killings illustrate this phenomenon. Intentional killings in peacetime have always been unlawful, and yet states are resorting to such measures without the necessary safeguards to avoid arbitrary deprivations of life, as prohibited by international human rights law. While most democratic governments do not use mercenaries to kill in a systematic manner the individuals that threaten their security, some have already admitted to doing so, and thus others are undoubtedly considering similar initiatives. As governments worldwide begin to view targeted killing as a possible remedy in their fight against international terrorism, nations that once were expected to always uphold the rule of law now strive only to do so domestically, or perhaps selectively, with the foreigners of particular states.

Traditionally, forceful intervention at the national level has been discussed under the banner of humanitarian intervention or the protection of nationals abroad. Humanitarian intervention is based on a desire to enforce human rights in a foreign jurisdiction, whereas the protection of nationals abroad involves just that: the use of force to defend the nationals of a given state on foreign soil. The legal justification for humanitarian intervention is distinct and more controversial than the one permitting the rescue of nationals abroad. Humanitarian interventions seek to uphold human rights in general, irrespective of nationality, while the rescue of nationals abroad is grounded on the inherent right of self-defense. As the only permissible ground for unilateral intervention, self-defense provides states with an actual right to use force abroad, whereas humanitarian intervention forces intervening states to rely on the proposition that “force used to protect human

---

life in situations where wide-spread violations of human rights are occurring is fully consistent with the Purposes of the UN, and therefore not incompatible with articles 2(4) and 2(7)."^241

There is, of course, little disagreement on the legitimacy of humanitarian intervention when it is undertaken at the request of the territorial state, or authorised by the UN in the context of a peace-keeping/making operation. The controversial question is whether intervention can be undertaken by states under a claim of right, without consent or UN authorisation. According to the UN Charter and the present state of international law, there is seemingly no such right in positive law. 242 Numerous scholars and nations alike maintain that unilateral interventions are impermissible as the use of force will always have political features. 243 Even its advocates recognize that under international law it is a doctrine highly susceptible to abuse. The prohibition against intervention must not, however, be extended to allow a state to abuse its nationals or neighbours; the purpose of the rule is simply to prevent states with ill motives from interfering.

Accordingly, most proponents condition their support by requiring that humanitarian intervention be free of political motivation. States not acting under the auspices of the United Nations or regional organizations must accordingly bear a higher standard of proof regarding their intentions. Intervention must further be narrow in scope and limited in purpose, and comport with all international prescriptions governing the use of force. When a state is unable or unwilling to protect the individuals within its territory, as required by its obligations inherent to sovereignty, concerned nations may have a right to intervene in order to do so. Although nations are still debating the legitimacy of humanitarian intervention, the fact that various states and scholars are studying how and when it should be exercised, and under whose authority, is a strong indication that sovereignty is no longer the absolute right that it once was. 244

^241 Derek W. Bowett, "The Use of Force for the Protection of Nationals Abroad," in Ed. Antonio Cassesse The Current Regulation of the Use of Force, (Dordrecht: Martinus Nijhoff Publishers, 1986), p.50; Article 2(7) states: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state... (Supra, note 1, 2(7)).
^242 For a review of literature on humanitarian intervention, see Penelope C. Simons, Project Ploughshares, found online at http://www.ploughshares.ca/content/MONITOR/mond00a.html, last visited 18 August 2003.
^243 A similar situation has been developing in the context of humanitarian intervention, whereas weaker nations are expected not to engage in human rights violations while larger states do so with impunity. See: Noam Chomsky, "Nato, master of the world" (May 1999) Le Monde Diplomatique; Paul-Marie De la Gorce, "Behind the Rambouillet talks" (May 1999) Le Monde Diplomatique.
^244 The Canadian Foreign Affairs minister was quoted as saying: "Clearly, we believe that there are circumstances that do justify the global community interfering in the internal affairs of States [...] and we’re getting closer to that with Iraq’s refusal to allow weapons inspections." From “Inside out Policy,” The Gazette, Rick Mofma and Janice Tibbets, 13 August 2002; “Morality bombing. What is war for? And should we have done it,” The National Post, Micheal Ignatieff and Robert Skidelsky, 18 April 2000.
It is also a fact that humanitarian interventions have occurred, as in Panama, Haiti, Somalia, Bosnia and Kosovo, and that much controversy has arisen from the community’s failures to effectively intervene in Rwanda or Srebrenica.\textsuperscript{245} This being said, there is a strengthening opinion internationally that when faced with clear evidence of a state’s inability or unwillingness to protect the rights of its nationals, the International community may have a duty to intervene to prevent wide-scale human rights violations.\textsuperscript{246} Considering that a state may have the right, or even the duty, to intervene on foreign soil to protect from harm individuals that are not its nationals, it can, \textit{a fortiori}, intervene to protect the rights of those that are.

When the governing authority of a sovereign country is incapable or unwilling to put an end to terrorist attacks, or is itself involved in their perpetration, a state whose nationals are attacked can, as in the case of humanitarian interventions, also ground its right to intervene in the sanctuary-state’s failure to fulfill its ‘responsibility to protect.’ By failing to establish a sense of law and order over their entire territory or by providing assistance to terrorists, a number of states are also failing to uphold their ‘duty to protect’ towards other members of the international community. In its report to the General Assembly, the International Commission on Intervention and Sovereignty (ICIS) defined the ‘responsibility to protect’ as “the idea that sovereign States have a responsibility to protect their citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”\textsuperscript{247}

Although targeted killings are being justified as self-defensive measures against terrorism, the foundations for the ‘responsibility to protect’ used to justify humanitarian interventions can also serve to justify targeted killing, especially when states that were not attacked are involved in pursuing those responsible. Beyond the relativity of sovereignty, which is common to both humanitarian intervention and the protection of nationals abroad, there are several concerns pertaining to the use of force that were also stated by the ICIS:

\textsuperscript{245} Frontline: the triumph of evil. The following website summarises the international community’s failure to intervene in Rwanda to stop the genocide, and more particularly the UN’s response to Romeo Dallaire’s plea for help, found at http://www.pbs.org/wgbh/pages/frontline/shows/evil/warning/, last visited 18 August 2003; “Dutch government accepts blame for Srebrenica massacre,” \textit{The Gazette}, Bruce Wallace, 17 April 2002, A17. The government’s resignation in light of this tragedy may not have been necessary, but it takes a ‘big government’ to take responsibility for one’s actions, or lack thereof.

\textsuperscript{246} \textit{Supra}, note 240.

\textsuperscript{247} \textit{Supra}, note 240, p. VIII.
While for the reasons stated we have not—except in passing—addressed in the body of our report the issues raised by the 11 September attacks, there are aspects of our report which do have relevance to the issues with which the international community has been grappling in the aftermath of those attacks. In particular the precautionary principles outlined in our report do seem to be relevant to military operations, both multilateral and unilateral, against the scourge of terrorism. We have no difficulty in principle with focused military action being taken against international terrorists and those who harbour them. But military power should always be exercised in a principled way, and the principles of right intention, last resort, proportional means and reasonable prospects outlined in our report are, on the face of it, all applicable to such action.248

These requirements concerning the use of military force are grounded in just war theory as expressed by humanitarian law. They pertain to situations where states are intervening, either unilaterally or collectively, against the sovereignty of others. They do not specifically address the norms that must be respected by states in their use of force to “arrest or neutralise” terrorists on foreign soil in the absence of armed conflict. They do however represent the guiding principles that regulate the use of all international force by states, which must also be adhered to when resorting to targeted killing. Subjective as they may be, the principles of right intention, last resort and proportional means will ultimately serve as the decisive factors in assessing the lawfulness of using force, perhaps bringing civility where there is none, even in the realm of ‘assassination.’

The 1976 raid at Entebbe, Uganda, which involved the rescue operation of mostly Israeli citizens following the hijacking of an airliner and its passengers by the Palestinian Liberation Army, is a striking example of a state exercising its right to use force on the territory of another in response to an armed attack, in light of that state’s unwillingness or inability to rescue those attacked. Because the highjackers were not agents of the Ugandan government, the above distinction would seemingly require Israel to have based its intervention on the principle of necessity. Yet when the Ugandan government failed to respond to the unlawful violence, it became indirectly responsible for the attack and an accomplice after the fact. Israel was thus forced to respond to the ‘armed attack’ according to its right of self-defense in light of Uganda’s failure to do so.

Since the doctrine of humanitarian intervention lacks universal support, targeted killing also runs a high risk of being labelled assassination or unlawful use of force. Yet just as humanitarian intervention can be justified in extraordinary cases in light of a state’s failure to protect individuals, it is equally arguable that targeted killings may be justifiable when necessary for the protection of life and other essential interests under similar circumstances. When confronted with hostile states that provide support for armed attacks against civilians, targeted nations cannot remain indifferent since doing so would only invite further aggression. Though

248 Supra, note 240, p. IX.
enforcement operations by a state on the territory of another can amount to violations of sovereignty, such actions may nonetheless be justified as necessary self-defensive responses to international terrorism. States that fail to respect the laws of peace cannot expect concerned members of the international community to forego necessary forceful interventions, especially in response to 'armed attacks.'

B) Providing Assistance to Terrorists and Refusing to “Prosecute or Extradite”

A basic tenant of international law is that states have a duty to protect other states from acts of terrorism that emanate from their territory. Expressed in United Nations Law and reinforced by the law of State Responsibility, it flows naturally from the principle that states shall refrain in their relations from the threat or use of force against other states. Having the obligation to protect members of the community from armed attacks, countries that sponsor or support terrorists may themselves be liable for their actions. In the face of potentially devastating security threats, the belief that states do not incur responsibility for intentionally supporting terrorists is false. Providing assistance or safe-harbour to individuals that commit terrorist attacks against other states is prohibited.

State-sponsored terrorism does not fit easily into the categories of individual or state terrorism, as it is a combination of both. As the name suggests, acts of terrorism that fall under this category are directed or encouraged by states, usually as a form of surrogate warfare. They allow countries to strike at their enemies in a way that is relatively inexpensive and less politically risky than direct military confrontation. The degree of state participation may vary significantly, in that terrorists may be tolerated, supported, or sponsored, ranging from the supply of arms and travel documents, to the providing of financial assistance and military training. Although any aid or support provided to terrorists by states may confer sufficient grounds for self-defensive action, the type or degree of support provided must undoubtedly be factored into any response, especially one involving the threat or use of force.

Because access to the resources of a state can greatly enhance the destructive potential of a terrorist group, those that acquire such support seldom reveal their sources. States have a strong interest in keeping such information unknown, given that outright evidence of such support can entail State Responsibility and provide

---

249 Supra, note 238.
a basis for defensive military action. Since a transparent relationship between terrorists and the states that support them is predictably uncommon, the elusive quest for the traceability of terrorist actions to their state sponsors is emerging as a primary and paramount consideration of international law.\textsuperscript{250}

In the case of operations to rescue nationals abroad, a distinction according to Bowett must be made between those situations in which \textit{a state or its agencies is somehow responsible} for the danger posed to a country's nationals, and situations where the territorial state could not with reasonable diligence have acquired control over it. The distinction does not alter the fundamental \textit{right to protect}, given that clear evidence of danger to life exists. It does, however, alter the legal basis for action, whereas threats emanating from non-governmental sources trigger not a right of self-defense, but of necessity. An 'armed attack' against a state's nationals cannot be considered 'aggression' if its perpetrators are not agents of a state. This is for the "largely technical reason that the acts of non-governmental parties—mobs, hi-jackers, terrorists, mutineers or whatever—are not \textit{per se} breaches of international law. There is therefore no \textit{delict} in response to which a state can invoke its right of self-defense."\textsuperscript{251}

States are responsible for the unlawful acts of their agents, but also for those acting under their instructions. Article 8 of the Law of State Responsibility concerning internationally wrongful acts states: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, the State in carrying out the conduct."\textsuperscript{252} A terrorist attack can therefore be imputable under the Law of State Responsibility to a state if it exercised \textit{effective control} over those forces responsible for the attack. What seems necessary, therefore, is some kind of advance knowledge of the attacks, and the reference to 'instructions' seems to reflect precisely that kind of minimal link.

This is what led, for example, to American claims of Libyan responsibility for the 1988 bombing of Pan Am Flight 103 over Lockerbie, as the individuals accused were members of the Libyan intelligence services. The Security Council in 1992 imposed economic sanctions on Libya for its connection with terrorist activities and for its refusal to extradite the two Libyan suspects. The pertinent Resolution stated: "\textit{Every state has the duty to}

\textsuperscript{251} \textit{Supra}, note 241, p.43. The requirement of a prior \textit{delict}, as a precondition to a right to use force in self-defense, is essential. Article 51 refers to the concept of 'armed attack', which represent essentially a form of 'armed delict' among nations.
\textsuperscript{252} \textit{Supra}, note 185, art.8.
refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force."\textsuperscript{253} The above formulation, it must be noted, clearly condemns the act of instigating or providing assistance to terrorists, without discussing the issue of effective control. It is worth noting that in an attempt to settle outstanding claims and overcome UN sanctions, Libya has finally claimed responsibility for the crash.\textsuperscript{254}

According to the International Court of Justice in the \textit{Nicaragua case}, merely financing, organising and assisting non-state actors does not "warrant the conclusion that these forces [were] subject to the United States to such an extent that any acts they have committed are imputable to that State."\textsuperscript{255} While the Court was right in declaring that without 'effective control' or 'advanced knowledge' a state cannot be deemed the author or aggressor of an attack, it can nonetheless be held responsible for its support as an accomplice or accessory after the fact. States have a general duty to carry out prevention of terrorism by "due diligence," which means that all reasonable measures must be taken to prevent acts of international terrorism that emanate from their jurisdiction. Governmental failures on this level that lead to the perpetration of terrorist acts against other nations will clearly engage their responsibility, even if those carrying-out the attacks are not acting under their "effective control."

States that provide assistance to terrorists that attack other nations are themselves responsible for their actions and thus committing aggression, albeit indirectly. States that do not provide direct support to terrorists but nonetheless fail to act when aware of impending attacks or the presence of wanted terrorists on their territory may also incur responsibility and be held responsible for their choices, as such failures rise beyond the level of gross negligence to intentional omission. Under the Law of State Responsibility, liability can be imputed in various contexts where there exists an internationally imposed duty that is violated, as is the case when states fail to exercise reasonable care to prevent the commission of illegal acts against other states, to punish those who commit them, and to exact reparations. Article 12 of the Law of State Responsibility for internationally

\textsuperscript{255} \textit{Supra}, note 100, at 119.
wrongful acts states: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character." 256

A failure then by state to respect the obligations inherent to sovereignty and set out in various UN documents can signal a breach of international law. In regards to attacks not specifically committed by state agents, the General Assembly's definition of Aggression still refers to actions of 'groups' as long as these are sent by or on behalf of a State and their attack is the functional equivalent of one carried out by regular forces.257 Under international law, states have a general obligation not to engage in activity that involves the threat or use of force against others, including the support of armed clandestine action. The General Assembly, in its Declaration on Friendly Relations, clearly held that:

Every State has a duty to refrain from organising, instigating, assisting, or participating in ... terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts. 258

On this, Hersch Lauterpacht held:

International law imposes upon the state the duty of restraining persons within its territory from engaging in such revolutionary activities against friendly States as amount to organised acts of force in the form of hostile expeditions against the territory of those States. It also obliges the State to repress and discourage activities in which attempts against the life of political opponents are regarded as a proper means of revolutionary action. 259

Emmerich de Vattel went even further by suggesting quite accurately that states and the international community in its entirety have a right to use force against others that support terrorism:

If, then, there is anywhere a nation of relentless and mischievous disposition, ever ready to injure others, to traverse their designs, and to excite domestic disturbances in their dominions, it is not doubted that all others have a right to form a coalition in order to repress and chastise that nation, and to put it for ever out of her power to injure them. 260

Whether assistance is intentionally provided to terrorists by states, or whether they simply remain indifferent to their presence, any act or omission by a state that leads to the perpetration of armed attacks against another can trigger its responsibility. When evidence can show that a nation has provided support to individuals or groups

256 Supra, note184, article 12.
257 Supra, note 138 (RES/3314).
258 Supra, note 238.
responsible for acts of terrorism in violation of its international obligations, there is no reason why it should not in some way be held accountable, even if it had no prior knowledge of an armed attack. It is also interesting to note that a failure of this type, which concerns a violation of the Law of Peace, can be owed according to article 33 of the Law of State Responsibility to the international community as a whole.261

There is also a growing sense that a failure to "prosecute or extradite" individuals responsible for serious crimes (such as the murder of innocent civilians) may also amount to a breach of international law incurring state responsibility. A state that has not provided direct support to terrorists prior to an attack may nonetheless provide indirect assistance after the fact by using its sovereignty to shelter them from prosecution. When sanctuary-states refuse to prosecute or extradite individuals within their territory that are responsible for terrorist attacks against innocent civilians, they are undoubtedly committing an international delict. While such states may not have exercised 'effective control' over those responsible for the attacks, they may well become accomplices by way of indirect aggression.

The expression aut dedere aut judicare (extradite or prosecute) is a modern adaptation of a phrase used by Grotius: aut dedere aut punire (extradite or punish). The first treaty imposing such an obligation was the Convention for the Suppression of Counterfeiting of 1929.262 In the Counterfeiting Convention, a distinction was drawn between individuals who committed offences abroad depending on their citizenship. States that refused to extradite their own nationals were expected to prosecute them at home. In the case of non-nationals, they were expected to prosecute them only if their internal legislation recognised as a general rule the principle of prosecution of offences committed abroad. This distinction made it possible for states to grant de facto immunity or asylum to persons wanted abroad, under the political offence exception.

The expression was subsequently drafted in a series of agreements that imposed the obligation to extradite or prosecute, including the Convention on Illicit Traffic in Dangerous Drugs of 1936,263 the never adopted Convention on Terrorism of 1937,264 the Convention on Traffic in Person of 1950,265 the Convention on

261 Supra, note 184, article 33 (see also article 48(b))
263 Convention on the Suppression of Illicit Traffic in Dangerous Drugs, 26 June 1936, 198 L.N.T.S. 299.
Narcotic Drugs of 1961, the Convention on Psychotropic Substances of 1971 and, to some extent, the Vienna Convention on Traffic in Narcotic Drugs of 1988. A different and quite stronger version of the obligation to extradite or prosecute appeared in the four Geneva Conventions of 1949. Contracting Parties were required to "search for" persons alleged to have committed acts constituting "grave breaches" of those Conventions and to "bring such persons, regardless of their nationality, before its courts," or else hand such persons over for trial to another High Contracting Party concerned.

A somewhat different formulation is contained in article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. This formulation requires the state in which an alleged offender is found to extradite the suspect to a state territory which has jurisdiction over the offence (such as the state of registry of a hijacked aircraft), or, if it does not extradite, "to submit the case to its competent authorities for the purpose of prosecution." This formula is also used in the Montreal Convention on Unlawful Acts Against the Safety of Civil Aviation of 1971, the New York Convention on Crimes Against Internationally Protected Persons of 1973, the Hostages Convention of 1979, the Convention on the Physical Protection of Nuclear Material of 1980, the Torture Convention of 1984, the Rome Convention on the Safety of Maritime Navigation of 1988, and the Mercenaries Convention of 1989. Variants appear in the OAS Terrorism Convention of 1971, the European Terrorism Convention of 1977, and the OAS Torture Convention of 1985. With the
exception of the *Apartheid Convention*\(^{281}\) of 1973, a version of the 1970 Hague formula appears in practically every subsequent multilateral treaty requiring the repression of an international offence.\(^{282}\) The relatively recent *International Convention for the Suppression of terrorist bombing*, for example, uses unambiguous language in article 8.1:

The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.\(^{283}\)

As traditionally defined, customary international law is composed of rules of conduct generally observed by states in their mutual relations and regarded by them as legally binding. There must be a general state practice and it must be recognized by them as law. Both elements are essential.\(^{284}\) Rules that states do not generally follow, as was sometimes the case of *aut dedere aut judicare*, would not normally qualify as rules of customary law. Humanitarian norms of international law, however, have been 'universalised' as customary rules with only marginal consideration of state practice.\(^{285}\) Such was the case at the Nuremberg Tribunal for war crimes and crimes against humanity. The same can also be said about the International Court of Justice's finding in the Nicaragua judgement that common article 3 was declaratory of international custom when it stated: "Essentially, principles deemed deserving of recognition as positive law by the international community have become such even in the face of inconclusive or contrary state practice."\(^{286}\)

The universal condemnation of terrorism coupled with the reiteration of the "extradite or prosecute" formula in numerous agreements may in fact serve to indicate the emergence of a general obligation of customary

---


\(^{284}\) *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) I.C.J. Report, 1969, p.3; *Case Concerning the Continental Shelf* (Libyan Arab Jamahiriya v. Malta) I.C.J. Report 1985, p. 29-30; *Supra*, note 100, par. 184; *Supra*, note 2, p. 51.


\(^{286}\) *Supra*, note 100, at 114.
international law, either with respect to 'particular treaty offences, with respect to a class of international law offences, or with international offences as a whole'.\textsuperscript{287} Though it is perhaps too early to claim that the obligation to extradite or prosecute suspected terrorists is representative of international customary law, a number of humanitarian law offences such as aggression, genocide, war crimes and crimes against humanity require that states respect this obligation, without which these offences would go unpunished. Like piracy, these crimes have been so universally condemned that nations have agreed to outlaw them and provide universal jurisdiction over them.

When considered as a whole, it is becoming increasingly clear that terrorism—including hostage taking, kidnapping, terrorist bombing, hijacking and sabotage of civil aircraft (or any other violence against innocent civilians)—can also trigger the \textit{universality theory of jurisdiction}.\textsuperscript{288} Though we may still be "in a twilight zone between no international criminal law and a fully-developed international criminal law," terrorism consists of acts universally condemned as common crimes by every civilized society.\textsuperscript{289} Since terrorism involving the killing of non-combatants is undoubtedly contrary to international law, the corresponding obligation to prosecute or extradite individuals responsible for such attacks is also paramount.\textsuperscript{290} As early as 1975, Irish Attorney General Mr. Costello remarked that, of all possible methods for ensuring that international offenders are brought to trial, the obligation to extradite or prosecute seemed to be "the one which the international community favours."\textsuperscript{291} Nevertheless, the shortcomings of international criminal law are well expressed by Robert Friedlander:

\begin{quote}
The difficulties of initiating and developing a meaningful international criminal law, when dealing with state sponsored or state fostered violations of prevailing norms, are similar to those relating to the international protection of human rights. Who bears the penalty for human rights violations? To be even more precise, what are the penalties? Who is to enforce them, and where are the mechanisms?\textsuperscript{292}
\end{quote}

\textsuperscript{287} Supra, note 282, p. 21.
\textsuperscript{290} There are actually 12 major multilateral conventions and protocols relating to the responsibilities of states for combating international terrorism, not to mention various Security Council resolutions and regional agreements. For a complete listing, visit: http://www.unodc.org/unodc/terrorism_conventions.html, last visited 18 August 2003.
\textsuperscript{291} Declan Costello, "International Terrorism and the Development of the Principle of aut dedere aut judicare" (1975) 10 \textit{J.I.L.E.} 483.
\textsuperscript{292} Supra, note 289, p.85.
As they involve the deliberate targeting of non-combatants, acts of terrorism are virtually indistinguishable from war crimes, except that they occur in the absence of armed conflict. Having occurred in peacetime, it is largely for this reason that Interpol has described the attacks of September 11th as crimes against humanity.\(^{293}\) Although it may currently lack the specific jurisdiction to undertake prosecutions for crimes committed in peacetime against innocent civilians, the International Criminal Court may very well evolve as the main forum for the prosecution of international terrorists. It is not too difficult to imagine how international crimes regulated by treaty (hostage taking, terrorist bombing, etc.) may one day be added to its list of crimes, or that a particularly open-minded bench of justices may favour an interpretation of crimes against humanity that includes violent acts of terrorism.\(^{294}\)

While refusing to extradite wanted fugitives for legitimate reasons (provided for by law and determined by an independent tribunal) may not render a state an ‘accomplice’ to a terrorist attack, states that otherwise provide international criminals with safe-haven and immunity from prosecution must be willing to face the consequences of their actions. As expressed by President George W. Bush: “If you harbor terrorists, you are a terrorist. If you train or arm a terrorist, you are a terrorist. If you feed a terrorist or fund a terrorist, you’re a terrorist, and you will be held accountable by the United States and our friends.”\(^ {295}\) The recently enacted Patriot Act of 2001 provides jurisdiction over certain crimes committed against U.S. assets abroad but also pronounces at section 803 the extensive “prohibition against harboring terrorists:”

(a) Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe, has committed, or is about to commit, an offence under section 32 (relating to destruction of aircraft or aircraft facilities), section 175 (relating to biological weapons), section 229 (relating to chemical weapons), section 831 (relating to nuclear materials, paragraph (2) or (3) of section 844(f) (relating to arson and bombing of government property risking or causing injury or death), section 1366(a) (relating to the destruction of an energy facility), section 2280 (relating to violence against maritime navigation), section 2332a (relating to weapons of mass destruction), or 2332b (relating to acts of terrorism transcending national boundaries) of this title, section 236(a) (relating to sabotage of nuclear

---

\(^{293}\) Interpol Resolution No AG-2001-RES-05, 70th Session, Budapest, 24-28th September 2001.

\(^{294}\) Report of the Preparatory Commission for the International Criminal Court — Addendum: Part II — Finalized draft text of the Elements of Crimes, PCNICC/2000/1/Add.2. Depending on the scale, article 7 (1) (a) regarding the Crime Against Humanity of murder can seemingly apply to most deadly acts of international terrorism.

facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284(a)), or section 46502 (relating to aircraft piracy) of title 49, shall be fined under this title or imprisoned not more than ten years, or both.  

State sponsored terrorism can involve a state that permits free entry or grants safe haven or safe passage of a known terrorist who flees from one country to another. It is not limited to giving direct material or logistical support. As this current study suggests, a state should be responsible as an accessory-after-the fact when it fails to punish or extradite terrorists that have killed innocent civilians. If a state harbours fleeing terrorists or refuses to effectively deal with individuals launching ‘armed attacks’ from its territory, the state ought to be held as a principal to the crime of aiding and abetting. A state may therefore be held responsible for an attack launched by non-state agents that it subsequently endorses, even tacitly.

In its judgement of May 24th, 1980, the International Court of Justice found that public statements of approval by Iranian authorities following the take-over of the US embassy in Teheran in 1979 created a liability for that state.  

It concluded that Iran had violated obligations owed by it to the United States under existing Conventions between the two countries, as well as general rules international law. The Court went on to declare that the impending violations engaged its responsibility and that the Iranian government was bound to secure the immediate release of the hostages, to restore the Embassy premises, and to make reparation for the injury caused to the United States government.

It expressed that while the events of November 4th, 1979, could not, for lack of sufficient information, be directly attributed to the Iranian state, its officials had done nothing to prevent or stop the take-over, and certain organs of the Iranian state had actually endorsed the acts and decided to perpetuate them. Accordingly, the actions of students and individuals not employed by the state were transformed into proxy acts of the Iranian state. By not obliging the militants to withdraw from the premises and release the hostages, the Court found the government of Iran responsible for the attack. When a sanctuary-state fails to react to terrorist attacks by not moving against its perpetrators, it may as the ICJ stated in the Tehran Hostage Case be responsible of indirect aggression.

---

298 Supra, note 296.
For example, by failing to prevent the planning of terrorist activities on its territory and then refusing to bring those responsible to justice, Afghanistan clearly failed in some of its most basic international duties. The sheltering of Bin Laden, which began long before September 11th, could simply have been interpreted as insistence on Afghan sovereignty. Certainly, the refusal to extradite Bin Laden could not in itself have sufficed to impute his acts unto the Taliban, any more than daily refusals to extradite by states all over the world are deemed an endorsement of a criminal's wrongdoing. Beyond the Taliban’s initial failure to uphold its duty to protect members of the community by acquiescing to the presence of international terrorists, its refusal to prosecute or extradite — or even arrest and investigate Bin Laden, may very well have amounted to the type of subsequent support discussed by the International Court in the Teheran Hostage Case.

Providing moral support or economic assistance to individuals or groups so that they can wage peaceful resistance may be insufficient to attribute responsibility to a state. Providing military support, or any form of assistance that will be used to conduct ‘armed attacks’ against a state is a wholly different matter, especially when innocent civilians are targeted. Though in certain cases a state may be justified in providing assistance to resistance groups fighting oppressive and unelected tyrants, providing support of any kind to terrorist groups is always unlawful. Any state that does, either directly or indirectly, is liable for its actions. Perhaps not criminally as states cannot yet be held to criminal liability, but certainly according to the Law of Peace and State Responsibility.299

Many questions regarding the applicable standards of proof may be raised at this level, such as the necessary evidence to demonstrate ‘effective control’ or participation in acts of terror. Such questions are deserving of entire studies in themselves and are beyond the reach of this research. Yet the presumption of innocence, as regards to individuals but also states, must be retained as it is recognised as a general principle of law by all civilised nations. Although presentation before the Security Council might allow the use of evidence that would not be considered credible in a court of law, its decisions would for most practical purposes remain political ones rather than legal ones. As a credible analysis based on a ‘beyond a reasonable doubt’ or ‘balance of probabilities’ standard may not obtain in such a politicised forum, clearly the onus of proof must remain high.

299 Supra, note 288, p.82.
Indeed, it would be hugely shameful if a state could be bombed (a dire consequence, needless to say) on the basis of evidence that would be substantially weaker than that required, for example, to engage its international responsibility before an international tribunal. The laws of Peace and of State responsibility are perhaps two distinct and separate regimes, but it seems elementary that one should only have to answer for attacks for which one is responsible. Although State Responsibility may vary depending on a number of factors such as the severity of an attack and the availability of credible evidence, the duty to either extradite or prosecute is a very difficult obligation to neglect when the crime in question amounts to an armed attack against innocent civilians. In an international system that is still largely decentralised, states are not entitled to acquiesce in violations that affect the international community in its entirety.

II. Forceful Operations and the Protection of nationals ‘Abroad’

A) The Use of State Force outside the Context of Armed Conflict

The unchecked targeted killing of individuals, usually terrorists, is casting doubt on a potentially legitimate counterterrorism measure of self-defense. Acting clandestinely and killing without accountability, assassins that embark upon such operations outside the context of armed conflict are committing extrajudicial executions on behalf of their governments. Though it is not necessary for a victim-state to respect the right to life as understood by human rights law when using force in self-defense against a state, it is always necessary to justify such measures according to the right to life when acting against individuals outside this context. The use of targeted killing can only be permitted in the absence of armed conflict when necessary for the protection of life. The following section will discuss the implications of ignoring human rights when using force abroad in the absence of armed conflict.

The use of international force to protect nationals, whether those at home or abroad, can invariably be justified in terms of self-defense. While the right to rescue, arrest, neutralise, or prosecute criminals lies principally with the central authority of every sovereign nation, it is incumbent upon every other state to ensure that all

---

300 In R. v. Cook, (1998) 2 S.C.R. 597, at 42, the Canadian Supreme Court stated: The terms “nationality” and “citizenship” are often used as if they are synonymous, but the principle of nationality is much broader in scope than the legal status of citizenship. While a national may be a citizen of a state, nationality also refers to a person who does not possess the full political and civil rights of citizenship, but has nonetheless “a right to protection of the state and in turn owes allegiance to it” (see Sharon A. Williams and A.L.C. de Mestral, An Introduction to International Law (2nd ed. 1987), at p.290. The term ‘nationals’ is therefore more encompassing than the notion of citizenship, hence its use.
members of the international community uphold their basic duties regarding the protection of innocent life. In response to armed terrorist attacks directed or supported by states, the use of state force to rescue, arrest or neutralise individuals abroad can very much amount to self-defense. When a sanctuary-state is unable or unwilling to meet its basic responsibilities relating to the protection of states and human life in general (which definitely include the obligations to arrest or neutralise wanted terrorists and rescue hostages), member-states of the United Nations—and particularly those targeted—have the important task of ensuring that law and order can be secured. By peaceful means whenever possible; by more forceful one’s when absolutely necessary. The protection of nationals ‘abroad’ therefore concerns not just the right of a state to intervene on the territory of another to protect its nationals residing abroad, but also the right of each to protect its domestic populace from illegal violence through forceful actions taken abroad.

As unauthorized responses to ‘armed attacks,’ forceful responses to terrorism allow states to explore a multitude of options that vary in degree and severity. Circumstances requiring, the following options can usually be justified as self-defensive response to terrorism. At the summit of these always lies the waging of war or armed conflict against a state or terrorist element within it. The fate of the Taliban in Afghanistan embodies this first and most severe response, while the involvement of foreign soldiers in the repression of terrorist violence represents another that is closely related, especially when military force is used against individual or group terrorists. Next is the use of military strikes to destroy terrorist bases and infrastructure, practiced almost routinely by Israel and the United States against states that harbor terrorists. With little risk to the forces of defending states, targeted bombings can sometimes provide strategic and defensive advantage. They nevertheless offer a heightened potential for civilian casualties.

The following step in this scale of state prerogatives involves the use of limited operations to arrest or kill wanted terrorists. Though nearly as offensive as military strikes as they involve the use of force and a violation of sovereignty, such responses can be less severe given their secrecy and targeted nature. It is nonetheless important to note that targeted killings are not distinct from operations to “arrest or neutralize” terrorists in foreign jurisdictions. In fact, regardless of whether or not lethal force has been previously authorised, all targeted killings (in the absence of war) ought to be referred to as operations to “arrest or neutralise”. Seeing as

---

301 Frederic L. Kirgis, “Cruise missile Strikes in Afghanistan and Sudan,” (1998), online, *A.S.I.L.*, found online at: [http://www.asil.org/insights/insigh24.htm](http://www.asil.org/insights/insigh24.htm). While the 1998 US cruise missile strikes in the Sudan and Afghanistan did very little in terms of providing protective advantage, they were nevertheless limited forceful operations to protect and show resolve, both of which can—within reason—fall within the scope of self-defense.
though unarmed soldiers placed “hors de combat” or willing to surrender must be given a chance to do so and not killed arbitrarily, it is only natural that terrorists being targeted as combatants also be granted this courtesy. In the scale of state prerogatives, targeted killings are defined above-all by the unmistakable presumption that forceful operations will likely end in the death of those targeted unless arrest is suddenly made possible. Finally, rescue operations for the liberation of hostages or kidnapped victims complete the list as the least severe.

Any such use of military force against individual terrorists and the states that support them can qualify as legitimate self-defense, but each response reveals a purpose and resort to force that is greater than the previous. In summary, they are: 1) the use of armed conflict or war against a state that supports terrorism or as an aid to the state in fighting armed terrorist groups within it; 2) the use of limited military strikes to degrade terrorist capabilities and deter states that support them; 3) the use of force, overt or covert, to specifically arrest or kill individuals responsible for terrorist attacks; 4) the use of force, overt or covert, to rescue individuals, usually nationals, held against their will. These responses listed above are all subject to the requirement of self-defense and each must serve a legitimate defensive purpose or else pass as aggression.

A victim-state that uses force abroad to protect its population against unlawful violence does not necessarily violate the prohibition on the threat or use of force. The right to protect nationals abroad is compatible with article 2(4) of the United Nations Charter, for such action is consistent with the purposes of the organisation, and further justifiable by the inherent right of self-defense provided at article 51. Force that is aimed at saving life and arresting individuals that have killed innocent civilians is not taken directed primarily against the “territorial integrity or political independence” of the state itself. Common criminals not employed by the government are firstly the primary targets, and given their strictly defensive nature, such operations taken in response to armed attacks cannot be considered aggression:

Action undertaken for the purpose of, and limited to, the defense of a State’s political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force ‘against the territorial integrity or political independence’ of any other state. 302

Article 2(4) of the UN Charter left the right of self-defense unimpaired, which prior to 1945 included the right to protect nationals abroad. The use of the term ‘inherent’ at article 51 further suggests an intention to preserve

302 Supra, note 140, p. 269
existing aspects of the customary right of self-defense. It is therefore unlikely that the right to use force on foreign soil to protect or rescue one's nationals from attacks was removed in the post-1945 security environment. Likewise, there is nothing to suggest in the General Assembly's most authoritative commentary on article 2(4), the Declaration of Principles on Friendly Relations, expressly or implicitly, that the use of force to protect nationals abroad is prohibited. 303

When the nationals of a state are threatened with loss of life or serious injury on foreign soil and the only way to protect them is through the use of targeted killing, then such action can be justified by article 51 of the UN Charter. Protecting one's population from unlawful violence by neutralising those responsible for it, and whenever possible, bringing them to justice, is an integral part of self-defense. Because population is an essential component of the state, it is perfectly possible to treat an attack on a state's nationals as an attack on the state, especially when its purpose is to intimidate the state in question. 304 Though they must not serve to promote political and financial interests, there is little doubt that targeted killings can be justifiable when their intended purpose is to save lives by preventing acts of terrorism.

Moreover, it is not defining that the practice of "arresting or neutralising" terrorists on foreign soil is not 'general' but confined to a few states. This factor, as in operations to rescue nationals abroad, has been cited to demonstrate that the practice lacks the degree of wide-spread support required for a customary right to emerge. Though the practice of using limited force abroad is somewhat limited, few states have the resources and capabilities to undertake such operations, not to mention the fact that terrorist attacks can only seldom be linked to nation states. Referring to rescue operations, Bowett wrote:

This argument is of doubtful validity because few states have the capacity to plan and execute what may be a very difficult and hazardous operation. And the practice of States can only mean the practice of those States with capacity to act in a particular way. Moreover, happily, the instance of abuse of aliens to a degree warranting armed protection by their national State are not numerous and so, necessarily, the practice is limited. 305

In reality, operations to "arrest or neutralise" terrorists on foreign soil can be justified by the same reasoning that allows for the rescue nationals abroad, so long as they are taken only in response to 'armed attacks' when the sanctuary-state is unable or unwilling to act and less forceful alternatives are unavailable. However, the

303 Supra, note 140, p.40.
304 Supra, note 140.
305 Supra, note 140, p.41.
deployment of specialized commando units to arrest or neutralise terrorists raises serious questions concerning the proper use of force and the role of the military. Few may question the deployment of elite troops, as in the Entebbe raid, to rescue hostages, yet the infiltration of forces abroad to intentionally kill wanted individuals can be troublesome, especially when undertaken in states that do not support them, in the absence of actual armed conflict.

No unit better illustrates this than the Twenty-second Special Air Service (SAS) Regiment of the British Army. As the threat of international terrorism grew after World War II, the SAS began to focus on counterterrorist strategies, and groups like the Irish Republican Army (IRA) were completely taken aback by its unconventional tactics. Unlike the police, the SAS were known for killing terrorists during operations. A deep sense of injustice spread along the Irish countryside and the SAS quickly became known as “killer squads” and examples of “British terrorism.” The British were fuelling popular resentment and providing the IRA with new recruits, all the while having only a limited and temporary impact on the perpetration of terrorist attacks. With the help of the European Court of Human Rights, the people of England have since realised the drawbacks of using extrajudicial killings, favouring instead to contain terrorists by fighting them relentlessly in a manner that is controlled and effective.

Though Special Forces have been known to use only lethal force rather loosely, the truth is that such forces are highly trained assets capable of exercise remarkable degrees of restraint and marksmanship. Because they specialise in the rescue and extraction of hostages, these units possess enormous abilities in the selection of targets and the neutralisation of threats. Such attributes can also be extremely useful when effecting international operations to arrests or permanently incapacitate. Inevitably, success in fighting terrorism will be increasingly determined by the ability of states to quickly and effectively infiltrate Special Forces into designated crisis areas. The fact that military assets will be used to conduct what are essentially police operations is understandable, since only the best trained individuals should be selected to conduct missions abroad.

Probably the most spectacular rescue occurred in 1997, when rebel forces took over the Japanese ambassador's residence in Lima, Peru. After months of unsuccessful negotiations, Peruvian President Fujimori gave the order

---

that commenced the precise rescue operation that freed all but one hostage. Months of preparation and planning in conjunction with American Special forces produced probably the best choreographed operation ‘known’ to this day. However, such operations don’t always unfold as planned, as demonstrated by the unsuccessful operation to rescue, on April 24/25 1980, American hostages held in the U.S embassy in Tehran.

The presence of such troops is nonetheless a serious security threat to the sovereignty states. Matters would change significantly, however, if arrest warrants were emitted by international tribunals and those listed were perceived by all as legitimate candidates for arrest and detention. The most recent initiative to adopt a European arrest warrant is seen as a major reform in streamlining international cooperation and a departure from traditionally cumbersome procedures. The issuance of such warrants allows for the arrest of subjects anywhere in Europe and authorises law-enforcement agencies of the European Union to bring the suspects before the court that issued the warrant, making the need for conventional extradition within Europe irrelevant. In such situations, it is more difficult to contest the validity of operations to arrest because an independent and impartial tribunal has requested the state action. Perhaps some day a similar process will be duplicated internationally.

Technology must also play an important role in the fight against terrorism. Although the military and its main contractors have already developed sophisticated unmanned vehicles to provide constant aerial surveillance or deliver munitions, non-lethal weaponry has received little attention and funding in comparison. The European Court has nonetheless emphasised the importance of such technologies in law enforcement initiatives. Instead of sending individuals into high-risk situations, the use of more sophisticated and mobile unmanned robots similar to those used by bomb squads could serve as a strong deterrent to terrorists and

---

307 Report on the Eleventh session of the Commission on Crime Prevention and Criminal Justice, E/2002"30-E/CN2002/14; The newly created entity EuroJust, consisting of one member from each member State of the European Union, will serve as a liaison body to improve and facilitate legal cooperation within Europe. Both these initiatives can serve as examples for other regional bodies, and perhaps the international community as a whole with regard to ‘serious crimes’ of international interest, such as terrorism.

308 Darkstar, Global Hawk, and Predator-type unmanned aerial reconnaissance vehicles have been adapted to carry substantial weaponry. Given that such vehicles are being flown remotely, one must also assume that the military has developed land-based vehicles with equally interesting capabilities to incapacitate without causing death. For soldiers, MIT is developing body suits that may in the future monitor vital signs and increase physical capabilities, as well as provide lighter and more effective armoured protection. It may be some time until law enforcement agents are able to benefit from these technological advancements, yet such advancements would dramatically decrease the risk associated with arresting dangerous individuals. See: “Invisible soldiers? We’ll see. MIT aims for quantum leap in combat-gear technology,” The Gazette, Anne Bernard, 15 March 2002, B-1.

prevent loss of life. Modern technology could provide intervening officers with crucial imagery and the option of using incapacitating force (such as electric discharges, nets or lasers) without causing death.

Although non-lethal technologies and highly trained forces are essential for the protection of nationals abroad, what the world needs most is leaders capable of exercising the necessary judgment to know when to use them, and the common sense to adopt policies that will help prevent attacks, not cause them. Although forceful operations may at times be necessary to protect life and prevent armed attacks, nations willing to lawfully undertake them must do so according to a legitimate right of self-defense. When Special Forces are mandated to undertake dangerous missions on foreign soil, it is crucial that their objectives always be defensible according to recognised principles of law and reason.

The longstanding problem is that situations requiring the arrest of international terrorists or the liberation of hostages (on the territory of a state that is either unwilling or unable to act) cannot be entrusted to an impartial police force representative of the global community. Interpol, the “international police force,” is an organisation of 146 member states whose primary mission is to collect and disseminate information regarding the status and whereabouts of particular international criminals. Though “in the popular press, Interpol is tagged with the image of an organisation having the power to investigate and arrest criminals... Interpol does not have the power to investigate or arrest suspects.” Since the United Nations has traditionally been charged with overseeing the relations between states, it has not involved itself deeply in the pursuit of terrorists beyond those situations that evolved in the context of genocide or ethnic cleansing. Because the UN only facilitates cooperation between national law-enforcement agencies and does not take a pro-active role in assuming these tasks, it has in the process forfeited a valuable opportunity to demonstrate the need to respect human rights when conducting what are essentially law-enforcement operations on foreign soil.

---

310 “Teen’s death sparks criticism of Israeli army policy,” The Montreal Gazette, Laurie Copans, 16 August 2002, A13: The following article describes the situation where a 19 year old Palestinian teenager was ordered by Israeli soldiers to strap on a bulletproof vest and approach a house where a Hamas militant was hiding, with instructions to bring him out. When the teenager advanced, he was shot and killed by the gunman. The army then chose to flatten the house with bulldozers, killing the Hamas militant inside. The terrorist, Nasser Jerar further was confined to a wheelchair since losing both legs and an arm when a bomb he was planting exploded prematurely in 2001. While the “neighbour procedure” used by the army may be criticisable, Israeli soldiers cannot be expected to risk their lives for a terrorist that is unwilling to surrender. However, the use of unmanned robots with cordless imagery may have informed the army of the terrorist’s condition, and convinced him to surrender. In any event, such technology would have prevented the loss of innocent life, be it that of a soldier or a Palestinian teenager.

The Security Council is of course the organ best placed to confer legitimacy to any use of international force, including operations to “arrest or neutralise.” Article 24 of the UN Charter confers upon the Council the “primary responsibility for the maintenance of international peace and security.” The Security Council is responsible for determining “the existence of any threat to the peace, breach of the peace, or act of aggression” (article 39), and for taking “such measures as embargoes, sanctions and the severance of diplomatic relations to redress the situations” (article 41), and should the Council consider such measures to be inadequate, “such action by air, sea or land forces as may be necessary to maintain or restore international peace and security” (article 42). In other words, the Security Council is the ultimate guarantor of the peace and the international organ responsible for assessing the lawfulness of armed force. In its report on humanitarian intervention, the International Commission on Intervention and Sovereignty wrote:

The UN, with the Security Council at the heart of the international law-enforcement system, is the only organisation with universally accepted authority to validate such operations […] The Commission is in absolutely no doubt that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes.  

312 Supra, note 240, p. 49.

The Security Council, however, has only once before used its authority to sanction a state refusing to “prosecute or extradite” individuals suspected of terrorist attacks (Libya), and never has it acted forcefully—save in the arrest of war criminals under the ad hoc tribunals—to detain or neutralise terrorists. Since the Security Council does not undertake enforcement measures against terrorists or rescue operations, states whose nationals are attacked are forced to assume (individually or collectively) these tasks specifically related to their defense. When it becomes clear to a state that forceful action must be taken immediately to protect human life and that alternatives are unavailable, it will naturally be inclined to do so. As Scheideman writes:

Nevertheless, it is important to acknowledge the reality that until viable alternatives exist for coping with terrorist threats, the use of force can be expected to remain a part of a victim state’s arsenal of options. To insist otherwise would render a victim state powerless to preempt planned attacks before damage is sustained.  

313 Supra, note 250.

Since the end of the Second World War, international law has evolved considerably to permit the prosecution of individuals, especially those responsible for serious crimes committed during armed conflicts. The process that started in Nuremberg and Tokyo has evolved throughout the 1990s into a complex system of international
criminal justice with the tribunals for the ex-Yugoslavia and Rwanda, and is now maturing into a permanent structure for the prosecution of crimes.

While the domestic laws of states are usually designed to deal with crimes like hijacking, hostage taking, and terrorist bombing, the International Criminal Court may one day provide a valuable platform through which states may prosecute terrorists internationally, though such crimes are currently beyond its reach. The International Criminal Court was created largely to lift the sovereign immunity of government officials, yet its reach extends, like its predecessors in The Hague and Arusha, to all individuals that have engaged in illegal conduct, including military figures and rebel leaders.  

Though it may currently lack the jurisdiction to undertake prosecutions for crimes committed in peacetime against innocent civilians, there is hope that the International Criminal Court will evolve as the main forum for international criminal law-enforcement. By providing a permanent institution for the prosecution of individuals and possibly allowing individuals whose rights are violated to seek redress, the independent Court could certainly provide the Security Council with the legitimacy to intervene in order to prevent acts of terrorism. Such a development would certainly bring together the international community in its struggle against terrorism.

The existing dilemma would nonetheless persist, given that the International Criminal Court does not have any law-enforcement personnel at its disposal. Though it could in theory provide a jurisdictional basis for the arrest of individuals on foreign soil through the emission of international warrants, not to mention a forum to contest abusive state actions, the Court would lack the ability to intervene to save lives. Given the complete absence of international institutions capable of undertaking effective enforcement operations in a non-political manner, situations that require the “arrest or neutralisation” of terrorists or the rescue of nationals abroad will likely remain, at least for some time, the sole responsibility of states. Acting alone under the cover of self-defense, they are likely to follow military rules of engagement, even against individuals not employed by the state.

---

314 Henry T. King and Theodore C. Theofrastous, “From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy” (1991)31.1 *C.W.R.J.I.L.* 47; “U.S to suspend aid over U.N. war crimes tribunal,” *The Gazette*, AP, 2 July 2003, A-23. It is incredible in some ways that America is working feverishly to seek immunity for its troops. America is the most powerful state on earth and it should not fear the prospect of having its military personnel prosecuted for war crimes. Mostly because it does not support such crimes or involve itself in their perpetration, but also because it would normally undertake of its own accord the prosecution of war crimes, genocide, and crimes against humanity, forfeiting international prosecutions according to the subsidiary principle.
When military force is directed *against a state* that has supported armed attacks or is refusing to extradite their authors, terrorists may in some cases be considered combatants according to humanitarian law. Situation falling outside the context of armed interstate conflict must nonetheless first be treated as criminal law-enforcement matters. The presumption of innocence, which is intimately linked to the right to life, effectively prohibits the targeted killing of civilians, which in peacetime include suspected terrorists that have not yet been declared guilty by a court of law. It is perhaps too easily forgotten that terror attacks are primarily problems of crime and punishment. As the Nuremberg tribunal held, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” 315

As Jonathan R. White reveals: “Most criminal terrorism and a good share of political terrorism is a law enforcement responsibility.” This means that when nonpolice units assist or replace police agencies, “they must think as the police do.” He adds “despite the necessity to develop certain military tactics or employ the direct help of the military, extrajudicial activities cannot be tolerated. For example, police and military units of some countries have formed death squads, claiming terrorists have become too strong. If legal norms are violated, security forces can become little more than terrorists themselves.”316 This same reasoning can apply to counterterrorism operations abroad, especially when states undertake targeted killings in the absence of a *legitimate* right of self-defense.

Our traditional notions of security are slowly adapting to the realities of asymmetric conflict. The prosecution of individuals following complex investigations and prosecutions is becoming *as important* as the projection of military might. During a Pentagon briefing on April 15th, 2002, Defense Secretary Donal Rumsfeld declared that American military troops in Afghanistan, with regards to the processing of suspected terrorists and their material evidence, should be commended for “doing what is essentially a *law enforcement task.*”317 President Bush declared himself on March 15th, 2002, that in the second phase of the global campaign against terror, the United States wanted “every terrorist to be made to live like an international fugitive on the run.”318

317 Comment by Defense Secretary Donal Rumsfeld, Pentagon briefing of 15 April 2002, CNN (emphasis added).
In a groundbreaking article entitled *Using Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*, Francisco Forrest Martin argues that in light of the changing character of contemporary armed conflicts, international protections concerning the right to life should be included to complement exiting humanitarian law. He expresses quite convincingly that in the case of "operations other than war," which involve armed confrontations in the course of peacekeeping, anti-drug trafficking, or counterterrorist operations, a higher standards of protection ought to apply. He writes:

Together, these opposing results from technological advances in weaponry are collapsing the bifurcation of the normative concept of armed conflict because, in conjunction with the implementation of the idea of "international police actions", combatants have effectively become either "criminal suspects" or "international police", depending on one's opinion as to the underlying legality of the conflict [...] As criminal suspects, they have political and civil rights as do civilians who are less blameworthy. It does not matter if these criminal suspects are terrorists or enemy forces possessing substantial weaponry. As the character of armed conflict changes into one characterised best as law-enforcement actions, so too should the law governing the conduct of hostilities. 319

It is instructive to highlight that the United Nations has already provided an international standard for the use of deadly force in peacetime in the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*,320 adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and the *United Nations Code of Conduct for Law enforcement Officials*.321 Although their provisions are not legally binding, they provide authoritative guidance and reflect a high level of consensus by the international community regarding the appropriate use of lethal force by law enforcement officials. They are also consistent with the right to life provisions of the *International Bill of Rights*. Principle 9 of the Basic Principles states:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life. 322

This article in a sense describes both the *jus ad bellum* and *jus in bello* of peacetime, because it describes when and how lethal force can be lawfully resorted to. Principle 5 also states:

---

319 *Supra*, note 172, p.3.
320 *Supra*, note 171 (*Basic Principles*).
321 *Supra*, note 171 (*Code of Conduct*).
322 *Supra*, note 171 (*Basic Principles*), at. 9.
Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

(a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
(b) Minimise damage and injury, and respect and preserve human life;
(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.  

This article represents another more detailed perspective on *jus in bello*, as it pertains to the requirements that must be met in order for the use of deadly force to qualify as admissible means in peacetime. Principle 7 further requires that governments ensure that arbitrary or abusive use of force and firearms by law enforcement officials be punished as a criminal offence under their law. In a similar manner that the *Civil Rights Covenant* and *European Convention* prohibit derogation of the right to life during public emergencies, Principle 8 also provides that “Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.” Finally, Principle 10 states that:

In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

Under international human rights law, the above stated standards relating to the use of deadly force, like those concerning the right to life, apply not only to law enforcement officials, but to *military and security forces acting in such a capacity as well*. The *United Nations Code of Conduct for Law Enforcement Officials* provides interesting insight on this matter. Article 2 requires that “In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.”

In its commentary to article 1 regarding the definition of law enforcement officials, it is further stated: “The term [law enforcement officials] includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by state security forces, the *definition of law enforcement officials shall be regarded as including officers of such services.*”

---

323 *Supra*, note 171 (*Basic Principles*), at. 5.
324 *Supra*, note 171 (*Basic Principles*), at.8.
325 *Supra*, note 171 (*Code*), at. 2.
326 *United Nations Code of Conduct for Law Enforcement Official*, Commentary (a) & (b) to article 1.
In addition to justifying targeted killings as acts of war to remove them from the scope of human rights law, it is a near certainty that states will also deny the applicability of the International Bill of Rights to individuals abroad suspected of being terrorists, claiming that its provisions were not designed to protect civilians from the actions of foreign governments. However, human rights law does apply to states when they extend their jurisdictions through security forces abroad. Just like the military of a state can incur responsibility when humanitarian law is violated in armed conflict, so can the intelligence and security forces of a state create against it a liability when human rights law is transgressed in peacetime.

The difference lies in the absence of mechanisms, judicial or otherwise, to ensure that states will uphold their freely agreed upon norms, in this case human rights treaties. This in turn is symptomatic of a greater characteristic of international law: that no binding supranational structure can effectively dictate the conduct of states. Though states are expected to fulfill in good faith their agreements under the principle of *pacta sunt servanda*, sovereign nations are still held to good behaviour by account of their own consent. It is, therefore, all the more important for states to extend their laws against murder to all individuals within their territory and subject to their jurisdiction. This would clearly extend, regardless of location, to foreign criminals or terrorists under their custody, as well as those “potentially in their custody” that will not be arrested because they will instead be killed.

To avoid abusive state policies, all democratic nations require that law-enforcement agencies abide by constitutionally protected norms of human rights law. They also allow courts to study the circumstances surrounding the arrest of suspected individuals and to sanction abusive state conduct. The right to kill, needless to say, is never permitted unless it is necessary for the survival or protection of others. Human rights law, however, has not yet evolved sufficiently to sanction violations of the right to life by states acting on foreign soil. International human rights treaties may in theory have subjugated all state security forces to the same

---

327 The United Nations Compendium concerning standards for the administration of justice comprises a number of international agreements: Universal Declaration of Human Rights; International Covenant of Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights (and two optional protocols concerning the Human Rights Committee and the abolition of the death penalty); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment; and the Convention on the Rights of the Child.

standard regarding the right to life and the use of deadly force, yet such initiatives have thus far avoided any specific inter-jurisdictional issues. Although human rights law has evolved as such within the European theatre, a similar process has not yet been duplicated internationally. In *Loizidou v Turkey* (1995), the European Court of Human Rights held at 101:

The responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—*it exercises effective control of an area outside its national territory*. The obligation to secure, in such an area, the rights and freedoms set out in the ECHR derives from the fact of such control whether it be exercises directly, through its armed forces, or through a subordinate local administration.\(^{329}\)

It is a hallmark of despotic and totalitarian regimes to employ large numbers of secret police or intelligence agents, and to use arbitrary measures such as torture and executions. Although this phenomenon has been experienced by most nations domestically through the repression of civil liberties, it is also being proven true in the case of clandestine agents acting abroad. Operating, as they often do, under cover and in plain clothes, such forces must be closely monitored and amenable to the control of human rights law, even when they operate on foreign soil.\(^{330}\) A failure to do so may be as misconstrued as aggression. On this, Brownlie wrote:

There can be little doubt that the use of force is *commonly* understood to imply a military attack, an ‘armed attack’ by the organised military, naval, or air forces of a State; but the concept in practice and principle has a wider significance. The agency concerned cannot be confined to the military and other forces under the control of the ministry of defense or war, since the *responsibility will be the same* if a government acts through ‘militia,’ ‘security forces,’ or ‘police forces,’ which may be quite heavily armed.\(^{331}\)

Until human rights violations by states against individuals abroad can be sanctioned by international law, various forms of judicial enforcement mechanisms, domestic and international, will be required to prevent arbitrary deprivations of life. Using intelligence assets and secret police to fight international terrorism abroad is perhaps inevitable.\(^{332}\) It is possible, however, to adopt measures that will ensure that such forces respect the basic rights of individuals. Rather then perpetuating an outdated cold war mentality, states have an opportunity to transform the existing perception that foreign security and intelligence forces are conducting aggressive warlike operations.


\(^{332}\) That is, until in every state a sense of order based on the rule of law prevails. The Democratization of the world is an encouraging sign on this front, yet the growing economic inequalities that dominate most modern societies will continue to hinder this process at the detriment of security unless greater importance is granted to such concerns.
While efforts by military, police, and foreign security and intelligence forces are crucial to the prevention, control and suppression of international criminality, they must nonetheless be conducted according to predetermined guidelines to ensure accountability. Absent any regulation, there are dangers that uncontrolled enforcement will lead to human rights abuses, and possibly further threaten international peace and security. If states are serious about using targeted killings in the name of security, than they must be willing to justify and control them. As Alan m. Dershowitz writes, “Unless we are prepared to impose some limits on the use of torture or other barbaric tactics that might be of some use in preventing terrorism, we risk hurtling down a slippery slope into the abyss of morality and ultimately tyranny.”

B) Life: The Great Divide

The reaction to the events of September 11th has had a significant impact not only on terrorists, but on human rights in general. To gain the upper hand, a number of states have adopted policies that undermine, and in some cases flatly contravene, basic human rights and fundamental principles of law. As a result, many states are becoming increasingly critical with the general demise in civil liberties. Since democratic states share similar conceptions of justice based on the rule of law, most of these issues concerning civil liberties will in time be successfully resolved. The question of targeted killing, however, is legally and morally unavoidable, and infinitely thornier. It involves the revival of fundamental differences between democratic states regarding the use of lethal force and the right to life, notably with regard to capital punishment.

The basic tenant of this study is that it is not appropriate nor legally defensible to target individuals according to military rules of engagement unless they are offering armed resistance in the course of a military campaign (as was the case in Afghanistan in 2001) or are somehow supported by hostile states responsible for ‘armed attacks’. The use of lethal force in situations falling outside this scope cannot be justified merely by the rules of

---

333 Supra, note 23, p. 146.
334 “Six months later, solidarity has limits,” The Gazette, Jocelyn Noveck (AP), 11 March 2002, B-1;
“European opposition growing against U.S.,” The Gazette, Don Melvin and Neil Tweedie, 6 August 2002, A1; While most European states support the U.S. in its war against Afghanistan publicly, many nonetheless feel the U.S. is concentrating too much on military force instead of the root-causes of terrorism. It is interesting to note that while the U.S. government has said little publicly concerning the link between its foreign policy (mostly concerning the Middle East) and the attacks of September 11th, to do so shortly after the attack would have been a concession to terrorists, effectively recognizing that terrorism pays.
armed conflict. Given the foreign dimensions of targeted killing and the ease with which governments can claim a right of self-defense, it is all the more important that such measures also be reconcilable with human rights law, especially since targeted killings will probably occur clandestinely in states that do not support terrorism.

The American administration, as conveyed by the first Chapter, has not declared its intention to use targeted killing only when necessary for the protection of life. Instead, it has used its foreign policy prerogative of waging war to render lawful the killing of what it considers combatants. In doing so, it has transformed al-Qai'da into a state-like entity whose engagement will be regulated by The Hague and Geneva Conventions. The effect of this policy has been to remove from the sphere of human rights law the killing of suspected terrorists on foreign soil. This reasoning also implies that "terrorists" can be killed as "combatants" in any state, friendly or not, in the absence of armed conflict. When the defining territorial and sovereign elements are removed from the scope of armed conflict, the impact of military operations on civilian populations can only spell disaster.

When using force to "arrest or neutralise" terrorists in countries where there is no war, it is crucial that states respect, whenever possible, the rules of engagement applicable in peacetime. I sincerely believe that overtly or covertly, the use of targeted killing outside the context of armed conflict must be justified by a legitimate right of self-defense against a particular state, or else conducted in a manner consistent with the right to life. As measures of counterterrorism taken on foreign soil, it may be that military forces or intelligence operatives will be involved in the execution of targeted killing operations. This does not imply that humanitarian standards of law ought to apply without consideration for human rights law.

The violations of sovereignty which occur as a result of targeted killings are truly derived from a primary violation, namely that of an individual's right to life. When a state engages another militarily, the rules of armed conflict apply because two opposing nations are fighting one and other. When a state uses force abroad against individuals that are not state-agents, the relationship is quite different. Victim-states that undertake operations to detain or neutralise suspected terrorists on foreign soil are not necessarily engaging in armed conflict. Instead, they are performing enforcement tasks that would otherwise be the responsibility of local governments, or perhaps the international community, in light of the formers' failure to do so.
If every governing authority is expected domestically to respect basic human rights law, why would the forces of another state acting on its behalf be absolved of such an obligation? The answer, at least on the surface, is quite simple. Any international use of force is regulated primarily by humanitarian law, not human rights law. When sovereign nations clash militarily, humanitarian law prevails. When nations use force on foreign soil without obtaining prior consent from the territorial state, the impending incursion, even when directed at individuals not employed by the state, may be considered aggression. Yet if all sovereign leaders are expected to respect human rights within their own jurisdictions, it follows that they must also do so when acting outside of them.

What is defining is not only the territory on which operations to “arrest or neutralise” take place, but the type of relationship that marks every use of force by states. When military operations are taken overtly by a sovereign state primarily to compel another to abandon its support of terrorists or human rights abuses, humanitarian law will invariably apply. When nations use clandestine operations to “arrest or neutralise” terrorists that are supported by states (directly or indirectly), elementary considerations of justice require that existing human rights standards be respected whenever possible, including those concerning the use of deadly force by law-enforcement officials.

Applying automatically the rules of armed conflict would allow powerful governments, so long as some military advantage was secured, to kill civilians on foreign soil that it considered expendable without having to compensate them or their families, and further permit the intentional killing of suspected terrorists that could otherwise be arrested. Yet terrorist suspects cannot be targeted and killed as combatants without due regard for their basic human rights in states where there is no war.335 In a similar way that multilateral coalitions, or the Security Council for that matter, must respect the principles and dictates of humanitarian law when conducting military operations and respect human rights when conducting law-enforcement operations, so victim-states must also when conducting operations to “arrest or neutralize” wanted terrorists abroad, which are in fact a mixture of both. Acting unilaterally cannot provide additional privileges or immunities that would not otherwise be granted multilaterally.

335 The Bush administration declaration that only Taliban soldiers, and not al-Qai’da members, were entitled to the protections of the Geneva Convention, illustrates this point well. If the al-Qai’da members are targeted like combatants of the Taliban government, why would they not be entitled to the same Prisoners of War (P.O.W.) status? If they are targeted according to the rules of armed conflict, they should at least be processed as such if they are captured. Declaring them illegal or unlawful combatants does not change the fact that they must either be processed as combatants or criminals, and treated accordingly.
If a state lacks the right to use force on the soil of a particular state, it is quite unreasonable to allow it to kill individuals in the first place. To allow it to kill individuals according to humanitarian standards of law in the absence of armed conflict or a link between the sanctuary-state and those targeted is simply absurd. It may also be aggression. What seems to emerge is that the rules of armed interstate conflict are wholly insufficient in themselves to regulate in peacetime the use of counterterrorism measures by states against individuals abroad. However menacing the threat of international terrorism may seem, the state cannot circumvent human rights provisions that prohibit arbitrary deprivations of life in peacetime by artificially applying the rules of war.

Beyond the impact of ignoring the provisions of the International Bill of Rights when acting outside one’s borders, what logic is there in denying foreigners the basic human rights that western nations have fought so fiercely to promote? In fact, why would democratic states even deny foreigners the protections embedded in their national constitutions? Though terrorists on foreign soil are not usually protected by domestic human rights documents like the American Bill of Rights or the Canadian Charters of Rights and Freedoms, they are undoubtedly subjected to the extension of a state’s jurisdiction by way of their security forces. Though it may be necessary to create new limitations for rights that operate in an international context, denying the applicability of national constitutions to individuals detained by their forces abroad is both imprudent and unsound.

The American administration has done so recently in detaining mostly Taliban and Al-Qaida fighters at Camp X-Ray, Guantanamo Bay. Their location was apparently chosen to limit the applicability of the U.S. Constitution, as though it could not be applied to individuals outside American territory but under its authority. In response to a transfer of prisoners in Afghanistan by Canadian Special Forces to American authorities, the Canadian Prime Minister made a similar judgement, noting that the issue could not engage Canadian Charter provisions because the detainees were never on Canadian soil in the first place. While these governments may be correct in that those detained will not be able to claim the constitutional protections of these documents because they have no legal recourse given the total absence of territorial link, it is false to assume out of hand that governments are free to violate domestic human rights provisions outside their territories.

In the case of the Canadian exchange of prisoners arrested in Afghanistan by Joint Task Force II (JTF II), it is important to take heed of the fact that those detained were captured in the course of an armed conflict. However, Canadian military forces do fall under the jurisdiction of the Canadian Government, and so those in its custody fall under their jurisdiction. On account of the *Charter of Rights and Freedoms*, and more specifically its considerations of fundamental justice (article 7), it may have been imprudent to turn over the prisoners without receiving assurances that they would not be executed. In the case of the *United States vs. Burns*, the Canadian Court stated:

Section 25 of the *Extradition Act* creates a broad ministerial discretion whether to surrender a fugitive, and if so, on what terms. While constitutionally valid, the *Minister’s discretion is limited by the Charter*(...)Although it is generally for the Minister, not the court, to assess the weight of competing considerations in extradition policy, the availability of the death penalty opens up a different dimension. *Death penalty cases are uniquely bound up with basic constitutional values* and the court is the guardian of the Constitution.\(^{337}\)

While the Charter may not apply given that the exchange occurred on foreign soil and that none of the defendants were Canadian, it is difficult strictly from a common sense point of view to understand why the Minister of Justice could be limited by the Charter in his actions, while soldiers that act on behalf of the Minister of Defense would not. Those captured may after all be executed by military commissions.\(^{338}\) It is possible also that in turning over the prisoners, Canada has violated its international obligations. At issue is the third of the 1949 Geneva Conventions, which applies to all combatants captured in war and requires that a “competent tribunal” be used to determine whether they are prisoners of war or illegal combatants, and to subsequently try them.\(^{339}\) Because the American administration has seemingly made this determination itself and the individuals may be tried in secrecy, Canada may have breached one of its fundamental obligations under international law.\(^{340}\)

While those detained may in the end be granted such hearings by a competent court, and it is true that none will ever benefit from the Charter’s protections, the belief that Canada’s security forces should not at least be guided


in their actions abroad by the Charter deserves review, especially since they will ultimately engage its responsibility internationally. In *R. v. Cook*, the Canadian Supreme held that:

The *Charter* is not absolutely restricted in its application to Canadian territory. It applies on foreign territory in circumstances where the impugned act falls within the scope of s. 32(1) of the Charter on the jurisdictional basis of the nationality of the state law enforcement authorities engaged in governmental action and where the application of *Charter* standards will not conflict with the concurrent territorial jurisdiction of the foreign state.\(^{341}\)

Though it concluded that the *Charter* applied to the interrogation by Canadian detectives of an accused in the United States, it also made clear that its conclusion was an exception to the general rule in public international law of territorial limits upon a state's exercise of jurisdiction, which arose on the basis of the very particular facts of the case at hand. It nevertheless expressed a rule of law whereby the application of the Charter to Canadian law enforcement authorities could be founded on other jurisdictional principles, namely nationality, so long as it did not result in an objectionable interference with the exercise of a foreign state’s jurisdiction.

As regard to targeted killings specifically, there is no doubt that forceful action to neutralise individuals on foreign soil would normally constitute a violation of sovereignty. When permitted by article 51 self-defense, the impending intervention by foreign security forces does not constitute interference with the sanctuary-state’s jurisdiction, as it failed to exercise its discretion to detain suspected terrorists in the first place. Although it is almost pointless to discuss the applicability of the *Charter* in situations where terrorists are killed on foreign soil by agents of another state, it is less so if Canadian agents participate in such operations. While those targeted will find it difficult to claim the protections of the *Charter* as they will no longer exist, it is not unreasonable to believe that the families of those killed will claim reparations. Given that nationality may trigger a jurisdictional basis for the applicability of the *Charter*, the government of Canada may find itself in violation of the Charter if its agents conduct unlawful or arbitrary killings, and possibly if they assist others in doing so.

In the case of those detained in Cuba, it could be feasible to argue that because the conflict is ongoing and the government is in need of more time to gather evidence against them, that certain guarantees may be temporarily suspended. Also, it is not surprising that combatants captured in armed conflict be tried by military courts without benefiting from all the protections guaranteed to criminals under the *Bill of Rights*. The Constitution,

after all, “is not a suicide pact.” In this sense, it is important that courts be sensitive to the legitimate security concerns of their governments. Overly protective courts dealing with the rights of terrorists, especially those captured in armed conflict, would inevitably force states to behave as the American administration has in Cuba. There is hope, however, that time will allow for more refined procedures to emerge that strike a healthier balance between the rights of those detained, and those of the state to protect itself against them.

To give preferential treatment to one’s nationals or those of friendly states, while denying others the minimal protections of national constitutions or international agreements, signifies ironically that the World Trade Organisation is in its treatment of commerce far more advanced than the international practice of human rights. If under free trade preferential treatment of national goods is forbidden, how can it be tolerable in terms of human rights? It would be troubling indeed if, as in ancient Rome, the fate of individuals was determined more by citizenry than elementary considerations of humanity.

Democracy under the Constitution calls for judicial deference to the coordinate branches of Government and their judgment of what is essential to the protection of the nation. But it calls no less for a steadfast protection of those fundamental rights imbedded in the Constitution, incorporated for the express purpose of insulating them from possible excesses of the moment. Lincoln once asked: “Is it possible to lose the nation and yet preserve the Constitution?” His rhetorical question called for a negative answer no less than its corollary: “Is it possible to lose the Constitution and yet preserve the nation?” The Constitution and nation are one. Together, they represent the people. Neither can exist without the other. It is with this thought in mind that we should gauge the claims of those who assert that national security requires what Constitutions condemn.

Questions pertaining to the applicability of domestic constitutions and their human rights protections to the enforcement actions of agents abroad, while fascinating, are deserving of entire studies in themselves. Though legal technicalities may prohibit individuals on foreign soil from benefiting from the protections of national constitutions, it is nonetheless interesting to question whether governments should be guided in their policies by the principles embodied in their most sacred documents. Unless foreigners be less human or less equal than


343 It is interesting to note that two American are also still being held in Guantanamo without charges. This factor is an early indication that the rights of citizens may also be one day be ignored in the pursuit of terrorists. If after all Americans can be denied the protections of their own Constitution, the possibly of foreigners having their international rights recognised is all the more unlikely.
their own citizens, governments using force abroad against individuals are faced with the same obligation to
prevent arbitrary deprivations of life. And though governments are expected to respect the rights of their
citizens and may lawfully chose to withhold the application of their national constitutions to foreigners,\textsuperscript{344} they
may not remove what basic human rights others may have under the \textit{International Bill of Rights}.

Beyond such considerations that may render the consequences of targeted killings disproportionate to the harm
they seek to avoid, it is important to note that international cooperation may also be hindered as a result. The
governments of Europe, Canada, Australia, and many others that oppose the death penalty, may be forced to
withhold valuable information from states that use targeted killing as a matter of policy. In the global campaign
against international terrorism, states must be able to rely on other states to look out for their interests, and to
warn them of any intelligence that may help prevent attacks. States who disagree with the practice of targeted
killing may not share information that would lead to such an end. States that limit their range options are
ultimately doing themselves the greatest disservice.

Until assurances are given that targeted killings will only be executed in the absence of armed conflict on the
territory of states that support terrorism according to a \textit{legitimate} right of self-defense, or else in a manner that
is consistent with the right to life and the rule of law, abolitionist states may refuse to cooperate for fear of
violating the right to life themselves and becoming accomplices to murder. Governments that oppose the death
penalty may be forced to withhold information such as the location of suspected terrorists from states that
practice targeted killing. The potential for conflict on this level, both legal and political, can be assessed by
existing tensions regarding assurances sought by Europe and others in extradition cases involving retentionist
jurisdictions.

Amnesty International has called the death penalty “the ultimate cruel, inhumane and degrading punishment,”
often reiterating that it violates the right to life, that it is irrevocable and can be inflicted on the innocent, and
that it has never been shown to deter crime more effectively than other punishments. Given the growing
movement towards abolition and the refusal by a number of states to extradite individuals to jurisdictions where
they may be subject to capital punishment, it is evident that extrajudicial executions (of which targeted killings
are often a form) are contrary to international public order. If death amounts to unacceptable punishment in
many states even after \textit{properly established declarations of guilt}, than death is an even greater outrage in the

\begin{flushright}
\end{flushright}
total absence of judicial involvement. Judge De Meyer in the Soering case stated that the unlawfulness of the
death penalty in Europe was recognised by the Committee of European Ministers when it adopted Protocol No.
6 in December 1982. He wrote:

No state party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to
extradite any person if that person thereby incurs the risk of being put to death in the requesting state. Extraditing
somebody in such circumstances would be repugnant to European standards of justice, and contrary to the public order
of Europe.

While the European Court of Human Rights (ECHR) refused to recognise that all forms of capital punishment
where also violations of article 3 of the European Convention, it nonetheless confirmed that certain
circumstances relating to death sentences could give rise to issues respecting the prohibition of inhuman and
degrading treatment or punishment. If capital punishment and the act of extraditing individuals to
retentionist jurisdictions is contrary to the public order of Europe, then the use by states of targeted killings in
the absence of armed conflict or a right of self-defense must be also. In Canada, a similar position was
expressed by the Supreme Court in United States v. Burns:

Countervailing factors favour extradition only with assurances. First, in Canada, the death penalty has been rejected
as an acceptable element of criminal justice. Capital punishment engages the underlying values of the prohibition
against cruel and unusual punishment. It is final and irreversible. Its imposition has been described as arbitrary and its
deterrent value has been doubted. Second, at the international level, the abolition of the death penalty has emerged as
a major Canadian initiative and reflects a concern increasingly shared by most of the world's democracies. [...] International experience thus confirms the validity of concerns expressed in the Canadian Parliament about capital
punishment. It also shows that a rule requiring that assurances be obtained prior to extradition in death penalty cases
not only accords with Canada's principled advocacy on the international level, but also is consistent with the practice
of other countries with which Canada generally invites comparison, apart from the retentionist jurisdictions in the
United States.

It further added:

345 Even states which allow draconian forms of punishment such as death by stoning first demand that individuals be
declared guilty by a competent tribunal as provided by law. "Nigerian woman appeals ruling of death by stoning," The
346 Soering vs. The United Kingdom (App. No. 14038/88), Series A, Vol. 161, p.52; see also on corporal
punishment Tyrer v. the United Kingdom, judgment of 25 April 1978 (Series A no. 26).
347 The death row phenomenon, marked by prolonged periods between sentence and execution, necessitate
additional circumstances such as extreme conditions of detention, mental health disturbances, young age, or
competing extradition requests to amount to inhumane and degrading treatment or punishment (Soering v.
United Kingdom, § 108); Kindler v. Ministry of Justice,[1991] 2 R.C.S. 779; Sher Singh v. State of Punjab,
348 Supra, note 337.
Canada’s support of international initiatives opposing extradition without assurances, combined with its international advocacy of the abolition of the death penalty itself, leads to the conclusion that in the Canadian view of fundamental justice, capital punishment is unjust and should be stopped. While the evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty, it does show significant movement towards acceptance internationally of a principle of fundamental justice Canada has already adopted internally — namely, the abolition of capital punishment. 349

The jurisprudence of Europe and Canada is but a reflection of what most abolitionist states are leaning towards. 350 Cooperation between law enforcement agencies will be seriously compromised unless assurances are granted that shared intelligence will not lead to the killing of terrorists outside the context of armed conflict unless absolutely necessary to save lives. In order to ensure that no territory on earth is complacent to the presence of terrorist elements within its boundaries, a certain level of respect and comity amongst states will be needed. Nations that unlawfully undertake operations to detain or kill suspected offenders on foreign soil will have little chance of receiving assistance from others, or even from informants that support bringing terrorists to justice but not killing them extrajudicially.

Expressing concern with the use of counter-terrorism measures that are incompatible with international standards of law, such as the adoption of vague and over-inclusive definitions of terrorism, the use of secret military courts or specialised tribunals to prosecute terrorists, the increasing practice of restricting habeas corpus and arbitrarily depriving individuals of liberty, and “other measures aimed at undermining public freedoms and suppressing social and political opposition,” 351 the International Commission of Jurists aligned itself with the statement of the High Commissioner on Human Rights, stating that:

An effective international strategy to counter terrorism should use human rights as its unifying framework. The suggestion that human rights violations are permissible in certain circumstances is wrong. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by States or non-state actors, are never justified no matter what ends. International human rights and humanitarian law define the boundaries of permissible political and military conduct. A reckless approach towards human life and liberty undermines counter-terrorism measures. 352

349 Supra, note 337.


The aforementioned statement is a most precise expression of what this research is attempting to convey. Although it deals not with issues of interstate cooperation and fails perhaps to acknowledge that in certain cases human rights violations may be a necessary evil, it does however emphasise the *role of human life and dignity as the unifying framework for international action.* Although the subject of this study has inevitably centered on the right of self-defense as it is the principle justification for targeted killing, there is little doubt that any abusive measure to fight terrorism will be detrimental in the long run to the international campaign against terrorism.

Although this consequence of targeted killing is significantly mitigated when victim-states have a right to use force in self-defense against a particular state, its impact on state relations as a whole is not negligible. Trust and cooperation among democratic states is crucial to the success of any campaign aimed at limiting the scourges of terrorism. Given the growing ties between terrorist groups, it is becoming evident that any division between democratic states as to what constitutes *just means* in the fight against terrorism will only reduce their ability to prevent attacks. As such, an important objective of this study is to advocate in favour of a unifying framework centered on the right to life, so that repressive and arbitrary measures which undermine human rights will not divide the democratic world and weaken its resolve to collectively suppress the threat of international terrorism.

In the absence of any international institution capable of generating the authority or consensus required to coordinate the war on international crime and terrorism, like-minded states that share a common ideal of peace and justice and based on human rights and the rule of law can work to ensure the reflection of this ideal under international law. Starting perhaps individually or regionally through binding statements and declarations, these nations can signal their intent to respect minimal considerations of humanity when conducting operations to “arrest or neutralise” individuals on foreign soil. To enhance their ability to prevent acts of international terrorism, all states must ultimately unite to develop a common strategy for the collective pursuit of dangerous individuals. Ensuring that lethal force is never used in a manner that is arbitrary or inconsistent with the right to life is a necessary first step in such a process.
CHAPTER IV. TARGETED KILLING AND THE RULE OF LAW

Man is the only animal that laughs and weeps, for he is the only animal that is struck with the difference between what things are, and what things ought to be.

—William Hazlitt

I. Reconciling Targeted Killing and International Human Rights Law

A) The Status of the Right to Life

The growing threat of terrorism, while a challenge to international security, would be an even greater threat if it were responsible for the demise of human rights. There is a chance, judging by the immediate reactions to September 11th, that terrorism will lead democratic nations down the same path once travelled by repressive communist regimes: increased security at the expense of privacy and human rights. Traditionally, limitations of the right to life have been interpreted domestically; the growing threat of international terrorism and the need to conduct enforcement actions abroad may nevertheless require a redefining of human rights that is more representative of current realities.

Beyond the need to justify the impending violations of sovereignty which may occur as a result of targeted killings by states according to article 51 self-defense, it may also be wise for nations to declare such actions against foreign terrorists (that are not agents of a state) as justifiable limitations to the right to life. When lethal force is used in countries where there is no war, it seems only fitting that targeted killings be justified according to peacetime standards of law. These require that deadly force be used only as a last resort when absolutely necessary to save lives. The following chapter will briefly outline the scope and current status of the right to life to determine how targeted killings can be reconciled in democratic nations as acceptable limitations to it.

At its core, international human rights law demands that states respect the rights of all individuals subject to their jurisdiction, not just those within their territory. Targeted killings, accordingly, appear largely inconsistent with the International Bill of Rights. Not merely because they violate its aim and Spirit, but because the minimal requirements laid-out within it are not receiving proper attention. To meet its legal imperatives and to also prevent tensions within the international community, it may be necessary for democratic states to regulate
or monitor the use of targeted killings, or both. States that use targeted killings on foreign soil in the absence of armed interstate conflict cannot fear the prospects of having to respect human rights law.

Targeted killings that are conducted in the absence of armed conflict or a right of self-defense are not just unlawful uses of international force, but extrajudicial executions as well. In summary executions, the procedural due process safeguards found at articles 14 and 15 of the *International Covenant on Civil and Political Rights* (ICCPR) are not observed; death sentences are usually rendered by a special "people's court," a "revolutionary court" or a military tribunal, in the absence of ordinary rules of procedure. In arbitrary executions, there is no legal process whatsoever. Given that targeted killings are carried out without due process of law or any judicial involvement for that matter, there is fear that they can amount to arbitrary extrajudicial executions. That is undoubtedly why governments have attempted until now to justify them as military operations aimed at combatants, as they are likely contrary to the *Covenant* and by extension human rights law.

In discussions concerning the relationship between the right to peace and the right to life, energy is often unnecessarily expended to determine which should come first. On the one hand, the right to life is exposed to serious risks during armed conflict, and on the other, peace is seriously jeopardised if the right to life is not held as sacred. Theoretically, the position regarding this relation is stated in the preamble of the *Universal Declaration*, which states namely that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." From this perspective, the right to peace would be derivative of the right to life rather than vice versa. Article 3 of the *Universal Declaration* which states that everyone has "the right to life, liberty and security of person" provides additional insight on the matter by placing the right to life before all others.

It is nevertheless true that armed conflicts do occur, and that they have not altogether been outlawed. Yet the deprivation of life during legitimate armed conflict is an exception to the right to life, and it has been

---


considerably limited by the Charter of the United Nations and Humanitarian Law. The right to peace is a corollary of the right to life grounded in the principle of non-use of force. To a certain extent, therefore, the right to life and the right to peace share some common ground and pursue the same goal. The strengthening of the right to peace has an important role to play in the increased protection of the right to life. However, the right to life is as a human right may not be subordinated to the right to peace as a right. The relationship is one of inter-dependence, with the right to life taking the primordial place.

Providing the major stimulus for international action, the atrocities of the Second World War compelled most states to adopt the Charter of the United Nations. In its preamble, it recognised the "dignity and worth of the human person," and made the promotion of human rights a central objective. Article 1 paragraph 3 states:

[The purposes of the United Nations are] To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 55 goes on to add:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote: (C) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

And Article 56:

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

It was also under the auspices of the UN that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights were drafted. The history of the right to life in the drafting of the International Bill of Rights has been recounted by several prominent authors and will not be recounted in

---

358 Supra, note 1, art. 1(3).
359 Supra, note 1, art. 55.
360 Supra, note 1, art. 56.
the following section. It is important, however, to highlight the parallel development of the Declaration and the original single Covenant. The Commission on Human Rights, its drafting committees, the Secretariat and the Third Committee all contributed to the evolution of the texts. These developments then provided the necessary impetus for additional initiatives aimed at furthering the cause of human rights, both on a regional basis and within the organisation.

During the drafting of these documents, the right to life provisions were dominated by the issue of exceptions to the right. Its evolution and recognition was in fact marked more by its exceptions than by its actual content. While there was unanimous support for its status as the supreme right, many states of the world still provided for capital punishment, and the lawful taking of life in a variety of circumstances. The Declaration, which began as a preliminary draft prepared by the Secretariat, included the following clause concerning the right to life: “Everyone has the right to life. This right can only be denied to persons who have been convicted under general law of some crime to which the death penalty is attached.” The Soviet Union requested that the reference to capital punishment be removed since it might signify United Nations approval of it. The Soviet delegation further requested a clause which read “the death penalty should be abolished in times of peace,” but was denied by a vote of 21 to 9 with 18 abstentions by the Commission. There was little discussion concerning possible limitations to the right to life other than the question of capital punishment.

Article 3, the pertinent clause concerning the right to life appeared in its final version as the following: “Everyone has the right to life, liberty and security of person.” The solution adopted in the Declaration concerning limitations on rights, including the right to life, was the insertion of a general limitation clause at article 29. The Consensus was that the Declaration should assert rights positively, in a non-technical manner, with the more detailed formulations left to the Covenant. While in each document a distinct solution was adopted to deal with this issue, the outcome was roughly the same.

The right to life clause in the Covenant was the source of considerable difficulty. The numerous drafts and amendments tabled before final adoption reflected the varying positions on how best to formulate an exception

---


363 UN CAOR C3.A/C.3/SR.

for capital punishment and to allow for other exceptions. The debate was dominated by disputes between the United States of America and the United Kingdom. Mrs. Roosevelt, Chairperson of the Commission and U.S. representative, considered that the role of the Covenant was to defend individuals from the unwarranted actions of governments and not to interfere with their legislative freedom, and believed that this would be best achieved by brief clauses urging states not to 'arbitrarily' violate particular rights, including the right to life. The United Kingdom, on the other hand, argued that unlike the Declaration, the Covenant was intended to be a binding, legal instrument, which required precision in drafting so that states could be held to their clearly defined commitments.

The British position implicated the drafting of a detailed and exhaustive list of exceptions to the right to life, which some argued placed greater emphasis on the exceptions rather than the right itself. There were also concerns about the feasibility of listing an exhaustive set of limitations without causing much debate and dissent. The United Kingdom also went beyond providing for possible exceptions, introducing an important safeguard to the use of deadly force: the principle of proportionality. By restricting the use of lethal force to the protection of life and subjecting that force to the requirement of absolute necessity, the British proposal (supported by several states, notably Australia, Lebanon, and France) innovated in the domain of human rights law. While it failed to gather support among the Commission, it nonetheless paved the way for the right to life clause in the European Convention. The right to life clause in the Covenant reads as follows:

### 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;

2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court;

3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide;

4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases;

5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women;

6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

---

365 Supra, note 364, p. 227; E/CN.4 SR.90, 91 (1949); E/CN.4 SR.88, p.10 (Mrs. Roosevelt).

The right to life is the right of every individual not to be arbitrarily deprived of life. It is the most fundamental of all rights. Its enjoyment is a condition *sine qua non* to the realisation of all other rights. Absent life, all other rights are extinguished. In this sense, the right to life is the primordial right. It ranks highest against any other. As demonstrated by the text of article 6, there was no agreement beyond capital punishment as to the possible limitations on the right to life. It was, however, clearly the intention of its drafters to establish an international standard concerning the right to life. The wording of article 6 and its prohibition on arbitrary deprivations of life represent the lowest common denominator regarding its protection. Although the word “arbitrary” was one of the most extensively debated terms and numerous views were advanced as to its meaning, what emerged from the debates is that the word was chosen in article 6 with the intention of providing the highest possible level of protection to the right to life.

When interpreting the relation between the right to life and the concept of arbitrariness, several considerations usually need to be taken into account. First, whether a deprivation is arbitrary or not *must* be determined ultimately by reference to international human rights law. Second, the inherent character of the right to life requires that the most stringent criteria be applied. Third, no arbitrary deprivation can ever be lawful under the Covenant. And finally, arbitrariness needs to be determined on a case by case basis since, as societies evolve, so may the concept of arbitrariness.\(^{367}\)

In its general comments on article 6 of the *Covenant*, the Human Rights Committee considered that State parties should take measures not only to prevent and punish arbitrary deprivations of life through criminal law, but also to prevent arbitrary killings by their own security forces.\(^{368}\) The Committee added that state parties should take specific and effective measures to prevent the disappearance of individuals and to investigate thoroughly cases involving violations of the right to life. Noting that the right to life had been too often narrowly interpreted, the Committee emphasised that the expression “inherent right to life” could not properly be understood in a restrictive manner.\(^{369}\) States were expected to strictly control and limit the circumstances in which persons may be deprived of life.

\(^{367}\) *Supra*, note 364.  
\(^{369}\) *Ibid.*
The obligations undertaken by states in protecting the right to life have both a formal and a substantive dimension. Formally, the right to life must be protected by law, the principle of legality. It has been pointed out that by nature the right requires a strict interpretation of the word ‘law’ and “[the] international obligation requires that the right to life be protected by higher forms in the legislative hierarchy, by statute or constitutional provision.”370 The Covenant also imposes unto states the duty to prevent arbitrary deprivations of life through the prosecution of such acts under criminal law. A failure on this level would violate article 6, in conjunction with article 2, which encompasses the duty of each State Party to “respect and ensure to all individuals within its territory and subject to its jurisdiction” the rights recognised in the Covenant.371

The duty to respect and ensure respect has negative and positive dimensions. In negative terms, states are expected to take measures to prevent unlawful deprivations of life by agents of the state, as well as by others acting contrary to the law. This duty requires an earnest effort by countries to deter, through punishment, violations of the right to life. In positive terms, the state should, for example, take all possible measures to reduce infant mortality and to increase life expectancy. This aspect of the right to life is aimed at encouraging the promotion of life through concrete and tangible measures. It is important to note that the duty to respect the right to life applies to all branches and organs of the state, including its legislative, administrative, executive and judicial branches, as well as its law-enforcement, security and military forces. This factor has particular implications on targeted killing.

The substantive protective dimension of the right to life requires that the domestic law of every state be in conformity with the Covenant read as a whole. This is clear from article 6, paragraph 2, which permits the imposition of the death penalty “only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant.” An execution, for example, based upon a discriminatory law which prescribed this penalty only for members of a particular ethnic minority would contravene the discrimination provisions of the Covenant. As a result, the execution would amount to an arbitrary deprivation of life, as the law itself would violate the provisions and spirit of the Covenant as a whole. Technically, the adverb “arbitrarily” would refer to the impending deprivation and not the law itself, yet the concerned legislation would not fulfil the characteristics required under article 6, which

371 Supra, note 353, art. 2.
demand that law (as to its substance) be compatible with the Covenant. A law permitting the use of targeted killing would similarly have to meet this substantive requirement.

To ensure compliance, the control mechanisms of the ICCPR are two-fold. First, State Parties are expected, under article 2, to ensure the rights under the Covenant. Such an obligation implicitly requires respect for the non-derogation provisions of article 4. Second, article 28 establishes a Human Rights Committee to whom states submit reports on legislative and other means taken to comply with their obligations under the Covenant, pursuant to article 40 (1). The Committee is empowered to receive and hear various complaints from States about other State Parties’ failures to comply with Covenant provisions (including articles 4 and 6), to create committees to study such problems and to issue advisory opinions. However, this authority is limited in that the consent of the States involved must be granted before the Human Rights Committee can investigate (art. 41.1). The ICCPR contains no actual enforcement provisions to force compliance other than the significant assumption that publication of findings will influence state action by creating pressures by other governments and public opinion to desist from future violations.

It was the Camargo and De Guerrero case, arising under the Optional Protocol with a communication to the Human Rights Commission against Colombia, which provided the first truly international interpretation of article 6 of the Covenant. The complaint was submitted on behalf of Mr. De Guerrero, whose wife was killed with six others when police raided a house in Bogata under an apparently lawful order to rescue a kidnap victim. Though the victim was never found in the house, an eleven-member police party hid and awaited the arrival of the “suspected kidnappers.” Seven unarmed people arriving at different intervals were shot dead at close range without being granted an opportunity to surrender. The following conclusions expressed by the Committee are essential to the understanding of the right to life under the Covenant. The Committee stated:

The right enshrined in Article 6 is the supreme right of the human being. It follows that the deprivation of life by authorities of the State is a matter of the utmost gravity. This follows from the article as a whole and in particular is the reason why paragraph 2 of the article lays down that the death penalty may be imposed only for the most serious crimes. The requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life meant that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State.

---

372 Supra, note 364, p. 234.
The Committee also noted that on the facts:

There is no evidence to suggest that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the Covenant.\textsuperscript{375}

The Committee concluded that the killings by the police had been disproportionate to the requirements of law enforcement, and that Mrs. De Guerrero had been arbitrarily deprived of life in violation of article 6 (1) of the Covenant. In response to Colombia’s argument that the deaths were justifiable by article 25 of the Colombian Penal Code (Legislative Decree 0070) which contained no limitation on the use of force by police and no corresponding penal responsibility, the Committee found that “the right to life was not adequately protected by the law of Colombia as required by Article 6.” The absence of any requirement of proportionality in the use of force by the police led the committee to describe it as violating the prohibition against arbitrary deprivation of life. The committee further determined that the state should both compensate Mrs. De Guerrero and amend the law under which her death had been justified.

The findings of the Committee played an important role in establishing the meaning of arbitrary deprivation of life. Establishing that excessive force by the state resulting in death was contrary to article 6 (1) and that the protections of due process of law were intimately associated with the right to life gave the Covenant the practicality and realism needed to ensure its credibility. While the issue of compliance or enforcement is still contentious under the International Bill of Rights, much benefit has been gained by the reporting of atrocities, as well as the ensuing interpretations of the right to life.

The European system is arguably the most important undertaking in the promotion of human rights. While it does not enjoy the same universal recognition as the Declaration or Covenant, its mandatory character as enforced by the European Commission and Court of Human Rights is paramount. These two bodies, known as the Strasbourg Organs, have allowed the interpretation and enforcement of human rights on a truly supranational level. Their contributions to the right to life are immeasurable. The European Convention has offered invaluable insight on the acceptable limitations to the right to life and the appropriateness of using deadly force under human rights law.

\textsuperscript{375} \textit{Ibid.}
The European Convention on Human Rights was signed in Rome on November 4th, 1950, and entered into force on September 3rd, 1953. The Convention, influenced by the drafting of the Universal Declaration, provided in turn a model for the International Covenant on Civil and Political Rights and the American Convention on Human Rights. The main contrast in the right to life provisions of the Covenant and the Convention lies in the fact that the Council of Europe instrument purports to exhaustively set out the permissible grounds for the deprivation of life, something that could not be agreed to internationally. The close relationship between the texts has nonetheless proven of great value in the interpretation of the right to life under both, especially with regards to the development of an international standard. Under the Convention, the right to life provision reads:

**Article 2**

Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Deprivation of life shall not be regarded as inflicted in contravention of those article when it results from the use of force which is no more than absolutely necessary:

1) in defence of any person from unlawful violence;
2) in order to affect a lawful arrest or to prevent the escape of a person lawfully detained;
3) in action lawfully taken for the purpose of quelling a riot or insurrection.

Because the provisions of the European Convention concerning capital punishment were too conservative and somewhat inadequate in contrast to the provisions of the Covenant, Protocol No.6 was adopted in 1982. It was the first instrument to effectively abolish the death penalty and it served as a model for the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty. It was Protocol No. 6, in fact, which initiated the groundbreaking process of refusing to extradite individuals to states where capital punishment still exists.

Two explicit limitations on the death penalty were included within article 2 of the Convention. First, sentences of death must be pronounced by a ‘court’ and they must be “provided by law.” The word ‘court’ appears

---

376 Supra, note 106.
377 American Convention on Human Rights, (1979) 1144 UNTS 123, OAST 36 (hereinafter the American Convention)
elsewhere in the Convention and it has been interpreted as implying a body independent of the executive branch of government and offering the guarantees of a judicial procedure. The expression “provided by law” imposes on every state an obligation to enact positive legal provisions authorising capital punishment if it is to be carried out. Similarly, any limitation of the right to life, as is the case of targeted killings internationally in the absence of armed conflict, must be “provided by law.” Although a number of states provide for the death penalty, there does not yet exist any such legislation concerning targeted killing, nor any requiring input from independent ‘courts’ to determine which individuals can be killed pre-emptively.

There is yet another noteworthy limitation to the right to life which was included in the European Convention and yet was omitted from the Covenant. Article 15(2) adds that “no derogation from Article 2, except in respect of deaths resulting from lawful acts of war... shall be made under this provision.” The Convention thus reflects the inevitable permissibility of killing during such times. A similar approach was taken in Protocol No. 6 which abolished the death penalty in Europe in times of peace. Unlike the Second Optional Protocol which restricted the death penalty for military crimes of the most serious nature, Protocol No. 6 established no limit ratione materiae on the use of the death penalty in wartime. Any attempt to abolish or restrict the death penalty in times of war in Protocol No. 6 may have conflicted with the wording of article 15. The expression “state of war” was retained in article 15 (1) of the Convention instead of ‘international armed conflict’ which was used in Protocol Additional I to the 1949 Geneva Conventions. The desire was to exclude civil conflicts from this exception and to limit as much as possible the situations in which intentional deprivations of life may be tolerated.

By permitting such deprivations only in situations involving war or the “imminent threat of war,” the right to life outside the scope of article 2 can only be limited during interstate conflict. Nowadays, the term ‘war’ is seldom used and armed conflicts are initiated not by declarations of war but by the use of force itself, or perhaps resolutions authorising the use of force. While there may be disagreement as to whether or not an official declaration is needed by at least one of the parties to signal the existence of a war, it is a fact that ‘war’ can only really occur between states. Situations falling short of war cannot, under the European Convention, be


382 Supra, note 90, p.228.

383 Supra, note 113.

384 Supra, note 82.
used to justify targeted killing. Rhetorically declaring war on terrorism, while effective in showing resolve, cannot modify the legal provisions concerning the right to life, especially in the European context.

Beyond lawful acts of war and capital punishment established by a court pursuant to a crime for which the penalty is "provided by law," the right to life can only be limited by the use of deadly force which is no more than absolutely necessary (a) in defence of any person from unlawful violence (b) in order to affect a lawful arrest or to prevent the escape of a person lawfully detained (c) in action lawfully taken for the purpose of quelling a riot or insurrection. The use of force in such circumstances is prima facie justifiable, but it must also be proportionate. Since individuals do not under normal circumstances intentionally deprive themselves of life, it is the ensuing level of force by state officials which must be defined and limited to avoid abuse.

There is also a growing jurisprudence to support that human rights law can apply to military forces in the context of enforcement operations conducted in the absence of war. In McCann et al. v. the United Kingdom, the Grand Chamber of the European Court of Human Rights interpreted the right to life provision of article 2. It noted, as had the European Commission in the Farrell, Stewart, and Diaz Ruano reports, that because the Convention must be interpreted and applied "so as to make its safeguards practical and effective," the text of article 2 was to be strictly construed. The Court continued "as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, article 2 ranks as one of the most fundamental provisions in the Convention—indeed one which in peacetime, admits of no derogation under Article 15."

The case involved the shooting of three suspected Irish Republican Army (IRA) members by the British Special Air Service (SAS) in Gibraltar. British and Spanish authorities had reasons to believe that a terrorist attack was planned for a ceremony in 1988. The suspects were known to authorities as active members of the IRA, but since they lacked sufficient evidence to prosecute them, they did nothing to prevent them from entering Gibraltar. They chose instead to closely monitor their movements and attempt to catch them "in the act."

---

385 Supra, note 106, article 2.
386 Supra, note 309 (McCann).
387 Farrell v. United Kingdom, December no 9013/80, D.R. 30, D.R. 38.
388 Stewart v. United Kingdom, December no 1044/82, D.R. 39.
390 Supra, note 309 (McCann), at 146.
Fearing at some point that the suspects would detonate a remote-controlled bomb, the authorities shot and killed them. Family members of the deceased believed Britain had violated article 2 of the *European Convention* and demanded that it compensate them accordingly.

Although the suspects had indeed planted a bomb, the method of detonation was not a remote device that could be set-off instantaneously. Moreover, the evidence claiming that it was such a device had been provided by a non-expert. Various reports indicated that the unarmed suspects had been shot several times at close range without being given a chance to surrender, and that some had been shot repeatedly after falling to the ground. The European Court concluded that excessive force had been used because shooting the suspects was not absolutely necessary in defence of persons from unlawful violence.

The Court’s decision was based on the facts that authorities (i) had not prevented the IRA suspects from entering Gibraltar; (ii) had failed to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous; and (iii) had failed to stop the soldiers from *automatically using lethal force*. Although the Court believed the SAS soldiers had acted honestly in shooting the suspects, it nonetheless found that their actions had been based on erroneous information. The Court expressed that the commanding officers, both in terms of intelligence and instructions supplied to the SAS soldiers, had failed to organise the operation *in conformity with the right to life*. Consequently, the operation had inevitably required the use of lethal force.

Taking all circumstances into account, the Court considered that the right to life, strictly construed, had been violated, and demanded reparations. It emphasised that the availability of non-lethal measures was necessary in order to preserve the integrity of law-enforcement operations and to ensure compliance with article 2, and that non-lethal measures had to have been considered and made available to the SAS. Because the operation relied solely on a “shoot to kill” strategy, it failed to meet the stringent requirements of the right to life. By recognising the honesty of the soldiers and yet declaring that the operation had violated the right to life, it used an objective criteria to determine the necessity of using deadly force. It further took great care to illustrate the dangers associated with bad intelligence, whereby avoidable deaths occurred as a result of erroneous information.
The groundbreaking work of the European Court of Human Rights has provided individuals of the European continent with a viable legal system to limit impunity often characteristic of states. As pioneers in matters of human rights law, the European Court in McCann developed what can be described as the international standard concerning the right to life in peacetime. While the “danger to human life” criteria stated in the UN Code of Conduct for law enforcement Officials was not explicitly articulated by the Court, it was already implicitly recognised by the Convention in the language of article 2. Given that any intentional deprivation of life must be justified according to competing claims involving the protection of others from unlawful violence in situations where lethal force is absolutely necessary, the outcome is roughly the same. The McCann Rule confirmed that military assets, like law-enforcement officials, were obligated to use lethal force only when strictly unavoidable to protect life, even on foreign soil.

The international standards concerning the right to life have evolved considerably since the drafting of the International Bill of Rights and the European Convention, yet they have converged to offer the highest degree of protection to this right. Largely encompassed in the UN’s Code of conduct and Use of deadly Weapons, they require generally that deadly force be used only when necessary as a last resort to protect life. As provided by C.K. Boyle, it can be summarised as the following: (1) Any deprivation of life must purport to have a legal basis; (2) the deprivation of life must be proportionate; (3) the question of justification of a deprivation must be subject to an independent judicial process; (4) deprivation of life may be justified only in defence of life.392

Although the absolute necessity and danger to human life requirements have not received official recognition by international tribunals outside the European theatre given the absence, beyond the Commission on Human Rights, of a global institution akin to the European Court of Human Rights, prohibiting ‘arbitrary’ deprivations of life and requiring states to use deadly force only when necessary to prevent armed attacks can have a similar effect. The existing unwillingness of governments to recognise their responsibility for human rights violations under the pretext of fighting a “war on terrorism” only confirms that “when legislatures, or nation-states, are left free to interpret the legal norms meant to restrain their own power, they will naturally have a greater tendency to find justification than might a more independent body.”393 In a world increasingly bent on

392 Supra, note 364.
restricting civil and political liberties in exchange for security, it is especially important to rely on human rights law and its institutions to determine the nature and scope of the right to life. 394

B) Acceptable Limitations to the Right to Life

At the most basic level, targeted killings and the right to life are incompatible. The Universal Declaration's article 3 pertaining to the right to life expresses quite clearly that “everyone has the right to life, liberty and security of person.” ‘Everyone’ would presumably include all human beings, including suspected terrorists, and to kill a person, regardless of circumstances, would obviously lead to death and therefore a violation of the right to life. What must be determined is whether targeted killings can be justified in peacetime as acceptable limitations to the right to life, or else pass as arbitrary deprivations of life. Before entertaining the possibility of justifiably limiting the right to life, it is important to stress that the Civil Rights Covenant already anticipated situations in which certain rights could be suspended. The right to life was not one of them. Article 4 declares:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation. 395

Besides limiting derogations on grounds of discrimination (art. 4.1), a state’s ability to suspend the rights of the Convention in times of emergency does not extend to fundamental rights deemed inderogable under paragraph 2 of article 4, which reads: “No derogation from articles 6, 7, 8, 11, 15, 16 and 18 may be made under this provision.” Hence, no state can ever ignore its obligation under the Covenant to ensure the right to life (art.6), freedom from torture (art.7), freedom from slavery or servitude (art.8.1 & 8.2), freedom from imprisonment for failure to pay a debt (art.15), the right to be recognised as a person before the law (art.16), and freedom of thought, conscience and religion (art.18).

These essential commitments of states apply at all times, whether in times of peace or situations of armed conflict, to all persons subject to a state’s authority and control. 396 The International Court of Justice has stated

---

395 Supra, note 353, art. 4.
396 Robert K. Goldman and Brian D. Tittemore, “Unprivileged Combatants and the Hostilities in Afghanistan: Their
in this regard, for example, that "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."397 As for the difficulty in determining when a public emergency emerges and the relative ease with which states may declare one, the important consideration is that the right to life may never be suspended regardless, especially in a democracy.398 As stated by the European Court in Klass v. Germany:

The Court being aware of the danger ...of undermining or even destroying democracy on the grounds of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.399

Since all human rights treaties specifically prohibit arbitrary deprivations of the right to life, the unchecked killing of terrorists outside the context of armed conflict is contrary to human rights law and most probably a violation of jus cogens. Because the norms which have risen to the status of jus cogens are far from clear, there is an attempt to link a select group of non-derogable rights (especially those applicable even in war by way of common article 3) from which states may not derogate during periods of emergency with such peremptory norms.400 Given that the right to life cannot be suspended by virtue of Article 4 and that states cannot forego the responsibility of their forces when conducting operations abroad, it is imperative that targeted killings be justified by democratic states as acceptable and necessary limitations of the right to life.

The right to life is not absolute, nor can it ever be considered in isolation. It must be weighed in accordance with the rights of other members of society. With this in mind, it is crucial that the utmost care be taken when limiting the right to life, as doing so means extinguishing it. Once taken away it cannot be restored. It is for this reason that article 29 of the Universal Declaration provide stringent conditions for limiting the rights and freedoms enshrined in its provisions. Article 29 states that:


397 Supra, note 144 (Nuclear Weapons), paras. 79, 84.
In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.401

Permissible limitations must therefore:

(a) be determined by law,

(b) solely for the purpose of:

i) securing due recognition and respect for the rights and freedoms of others, and

ii) of meeting the just requirements of morality, public order and the general welfare in a democratic society

The requirement that limitations must be “determined by law” is a safeguard against capricious and irrational state action. It ensures a minimal level of predictability and enables state functionaries to ground their forceful intervention on predetermined and identifiable principles. The word ‘law’ not only refers to domestic law but also encompasses international law. It is nonetheless difficult to determine what situations fall under the purposes which the Declaration recognises as legitimate in a democratic society. The use of abortions, capital punishment, and euthanasia, are all contentious limitations to the right to life. State practice tends nonetheless to reveal appreciable agreement over certain cases in which individuals may legitimately be deprived of life. These include: capital punishment for serious crimes, law enforcement actions aimed at preventing crime or arresting suspected offenders, defending any person from unlawful violence, quelling riots, defending security zones, as well as military actions in legally conducted armed conflicts.

The limitations foreseen in article 29 of the Declaration were perhaps not intended to encompass measures such as targeted killings, which in the past were inherently political, yet in the new security environment, they cannot be seen merely as tools of low intensity warfare aimed at undermining political regimes. In response to armed attacks by terrorists, especially those supported by states, such measures can also amount to legitimate acts of self-defense when taken by states to protect innocent civilians from unlawful violence. Unfortunately, a number of states still justify arbitrary and atrocious killings under the pretext of defending people’s rights, maintaining law and order, or safeguarding national security. Unless steps are taken to ensure their compliance with the rights of life and self-defense, the recent popularity of targeted killings in the “war on terrorism” may represent an example of this phenomenon.

401 Supra, note 361, art. 29.
Under the *International Bill of Rights*, any lawful deprivation of life must not be *arbitrary* (Covenant) and have a legal basis “provided by law,” and further be taken for the purpose of “securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” Before studying the legality requirement, it is interesting, though in some ways unnecessary, to determine whether targeted killings can amount to measures enacted for the purpose of “securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” Unnecessary because throughout this research it has been stated on several occasions that as a last resort, the use of lethal force against terrorists on foreign soil may be necessary to prevents acts of international terrorism and protect life. Interesting because beyond killing terrorists that are on their way, many states will not approve of the preemptively killing of impossible to arrest and likely to strike again terrorists without safeguards.

The first aspect to evaluate is whether targeted killing as a limitation to the right to life can actually serve to secure the rights of others. While there is only little evidence, as presented in the necessity portion of Chapter two, to suggest that targeted killings may help protect individuals and society against terrorism, even the slightest success in the most limited of cases can be conclusive. If only the lives of a few individuals can be secured through the use of such measures, they are worth considering. Of course evidence also suggests that killing terrorists may increase the likelihood of retaliatory attacks, rendering targeted killings actually counter-productive in securing the rights of others. In the end, a costs-benefits analysis will be needed to determine whether targeted killing operations ought to occur, depending largely on their ability to secure the protective needs of others.

In making such determinations, any factors must be taken into consideration, including the potential for retaliation and the benefits gained by neutralising dangerous individuals. It is important to remember, however, that “impossible to arrest and likely to strike again” terrorists will probably be responsible for further loss of innocent life unless they are incapacitated, and that foregoing a potentially just and necessary targeted strike for fear of terrorism is to reward the practice. Though prosecution and detention are always the preferred means of incapacitation, the use of lethal force taken as a last resort to protect life when innocent civilians are not injured or killed can, in extraordinary circumstances, amount to “securing the rights of others.”
The second and more controversial aspect is whether targeted killings are compatible with precepts of international justice, namely whether they can meet the “just requirements of morality, public order and the general welfare in a democratic society.” Ironically, whether this factor will be met depends in large part on the first. If targeted killings are meant to protect life and secure the rights of others, they will in all likelihood be supported by a majority of states. If they are punitive in nature and taken simply for revenge, they probably will not. It is no coincidence that a similar test is used to determine the lawfulness of using force with regard to article 51. Using the cloak of security to justify retribution in kind is the falsehood which removes from self-defense what little legitimacy may exist in the use of force.

Since premeditated murder is illegal in every state, deductive reasoning only solidifies the notion that unchecked targeted killings carried-out in the absence of armed conflict or a right of self-defense against a particular state are contrary to international public order. Even though states nations are conducting them in the shadows under the cover of military necessity, the global prohibition against murder, a general principle of law, cannot be ignored. States have a duty to protect the people under their jurisdiction, including those abroad, and cannot expose them to policies that will arbitrarily deprive them of life.

Because targeted killings violate the presumption of innocence, the possibility that innocent individuals will be executed is fairly high. Sara Scheideman writes: “Just as a defendant in a criminal trial virtually anywhere in the world must be proven guilty beyond a reasonable doubt, it is imperative for policy-makers to apply the same standard to alleged terrorists before the use of force is ever contemplated.” It is a known fact that the judicial systems of even the most civilised of democratic states are bound to make errors. The impact that DNA testing is having in freeing so many convicts that were wrongly accused and yet successfully prosecuted is alarming. Around the world, offenders of all types (including some on death row) have been proven innocent after years of incarceration. In the United States vs. Burns, the Canadian Supreme Court Stated:

The accelerating concern about potential wrongful convictions is a factor of increased weight since Kindler and Ng were decided. The avoidance of conviction and punishment of the innocent has long been in the forefront of “the basic tenets of our legal system.” The recent and continuing disclosures of wrongful convictions for murder in Canada and the United States provide tragic testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent. This history weighs powerfully in the balance against extradition without assurances when fugitives are sought to be tried for murder by a retentionist state, however similar in other respects to our own legal system.  

---

402 Statute of the International Court of Justice, article 38(c); Supra, note 2, p. 115-117.
403 Supra, note 250.
404 Supra, note 337.
Entrusting members of the executive branch of government with the task of evaluating evidence against suspected terrorists may also be an indication of the potentially arbitrary character of targeted killings. Government officials are not impartial arbiters but personally involved actors in the conflicts which confront them. Given that well educated judges and jurors in courts of law are inclined to make errors even when defendants are granted a full defense, it is inevitable that government officials will be similarly inclined. To make political leaders both judges and executioners is simply bad policy. Government officials in a democracy are especially vulnerable to special interests and cannot be expected to remain impartial in all situations. Allowing them to determine without proper safeguards which terrorists must be killed pre-emptively to prevent armed attacks is not compatible with the rule of law, which ensures through the separation of powers that individuals will not be subjected to abusive state conduct.

Suspected terrorists or criminals may further be killed by state agents because they lack the evidence to prosecute them and ensure their conviction. The deliberate killing of such individuals can eliminate this obstacle, as well as the potentially difficult consequences of detaining them. Their status as common criminals, combatants or “unlawful combatants” must not be determined, and their detention may not serve as a platform for future acts of terrorism. Although removing such consequences may, from a utilitarian perspective, provide interesting incentives for permitting targeted killing, they are flatly not acceptable considerations under human rights law and further testify to the potentially arbitrary character of such killings.

Also, the evidence that is processed by members of the executive branch of government and their law enforcement agencies is not always conclusive. Too often bad intelligence is blamed for unwarranted attacks on other states, and too often innocent civilians are killed as a result. If terrorists are targeted based on

---

405 Dershowitz proposes adopting of a formal requirement for the issuance of judicial warrants as a prerequisite to nonlethal torture, much like those issued in the case of search warrants. The U.S. Supreme Court on this requirement held that “The informed and deliberate determinations of magistrates... are to be preferred over the hurried actions of officers.” U.S. v. Lefkowitz, 285 U.S. 452, 464 (1932). It further added that: Its protection (the Fourth Amendment) consists in requiring that those inferences (which reasonable men draw from evidence) be drawn by a neutral and detached magistrate instead of being judged by the officers engaged in the often competitive enterprise of ferreting out crime.” Johnson v. U.S. 333 U.S. 10, 13-14 (1948). Dershowitz makes his point that such warrants will reduce the likelihood of abuse by citing an observation by Abraham Maslow, “to a man with a hammer, everything looks like a nail. If the man with the hammer must get judicial approval before he can use it, he will probably use it less often and more carefully.” (Supra, note 23, p.160).

intelligence gathered by foreign security services, the odds that innocent people will be killed is high, especially if an independent tribunal does not first establish the credibility of the evidence.

It is difficult to understand why terrorists would have fewer rights than say serial killers or war criminals. It is a fact after all that their violence is usually a politically motivated form of resistance, while serial killers and war criminals often gratuitously inflict harm. Although every criminal that harms innocent civilians must be prosecuted and/or removed from society, there is no valid reason to deny terrorists the protections that are recognised to all suspected criminals. If genocide can be prosecuted according to recognised standards of criminal law and human rights law, so can international terrorism. Ignoring the basic rights that are guaranteed to all humans in the case of international terrorists does not play in favour of meeting the “just requirements of morality, public order and the general welfare in a democratic society.”

The protections set-out in the Universal Declaration have arguably become a basic component of international customary law binding all states. The International Court of Justice declared in the Tehran hostage case that the obligatory force of the “prohibition of arbitrary deprivation of liberty” was a component of both the UN Charter and the Declaration. It stated: “Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the fundamental principles enunciated in the Universal Declaration of Human Rights.” If arbitrary detentions are incompatible with the Declaration, so are arbitrary deprivations of life, and thus perhaps targeted killings, despite the absence of case law to that effect. The fact that so much debate exists as to whether or not capital punishment can meet the requirements listed above is a strong indication that targeted killings may also fail to do so.

It is equally true, if not more so, in the case of torture which is always prohibited even in wartime. A unanimous Israeli Supreme Court decision outlawing the use of torture in 1999 declared that Israel, as a party to each of the relevant international law treaties governing the prohibition against torture, and as a member of the


Supra, note 297, at 42; In this statement, the Court went considerably further than it had previously done in its treatment of discrimination in the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory opinion, [1971] I.C.J. Rep.1, p.16.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (entered into force 26 June 1987) General Assembly resolution 39/46 of 10 December 1984, art.2(2).
general community of nations, was bound to respect the prohibition. It went on to affirm that "the rules pertaining to investigations are important to a democratic state because they reflect its character." I believe the same is true of targeted killings.

There is a powerful inconsistency between the conviction with which individuals and states discuss the absolute prohibition against torture all the while accepting easily the proposed permissibility of targeted killings. If one rejects the premise that the rules of war ought to be applicable in peacetime, the killing of terrorists without proper safeguards to limit potential abuse is a flagrant violation of the most basic human right. Given that death is permanent and pain is temporary, in the fight against international terrorism, "death is underrated, while pain is overrated." Given that lesser violations such as torture and arbitrary detentions are manifestly incompatible with human rights law and the Universal Declaration, targeted killings without proper safeguards must also be contrary to requirements of morality, public order and the general welfare in a democratic society.

The prohibition against arbitrary deprivation of life is all but absolute. It has risen to the level of jus cogens according to some, and it is undoubtedly an obligation erga omnes. Even states that still resort to capital punishment forbid the imposition of death without properly enacted legislation and a prior determination of guilt by a court of law. This principle has been the basic tenet of every human rights treaty dating back to the Magna Carta. To effectively recognise the use of arbitrary killings as legitimate counter-terrorism measures in the absence of armed conflict would contradict every notion of justice founded on the rule of law. What seems to emerge is that targeted killings may not inherently be unlawful or unjust; it is rather their arbitrary character devoid of limits to prevent wrongful or unnecessary death that confer upon them a universally recognised sense of repugnance.

Faced with an ever growing threat of international terrorism and the militarization of many armed groups, it is probable that targeted killing will, as a last resort, evolve into a legitimate measure of counterterrorism. To be consistent with the "just requirements of morality, public order and the general welfare in a democratic

---

410 Supra, note 54; see also Ireland v. the United Kingdom, judgment of 18 January 1978 (Series A no. 25).
411 Supra, note 55.
412 Dershowitz, p. 149.
413 Case Concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain) [1970] I.C.J. Report 3, par. 33-34; supra, note 328, art. 53 (Jus Cogens); supra, note 2, pp. 36-37.
414 The Magna Carta of 1215 was perhaps the first document to recognise the need to subject governments to the rule of law to achieve this end: "No free man shall be taken or imprisoned or diseased or outlawed or exiled or in any way ruined, nor will we go or send against him, except by lawful judgement of his peers or by the law of the land." Magna Carta of 1215, United Kingdom, Article 39.
society,” they will nonetheless have to be “provided by law” or constrained in some manner by safeguards to prevent arbitrary deprivations of life. Whether resulting from torture or ill treatment in prison or detention, from enforced or involuntary disappearances, or from targeted killing, death resulting from arbitrary deprivation of life is incompatible with the International Bill of Rights. Faced with such a prospect, it is critical that democratic nations develop guidelines to ensure that targeted killings will be conducted in the absence of armed conflict only when less forceful alternatives are unavailable for the purpose of preventing armed attack.

In an article entitled Unjust, unwise, un-American concerning military commissions for the trials of terrorist suspects held at Guantanamo Bay, the Economist wrote: “Nobody denies that fighting terrorism puts justice systems under extraordinary strain. But this dilemma has frequently been faced by others without resorting to military trials. The established procedure is to pass special anti-terrorism laws, altering trial rules somewhat but not abandoning established court systems, and trying to retain the basic rights of those accused as much as possible.” Even though it involves the possible legitimization of intentional killing in situations that lack immediate urgency, I feel very strongly that the same can apply in the case of operations to “arrest or neutralise” international criminals in the absence of actual armed conflict.

At Nuremberg, genocide was punished retroactively even in the absence of specific treaty provisions to its effect. Since human rights standards are already well defined, it is all the more probable that history will one day look back and take notice of the violations occurring today. Though gross human rights violations such as arbitrary killings may not be prosecutable in the future as is the case of war crimes under the International Criminal Court, they will nonetheless leave their indelible mark on the history of our nations and forever scar them. Much like the internment of Japanese Canadians during World War II. Since this new “war on terrorism” will likely last for some time, it is still possible to right many of the wrongs committed since September 11th. The best way for states to do so is to forego killings that are unnecessary and arbitrary and to closely monitor those that are not.

416 Much like the internment of Japanese Canadians during World War II.
II. In Search of a Unifying Framework

A) The Principle of Legality

The first requirement of article 29 of the *Universal Declaration* is that any attempt to limit the right to life be "determined by law." Under the *Civil Rights Covenant*, the right to life must *be protected by law*, the principle of legality. In the case of targeted killings, however, there is no enacted legislation in any state to the effect that governments may kill individuals on foreign soil. Unlike the death penalty in some countries, targeted killings have not yet been permitted by law. States that do not undertake the task of regulating them and thus creating another limitation to the right to life will have difficulty satisfying the legality requirement. So long as targeted killings are not in some way prescribed by legislation or conducted with proper safeguards (legislative, judicial or otherwise) that promote the rule of law, it is unlikely that they will meet the dictates of international human rights law.

While legislative branches of government have not yet sanctioned the use of institutionalized killings on foreign soil outside the context of armed conflict, the executive branches of some nations have entertained the idea. It is no secret that many foreign security services have executed individuals in the course of their duties. The governments implicated, however, have traditionally denied involvement. Such was often the case in Israel prior to the second intifada. In line with its post September 11th policy, the Bush administration has admitted to issuing an *intelligence finding* that would permit the killing of terrorists around the world. Though such an order cannot legally extend the right to kill individuals as combatants in states against which there exists no armed conflict or a right to use force in self-defense, it does represent an important step towards assigning accountability for such actions.

By specifically naming the targets and assigning responsibility for their deaths with senior members of government, the American administration has eliminated some of the confusion or plausible deniability normally associated with targeted killings or assassinations. Placing terrorists on "most wanted" lists, however,

---

417 On the first day of the 107th Congress, a bill was introduced by U.S. Republican Congressman Bob Barr of Georgia that would legislatively have repealed the Ban on assassinations found in Executive Orders 11095, 12306 and 12333. H.R. 19, entitled the "Terrorist Elimination Act," submitted to the House International Relations Committee without much support, was introduced on 3 January 2001, eight months before the attacks of September 11, 2001.


419 *Supra*, note 83.
does not confer a right to kill them nor provide any real indication of a nation’s intent to use deadly force. Israel, for example, has routinely provided the Palestinian Authority with lists of terrorists to detain that might otherwise be targeted. It seems elementary that a state whose territory might serve as the location for targeted killings first be granted the right to detain those wanted for terrorist attacks.

Executive orders or special lists are nevertheless internal measures of accountability that do not amount to legislative authorisations under international law. The secretive nature of Intelligence findings preventing any public consultation undermines their qualification as ‘law’ and makes it impossible to determine whether the evaluation process (as to which terrorists will be targeted) is reasonable and can withstand objective scrutiny. Except for the very gruesome attack in Yemen, there has also been no real “visibility” of these measures. Though it appears to be the first of its kind to date, there is no reason to believe that any country would openly admit to killings it could easily deny. Without public approval or awareness, it is difficult to argue that democratic populations support the use of targeted killings in countries where there is no war.

As previously stated, the nature of the right to life requires a strict interpretation of the word ‘law,’ which is not synonymous only with ‘illegal’ or ‘against the law,’ but includes more broadly notions of inappropriateness, injustice and lack of predictability. Article 6 (2) of the Covenant permits the imposition of the death penalty “only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant.” In the unlikely event that laws on targeted killing were enacted or that executive orders were considered sufficient, such domestic initiatives may nonetheless fail to meet the requirement of article 6. Unless the right to life was fully respected with due consideration for the presumption of innocence, the resulting legislation would fall short of meeting the standards set out in the Covenant.

---

420 Though it remains unclear whether it continued to do so after Israelis continued to do so after talks broke down with the PA in the Spring of 2002 (Supra, note 25, p. 6).
Inevitably, any process to regulate or monitor targeted killings would require much debate within a society. Although it is very difficult to reconcile targeted killings with the right to life, it is not impossible. This would entail, at the least, a declaration of guilt beyond a reasonable doubt of the targeted individual by a competent court of law and the imposition in abstantia of the death penalty, as well as the determination that he/she will likely strike again unless neutralised. The law would have to apply equally to all individuals who threaten national/ international security based upon their proven participation in prior acts of terror in which innocent people were killed. No discrimination based upon ethnicity or religion could be justified, and a special fund would presumably have to be created and administered to compensate innocent victims or their relatives.

While such measures may sound absurd, it is only because democratic nations and their citizens are fundamentally opposed to murder and establishing acceptable parameters for targeted killings by states contradicts their most fundamental notions of justice. Yet if it were necessary for states to use lethal force on foreign soil in the absence of armed conflict to prevent armed attacks, enacted legislation or binding declarations by governments could perhaps provide a predetermined framework by which to carry-out and monitor targeted killings to avoid abuses.

Given the sensitive nature of such measures, there are serious implications in legislating or somehow regulating targeted killings. The difficulty, as stated again by Alan Dershowitz in reference to torture, is that by creating a legal structure for limiting and controlling targeted killing, we essentially compromise our opposition to the practice in all circumstances and create a potentially dangerous and expandable situation.423 That, I would argue, has already occurred in the case of target killing, given the openness with which the United States and Israel have already killed terrorists internationally. Establishing legal procedures at this point could only mitigate the effects of such policies. The real issue then is not whether targeted killing would or would not be used in extraordinary cases to prevent attacks, but rather whether states should carry-them out “openly, pursuant to a previously established legal procedure, or whether it should be done secretly, in violation of existing law.”424

The Landau Commission, which investigated interrogation practices of Israel’s General Security Services from 1987 to 1989, concluded that there “are three ways for solving this grave dilemma between the vital need to

423 Supra, note 23, 153.
424 The following reasoning is applied by Alan Dershowitz with regards to torture in the “ticking bomb case,” (Supra, note 23 p.151.)
preserve the very existence of the state and its citizens, and maintain its character as a law-abiding state." The first is to allow the security forces to continue to fight terrorism in "a twilight zone which is outside the realm of the law." The second is "the way of the hypocrites: they declare that they abide by the rule of law, but turn a blind eye to what goes on beneath the surface." And the third, "the truthful road of the rule of law," is that the "law itself must insure a proper framework for the activity" of the security services in seeking to prevent terrorist acts. There is no doubt in my mind that the third option will in the long-run represent the most effective and acceptable course of action.

Although it may be tempting in a democracy to conduct actions "off-the-book or below the radar screen," "citizens cannot approve or disapprove of governmental actions of which they are unaware." Open accountability and visibility are essential elements of any democratic society, and "no legal system operating under the rule of law should ever tolerate an "off-the-books approach to necessity." The same reasoning applies for targeted killings, which are justifiable in a similar fashion as torture in the ticking bomb case. As Dershowitz eloquently expresses with regard to torture:

Even the defense of necessity must be justified lawfully. The road to tyranny has always been paved with claims of necessity made by those responsible for the security of the nation. Our system of checks and balances requires that all presidential actions, like all legislative or military actions, be consistent with governing law. If it is necessary to torture in the ticking bomb case, then our governing laws must accommodate this practice. If we refuse to change our law to accommodate any particular action, then our government should not take that action.

To label as arrogance the openness demonstrated by Israel and the United States in resorting to targeted killing is not entirely accurate. Israel and the United States have both been the victims of some of the worst acts of terrorism ever recorded in peacetime, and as prime targets of terrorist attacks, they have really only admitted openly what many states do secretly. While a failure to present in every case the proper legal justifications for undertaking such killings or to forego recognition and compensation when errors do occur may amount to an abuse of state power, it would be wrong to consider this openness as completely unproductive. Because they have spoken (though very little) about targeted killings as counter-terrorism measures, the general public has

425 Supra, note 23, p. 150; supra, note 54.
427 Supra, note 23, p.150.
428 Supra, note 23, p. 152.
429 Leon v. Wainwright 734 F.2d 770, 772-73 (11th Circuit 1984) Although the court did not find it necessary to invoke the common law "necessity defense" since no charges were brought against the policeman who tortured a kidnapper to learn the location of his victim, it described the torture as having been "motivated by the immediate necessity to find the victim and save his life." (Supra, note 23, p.153)
been able to explore the issue and develop its opinions on the matter, while scholars and policy advisors have been granted an opportunity to study the practice in greater depth. Although a thorough public debate is yet forthcoming, nothing less than openness on the use of targeted killings as a matter of policy would be expected of democratic states.

Steven R. David believes strongly that “Israel should be open and unapologetic about its pursuit of targeted killings... There is no need for Israel to evade responsibility for carrying out this policy, especially when Israeli involvement is obvious. Denial or refusal to comment leaves Jerusalem open to the charge that it is behaving improperly or has something to hide. Neither is the case and Israel should not behave like this.”430 As Dershowitz proposes, “A good test of whether action should or should not be done is whether we are prepared to have it disclosed- perhaps not immediately, but certainly after some time has passed.”431 This realistic proposition gives life to the previously expressed requirement of Security Council notification.

It is easy for states that have been largely sheltered from the effects of terrorism to criticise in absolutes certain measures like targeted killings. In some ways criticism is warranted, given that victim-states share a burden of blame, themselves partly responsible for their precarious position as targets.432 However, it is also a fact that violence against innocent civilians is never justified, regardless of the causes motivating them. Having only marginal impact on the determination of foreign policy, individuals cannot be targeted for living on a particular territory or belonging to a certain ethnic or religious group. Claiming a direct link between abusive foreign policy and terroristic violence is simply stating the obvious. Those that claim that American and Israeli citizens somehow “deserve” what is happening to them suffer from the worst form of ignorance, having succumbed themselves to the reasoning of the terrorist.

It is important also to question matters concerning the final authorisation procedure for targeted killings. Like the airliner that is possibly heading towards a sky-scraper or residential area, the decision to authorise its destruction cannot be taken in advance regardless of circumstances. Perhaps the plane will change its course or passengers will regain control of the aircraft. Similarly, if a terrorist is prepared to surrender or in a position

---

430 Supra, note 25, p. 21.
431 Supra, note 23, p. 152.
432 Consider for example articles 25(2) and 39 of the Law of State responsibility for internationally wrongful acts (supra, note 184) Article 25(2) precludes necessity as a defense if “the state has contributed to the situation of necessity,” and article 39 is entitled Contribution to the Injury. While innocent civilians should never be the target of unlawful attacks, there is more often than not a connection between a government’s foreign policy and the targeting of its nationals.
where foreign forces can capture him/her with little or no resistance, then the use of lethal force will not be necessary. It is unlawful for even a head of state to allow the killing in peacetime of individuals that may be arrested, even though the permission to incapacitate them has already been granted (what I like to call the principle of death interrupted. Much like the decision to shoot down a plane-full of civilians, permission to kill must be granted when strictly necessary on a case-by-case basis by someone with the required authority to make such decisions, as well as to withdraw them.

No reasonable person would allocate the decision to shoot down a plane filled with passengers to a fighter jet pilot or local airbase commander, unless of course there was no time to transmit the information up the chain of command. A decision of this kind must obviously be made at the highest level possible, with visibility and accountability. Based on matters of legality and morality, the decision to “neutralise” a terrorist ought to be made on a case-by-case basis by the head of state, following some form of judicial and/or legislative procedure implicating in absentia the individual targeted with the perpetration of an armed attack against innocent civilians, as well as to assess the necessity of killing pre-emptively to protect life. The above suggestion is nevertheless beyond the general purpose of this research, whose main goal is to signal the dual importance of respecting both the national right of self-defense and the individual right to life in the course of targeted killings by states.

B) Proposed Guidelines for Targeted killing

When it is otherwise impossible to detain suspected terrorists that have already committed ‘armed attacks’ and are likely to do so again, victim-states can in extraordinary cases resort to targeted killing on foreign soil as a last resort to prevent loss of life. When states are unable or unwilling to fulfill their obligation to protect other nations from acts of terrorism that emanate from their territory, or are themselves providing assistance to terrorists, victim-states can use force in self-defense to protect their interests from unlawful violence. Certain conditions must nonetheless be established before targeted killings can be considered lawful measures of counterterrorism taken on foreign soil in the absence of armed conflict. Though merely suggestive, the following conditions must be jointly satisfied before targeted killings can be considered proportionate responses to international terrorism.
First, victim-states wishing to undertake targeted killings must not be prohibited by law from doing so. In other words, governments must ensure that such policy choices are compatible with both domestic and international law. Killings that violate constitutional or legislative imperatives cannot be undertaken, nor can those which are contrary to existing international Treaties and traditions. Specifically, targeted killings must serve a protective purpose, meeting the requirements of necessity, proportionality and Security Council notification found at article 51 of the United Nations Charter. States must also respect all humanitarian and human rights law provisions that may apply to their enforcement operations, as well as allow violations to be noted and prosecuted.

Second, the individual targeted must be found guilty beyond a reasonable doubt of involvement in a deadly armed attack in abstentia by an independent judge or tribunal. Because capital punishment is inflicted in democratic retentionist states only for the worst crimes, a state cannot justify killing terrorists that have not killed, or at least attempted to kill. Involvement includes the individuals that have participated, beyond a reasonable doubt, in the planning or execution of deadly armed attacks. In operations to abduct criminals, the less demanding “reasonable doubt” standard of proof applied for the emission of arrest warrants may suffice. In the case of targeted killing, however, the presumption of innocence demands that suspected terrorists be found guilty of terrorist attacks causing death or perhaps serious injury “beyond a reasonable doubt.” No matter how dangerous the threat of terrorism, the killing of innocent persons wrongly believed to be criminals is the worst possible outcome. In a frenzy to ensure security, states cannot mimic terrorists and themselves be responsible for the deaths of innocent civilians. The fact that individuals would be tried in abstentia is already dangerous enough.

Third, the sanctuary-state must first be given an opportunity to apprehend the suspected offender before any operation on its territory can be justified. A state retains ultimate jurisdiction over the individuals on its territory. Unless by its own fault or delict, it must therefore be allowed to detain suspected criminals that are residing within its borders. The sanctuary-state, minimally, must respond to requests by victim-states to “prosecute or extradite” suspected offenders by moving to investigate or detain them. The stronger the evidence against those concerned, the greater any refusal on the sanctuary-state’s part will be.

Because an individual’s guilt will have prior to the request been proven “beyond a reasonable doubt” in abstentia by an independent judge or tribunal, it will be very difficult for the sanctuary state to refuse the
victim-state's request. However, if the refusal to detain, prosecute or extradite, is based on a legitimate decision by an impartial court of law, the victim-state cannot claim to have a right to intervene or use force against it. Predicaments where weaker countries are bullied into extraditing suspected terrorists while powerful states retain their sovereign right to refuse such requests must be avoided at all cost.

Fourth, every available peaceful remedy must first have been exhausted and failed before targeted killing can be justified. Regular criminal law-enforcement channels must first have been used to secure an individual’s detention, prosecution or extradition, and failed. Every reasonable alternative, including diplomatic and economic pressures must also have been exercised without success. It is not necessary, however, for a state to compromise its relations altogether with the sanctuary-state in order for more forceful measures to be considered appropriate. While imposing economic sanctions and severing diplomatic relations might be the best solution morally to punish states that shelter terrorists, the effects of such measures may be disproportionate to the harm they seek to avoid.

Fifth, other less intrusive forceful measures such as arrest must also be unavailable or have failed before targeted killings can be justified. If suspected offenders can be detained through overt or covert operations, then killing them will not respect humanitarian or human rights law provisions. Causing death where there need not be is always unlawful. Terrorists cannot be killed if suddenly arrest is made possible. The only reason targeted killing can occur pre-emptively in the first place is because certain terrorists are so well protected that any attempt to detain them will inevitably lead to greater harm, either by endangering peace, the lives of those undertaking the arrest or the civilians that surround them. While ‘death warrants’ may be signed in advance, law enforcement agencies must accept that in the course of operations circumstances may change, whereas other less intrusive options may become available, thus rendering targeted killing unnecessary and disproportionate. In addition to this principle of “death interrupted,” a suspect must—whenever possible—be granted a chance to surrender before being killed.

Sixth, the decision to kill must be made in response to an objectively defendable belief that a failure to do so will result in serious injury towards the state and its essential interests. Reflecting a danger to human life criteria, the standard for measuring serious injury must be high, reflecting basic principles of reason. While serious injury to a state’s territorial integrity or political sovereignty may at times also meet this standard (such
as irreparable damage to the environment, its national security, or its political independence), material or economic damage cannot justify targeted killings unless accompanied by loss of life or threat thereof.

Seventh, the decision to kill a terrorist abroad must be made by the head of state or members of its legislature, so that responsibility for the attack can be traced with little difficulty. If innocent individuals are targeted or civilians killed, compensation will surely be in order. While apologies and financial compensation may not bring back loved ones, they may serve to lessen the hatred associated with such attacks and allow the families of those killed to rebuild their homes, and maybe their lives. Accidents will happen, but much like the states that support terrorists, those that hunt them down must also be ready to accept the consequences of their actions and be held accountable for them. Ensuring that decisions to kill terrorist outside the context of armed conflict are made at the highest level of government is essential.

And finally, victim-states must have enacted legislation allowing for the use of targeted killing or somehow adopted predetermined guidelines to prevent and monitor abuse. It is essential that states resorting to such measures be conscientious of the potential for error and excess when intentionally killing “terrorists” on foreign soil. Without proper safeguards to prevent arbitrary deprivations of life and unlawful uses of international force, targeted killings will be virtually indistinguishable from acts of terrorism, thereby denying democratic nations and their agents the necessary sense of justice required to carry-them out effectively. Insisting that counterterrorism measures be motivated by legitimate claims of self-defense and executed according to the rule of law is necessary to promote unity among states, and thus victory against terrorists.
CONCLUSION

Our world will remain uncivilized until we learn to cooperate and value the sustenance of life on our planet. Coming together to denounce arbitrary deprivations of life is a good starting point. In peace as in war, states are required to respect minimal standards for the use of lethal force. In war, a combatant who surrenders to the enemy or is placed hors de combat cannot be executed summarily. In peacetime, criminals and terrorists cannot be killed arbitrarily when they can be arrested or made to surrender. Either in the promotion of terror or the repression of crime, individuals may not be arbitrarily deprived of life. If democratic states are serious about adopting policies of targeted killing to protect themselves against international terrorism, they must be willing to respect the rules of engagement that govern their actions, and prohibit the use of lethal force that is unnecessary or disproportionate.

Like every other forceful response to terrorism, targeted killing must be evaluated within a predetermined framework of law requiring a dual analysis: one concerning the temporary violation of state sovereignty incurred as a result of such operations abroad, and the other concerning the extrajudicial violation of an individual’s right to life. The question of legality rests therefore on the willingness of each state to interpret in good faith the rules of humanitarian and human rights law in the administration of international justice. This much is clear. In response to armed attacks, a victim-state may lawfully exercise its right to use force in self-defense for the express purpose of “arresting or neutralising” individuals that represent serious security threats. There is nevertheless a significant difference between using premeditated targeted killings that are by nature protective and those that occur automatically as a result of choice or policy. Incidentally, international law permits the former and prohibits the latter.

Although humanitarian law remains the lowest common denominator for the use of international force, existing standards regulating in peacetime the use of lethal force will eventually dominate in the fight against international terrorism. In order to gain credibility, the forcible protection of life will have to be guided by objective and predetermined criteria to prevent excesses. Providing, without regard to institution, a legitimate and transparent doctrine of forceful intervention outside the context of armed interstate conflict (as for operations to arrest, neutralise or rescue individuals on foreign soil) may in fact be the most effective way to ensure legitimacy and limit abuse. Criminal and human rights law provide such a doctrine. At its core, any
doctrine of international enforcement based on criminal and human rights law must equally guarantee the right to life to all without regard to race or citizenship.

When a right of self-defense exists, but a state of belligerency does not, states must not be allowed to kill terrorists without regard for basic human rights, especially when innocent civilians will also die as a result. When military force is not directed primarily against state forces but common terrorists or criminals, elementary considerations of humanity demand that civilians not be considered simply as means to an end. While civilians may accidentally be killed as they are domestically in the repression of crime, they cannot be intentionally sacrificed during enforcement actions in the absence of armed conflict. This factor will continue to grow in importance as forceful measures against terrorism are increasingly taken in populated areas, and as the nature of international conflict becomes less about waging war than fighting crime.

When innocent civilians are killed during operations of targeted killing in countries where there is no war, accountability implies more than the determination responsibility: it involves compensation for unlawful injury. In the advent of wrongful death, accountability demands that errors be recognised and compensation forthcoming. Basic indemnities would surely demonstrate a willingness to target only those responsible for armed attacks and perhaps provide some legitimacy to the practice. Of course some governments will conveniently extend their “war on terrorism” argument to forego compensation, explaining that in ‘war’ accidents do happen and that “collateral damage” is inevitable and always regrettable. Though the sincerity of those that express regret at the loss of innocent life is not always questionable, their judgment and understanding of the law can be. No matter how worthwhile the cause of an independent state, the democratization of another, the removal from power of a tyrant or the elimination of a terrorist, the intentional killing of innocent persons is never justifiable.

Using force abroad in self-defense to “arrest or neutralise” terrorists that have killed innocent people can be a reasonable option, so long as the host-state is unwilling or unable to do so and the impending intervention is exercised in a principled way. Killing individuals who can be otherwise arrested does not provide a state with any great sense of justice or accomplishment, and it goes a long way to discredit what little legitimacy it had before an operation. When states are free to pursue aggressive policies under the cloak of self-defense, the use of deadly force presents a serious challenge to international peace and security. If a terrorist attack against the
nationals of a state can amount to an ‘armed attack’ against that state, then the same can be said about a killing or abduction that constitutes an unlawful use of force.

In 1982, the United Nations director of the Division of Human Rights informed the Commission on Human Rights that “the protection of human life is one of the most urgent priorities on the human rights agenda; the deliberate killings of human beings rank amongst the most severe, extensive and shocking violations of human rights in the world today.”433 It was in response to this address that the Commission appointed a Special Rapporteur, M.S. Amos Wako, to examine the problem of extrajudicial executions, summary or arbitrary. He reported that intentional killings were being carried out by government agents or by civilians with the government’s complicity or tolerance or connivance, by-passing any formal judicial process. In most cases, governments refused to acknowledge their accountability for such deaths. He cited the following examples:

1) The killings of people who are in detention often after torture;
2) The deliberate killings of targeted individuals who are not under detention by governments;
3) The massacre of groups of individuals such as political demonstration, petitioners, people gathering for a meeting;
4) The systematic killing over a period of time of specific categories of persons such as members of political parties, ethnic and/or religious groups, social classes or trade unions;

Self-defense as the necessary platform for the use of international force and the concept of ‘armed attack’ as its trigger can operate effectively in the fight against international terrorism, both against state and non-state actors. The armed attack threshold, while operating within the context of interstate relations, can also serve as the bridge between human rights law and national self-defense when it embodies the notion of loss of life. Frankly, the most important factor to ascertain is whether the sanctuary-state whose territorial integrity is violated as a result of targeted killings is somehow responsible for terrorist attacks against the victim-state taking action against it. In the affirmative, the use of abductions or targeted killings will be justified according to humanitarian law via article 51 self-defense. In the negative, such actions may constitute illegal reprisals, aggression, and possibly state terrorism, even when conducted against non-state actors.

It is not possible for governments to claim a general right of self-defense against all terrorists anywhere in the world to allow their killing. Regardless whether military, foreign intelligence, security or police assets are used

433 UN Press release HR/1140, 1 February 1982, p.3.
434 Summary or arbitrary Executions, Report by Mr. S. Amos Wako, Special Rapporteur of the Commission on Human Rights, E/CN.4/1983/16, paragraphs 74-75
to fulfill law-enforcement tasks abroad, the minimal standards concerning the right to life and the use of deadly force applicable in peacetime must be respected. Only if there exists an armed conflict or a right of self-defense against a particular state can they be superseded by the less stringent requirements of humanitarian law. The fact that extremist groups violate humanitarian and human rights law is not an excuse for states to respond in kind, nor does it absolve the West of its share of blame in the events that triggered them.\footnote{C. Johnson, \textit{Blowback: The Costs and Consequences of American Empire} (2000).} One need only look at the support given to Muslim extremist groups during the Cold War or the weapons industry in general. The arbitrary killing of individuals is always a crime. If the sanctity of life and the right ensuring it can be violated with ease even in peacetime, then the fate of humanity is sealed in conflict.

Because states are sovereign and equal actors in their relations, it is crucial that they refrain from carrying out enforcement activities upon the territories of others. Beyond the immediate impact on the Law of Peace and States Responsibility, targeted killings on foreign soil in the absence of armed conflict or a right of self-defense against a particular state might also entail a number of other consequences that would vastly turn the tide of proportionality against their use. A most important factor to consider is reciprocity. If the agents of a state are granted permission to roam the globe and kill individuals in their hunt for suspected offenders, the agents of other states will likely embark upon similar adventures outside their borders.

Because in democratic states openness and pluralism is a fact of life, it is almost impossible to determine physically which individuals are security threats. In other less diversified and repressive states, it is still easier to monitor strangers. Though this factor may dwindle with time as the world democratizes, liberal states like those of Europe and North America are presently at a serious disadvantage, and they will be for some time. The effects of this unavoidable reality become more important when direct action spurs an increase in foreign security and intelligence activities abroad. If some democratic nations adopt policies of targeted killing, it is likely that other states, including authoritarian regimes, will engage in similar practices. Reciprocity is an unavoidable reality of international relations. Though not all peaceful measures and good conduct will be reciprocated, aggressive initiatives are sure to be. In a world of \textit{real politik}, governments that adopt policies of targeted killing can expect others to do the same.

Certainly, the United States in adopting a policy of targeted killing outside the context of armed conflict has not put itself in a situation where it could usefully urge restraint on the part of others. The longstanding U.S. policy
condemning extrajudicial execution will quickly become a remnant of the past unless it moves to clarify its position. As of now, it has provided hawks in various countries with the kind of ready-made justification for the use of violence which had eluded them for so long. Advocates of a strict retaliation policy may rejoice in this latest policy choice, and yet still be worried by the price that will have to be paid by the rest of the world and the U.S. itself sooner than one cares to think.

In the quest to suppress international terrorism, the right intention requirement of humanitarian law must not be confused with the just cause criteria. A state may have a right to use force in self-defense in response to an armed attack, and yet fail to meet the right intention requirement. This would be the case of a state using the cloak of a just cause to prosecute a war simply for political advantage, to avoid complicated prosecutions, or to satisfy an appetite for revenge. A terrorist attack cannot be seized as the perfect opportunity to test new experimental weaponry or to increase one’s approval ratings before an election. The problems of using force are multiple, but international law condemns none more than the resort to force that is unnecessary, and whose objective is not truly the achievement of protective advantage, but the furthering of special interests.

Unfortunately, the reasons which compel individuals to kill themselves amidst others in suicide attacks are neither trivial nor negligible. Such individuals are not mere criminals acting out sick pathologies; they represent instead a dangerous generation of martyrs willing to kill in the name of a cause. Although the murder of innocent civilians is never justified, the fact that individuals are sacrificing their own lives in suicide attacks is indicative of larger issues. And while desperation and inequality have been shown to generate conflict of this nature, many still condemn terrorism as though it were motivated purely by profit. Yet extremists would never have reached the kind of dismal interpretation of religion or ideology were it not against the background of their political, economic and social circumstances. It is in this sense that terrorism and crime in general share their strongest bond, in that the conditions of desperation and hopelessness are intimately linked with acts of violence and aggression.

In sum, targeted killings can be considered ‘necessary’ and ‘proportionate’ responses to international terrorism according to article 51 of the United Nations Charter, but only to the extent that a state has somehow failed to uphold its responsibilities towards a state or the international community (either by supporting terrorists or by remaining complacent to their presence), and providing that its requirements are adequately satisfied. In exceptional circumstances, targeted killings can serve as lawful responses to international terrorism when
conducted in a principled way and as a last resort to save lives. In the absence of armed conflict or a legitimate right of self-defense, targeted killings may not be carried-out except in a manner consistent with the right to life and the rule of law.

Killing a terrorist that no longer poses a danger to human life is intolerable. In war as in peace, the use of lethal force by states must be a means towards securing a legitimate protective advantage. In essence, a state can use force to defend itself against another state or terrorist that has, or is preparing, to attack it, but it cannot use targeted killing against individuals that are not directly involved in the perpetration of attacks, nor can it undertake such measures when less forceful alternatives would suffice. There are various types of terrorists in this world (cyber-terrorists, political or religious terrorists, narco-terrorists, etc.) but only one kind that is really worth going abroad to capture or eliminate: the kind that kills civilians. Making it known and understood that any such attack will lead to the tireless pursuit of those responsible, through the use of abduction or targeted killing in foreign countries if necessary, is surely the greatest deterrent of all.

Terrorists, the true enemies of humankind, may very well have precipitated the reconciliation of the otherwise irreconcilable: the animal survival instinct of the Kissingerian realist and the urban missionary zeal of the Wilsonian idealist, under the reassuring auspices of the technocratic legalist.\footnote{Speech by the Prime Minister at the Lord Mayor's Banquet, Tony Blair, 12 November 2001 (noting that “In the war against terrorism the moralists and the realists are partners, not antagonists”).} It would be ironic if the dangers associated with non-state actors were used as a pretext to pry open the corpus of inter-state rules, without replacing them with anything more sensible. Law, in this sense, is less constraining of politics than it is revealing of it. Ultimately, criminal justice will have to confront seriously the extent to which it is capable of generating a discourse that can be as much a prolongation of war as it is an alternative to it. If forceful responses to terrorism can be permitted in the name of security, than they must not resemble the acts of terror which they seek to eliminate.

In the end, the greatest consequence of targeted killing is that innocent civilians will pay the price. Because unregulated targeted killings have always prompted more death and destruction on the part of terrorists, it is above all a disservice to populations at large if governments blindly adopt such measures. Except in situations where lethal force is truly necessary as a last resort to prevent deadly attacks, it is the citizens of this world that will suffer from the reckless policies of their governments. Given that terrorists usually lack the courage and
resources to engage the security forces of states, retaliatory action, like most terroristic violence, will be directed at civilians.

This being said, force in a modern world that is not defensive is undemocratic. In a fragile balance between the minority that controls and benefits from aggression and the majority that pays for it, it is crucial that governments adopt policies that meet the protective needs of those that they serve. States that use measures like targeted killings outside the context war without sensible control mechanisms are simply inviting others to respond in kind, exposing their own populations to the typical lawlessness of international affairs. In this sense, the tyranny of democracy resides not within the majority. It emanates rather from the interested few with the necessary power to act on its behalf.
BIBLIOGRAPHY

LEGISLATION AND PRIMARY SOURCES


Convention on the Suppression of Illicit Traffic in Dangerous Drugs, 26 June 1936, 198 L.N.T.S. 299.


E/CN.4 SR.90, 91 (1949).

E/CN.4 SR.88 (1949).


Executive Order No. 11095 (1976)

Executive Orders 12036 (1978)


G.A. Res. 56/183 (Responsibility of States for internationally wrongful acts, General Assembly (Sixth Committee)), UN Doc. XXX., 56th session, December 12, 2001.


Hague Convention (IV) Respecting the Laws and Customs of War on Land, with annex of Regulations, 18 October 1907, T.S. No.539, 1 Bevans 631, 36 Stat. 2277 (entered into force 26 January 1910).


S.C. Res. 1368 of September 12, 2001

S.C. Res. 1373 of September 28, 2001


Senate Committee to Study Governmental Operations with respect to Intelligence Activities, Interim Report (1975).


Statute of the International Court of Justice, June 26, 1945, a copy of which can be viewed online at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstatute.htm.
Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act), H.R.3162 (2001).


JURISPRUDENCE


Caliberti De Csariego v. Uruguay (1984), 68 I.L.R. 41 at 10.3.


Case Concerning the Gabeikovo-Nagymaros Project (Hungary vs. Slovakia), 1997 I.C.J. 92 (Sept. 25).


Farrell v. United Kingdom, December no 9013/80, D.R. 30, D.R. 38.


Ireland v. the United Kingdom, judgment of 18 January 1978 (Series A no. 25).


Paquette Habana, 175 U.S. 677 (1900).


Reid v. Covert, 354 U.S. 1 (1957)


Ringeisen v. Austria, 16 July 1971, Series A, Vol.84, 1 EHRR 455, 56 ILR 442.


Stewart v. United Kingdom, December no 1044/82, D.R. 39.


Tel-Oren v. Libyan Arab Republic, 726 F. 2d 774, 809 (D.C. Cir. 1984).


Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1946, Cmd. 6964, Misc. No. 12.

Tyrer v. the United Kingdom, judgment of 25 April 1978 (Series A no. 26).


United States v. Belmont, 301 U.S. 324 [1937]


United States v. Guy Capps Inc., 204 F. 2d 655 [1953]


United States v. Minnesota, 270 U.S. 181


SECONDARY MATERIALS: PUBLICATIONS


BLACK Ian and Benny Morris, Israel’s Secret Wars: A History of Israel’s Intelligence Services (New York: Grove Weidenfeld, 1991)


BOWETT Derek, Self-defense in international law (Manchester: 1958).


HANNIKAINEN Lauri, Peremptory Norms (Jus Cogens) in International Law, (Helsinki: Lakimielsliton Kustannus, 1988).


WHITE Jonathan R., Terrorism, fourth ed. (Belmont, Ca: Thomson Wadsworth, 2002).


SECONDARY MATERIALS: REPORTS, JOURNALS AND LAW REVIEWS


BOWETT Derek, “Reprisal Involving Recourse to Armed Force” (1972) 66 American Journal of International Law 1.


CHOMSKY Noam, “Nato, master of the world” (May 1999) Le Monde Diplomatique.


Summary or arbitrary Executions, Report by Mr. S. Amos Wako, Special Rapporteur of the Commission on Human Rights, E/CN.4/1983/16.


**NEWS AND MEDIA**


CNN Interview with Donald Rumsfeld, 28 October 2001.


“Israel’s high court outlaws torture,” *Knight Ridder Newspapers*, Barbara Demick, 7 September 1999.


Pentagon briefing, comment by Defense Secretary Donal Rumsfeld, CNN, 15 April 2002.


“Sharon regrets missed chance. ‘Sorry we didn’t kill Arafat 20 years ago,’” *The Gazette*, 1 February 2002, B-1.


Speech by the Prime Minister at the Lord Mayor’s Banquet, Tony Blair, 12 November 2001.


UN Press release HR/1140, 1 February 1982.


**ONLINE SOURCES**


Classification of Counter-Terrorism Measures, found at http://www.undcp.org/terrorism_measures.html.


*Frontline: the triumph of evil.* PBS documentary and site found online at http://www.pbs.org/wgbh/pages/frontline/shows/evil/warning/.


“Israel to continue ‘targeted killings’” The Guardian Unlimited Network, 3 July 2001, online at http://www.guardian.co.uk/israel/Story/0,2763,516309,00.html.


Major multilateral conventions and protocols relating to the responsibilities of states for combating international terrorism: http://www.unodc.org/unodc/terrorism_conventions.html.


“Sharon dismisses 'two states' remark,” Middle East Information Center, found online at http://www.guardian.co.uk/print/0,3858,4558613-103681,00.html.

SIMONS Penelope C., Literature review of humanitarian intervention, Project Ploughshares, found online at http://www.ploughshares.ca/content/MONITOR/mondo0a.html. 


* All links were operational as of August 24th, 2003.